Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 2

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

No. 56

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONS FOR CERTIORARI FILED { SEPTEMBER 10, 1937. MAY 23, 1938.

CERTIORARI GRANTED MAY 31, 1938.

TRANSCRIPT OF RECORD

(IN FIVE VOLUMES)

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 5801. **October Term, 1935.**

NATIONAL BISCUIT COMPANY,

Plaintiff-Appellant,

v.

KELLOGG COMPANY,

Defendant-Appellee.

Volume I.

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(Pages 1 to 698 inclusive)

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Filed August 10, 1935.

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5—Kellogg Package, Waitress 172/8/11/32, Biltmore Hotel, Providence, Witness Sweet	I	326	...	...
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10—Old Style Carton, Shredded Wheat, Witness Schapansky (Saucer With Two Biscuit)	II	720*	IV	3
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18—Large Kellogg Carton or Case, Burlington Grocery, Burlington (Photograph to Be Substituted), Witness Sharpley	I	400*	...	...
19—Individual Kellogg Carton, Vermont Lunch, Burlington, Witness Thayer	I	406*	...	...
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22—Menu, Vermont Lunch, Burlington, Vt., Witness Bradbury	I	409*	Not printed	
23—Sales Slip, Duritsky's, Uniontown, Pa., Witness White	I	423	Not printed	
24—Kellogg Carton, Duritsky's, Uniontown, Pa., Witness White	I	423	...	...
25—Sales Slip, H. L. Black Grocery, Juniata, Pa., Witness Colliflower	I	427	Not printed	
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31—Kellogg Carton, Isaly's Dairy, Steubenville, Ohio, Witness Trescher	I	445	...	...
32—Kellogg Carton, Restaurant, East Liberty, Witness Borneman	I	446	...	...
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35—Strip Display Sign, Showing Dish Containing Two Biscuit, Witness Nubermeyer	I	454	Not printed	
36—Glass Bowl, Witness Nubermeyer	I	454	...	...
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80—Kellogg Package, Grocery Store, South Norwalk. Conn., Witness Cavalier	I	612*	...	...
81—Purchase Slip, Grocery Store, Stamford, Witness Tuttle	I	614*	Not printed	
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83—Newspaper Schedules (Summary), Witness DeWeese	I	571*	IV	11
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85—Paper, Letter From Walter H. Page, Witness DeWeese	I	572*	IV	43
86—List of Publications Referring to Shredded Wheat, Witness DeWeese	I	572*	Not printed	
87 to 112—Books or Albums Containing Records of Shredded Wheat Advertising, Witness DeWeese	I	572*	Not printed	

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117—Cut-out, Witness Oliva	I	621*	Not printed	
118—Cut-out, Witness Oliva	I	621*	Not printed	
119—Four Price Cards, Witness Oliva	I	621*	Not printed	
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121—Window Poster, Witness Oliva	I	621*	Not printed	
122—Three Sheet Poster, Witness Oliva	I	622*	Not printed	
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124—Hanger Card, Witness Oliva	I	622*	Not printed	
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126—Hanger Card, Witness Oliva	I	622*	Not printed	
127—Price Card, Witness Oliva	I	622*	Not printed	
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132—Restaurant Menu, Witness Oliva	I	623*	Not printed	
133—Three Window Posters, Witness Oliva	I	623*	Not printed	
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135—Price Window Poster, Witness Oliva	I	623*	Not printed	
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138—Letter and Circular Distributed With Free Samples of Shredded Wheat, Witness Oliva	I	623*	Not printed	

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142—Kellogg Package (in Part), Restaurant, Hampstead, Long Island, Witness Parnell	I	641*	...	...
143—Kellogg Package, Grocery Store, Seaford, Witness Tuthill	I	643*	...	...
144—Kellogg Package, Grocery Store, Brooklyn, Witness Evans	I	651*	...	...
145—Kellogg Box, Cafeteria, Brooklyn, Witness Evans	I	652*	...	...
146—Menu, Cafeteria, Brooklyn, Witness Evans	I	655*	Not printed	
147—Kellogg Box, Grocery Store, Witness McCrum	I	656*	...	...
148—New Carton, National Biscuit Co., Witness Oliva	I	657*	...	...
149—Transcript of Annual Sales of Shredded Wheat, Witness Dunlap	I	675*	IV	50
150—Combined Schedule of Advertising Expenditures, Witness Dunlap	I	675*	IV	51
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152—Kellogg Package, Restaurant, Fresno, California, Witness Schapansky	II	716*	...	...
153—Kellogg Package, Black's Package Store, Fresno, California, Witness Schapansky	II	717*	...	...
154—Kellogg Carton, Grocery Store, With Sales Slip, Fresno, California, Witness Schapansky	II	718*	...	...

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163—	Menu, Ship Monterey, Ross, California, Witness Mears	II	1196*	Not printed	
164—	Menu Card, Restaurant Owner, San Francisco, California, Witness Dubac	II	1235*	Not printed	
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166—	Kellogg Carton, Burlingame, California, Witness West	II	1190*	...	...
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181—Fort Worth Grocery Co., Price-List, Witness Wilde	II	1339*	Not printed	
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183—Kellogg Package, Witness Burke	II	884*	...	...
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*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
191—Kellogg Package, Witness Guthrie	II	936*	...	...
192—Kellogg Carton, Witness Guthrie	II	938*	...	...
193—Menu Card, Witness Guthrie	II	938*	Not printed	
194—Page of the Wichita Independent, Witness Guthrie	II	938	Not printed	
195—Kellogg Package, Witness Branson	II	943*	...	...
196—Purchase Slip, Witness Branson	II	943*	Not printed	
197—Page of the Winona Republican Herald, Dated January 20, 1933, Witness Kolvoord	III	1411*	Not printed	
198—Newspaper Advertisement of the Decatur Home Stores, Witness Kolvoord	III	1415*	Not printed	
199—Old-Style Kellogg Folder Cut, Witness Kolvoord	III	1415*	Not printed	
200—Newspaper Advertisement, Reading Eagle, April 28, 1932, Witness Kelly	III	1443*	Not printed	
201-A—Newspaper Clipping, Kalamazoo Gazette, Witness Mahan	III	1476*	Not printed	
201-B—Sheet, Containing Same, Kalamazoo Gazette, March 2, 1933; Newspaper Clipping, Witness Mahan	III	1476	Not printed	
202—Price-List Put Out by the Kellogg Company, Dated February 1, 1933, Witness Mahan	III	1476*	IV	53
203—Paper Showing Picture of Kellogg's Whole Wheat Biscuit Containing Two Biscuit in a Dish to Be Addressed to Store Managers, Witness Mahan	III	1477	IV	55
204—Tear Sheet From the Battle Creek, Michigan, Moon Journal, October 21, 1932, Witness Mahan	III	1477	Not printed	
205—Hand-Bill Used by I. G. A. Stores, Witness Mahan	III	1477	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
206—Sheet From the News Telegraph, Dated March 10, 1933, Sharon, Pa., Witness Ander	III	1638	Not printed	
207—Page Twenty-nine of the Pittsburgh Press, Dated March 25, 1932	III	1638	Not printed	
208—Package of Hat Cleaner, Witness Rush	III	1727	...	...
209—Package of Camel Cigarettes, Witness Rush	III	1728	...	...
210—Copy of the Reading Eagle, May 5, 1932, Witness Miller	III	1846*	Not printed	
211—Page of the Reading Eagle, February 4, 1932, Witness Miller	III	1846*	Not printed	
212—Sheet Containing Ad of the Kellogg Company of the Reading Eagle, May 12, 1932, Witness Miller	III	1846*	Not printed	
213, 214—(Numbers Skipped, No Such Exhibits Marked.)				
215—Package Resembling Plaintiff's Exhibit No. 166 (a Kellogg Shredded Whole Wheat Biscuit Carton), Witness Hopkins	III	1871*	...	...
216—Package Resembling Plaintiff's Exhibit No. 165, Witness Hopkins	III	1872*	...	...
217—Cardboard Liner, Used by Kellogg Company in Whole Wheat Biscuit Cartons, Witness Hopkins	III	1872*	...	...
218—Easel or Study Advertising, Witness Hopkins	III	1874*	Not printed	
219—Sheet of the Reading Eagle, March 31, 1932, Witness Hopkins	III	1875*	Not printed	
220—Sheet of the Reading Eagle, March 5, 1932, Witness Hopkins	III	1875*	Not printed	
221—Sheet of the Reading Eagle, March 17, 1932, Witness Hopkins	III	1875*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in consing record.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
222	Copy of Modern Merchant and Grocery World, Witness Hopkins	III	1875*	Not printed	
223	Cash-and-Carry Bulletin, Witness Hopkins	III	1875*	Not printed	
224	William Montgomery & Co., Price-List, Witness Hopkins	III	1876*	Not printed	
225	Copy of Modern Merchant and Grocery World, February 9, 1933, Witness Hopkins	III	1876*	Not printed	
226	Standard Government Form of Bid, Witness Hopkins	III	1879	Not printed	
227	Price Bulletin of Provisional Contracts, Witness Hopkins	III	1879	Not printed	
228	Copies of Requisitions, Consisting of Six Sheets, Witness Ruckman	III	1912*	Not printed	
229	Advertisement, Minneapolis Journal, April 30, 1932, Witness Ruckman	III	1940*	Not printed	
230	Breakfast Menu, Hotel Paxton Coffee Shop, Witness Dubois	III	1947*	Not printed	
231	Menu, Main Dining-Room, Hotel Paxton, Witness Dubois	III	1947*	Not printed	
232	Room-Service Menu, Hotel Paxton, Witness Dubois	III	1947*	Not printed	
233	Board of Control Specifications, Witness Sawyer	III	1965*	Not printed	
234	Consolidation Agreement, Dated May 19, 1890, Witness Malone	II	958*	Not printed	
235	Copy of Certificate of Incorporation, Dated May 7, 1900, Witness Malone	II	978	Not printed	
236	Letter, Division Passenger Agent, Atchison, Topeka & Santa Fe Railway Co., April 13, 1933, Witness Malone	II	979	Not printed	
237	Certified Copy Resettled Final Decree in Shredded Wheat Company Against Humphrey Cornell Company	III	2005	IV	57

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
238—Menu Card, The Fenway Inn	I	251	Not printed	
239—Photographs (24), Illustrating Plaintiff's Operations	I	271	IV	63
240—Box Diamond-Shape Biscuit	I	271	Not printed	
240-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 240	III	2019	IV	111
241—Box of Cone-Shaped Biscuit	I	272	...	...
241-A—Photograph of Four Biscuit of Plaintiff's Exhibit No. 241	III	2019	IV	113
242—Box of Doughnut-Shaped Biscuit	I	273	...	...
242-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 242	III	2019	IV	115
243—Box of 3-inch Round-Cut Biscuit	I	274	...	...
243-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 243	III	2019	IV	117
244—Box of 2-inch Round-Cut Biscuit	I	274	...	...
244-A—Photograph of Three Biscuit of Plaintiff's Exhibit No. 244	III	2019	IV	119
245—Box of 3-inch Round-Moulded Biscuit	I	275	...	...
245-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 245	III	2019	IV	121
246—Box of Biscuit Baked in Automatic Machine	I	276	...	...
247—Sheet Tampa Morning Tribune, July 9, 1932	I	303	IV	123
248—Sheet The Tampa Daily Times, July 8, 1932	I	303	IV	125
249—Sheet The Saint Paul Pioneer Press, April 26, 1933	I	304	Not printed	
250—Digest of Style for Government Printing	I	304*	...	...
251—Stipulation Re Depositions in Connecticut Case	I	306	IV	127
252—Four U. S. Trade-mark Registrations of Plaintiff	I	315	IV	129

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
	No. 85,186, January 30, 1912	I	315	IV	129
	No. 178,725, January 15, 1924	I	315	IV	133
	No. 216,593, August 17, 1926	I	315	IV	131
	No. 213,456, May 25, 1926	I	315	IV	135
253	Twenty-seven State Registrations of Trade-mark Shredded	I	315	Not printed	
254	Certificate of Incorporation, Natural Food Co.	II	1004	Not printed	
255	Certified Court Order Supreme Court, New York, Authorizing Change of Name to Shredded Wheat Company	II	1005	Not printed	
256	Certificate of Organization National Biscuit Co.	II	1005	Not printed	
257	Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
258	Second Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
259	Third Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
260	Bill of Sale, 30th April, 1930, From Shredded Wheat Company to National Biscuit Co.	II	1005	Not printed	
261	Carton Purchased at Kenosha on December 24, 1932	III	2018	...	...
262	Sketches A and B Used in Cross-Examination of Witness Penty	II	1127	Not printed	
263	Report on Hot and Cold Cereals	II	1137	Not printed	
264	Report on Hot and Cold Cereals	II	1137	Not printed	
265	Slip Referred to by Witness Poole	II	1145	Not printed	
266	Package of Plaintiff's Reprocessed Biscuit	III	2018	...	...
267	Package of Plaintiff's Reprocessed Biscuit	III	2018	...	...
268	Package of Plaintiff's Biscuit, Part Reprocessed	III	2018	...	...
269	Bundle of Photographs	III	2018	Not printed	

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
270—Package Like Plaintiff's Exhibit 2, Kellogg's Shredded Whole Wheat Biscuit		III	2018	...	...
271—Defendant's Carton Put Out September, 1932		III	2018	...	...
272—Carton Kellogg's Shredded Whole Wheat		III	2018	...	...
273—Decree in Case of Natural Food Co. v. Bulkley, et al.		III	2020	Not printed	
274—Carton Champion Flake Butters		III	2024	...	...
275—Dupont Company Price-List on Cellophane		III	2036	Not printed	

PLAINTIFF'S EXHIBITS UNDER RULE 46.

A—Publication of the Cyrus Curtis Pub. Co.	III	2019	Not printed	
B—Opinion of the Court of Appeals in Williams Case	III	2020	Not printed	
C—Decree of Court of Appeals in Williams Case	III	2020	Not printed	

DEFENDANT'S EXHIBITS.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
1—Letter of Mr. Sweet	I	340	Not printed	
2—Letter of Mr. Sweet	I	340	Not printed	
3-A—Letter of Mr. Sweet	I	340	Not printed	
3-B—Letter of Mr. Sweet	I	340	Not printed	
4—Kellogg Carton, Witness Hamilton	I	357*	...	...
5—Kellogg Carton, Witness Hamilton	I	357*	...	...
6—Package Kellogg Whole Wheat Biscuit	I	495*	...	...
7—Slip of Witness' Signature Torn Off Plaintiff's Exhibit No. 54, Witness Loughlin	I	502*	Not printed	
8—Box or Carton, Kellogg's, Witness Dodge	I	531*	...	...
9—Letter and Enclosure; News Release, Re: Suit Against Kellogg, Witness DeWeese	I	604	IV	137
10—Newspaper Article, Filing of Suit by Shredded Wheat Company, Witness DeWeese	I	604	IV	138
11—Quaker Muffetts Package, Witness Weinstock	I	667*	...	...
12—Package, Codfish, Witness West	II	1194*	...	...
13—Package, Baker's Cocoanut, Witness West	II	1194	...	...
14—Package, Kellogg's Whole Wheat Flakes, Witness West	II	1194*	...	...
15—Package, Kellogg's Muffetts, Witness West	II	1194	...	...
16—Triscuit Carton, Witness Powell	II	1266	...	...
17—Wheat Krumbles Carton, Witness Thompson	II	1275*	...	...
18—Poster, Wheel of Knowledge, Witness Thompson	II	1277*	Not printed	
19—Poster, Jumbo Kellogg Carton, Witness Thompson	II	1277*	Not printed	
20—Sheets, Ads, Witness Thompson	II	1278*	Not printed	
21—Kellogg's Corn Flakes, Witness Thompson	II	1285	...	...
22—Kellogg's All-Bran, Witness Thompson	II	1285	...	...
23—Kellogg's Pep, Witness Thompson	II	1285	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
24—Kellogg's Wheat Krumbles, Witness Thompson	II	1285	...	...
25—Kellogg's Rice Krispies, Witness Thompson	II	1285	...	...
26—Kellogg's Kaffee Hag, Witness Thompson	II	1285	...	...
27—Kellogg's Wheat Krispies, Witness Thompson	II	1285	...	...
28—(Number Skipped, No Such Exhibit Marked.)				
29—Kellogg's Whole Wheat Flakes, Witness Thompson	II	1285	...	...
30—Package of Tear Sheets From San Francisco and Oakland Papers	II	775*	Not printed	
31—Package of Kellogg's All-Bran, Witness Anderson	II	1339*	...	...
32—Package of Post's Whole Bran, Witness Anderson	II	1339*	...	...
33—Package of Uneeda Graham Crackers, Witness Anderson	II	1339*	...	...
34—Package of Brown's Graham Crackers, Witness Anderson	II	1339*	...	...
35—Package of Sunshine Dutch Rush, Witness Anderson	II	1339*	...	...
36—Package of Holland Rusk, Witness Anderson	II	1339*	...	...
37—Package of Brown's Vanilla Wafers, Witness Anderson	II	1339*	...	...
38—Package of Uneeda Vanilla Wafers, Witness Anderson	II	1339*	...	...
39—Package of Van Camp's Spaghetti, Witness Anderson	II	1340*	...	...
40—Package of Thrift Spaghetti, Witness Anderson	II	1340*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
41—Package of Swans Down Biscuit Mix, Witness Anderson	II	1340*	...	...
42—Package of La France Biscuit Flour, Witness Anderson	II	1340*	...	...
43—Package of Uneeda Assorted Biscuit, Witness Anderson	II	1340*	...	...
44—Package of Sunshine Specialties Assortment, Witness Anderson	II	1340*	...	...
45—Package of Baker's Cocoanut, Witness Anderson	II	1340*	...	...
46—Package of Premier Spaghetti, Witness Anderson	II	1340*	...	...
47—Package of Van Camp's Kidney Beans, Witness Anderson	II	1340*	...	...
48—Package of Premier Beans and Pork, Witness Anderson	II	1340*	...	...
49—Package of Van Camp's Spaghetti, Witness Anderson	II	1340*	...	...
50—Package of LaChoy Shredded Sprouts, Witness Anderson	II	1340*	...	...
51—Package of Van Camp's Hominy, Witness Anderson	II	1340*	...	...
52—Package of Beech-Nut Pork and Beans, Witness Anderson	II	1340*	...	...
53—Package of Battle Creek Fig and Bran, Witness Anderson	II	1340*	...	...
54—Package of Van Camp's Hominy, Witness Anderson	II	1340*	...	...
55—Package of Beech-Nut Spaghetti, Witness Anderson	II	1340*	...	...
56—Package of Baker's Sweet Potato Shredlets, Witness Anderson	II	1340*	...	...
57—Package of Dunham's Original Shred Cocoanut Witness Anderson	II	1340*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
58—Package of Baker's Cocoanut Shredded, Witness Anderson	II	1340*	...	...
59—Package of National Shredded Wheat Biscuit, the Larger Individual Carton, Witness Baskett	II	1342*	...	...
60—Package of National Shredded Wheat Biscuit, the Smaller Individual Carton, Witness Baskett	II	1342*	...	...
61—Photograph of the Interior of the Wyatt Self-Service Store, Witness Baskett	II	1344	Not printed	
62—Package of Post Toasties, Corn Flakes	II	905*	...	...
63—Package of Genuine Egg Noodles	II	905*	...	...
64—Postal Card of Clover Farms Store, Reads, "Valuable Coupon," Witness Walters	III	1402*	Not printed	
65—Jumbo Carton Display, Witness Kolvoord	III	1405*	...	...
66—Display Piece With Stand, Picturing a Saucer With Two Biscuit, Witness Kolvoord	III	1406*	...	...
67—Grocers' Display Piece Which Holds Carton Kellogg's Whole Wheat Biscuit, Witness Kolvoord	III	1406*	...	...
68—Sheet of Day Advertisements, Winona Republican Herald, January 20, 1933, Witness Kolvoord	III	1416	Not printed	
69-A and 69-B—Advance Sales Notice, Consisting of Two Sheets, Witness Chapelle	III	1418*	Not printed	
70—Package, Kellogg's, Witness Hatfield	III	1444*	...	...
71—Package of Shredded Wheat, Witness Hatfield	III	1444*	...	...
72—Individual Kellogg Package, Witness Tyler	III	1446*	...	...
73—Mat, Used in Newspapers in Printing, Witness Kolvoord	III	1449*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
74—Menu, Referring to Kellogg Carton, Witness Miller		III	1454	...	...
75—Small Individual Kellogg Package, Witness Gray		III	1529*	...	...
76—Kellogg Individual Package, Witness Gray		III	1529*	...	...
77—Older Package of Muffetts, Witness Lewis		III	1534*	...	...
78—Newer Package of Muffetts, Witness Lewis		III	1534*	...	...
79—Copy of Bid, Woman's Relief Corps Home, Witness Lewis		III	1536*	IV	142
80—Kellogg Package		III	1631	...	...
81—Shredded Wheat Package		III	1631	...	...
82—Forty-inch Advertisement, Martins Ferry, Witness Ander		III	1632*	Not printed	
83—Large Set-up Window Photograph Display, Witness Ander		III	1633*	...	...
84—A Smaller Set-up Window Photograph Display, Witness Ander		III	1633*	...	...
85—Copy of Bid, Tubercular Sanitarium, Cresson, Pennsylvania (Department of Health)		III	1641*	Not printed	
86—Copy of Bid, Specifies Kellogg's Whole Wheat Biscuit, Tubercular Sanitarium, Cresson, Pa., Witness Ander		III	1642*	Not printed	
87—Copy of Bid, Pennsylvania Soldiers' and Sailors' Home, Witness Ander		III	1642*	Not printed	
88—Package, Rippled Wheat, Witness Bell		II	954	...	...
89 and 90—Kellogg Deal Price Cards, Witness Mazman		III	1750*	...	...
91—Ross Carton, Witness Witherell		III	1764*	...	...
92—Chester Lowry's Blue Book Price List, Witness Bickham		III	1801*	Not printed	
93—Camden Price List, Lowry's Blue Book, Witness Bickham		III	1801*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
94	Advertisement From Reading Eagle, February 4, 1932, Witness Miller	III	1841*	Not printed	
95	Letters From National Biscuit Company to Jobbers, December 1, 1931, Witness Miller	III	1842*	IV	143
96 and 97	Two Circulars Carrying Advertisements of Kellogg's Whole Wheat Biscuit, Witness Moyer	III	1850*	Not printed	
98	Story Book of Games, Witness Hopkins	III	1863*	Not printed	
99	Wheel of Knowledge Chart, Witness Hopkins	III	1863*	Not printed	
100-A	File Copy of Standard Government Form of Bid, for Use by Navy Department, for Supply Department, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866	Not printed	
100-B	Standard Government Form of Bid, by Navy Department, U. S. Navy Yard, Washington, D. C., Witness Hopkins	III	1866	Not printed	
101	Standard Form of Bid, Dated January 12, 1933, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866	Not printed	
102	Federal Standard Stock Catalogue, N-C-191, Witness Hopkins	III	1868	Not printed	
103	Small Kellogg Carton, Purchased on Dining Car, Northwestern Railroad	III	1944*	...	...
104	Letter to the Kellogg Co. From the F. H. Cobb Co., Inc., Cortland, N. Y., Dated March 22, 1933, an Addendum to the Testimony of Mr. A. J. Twentyman	III	1952*	Not printed	
105	Case Used for Packing National Shredded Wheat, Witness Sawyer	III	1957*	...	...
106	Sketch, Diagram of Threads, Witness Malone, Made by Mr. Clarke	II	963	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
107—Sketch Diagram of Threads, Made by Witness Malone	II	963*	Not printed	
108—Photostatic Copy of Ad in the Denver Republican, Dated March 11, 1894, Witness Hurd	II	974	IV	145
109—Certificate of Incorporation Colorado Shredded Wheat, January 25, 1895, Witness Hurd	II	977*	Not printed	
110-A and 110B—Government Bid, Fort Logan, Dated April 11, 1933, Witness Copeland	III	1989*	Not printed	
111—Package of Egypt Stick Candy	III	1990	...	...
112—Second Sheet, Page Five, Denver Times, March 17, 1894	III	1990	Not printed	
113—Second Sheet, Page Five, Denver Times, March 10, 1894	III	1990	Not printed	
114—Third Sheet, Page Eight, Daily News, Denver, Colorado, July 17, 1895	III	1990	Not printed	
115—Fourth Sheet, Page Eight, Daily News, Denver, Colorado, July 14, 1895	III	1990	Not printed	
116—Fifth Sheet, Page Eight, Daily News, Denver, Colorado, July 27, 1895	III	1990	Not printed	
117—Sixth Sheet, Page Eight, Daily News, Denver, Colorado, July 7, 1895	III	1991	Not printed	
118—Seventh Sheet, Page Eight, Daily News, Denver, Colorado, July 10, 1895	III	1991	Not printed	
119—Eighth Sheet, Page Eight, Daily News, Denver, Colorado, July 28, 1895	III	1991	Not printed	
120—Copy of Record in the Case of Shredded Wheat vs. The Humphrey Cornell Co. and Frederick H. Towne, Witness Ross	III	1992	Not printed	
121—Photostatic Certified Copy of Majority Opinion of the U. S. Circuit Court of Appeals, Witness Ross	III	1992	IV	147
122—Copy of Petition for Rehearing, Witness Ross	III	1993	IV	159

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
125—Kellogg Carton Used From About 1910 to 1912, Witness Ross	III	1999*	...	...
126—Kellogg Carton Used From 1913 to 1914 to Some Time in 1915, Front Panel of Carton Entitled Kellogg's Toasted Wheat Biscuit, Witness Ross	III	2000*	...	...
127—Kellogg Carton Used From 1915 Until 1918 (About) or 1919, Front Face Reads "Copyright 1910 by Kellogg's Toasted Corn Flakes Co.," Witness Ross	III	2000*	...	...
126—Certified Copy of Mandate, Witness Ross	III	2005	IV	163
127—Shredded Wheat Company Chart, "Educational Exhibit of Shredded Wheat Biscuit"	I	288*	Not printed	
128—Book of Labels Illustrative of Jordan Testimony	II	1002	Not printed	
128—Book of 1925 Newspaper Advertising	II	1003	Not printed	
129-A—Book of 1922 Newspaper Advertising	II	1003	Not printed	
129-B—Book of 1929 Newspaper Advertising	II	1003	Not printed	
129-C—Book of 1930 Newspaper Advertising	II	1004	Not printed	
129-D—Book of 1931 Newspaper Advertising	II	1004	Not printed	
129-E—Book of 1932 Newspaper Advertising	II	1004	Not printed	
130—Board Containing Samples of Defendant's Cartons, Marked A to R	II	1006	...	...
131—Holder Containing Kellogg Poster Advertising Before Suit Brought	II	1016	...	...
132—Packages Prepared by Witness Jordan	II	1016	...	...
133—Form Letter to Newspapers Re Kellogg Advertisements	II	1016	Not printed	
134—Five Bundles of Retailer Advertisement of Kellogg's Wheat Biscuit	II	1016	Not printed	
135—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat Biscuit	II	1016	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
136—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat	II	1017	Not printed	
137—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat	II	1017	Not printed	
138—Batch of Advertisements of Plaintiff	II	1025	Not printed	
139—Odd Advertisements of Plaintiff in Woman's Home Companion	II	1035	Not printed	
140—Plaintiff's Pamphlet "Uneeda"	II	1035	Not printed	
141—Standard Government Form of Bid, Department of Interior	II	1043	Not printed	
142—Federal Specification for Cereals (Breakfast Foods)	II	1043	Not printed	
143—Defendant's Bid Naval Supply Department, Norfolk, Va., May 16, 1933	II	1044	Not printed	
144—Defendant's Bid Naval Supply Depot, Norfolk, Va., March 15, 1933	II	1045	Not printed	
145—Samples of Defendant's Early Advertisements of Kellogg's Toasted Wheat Biscuit	II	1047	Not printed	
146—Early Carton of Kellogg's Shredded Whole Wheat Biscuit	II	1048	...	...
147—Blank Carton Sanitas Toasted Corn Flakes	II	1050	...	...
148—Advertisements Kellogg's Shredded Krumbles	II	1052	Not printed	
149—Carton of Kellogg's Krumbles, Shredded Whole Wheat	II	1053	...	...
150—Carton Kellogg's Wheat Krumbles	II	1053	...	...
151—Carton Kellogg's Wheat Krumbles (U. S.)	II	1058	...	...
152—Letter May 3, 1933, N. A. Relfrich to Kellogg's Sales Co.	II	1059	Not printed	
153—Proposal April 8, 1933, to Navy Purchasing Officer, New York	II	1060	Not printed	
154—Price Bulletin of Provision Contract for May, 1933, Port of New York	II	1061	Not printed	

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
[illegible]—Bid March 3, 1933, Navy Purchasing Office, New York		II	1062	Not printed	
[illegible]—Bid June 8, 1932, Naval Air Station, Lakehurst, N. J.		II	1062	Not printed	
17—Bid February 23, 1933, Selfridge Field, Mich.		II	1063	Not printed	
18—Bid May 9, 1933, West Point, N. Y.		II	1063	Not printed	
19—Invitation for Bid August 22, 1932, Veterans Administration Home, National Military Home, California		II	1064	Not printed	
20—Invitation for Bids, October 25, 1932, Veterans Administration, Washington, D. C.		II	1064	Not printed	
21—Invitation for Bids, October 25, 1932, U. S. Marine Hospital, St. Louis, Mo.		II	1064	Not printed	
22—Bid March 21, 1932, Fort Benjamin Harrison, Ind.		II	1065	Not printed	
23—Bid September 8, 1932, Fort Hoyle, Md.		II	1065	Not printed	
24—Invitation for Bids, May 19, 1932, U. S. Property and Disbursing Officer, Trenton, N. J.		II	1065	Not printed	
25—Bids January 9, 1932, The Army War College, Washington, D. C.		II	1065	Not printed	
26—Bid August 18, 1932, Fort Moultrie, S. C.		II	1066	Not printed	
27—Bid November 11, 1932, Langley Field, Va.		II	1066	Not printed	
28—Bid January 19, 1933, Fort Crook, Neb.		II	1066	Not printed	
29—Bid March 25, 1933, Fort McClellan, Ala.		II	1066	Not printed	
30—Bid April 4, 1932, Fort Mason, San Francisco, Cal.		II	1066	Not printed	
31—Bid July 21, 1931, Fort Warden, Wash.		II	1067	Not printed	
32—Bid July 13, 1932, Quartermaster Supply Officer, Brooklyn, N. Y.		II	1067	Not printed	
33—Bid Marine Barracks, Navy Yard, Portsmouth, N. H.		II	1068	Not printed	
34—Invitation for Bids, Pennsylvania Department of Health, Sanitarium No. 2, Cresson, Pa.		II	1068	Not printed	

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175	Specification for Cereals, Pa., December 10, 1932	II	1069	Not printed	
176	Specifications State of South Dakota	II	1069	Not printed	
177	Request for Bids, December 19, 1932, Maine	II	1070	Not printed	
178	Proposal, Rockland State Hospital, Orangeburg, N. Y.	II	1070	Not printed	
179	Invitation for Bids, March 13, 1933, Tennessee	II	1070	Not printed	
180	Order April 1, 1933, Wassaic State School, Wassaic, N. Y.	II	1071	Not printed	
181	Order January 16, 1933, Newark State School, Newark, N. J.	II	1071	Not printed	
182	Order March 23, 1933, Great Meadow Prison, Comstock, N. Y.	II	1071	Not printed	
183	Order January 14, 1933, Willard State Hospital, Willard, N. Y.	II	1071	Not printed	
184	Specifications Division of Purchases and Supplies, Springfield, Ill.	II	1072	Not printed	
185	Individual Carton Kellogg's Whole Wheat Biscuit	II	1072	...	...
186	Large Carton Kellogg's Whole Wheat Biscuit	II	1072*	...	...
187	Menu Card, Chicago, Milwaukee, St. Paul and Pacific	II	1074	Not printed	
188	Menu Card, Hotel Fort Shelby, Detroit, Mich.	II	1075	Not printed	
189	Bid March 13, 1933, Naval Supply Depot, Norfolk, Va.	II	1088	Not printed	
190	Bid February 11, 1933, U. S. Marine Corps, Navy Building, Washington, D. C.	II	1089	Not printed	
191	Bid of Price Brothers, May 18, 1933, Naval Home, Philadelphia, Pa.	II	1091	Not printed	
192	Plaintiff's Individual Carton, Large Biscuit	II	1098	...	...
193	Blueprint Diagrammatic Sketch Defendant's Mill	II	1107	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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194—Photographs (13) Illustrating Defendant's Operation	II	1111	Not printed	
195—Sample of Shreds First Time Through Rolls	II	1116	...	...
196—Sample of Shreds Second Time Through Rolls	II	1116	...	...
197—Sample of Shreds Third Time Through Rolls	II	1116	...	...
198—Carton of Fifteen Biscuit at 400 Degrees 1½ Hours	II	1117	...	...
199—Sample of Biscuit With Brown Band	II	1122	...	...
200—Sample of Biscuit With Green Band	II	1122	...	...
201—Sample of Biscuit With K Stamped Thereon	II	1123	...	...
202—Sample of Biscuit With Red Food Coloring	II	1123	...	...
203—Sample of Biscuit With Brown Food Coloring	II	1124	...	...
204—Sample of Biscuit With Green Strip on Top	II	1124	...	...
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206—Sample of Biscuit With K Impressed Thereon	II	1125	...	...
207—Sample of Biscuit With Brown Stripes	II	1125	...	...
208—Sample of Biscuit With K Impressed Thereon	II	1125	...	...
209—Biscuit as Shown, Sketch A Attached to Exhibit 262	II	1130	...	...
210—Sample Diamond Shape Biscuit	II	1179	...	...
211—Sample Diamond Shape Biscuit	II	1179	...	...
212—Sample Biscuit With Band of Paper	II	1139	...	...
213—Sample Biscuit With Tag	II	1140	...	...
214—Sample Biscuit Enclosed in Envelope	II	1140	...	...
215—Large Card Carrying Samples of Plaintiff's and Defendant's Cartons	II	1151*	...	...

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217	Defendant's Shipping Container Case No. 360	II	1152	...	...
218	Defendant's Shipping Container Case No. 324	II	1152	...	...
219	Window Display Card of Plaintiff	II	1152	...	...
220	Samples of Defendant's Cartons	II	1153	...	...
221	Photographs (2) of Store Displays	II	1153	Not printed	
222	Letter June 2, 1932, C. K. Brace, Manager, National Biscuit Co., Denver, Col., to All Jobbers	II	1154	IV	169
223	Chart of Kellogg's Shredded Wheat Biscuit Cartons	II	1155	Not printed	
224	Three Cartons Kellogg's Shredded Krumbles	II	1155	...	...
225	Advertisement Chicago Daily Tribune, June 2, 1928	II	1155	Not printed	
226	Advertisement The Battle Creek Moon Journal, May 25, 1922	II	1156	Not printed	
227	Open Letter of Plaintiff to "Dear Madam"	II	1157	Not printed	
228	Carton Complimentary Samples Shredded Whole Wheat	II	1157	...	...
229	Pamphlet Fifty Ways of Serving Shredded Whole Wheat	II	1157	Not printed	
230	Recipes for New and Delicious Energy Dishes	II	1157	Not printed	
231	Carton Kellogg's Battle Creek Shredded Wheat	II	1158	...	...
232	Registration No. 276,592, Battle Creek, Shredded Wheat	II	1158	Not printed	
233	Chamber's Journal, January 27, 1900	II	1158	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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35	—File Wrapper and Contents, Trade-Mark Registration No. 213,456 Shredded Wheat	II	1159	IV	181
36	—Book of Trade-Mark Registrations of Plaintiff	II	1160	IV	193
37	—Collection of Correspondence	II	1161	Not printed	
38	—Samples of Shredded Paper, Shredded Gelatine and Shredded Cellophane	II	1161	...	...
39	—Reproduction of Kellogg Biscuit Prior to 1920	II	1162	Not printed	
40, 240-A, 240-B	—Box of Split Peas, Lima Beans and Pop Corn, With Cellophane Windows	II	1163	...	...
41	—Advertisements in Grocery World, Five Sheets	II	1165	Not printed	
42	—Perky U. S. Patent No. 548,086, October 15, 1895	II	1166	IV	207

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242	Book of Patents Issued to Plaintiff, Viz.:				
	Perky & Ford U. S. Patent No. 502,378, August 1, 1893	II	1166	V	1
	Perky U. S. Patent No. 520,496, May 29, 1894	II	1166	V	5
	Perky U. S. Patent No. 532,286, January 8, 1895	II	1166	V	11
	Perky U. S. Patent No. 532,480, January 15, 1895	II	1166	V	15
	Perky U. S. Patent No. 532,481, January 15, 1895	II	1166	V	21
	Perky U. S. Patent No. 532,697, January 15, 1895	II	1166	V	25
	Perky U. S. Patent No. 532,698, January 15, 1895	II	1166	V	29
	Perky U. S. Patent No. 533,551, February 5, 1895	II	1166	V	33
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	Perky U. S. Patent No. 533,553, February 5, 1895	II	1166	V	41
	Perky U. S. Patent No. 533,554, February 5, 1895	II	1166	V	45
	Perky U. S. Patent No. 533,555, February 5, 1895	II	1166	V	49
	Montgomery U. S. Patent No. 533,821, February 5, 1895	II	1166	V	55
	Perky U. S. Patent No. 548,086, October 15, 1895	II	1166	V	59
	Perky U. S. Design Patent No. 24,688, September 17, 1895	II	1166	V	61
	Perky U. S. Patent No. 571,284, November 10, 1896	II	1166	V	65
	Perky U. S. Patent No. 598,745, February 8, 1898	II	1166	V	77

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Perky U. S. Patent No. 667,892, February 12, 1901	II	1166	V	91
Perky U. S. Patent No. 678,127, July 9, 1901	II	1166	V	109
Perky U. S. Patent No. 678,625, July 16, 1901	II	1166	V	121
Perky U. S. Patent No. 681,656, August 27, 1901	II	1166	V	135
Burbank U. S. Patent No. 683,100, September 24, 1901	II	1166	V	143
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Perky U. S. Patent No. 713,795, November 18, 1902	II	1166	V	169
Perky U. S. Patent No. 746,145, December 8, 1903	II	1166	V	173
Burbank U. S. Patent No. 770,159, September 13, 1904	II	1166	V	181
Horner U. S. Patent No. 785,554, March 21, 1905	II	1166	V	189
Perky U. S. Patent No. 797,604, August 22, 1905	II	1166	V	201
Smith U. S. Patent No. 1,195,114, August 15, 1916	II	1166	V	225
Anderson U. S. Patent No. 1,334,429, March 23, 1920	II	1166	V	231
House U. S. Patent No. 1,592,768, July 13, 1926	II	1166	V	243

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	Webster U. S. Patent No. 1,592,797, July 13, 1926	II	1166	V	301
	Anderson U. S. Patent No. 1,621,863, March 22, 1927	II	1166	V	313
243	Valentine U. S. Patent No. 831,909, September 25, 1906	II	1166	V	319
244	Book of Patents Issued to Defendant, Viz.:				
	Valentine U. S. Patent No. 1,102,614, July 7, 1914	II	1166	V	331
	Kellogg U. S. Patent No. 1,159,045, November 2, 1915	II	1166	V	355
	Kellogg U. S. Patent No. 1,189,130, June 27, 1916	II	1166	V	357
	Kellogg U. S. Patent No. 1,197,297, September 5, 1916	II	1166	V	361
	Kellogg U. S. Patent No. 1,783,434, December 2, 1930	II	1166	V	361
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	Valentine U. S. Patent No. 1,124,363, January 12, 1915	II	1166	V	411
	Valentine U. S. Patent No. 1,143,151, June 15, 1915	II	1166	V	417
245	Book of Miscellaneous Patents Issued to Others Than Plaintiff or Defendant, Viz.:				
	Cooley U. S. Patent No. 782,109, February 7, 1905	II	1167	V	437
	Williams U. S. Patent No. 820,899, May 15, 1906	II	1167	V	441
	Williams U. S. Patent No. 878,262, February 4, 1908	II	1167	V	445
	Williams U. S. Patent No. 896,964, August 25, 1908	II	1167	V	451
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	Williams U. S. Patent No. 1,062,627, May 27, 1913	II	1167	V	505
	Black U. S. Patent No. 1,210,589, January 2, 1917	II	1167	V	511
	Williams U. S. Patent No. 1,263,009, April 16, 1918	II	1167	V	513
6	Bid of Plaintiff May 8, 1933, Department of Interior, Washington, D. C.	II	1170	Not printed	
7	Bid of Plaintiff December 12, 1932, U. S. Marine Corps, Washington, D. C.	II	1171	Not printed	
8	Bid of Plaintiff March 17, 1933, U. S. Marine Corps, Washington, D. C.	II	1172	Not printed	
9	Bid of Defendant February 3, 1933, Marine Barracks, Dover, N. J.	II	1172	Not printed	
1	Advertisement, The Natural Food Co. in New York Daily Tribune, May 12, 1907	II	1176	Not printed	
—	Advertisement, The Shredded Wheat Co. in Trade, Detroit, April 9, 1913	II	1176	Not printed	
—	Package of Arrowroot Biscuits	II	1177	Not printed	
—	Package of Fig Newtons Biscuits	II	1177	Not printed	
—	Package of Hydrox Biscuits	II	1177	Not printed	
—	Certificate of Incorporation of The Colorado Shredded Wheat Co.	II	1177	Not printed	
—	Carton of Kellogg's Corn Flakes	II	1178	...	..
A	Clarke Sketch of Cutting of Diamond-Shape Biscuit	II	1178	Not printed	

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258—Chart Illustrating Cartons of Plaintiff's Wheat Biscuit and Triscuit	II	1179	Not printed	
259—Box Plaintiff's Butter Thin Biscuit	III	2035	...	...
260—Box Plaintiff's Uneeda Biscuit	III	2035	...	...
261—Box Plaintiff's Graham Crackers	III	2035	...	...
262—Box Plaintiff's Premium Flake Crackers	III	2035	...	...

DEFENDANT'S EXHIBIT UNDER RULE 46.

A—Proceedings in the Patent Office	III	2021	Not printed	

Proceedings in the United States Circuit Court of Appeals are included in Vol. 3-A

UNITED STATES OF AMERICA,
DISTRICT OF DELAWARE, } *ss.:*

BE IT REMEMBERED, that at a District Court of the United States for the District of Delaware, begun and held at the United States Court House and Post Office Building, in the City of Wilmington, in said District of Delaware, at the time and place required by law, among other, the following proceedings were had, to wit:

NATIONAL BISCUIT COMPANY,
Plaintiff,
v.
KELLOGG COMPANY,
Defendant.

No. 980. IN EQUITY.

DOCKET ENTRIES.

June 11, 1932. Bill of complaint filed; same day subpœna issued, returnable July 1, 1932.

June 17, 1932. Marshal returns on subpœna, "Served", &c.; same day writ filed.

June 29, 1932. Defendant appears by E. Ennalls Berl, Esqr., its solicitor; same day præcipe filed.

June 30, 1932. Stipulation filed; same day order extending time for filing answer until August 1, 1932; same day order filed.

Aug. 3, 1932. Stipulation filed; same day order extending time for filing answer until

	August 10, 1932; same day order filed.
Aug. 8, 1932.	Answer filed.
Aug. 30, 1932.	Plaintiff's reply to defendant's affirmative defense, filed.
Oct. 29, 1932.	Stipulation filed; same day order extending time for taking depositions, &c.; same day order filed.
Dec. 14, 1932.	Stipulation filed; same day order extending time for taking depositions, &c.; same day order filed.
Dec. 15, 1932.	Stipulation filed.
Dec. 27, 1932.	Order granting leave to file plaintiff's interrogatories; same day order and interrogatories filed. (Exit copy to defendant's attorneys.)
May 22, 1933.	Defendant's answers to plaintiff's interrogatories, filed.
May 22, 23, 24, 25, 26, 31, 1933.	Trial.
June 1, 2, 1933.	Trial.
June 2, 1933.	Depositions on behalf of plaintiff and defendant (in 10 volumes) filed.
June 2, 1933.	Record of proceedings at trial, filed.
Aug. 1, 1933.	Plaintiff's requests for findings of fact and conclusions of law, filed.
Sept. 30, 1933.	Defendant's requests for findings of fact and conclusions of law, filed.
Oct. 31, 1933.	Hearing on pleadings and proofs.

Nov. 1, 1933. Hearing on pleadings and proofs.

Jan. 11, 1935. Opinion of court filed.

Jan. 22, 1935. Final decree dismissing bill of complaint, with costs against the plaintiff; same day decree filed.

Feb. 12, 1935. Plaintiff's petition for appeal with assignments of error, filed; same day order allowing appeal, bond in the sum of $500.; same day order filed.

Feb. 20, 1935. Plaintiff's præcipe of lodgment of condensed statement of the evidence, with four volumes, filed.

Feb. 20, 1935. Notice to defendant's solicitor of lodgment of condensed statement of testimony, filed.

Feb. 20, 1935. Plaintiff's præcipe for transcript of record with acceptance of service by solicitor for defendant endorsed thereon, filed.

Feb. 22, 1935. Order approving bond on appeal in the sum of $500, with American Surety Company of New York, as surety; same day bond filed.

Feb. 22, 1935. Citation issued.

Mar. 2, 1935. Citation with acceptance of service by solicitor for appellee endorsed thereon, filed.

Apr. 23, 1935. Præcipe of defendant-appellee for inclusion of additional matter in transcript on appeal, filed.

Apr. 23, 1935. Stipulation with condensed narrative statement of evidence, filed; same day order approving record, &c.; same day order filed.

Apr. 23, 1935. Stipulation filed; same day order for withdrawal of physical exhibits, &c.; same day order filed.

BILL OF COMPLAINT.

(Filed June 11, 1932.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

NATIONAL BISCUIT COMPANY,
Plaintiff,
v.
KELLOGG COMPANY,
Defendant.

No. 980. IN EQUITY.

Plaintiff, National Biscuit Company, for its bill of complaint against defendant, Kellogg Company, alleges:

1. That plaintiff, National Biscuit Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, a citizen and inhabitant of said State and has one of its manufacturing plants and a place of business at the City of Niagara Falls in the State of New York, and that defendant, Kellogg Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, a citizen and inhabitant of said State and has a manufacturing plant at Battle Creek, County of Calhoun and State of Michigan.

2. That this action is between citizens of different states for unfair competition in trade in which the amount involved, exclusive of interest and costs, exceeds the sum or value of three thousand dollars ($3000).

3. That Cereal Machine Company was duly incorporated under the laws of the State of Colorado on

June 8, 1893; that it was engaged in the manufacture and sale of a whole wheat biscuit, an edible product; that Henry D. Perky was the founder of the business of said Cereal Machine Company and was president of said Cereal Machine Company; that on or about the seventeenth day of May, 1900, the name of said Cereal Machine Company was, pursuant to the laws of the State of Colorado, duly changed to Shredded Wheat Company; that in the year 1900 The Natural Food Company, a corporation, was duly organized under the laws of the State of New York; that in the year 1900 said The Natural Food Company acquired, succeeded to and thereafter continued until in the year 1930 the said business theretofore conducted by said Colorado corporation under the successive names Cereal Machine Company and Shredded Wheat Company; that on or about the fifteenth day of May, 1908, the name of said The Natural Food Company, was, pursuant to the laws of the State of New York, duly changed to The Shredded Wheat Company; that in the year 1898 plaintiff, National Biscuit Company, a corporation, was duly organized under the laws of the State of New Jersey and since its incorporation plaintiff has been and now is engaged in the manufacture and sale of edible products; that in the year 1930 plaintiff, National Biscuit Company, acquired and succeeded to the whole of the going business, trade-marks and property of said The Shredded Wheat Company, a New York corporation; that since plaintiff acquired and succeeded to the said going business of said The Shredded Wheat Company it has continued and is now continuing to conduct the same; that the said business which plaintiff acquired in the year 1930 and which it has been and now is continuing has been carried on as the "Shredded Wheat Division" of plaintiff and that the said going business which plaintiff acquired, continued and is now contin-

ning was begun in the year 1893 and has been carried on continuously since that time.

4. That plaintiff's said predecessors and plaintiff have manufactured and sold to the public from the time of the beginning of plaintiff's predecessors' operations in 1893 to the present time a whole wheat biscuit; that the same has always been made from whole wheat of the highest grade and quality and has always been made with great skill and care so as to retain the body and substance of the wheat in said biscuit, and was and is made in buildings and structures especially designed for the purpose and built at great expense and by mechanism also especially designed and with particular regard to purity and cleanliness, and in such manner that said whole wheat biscuit passes directly from the factory to the customer without opportunity for contamination by odors or any foreign substance; and that during all of said period plaintiff and its said predecessors have spent large sums of money in scientific investigation for the purpose of continually maintaining, improving and perfecting the method of manufacture and the quality of said product.

5. That at all times since 1901 plaintiff's predecessor and plaintiff have had a plant at Niagara Falls, New York, where said biscuit has been and is being made; that said plant at Niagara Falls, New York, has been open to the public and the complete process of the manufacture of said biscuit has been disclosed to the public; that in order to assure a complete inspection, plaintiff's said predecessor and plaintiff have employed guides at said plant at Niagara Falls, New York, and said guides conduct all visitors throughout said plant and explain in detail the various processes of manufacture, and that said plant is visited and inspected by many thousand persons annually.

6. That from the beginning of the manufacture of whole wheat biscuit by plaintiff's said predecessors and continuously until the present time, plaintiff's said predecessors and plaintiff have manufactured said whole wheat biscuit for sale and consumption, without material alteration or change, in a distinctive and peculiar shape and appearance; that said biscuit has been produced and baked so as always to present an appearance at once recognized and readily distinguishable from any other forms of food product ever before manufactured either from wheat or any other article; that the whole wheat biscuit of plaintiff is composed and built up solely of filaments of wheat, and is fashioned in a distinctive form, it being substantially rectangular and having rounded top and bottom surfaces and sharply severed ends and having the filaments of which it is composed arranged substantially parallel and its entire surface being browned by baking and rendered crisp and palatable as to its component parts.

7. That continuously during the past thirty-nine years, plaintiff's said predecessors and plaintiff have formed and baked said whole wheat biscuit product in the form and condition above stated, and said biscuit became known during said period of years to the general public by reason of the particular and distinctive shape, appearance and structure of the individual biscuit as above described, and also by reason of the care, skill and uniform high quality in manufacture; that for many years past said whole wheat biscuit has come to have and now has a special and secondary significance and meaning to the public by reason of the facts above set forth, and thus to mean and signify only the said biscuit of the manufacture and sale of plaintiff; that even when displayed separate and apart from plaintiff's carton and advertising matter and standing alone without other means of identification, plaintiff's

said biscuit has come to have with the general public the meaning and significance of the product and output only of plaintiff.

8. That continuously during the past thirty-nine years said biscuit of plaintiff has been associated by the public with plaintiff's said predecessors and plaintiff as sole source of manufacture, by its particular form and appearance and by the particular words and terms "Shredded Whole Wheat Biscuit," or "Shredded Wheat Biscuit," or "Shredded Wheat," the said words and terms having been originally adopted and used by plaintiff's predecessors as fanciful and distinctive designations identifying the said particular product of their origin; that plaintiff's said predecessor, The Shredded Wheat Company, a New York corporation, registered in the United States Patent Office on the fifteenth day of January, 1924, the said trade-mark consisting of the words "Shredded Wheat"; that said trade-mark registration bears No. 178,725 and is for biscuit or crackers; that said The Shredded Wheat Company also caused to be registered in the United States Patent Office on the twenty-fifth day of May, 1926, the trade-mark consisting of the words "Shredded Wheat"; that said trade-mark registration bears No. 213,456 and is for biscuits, crackers and cereal foods cooked or prepared for consumption; that no other person, firm, corporation or association has the right to use said trade-mark, consisting of the words "Shredded Wheat," in the United States for said products; that in the year 1909 plaintiff's said predecessor, The Shredded Wheat Company, a New York corporation, adopted and continued to use in its advertisements and upon packages containing said biscuit, the trade-mark consisting of a view of said whole wheat biscuit, a saucer or dish and a spoon placed within the saucer or dish, the biscuit being partly im-

mersed in cream; that said trade-mark was duly registered in the United States Patent Office on the thirtieth day of January, 1912, and bears registration No. 85,186; that said trade-mark registration No. 85,186 was duly renewed on or about October 20, 1931, for a further period of twenty (20) years from the thirtieth day of January, 1932; that in the year 1909 plaintiff's said predecessor, The Shredded Wheat Company, also adopted and used upon packages containing said biscuit the trade-mark consisting of a cut or representation of two said shredded wheat biscuit, and a saucer or dish, the said biscuit being placed therein and partly immersed in cream or milk; that said trade-mark was duly registered in the United States Patent Office on the seventeenth day of August, 1926, and bears registration No. 216,593 for biscuits, crackers and cereal foods cooked or prepared for consumption; that no other person, firm, corporation or association other than plaintiff has the right to use said trade-marks in the United States; that said trade-marks have been used upon packages containing said biscuit and in advertisements of said biscuit for many years and they were not abandoned by plaintiff's said predecessors or plaintiff; that plaintiff adopted and continued and is now using upon packages in which its said biscuit is packed a cut or figure of said biscuit; that said words, terms and trade-marks have been so associated with plaintiff's product that they have been and are indicative of source or origin continuously during said entire period from their adoption to the present time; that said words, terms and trade-marks so associated have grown to be the trade-marks and trade names of plaintiff for its said product and are the symbol of its good will and its commercial signature; that the said words, terms and trade-marks have for many years been indicative of the intrinsic worth and high quality of plaintiff's said biscuit product as a pure and

wholesome food for human consumption; that said words, terms and trade-marks taken singly or together have only the meaning in the public mind throughout the United States and in foreign countries and are applied to only one specific thing by the general public, to wit, the said well known and specific article of food manufactured and marketed for so many years by plaintiff's said predecessors and plaintiff; that said words, terms and trade-marks taken singly or together do not apply to, nor are they used in respect of, any other article or thing whatsoever, either in respect of a food for human consumption or otherwise, except for defendant's unlawful acts as hereinafter referred to; the said words, terms and trade-marks taken together have no meaning whatsoever in the public mind except in their association with the said biscuit of plaintiff and plaintiff as the sole source of manufacture; and that in consequence said words, terms and trade-marks, in association with the said whole wheat biscuit of plaintiff in their distinctive and well known form and appearance, have long since acquired a secondary meaning and special significance in respect of source or origin for the said product of plaintiff.

9. That the volume of sales of plaintiff's said biscuit during the early years immediately following its introduction into the market, was relatively small; that sales of said biscuit have increased and grown until 1,089,396,432 of said biscuit were sold in the calendar year 1928; that in the calendar years succeeding the year 1928 the manufacture and sale of said biscuit has closely approximated the said figure for the calendar year 1928; and that said product now goes into the homes as a food product of more than twenty-five million families annually.

10. That the growth of the business of plaintiff and its said predecessors in the marketing of said bis-

cuit product, has been largely a matter of education and a gradual appreciation by the public of said food product of plaintiff; that said product was an entirely new product, the merits of which were not initially understood or appreciated by the public; that the great value of said product was explained and made known to the public through continuous years of expensive advertising and house to house canvassing, in order to demonstrate and convince it that plaintiff's said biscuit product was of great dietetic and food value, free from all adulterations, nutritious in body and substance and without opportunity of adulterations and contaminations in its manufacture.

11. That for very many years past plaintiff's said predecessors and plaintiff have continuously associated with said biscuit product the said words and terms "Shredded Whole Wheat Biscuit," "Shredded Wheat Biscuit" and "Shredded Wheat," a cut, representation or picture of plaintiff's said distinctive form of biscuit and a cut, representation or picture of said biscuit placed in a saucer and partly immersed in cream, in order more closely to associate said words and terms in the minds of members of the public with the actual biscuit when out of the carton and with plaintiff as the source or origin; that for more than thirty-nine years past plaintiff and its said predecessors have advertised and made known their said biscuit product together with said words and terms through a wide variety of mediums known to the advertising trade, such as letter heads, billboards, newspapers, magazines, booklets, pamphlets, circulars, menu cards, public exhibits, free samples, lectures, house to house canvassing, etc.; that during the many years of the manufacture and marketing of said biscuit, plaintiff's said predecessors and plaintiff have expended many millions of dollars in said advertising and education of the public, and the

economies of large production effected by reason of the increased volume of sales due to such advertising and educational work have benefited the purchasing public.

12. That a large percentage of the stores and restaurants which purchase plaintiff's said biscuit product and vend the same to their customers separate the same from the cartons or containers in which they are packed by plaintiff and display the same in windows, glass globes and other transparent containers, and in bowls, dishes and saucers without any mark of identification thereon or associated therewith, and that when so separated, displayed and exhibited, the public by reason of said continuous and extensive advertising and education by plaintiff, always and immediately recognize said biscuit product as "Shredded Whole Wheat Biscuit," "Shredded Wheat Biscuit" and "Shredded Wheat," the product of plaintiff alone; that vast numbers of plaintiff's said biscuit are individually served in restaurants, hotels, boarding houses, homes, etc., to the ultimate consumer without any mark of identification thereon or associated therewith; that said biscuit associated with said words and terms mean to such ultimate consumer only the biscuit of plaintiff, by reason of their well known distinctive form, shape, color, structure, substance, quality and general appearance and character; and that at all times when the ultimate consumers order "Shredded Whole Wheat Biscuit," "Shredded Wheat Biscuit" or "Shredded Wheat," they intend and for many years have intended the well known biscuit product of plaintiff and no other article.

13. That through the many years of use of the said biscuit of plaintiff, obtained by consumers upon their request by the words and symbols above stated, the public has developed a confidence in the composition, quality, purity and food value of plaintiff's prod-

uct the sale of which has increased in large proportions until in the year 1928, 1,089,396,432 of said biscuit were made and sold; that the long association of said words, terms and symbol with said biscuit of plaintiff and plaintiff as the source of production, has developed in the public mind a continual guaranty of quality and food value in respect of plaintiff's product; that the terms "Shredded Whole Wheat Biscuit," "Shredded Wheat Biscuit" and "Shredded Wheat" and said symbols mean to the public the said familiar product of plaintiff alone, and not a product of similar appearance of the manufacture and sale of any other person, firm, corporation or association; that the public has developed the habit and custom of purchasing and consuming the biscuit of plaintiff because of its source or origin; that the supply to a purchaser of any product having a similar appearance but coming from a different source, upon his order or any of said words and terms above stated, constitutes deception upon him; that such other product being unknown to a purchaser, it would not be the article of food that he had intended to receive and would be as different from his conception as though of entirely different appearance and identified by different characterizations; that as said biscuit is manufactured food for human consumption, its origin is of infinitely more interest and consequence to the public than would be the origin of some article for manual use, the fitness of which may be judged by inspection; and that the chemical and dietetic effect of a food is not determined by its appearance but its content, and the public relies upon the skill and honesty of the maker and desires such product because of confidence in knowledge of its source, and for that reason accepts the appearance of the shredded wheat biscuit and the said distinguishing words, names and marks as guaranteed of its source, purity and wholesomeness.

14. That during said period of thirty-nine years prior to the conduct of the defendant herein presented, no person, firm, corporation or association has engaged in the manufacture and sale of a whole wheat biscuit made in the shape, form, color, structure and appearance of plaintiff's product, except that in 1915 Ross Food Company, a New York corporation, did for a short time engage in the manufacture of a biscuit, called "Ross' Whole Wheat Biscuit"; that the same was made in imitation of plaintiff's product and was of somewhat similar appearance; that plaintiff at said time instituted a suit in equity in the District Court of the United States for the District of Connecticut against The Humphrey-Cornell Company, a wholesale grocery company distributing the biscuit of said Ross Food Company, together with said Ross Food Company and certain of the individuals who had organized said Ross Food Company; that in said suit an injunction was issued by said District Court restraining the defendants therein from manufacturing and selling said product unless each biscuit was specially marked so as to indicate distinctively and effectively that the same was made by defendants therein and not by plaintiff, and the decree of said District Court as to injunction, with certain modifications, was affirmed by the United States Circuit Court of Appeals for the Second Circuit. The decision of the said District Court in said suit is reported in 244 Fed. Rep. 509 and the decision of the United States Circuit Court of Appeals for the Second Circuit on appeal in said suit is reported in 250 Fed. Rep. 960.

15. That long subsequent to the marketing of plaintiff's said whole wheat biscuit and the adoption and use by plaintiff of the said words, terms and symbols or marks defendant herein began the manufacture of a whole wheat product which it designated and

named in display type upon its cartons and containers "Shredded Whole Wheat Biscuit" and said product so designated has been offered for sale and sold by defendant and advertised to the purchasing public by defendant and retailers engaged in the sale of defendant's product to the purchasing public; that subsequently the defendant began and now is engaged in making and selling whole wheat biscuit simulating the whole wheat biscuit of plaintiff in particular and distinctive shape, appearance and structure and has packaged the same in packages or cartons upon which is displayed the representation of said biscuit placed in a saucer in imitation and simulation of the trade mark of plaintiff consisting of the representation of the genuine biscuit of plaintiff placed in a dish or saucer that; defendant has used in its advertisements of its said biscuit made in imitation of plaintiff's genuine biscuit, made in particular and distinctive shape, appearance and structure a cut, picture or representation of a biscuit in association with the word "Shredded"; and that defendant and retailers of defendant's said imitation whole wheat biscuit have advertised in newspapers defendant's said biscuits as "Shredded Wheat" and have embodied in some of such advertisements the well-known trade name "Shredded Wheat" of plaintiff for plaintiff's said whole wheat biscuits, a representation of biscuits placed in a saucer, to wit, in many newspapers among those published as follows:

The Circleville Herald, Circleville, Ohio, March 27, 1931;

Lancaster, Ohio, Daily Gazette, Lancaster, Ohio, April 3, 1931;

Tulsa Retailers' Tribune, Tulsa, Oklahoma, August, 1931;

Brown County Journal, New Ulm, Minnesota, August 28, 1931;

Johnstown Tribune, Johnstown, Pennsylvania, August 21, 1931;

The Bethlehem Globe-Times, Bethlehem, Pennsylvania, April 7, 1931;

Marion Star, Marion, Ohio, April 4, 1931;

The Janesville Daily Gazette, Janesville, Wisconsin, May 19, 1931;

St. Paul Dispatch, St. Paul, Minnesota, April 9, 1931;

New Bedford Times, New Bedford, Massachusetts, May 19, 1931;

Bangor Daily News, Bangor, Maine, April 11, 1931;

Fall River Herald News, Fall River, Massachusetts, April 3, 1931;

Times, New Haven, Connecticut, August 28, 1931;

New Ulm Journal, New Ulm, Minnesota, August 28, 1931;

The Pittsburgh Press, Pittsburgh, Pennsylvania, April 1, 1932;

Lancaster Daily Intelligencer Journal, Lancaster, Pennsylvania, March 19, 1932;

Courier Post, Camden, New Jersey, February, 1932;

The Evening Bulletin, Providence, Rhode Island, April 1, 1932;

The Evening Bulletin, Providence, Rhode Island, March 22, 1932;

Bridgeport Post & Telegram, Bridgeport, Connecticut, March 21, 1932;

Hartford Times, Hartford, Connecticut, March, 1932;

Norfolk Ledger Dispatch, Norfolk, Virginia, March 29, 1932;

The Houston Chronicle, Houston, Texas, March 25, 1932;

The Retailer, Miami, Florida, March , 1932;

St. Paul Dispatch, St. Paul, Minnesota, March 22, 1932;

The Daily Northwestern, Oshkosh, Wisconsin, March 25, 1932;

Eau Claire Telegram, Eau Claire, Wisconsin, April 5, 1932;

The Des Moines Tribune, Des Moines, Iowa, April 1, 1932;

St. Louis Daily Globe-Democrat, St. Louis, Missouri, March 30, 1932;

Tulsa Retailers' Tribune, Tulsa, Oklahoma, March, 1932;

The Los Angeles Evening Herald, Los Angeles, California, March 25, 1932;

Los Angeles Times Merchandiser, Los Angeles, California, April, 1932;

Miami Herald, Miami, Florida, April 27, 1932;

Manila Daily Bulletin, Manila, P. I., March 11, 1932;

Daily Times, Erie, Pennsylvania, April 1, 1932;

The Greensboro Record, Greensboro, North Carolina, March 25, 1932;

Danville Commercial News, Danville, Illinois, April 22, 1932;

Minneapolis Journal, Minneapolis, Minnesota, April 15, 1932;

Evening World-Herald, Omaha, Nebraska, April 8, 1932;

Bulletin of Merchandising and Sales Promotion, Bridgeport, Connecticut, March 21, 1932;

Wausau Herald, Wausau, Wisconsin, April 1, 1932;

that the manufacture and marketing of said products by defendant in imitation of the genuine biscuit of plaintiff of distinctive and peculiar shape and appearance and the use of the word "Shredded" in connec-

tion with the said products, the use of a cut or picture of said biscuit alone or in association with the word "Shredded" and the representation of said biscuits placed in a dish or saucer occurred without the consent of plaintiff and in derogation and violation of its rights.

16. That said product of the defendant is not the biscuit manufactured and produced by plaintiff for so many years and which the public has always associated with the words and terms "Shredded Whole Wheat Biscuit" or "Shredded Wheat Biscuit" or "Shredded Wheat" or by said symbols or marks, but said biscuit manufactured by the defendant is an imitation in appearance of the product manufactured by plaintiff in that it closely simulates the same in height, measurements in circumference, color, structure and formation, differing in appearance only in that it is somewhat shorter on the fragile ends and is devised to appear like the genuine but contains less wheat; and that the purpose and effect of defendant in manufacturing and marketing said article designated as "Shredded" whole wheat biscuit, is so to take advantage of and to appropriate to itself the good-will and trade names of plaintiff established through years of effort and at tremendous financial expenditure for advertising and in educating the public, as well as the recognized reputation of plaintiff as the source or origin of a unique product of the highest quality and so made as to insure the highest degree of purity and wholesomeness.

17. That prior to undertaking the manufacture of said biscuit in imitation of plaintiff's product, defendant manufactured and sold a whole wheat biscuit of a different type, style and appearance under the name of "Kellogg's Toasted Whole Wheat Biscuit"; that plaintiff is informed and believes and therefore alleges that the manufacture and sale of said toasted whole wheat

biscuit was not financially successful and was discontinued; that thereafter defendant manufactured and marketed a biscuit more in semblance of plaintiff's product than defendant's said "Toasted Whole Wheat Biscuit," although not as close an imitation as the product now complained of, under the name of "Shredded Whole Wheat Biscuit"; that plaintiff protested against the marketing of said biscuit and the use of said words and terms "Shredded Whole Wheat Biscuit" appropriated for it, immediately upon learning of the same and the marketing of said product was discontinued by defendant; that more recently, defendant continuing to seek to take advantage of the success of plaintiff's said product, has engaged in the manufacture and marketing of the product complained of in imitation of that of plaintiff, and has employed with it words, terms and trade marks which have always been associated only with plaintiff's products, and is attempting to occupy the same market and sell its product to the same purchasers and consumers as have in the past purchased the said biscuit of plaintiff.

18. That said conduct of defendant conveys to the public a false impression as to the origin of the biscuit produced by it; that the public is deceived by the similarity in appearance of the biscuit of defendant made in imitation of the said biscuit of plaintiff, the designation "Shredded" Whole Wheat Biscuit, "Shredded" wheat, the cut or picture of said biscuit in association with the word "Shredded" and the cut of said biscuit placed in a saucer; that the public desiring the said well-known product of plaintiff by reason of its confidence therein, upon ordering the same by the words and terms long associated with it, will, without the test or trial to which a new food of another manufacture is customarily subjected, unwittingly accept the unknown imitation in place of the genuine; that the defendant

thereby benefits and will continue to benefit unlawfully by reason of its improper appropriation of the words, marks, terms and appearance associated with plaintiff's biscuit and in proportion to the success of that unlawful appropriation enjoy unjustly benefits of the good-will of plaintiff; and that in the event that defendant is permitted to violate the public confidence through the substitution of its said imitation biscuit and to appropriate for its product the distinctive form and appearance of plaintiff's said biscuit and also the terms and trade marks herein complained of, other manufacturers by like practices may do the same and while maintaining the imitative appearance of plaintiff's said biscuit, progressively lower the standard of quality and purity and thereby destroy the public confidence in the product of plaintiff and the good-will of plaintiff built up at great expense over a period of thirty-nine years of faithful effort to maintain the high quality and food value of said product which the public has always associated with plaintiff's said predecessors and plaintiff as sole source of origin.

19. That vast quantities of the biscuit manufactured by plaintiff reach consumers in restaurants, hotels, boarding houses, and homes outside of and independently of packages, and without any identifying mark other than the form, shape, color and appearance of the biscuit, all of which features the public has long since come to associate solely with the biscuits manufactured by plaintiff's predecessors and plaintiff; that the biscuits of defendant reach consumers in restaurants, hotels, boarding houses and homes outside of and independently of the packages; that the manufacture and sale by defendant of its biscuit made in imitation of the well-known biscuit of plaintiff, without means thereon of identification of the source or origin facilitates the palming and passing off of defendant's said

biscuit as and for the said well-known biscuit of the manufacture and sale of plaintiff by proprietors of restaurants, hotels, boarding houses and other establishments when individual biscuits are served independently of the carton all with the danger that the public confidence in plaintiff will be undermined and its demand for plaintiff's said biscuit will diminish, all with great loss and injury to plaintiff.

20. That in many instances and recently actual deception and deceit has been practiced upon the public; that upon request of dealers and ultimate consumers who have sought to obtain said "Shredded Whole Wheat Biscuit," or "Shredded Wheat Biscuit," or "Shredded Wheat," of plaintiff the product of defendant has been palmed off and sold in the place and stead of the genuine biscuit known to the public and of which plaintiff and its said predecessors have always been the sole source of supply, all in unfair and unlawful competition with plaintiff and to its great loss and damage.

21. That in order further to facilitate the process of appropriating the good-will of plaintiff and in palming off the product of the defendant upon order for the biscuit of plaintiff, defendant has imitated on its cartons and packages the substance of the advice and directions to consumers that have always appeared upon the cartons and containers of plaintiff and that defendant's said biscuits are sold in the market at a less price than that of plaintiff.

22. That defendant for a number of years past has marketed certain breakfast foods other than the biscuit above complained of, and has competed with plaintiff in its sale to the same general class of consumers; that plaintiff is apprehensive that defendant, if not restrained by this Court, will proceed to flood

the market with a progressively poorer quality of imitation biscuit and maintain in respect of such imitation the appearance of plaintiff's biscuit and appropriate therefor said words, terms and trade-marks now associated in the mind of the public with plaintiff's product alone, and thereby, through a progressive campaign of substitution and deceit of the public, occasion increased confusion and a growing distrust of the product of plaintiff, and through accumulation thereof effect ruin of plaintiff's good-will and high standing and increase the public demand for the other different breakfast foods now being marketed by defendant.

23. That the full value of plaintiff's said equitable rights in the said words and terms "Shredded Whole Wheat Biscuit", "Shredded Wheat Biscuit" and "Shredded Wheat", the particular and distinctive shape, appearance and structure of said biscuit, the said trade-marks "Shredded Wheat", the representation of said biscuit and the cut or picture of said biscuit placed in a dish or saucer in connection with plaintiff's said Shredded Whole Wheat Biscuit exceeds the sum or value of $5,000,000 and that the said acts of the defendant, unless restrained, will destroy the value of plaintiff's rights in and to said property.

24. That the acts of the defendant herein complained of were knowingly and intentionally committed, are contrary to equity and good conscience, a fraud upon the public and constitute unfair competition in trade with plaintiff and a fraudulent invasion of and violation of plaintiff's rights; and that said acts of defendant are calculated to deceive purchasers, and necessarily enable and promote false, fraudulent and unfair competition in business and false, fraudulent and unfair appropriation and use of the words, terms

and symbols so appropriated by defendant as aforesaid, and the fraudulent and unlawful sale and substitution by unscrupulous persons of the product of defendant for the genuine biscuit of plaintiff.

25. That, upon information and belief, the said unlawful, wrongful and fraudulent acts of defendant have caused damage to plaintiff in at least the sum of $250,000 but as to the exact amount plaintiff cannot set forth and prays discovery.

26. Plaintiff alleges that it can have no adequate relief against the defendant for its said acts of unfair competition in trade with plaintiff except in this a court of equity.

Wherefore plaintiff prays:

1. That the defendant be required to appear and answer unto this bill of complaint but not under oath, answer under oath being hereby waived.

2. That this Court enter a decree holding that plaintiff's said predecessors were the first to use and that plaintiff is vested with the exclusive right in and to the whole wheat biscuit made in said particular and distinctive shape, appearance and structure, in and to the name "Shredded" and "Shredded Wheat" in connection with said whole wheat biscuit, in and to the representation or picture of said whole wheat biscuit made in said particular and distinctive shape, appearance and structure, and in and to the representation of said biscuit of particular and distinctive shape, appearance or structure placed in a saucer or dish.

3. That an injunction, both provisional during the pendency of this suit and perpetual, be issued out of

and under the seal of this Court, directed to defendant, its officers, agents, attorneys, workmen, employees, its successors or assigns, and all others acting by or under its direction or authority, restraining and enjoining it and them, and each of them, from, directly or indirectly, manufacturing or selling whole wheat biscuit made in imitation and simulation of the said whole wheat biscuit of the manufacture and sale of plaintiff, of particular and distinctive shape, appearance and structure: from employing upon cartons, in advertisements or otherwise the name "Shredded" in connection with said biscuit; from employing in advertisements or upon cartons containing said biscuit a cut or picture of said biscuit of particular and distinctive shape, appearance and structure, either alone or in association with the word "Shredded"; from using or employing on packages or in advertisements or otherwise the trade-mark consisting of the words "Shredded Wheat", or any simulation thereof; from using or employing on packages or in advertisements or otherwise the trade-mark consisting of the representation of said biscuit of particular and distinctive shape, appearance or structure placed in a saucer or dish, or any simulation thereof and from aiding, assisting or inducing others to advertise, sell, pass or palm off the whole wheat biscuit of the manufacture and sale of defendant as and for the whole wheat biscuit of the manufacture and sale of plaintiff.

4. That an accounting be awarded to plaintiff against defendant of defendant's profits, gains and advantages and the damages suffered by plaintiff by reason of defendant's said acts of unfair competition in trade with plaintiff.

5. For costs of this suit.

6. For such other and further relief as the circumstances of the case may require.

NATIONAL BISCUIT COMPANY,
By (Sgd.) C. F. BLISS,
Vice President.

(Sgd.) ALEXANDER L. NICHOLS,
(Sgd.) HUGH M. MORRIS,
Solicitors for Plaintiff.
Dupont Building,
Wilmington, Delaware.
(Sgd.) DRURY W. COOPER,
Of Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

C. F. BLISS, being duly sworn, deposes and says that he is vice-president of National Biscuit Company, the plaintiff named in the foregoing bill of complaint; that he has read the foregoing bill of complaint and that the facts therein stated are true to his own knowledge except as to such facts as may be stated on information and belief, and as to such facts he believes it to be true; and the reason why this verification is not made by plaintiff personally is that plaintiff is a corporation of which affiant is a duly qualified officer.

(Sgd.) C. F. BLISS.

Subscribed and sworn to before me this third day of June, 1932.

(Sgd.) GEO. H. COPPERS,
(Seal) *Notary Public.*
Notary Public, New York County.
County Clerk's No. 177, Reg. No. 3C178.
Term expires March 30, 1933.

ANSWER.

(Filed August 8, 1932.)

Defendant, Kellogg Company, for its answer to the bill of complaint herein, alleges:

That defendant is not advised save by the bill of complaint as to the matters alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26 of the bill of complaint and therefore denies the same, and each of the same, leaving plaintiff strictly to its proofs, and defendant specifically denies that it has been guilty of any unlawful, wrongful or fraudulent acts as charged in the complaint, and defendant generally denies the allegations of the complaint, and each of them, except as to such facts as are hereinafter specifically alleged and admitted.

Affirmative Defense.

For an affirmative defense to the alleged cause of action set forth in the bill of complaint, defendant alleges:

1. That defendant, Kellogg Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, a citizen and an inhabitant of said State and has a manufacturing plant at Battle Creek, County of Calhoun and State of Michigan, and that plaintiff, National Biscuit Company, is a corporation organized and existing under the laws of the State of New Jersey, with a regularly established manufacturing plant and place of business at New York City in the Southern District of the State of New York and another factory at Niagara Falls in the State of New York.

2. That, on information and belief, Cereal Machine Company was duly incorporated under the laws

of the State of Colorado on June 8, 1893; that it was engaged in the manufacture and sale of a shredded whole wheat biscuit, an edible product; that Henry D. Perky was the founder of the business of said Cereal Machine Company and was president of said Cereal Machine Company; that on or about the seventeenth day of May, 1900, the name of said Cereal Machine Company was, pursuant to the laws of the State of Colorado, duly changed to Shredded Wheat Company; that in the year 1900 The Natural Food Company, a corporation, was duly organized under the laws of the State of New York; that in the year 1900 said The Natural Food Company acquired, succeeded to and thereafter continued until in the year 1930 the said business theretofore conducted by said Colorado corporation under the successive names Cereal Machine Company and Shredded Wheat Company; that on or about the fifteenth day of May, 1908, the name of said The Natural Food Company was, pursuant to the laws of the State of New York, duly changed to The Shredded Wheat Company; that in the year 1898, plaintiff National Biscuit Company, a corporation, was duly organized under the laws of the State of New Jersey and since its incorporation said plaintiff has been and now is engaged in the manufacture and sale throughout the several States of edible products; that in the year 1930 plaintiff, said National Biscuit Company, acquired and succeeded to the whole of the going business, alleged trade-marks and property of said The Shredded Wheat Company, a New York corporation; that since said plaintiff acquired and succeeded to the said going business of said The Shredded Wheat Company, it has continued and is now continuing to conduct the same throughout the several States and with foreign nations; that the said business which plaintiff acquired in the year 1930 and which it has

been and now is continuing has been carried on as the "Shredded Wheat Division" of plaintiff through direct sales offices and places of business of defendant located in various of the several states.

3. That plaintiff's said predecessors and plaintiff have been and are engaged in the manufacture of the familiar article of food known as shredded whole wheat biscuit or shredded wheat, the product having been formerly made under a series of patents of which the original and basic is for a product and a process. This patent was granted to said Henry D. Perky, the original promoter of the enterprise, in October, 1895, No. 548,086, and disclosed a process of boiling the original whole wheat berry, partially drying it, and then forcing it between compression rollers, one or both of which had peripheral grooves, which mashed the several parts of the berry into a heterogeneous soft paste. This paste was then forced out through combs or scrapers, so as to emerge in thin filaments or shreds. The patent states that the wheat in this form is ready for food, though it may be baked in various ways.

4. That in the actual manufacture of the shredded whole wheat biscuit, the pulpous shreds or filaments which proceed from the combs, as described in the said Perky product patent, are carried off upon a web or endless belt, and are built up by a succession of layers until a strand of the desired thickness is secured. This strand is cut at given intervals by knives or otherwise, thus making the longer edges of the biscuit, which through the pressure of the knives are matted or pressed together. The biscuits are then cooked in an oven which raises the top, except at the longer edges, which have been matted together, separating the shreds, and making more obvious the interstitial tex-

ture of the whole. The baking also browns the top and hardens the biscuit by drying; the color depends upon the manipulation of the heat and somewhat varies with the operator.

5. That in September of the same year, said Perky took out a design patent No. 24,688, dated September 17, 1895, for a term of fourteen years upon a biscuit, shown in the accompanying drawings and rectangular in plan view; the longer axis being about twice the shorter. The end view or section on the shorter axis was ovoid; the bottom or base of the biscuit being flatter than the top. The design also displayed the rough or filamented texture of the biscuit. It described as the leading feature of the design "a fibrous interstitial appearance, showing superimposed layers or irregular interlacing threads or filaments," in such wise that the threads are visible from the surface through the outer layers. This design resulted necessarily from the actual process of manufacture above described.

6. That the plaintiff's predecessor, the Cereal Machine Company, of Colorado, began the manufacture of this product in 1895, and the sale thereof by plaintiff and its said predecessors has been since continued.

7. That up until the year 1915 and later, plaintiff's predecessors carried, printed prominently upon the packages of their said shredded wheat, the following notice:

"September 17, 1895, Patented October 15, 1895.

This food, the process of making it, and special machinery for its manufacture, are under the protection of the United States Government by virtue of many patents, as follows:

[illegible], August 1, 1893
[illegible], May 29, 1894
[illegible], June 26, 1894
[illegible], January 9, 1895
[illegible], January 15, 1895
[illegible], January 15, 1895
[illegible], January 15, 1895
[illegible], January 15, 1895
[illegible], February 5, 1895
[illegible], February 5, 1895
[illegible], February 5, 1895
[illegible], February 5, 1895
[illegible], February 5, 1895
[illegible], February 5, 1895
[illegible], September 17, 1895
548086, October 15, 1895
548087, October 15, 1895
[illegible], March 21, 1896
571284, November 10, 1896
571285, November 10, 1896
[illegible], February 8, 1896
28785, June 7, 1898
614338, November 15, 1898
618288, January 24, 1899
625696, May 23, 1899
681656, August 27, 1901
35511, December 21, 1901
684788, October 22, 1901
685671, October 29, 1901
683100, September 24, 1901
684789, October 22, 1901
683101, September 24, 1901
678127, July 9, 1901
667892, February 12, 1901
678625, July 16, 1901
681656, August 27, 1901
713793, November 18, 1902
746145, December 8, 1903
770159, September 14, 1904
797604, August 22, 1905
785554, March 21, 1905."

8. That the basic patents relating to shredded wheat, namely, the Perky patents No. 548,086 and [illegible] granted on October 15, 1895, expired by limitation on October 15, 1912, and that all subsequent patents claimed by plaintiff's predecessor and listed on its food packages, as above set forth, have long since expired by limitation and the subject matter thereof has fallen into the public domain.

9. That in some of said patents, as well as some of the trade-mark registrations of plaintiff's predecessors and in the advertisements of plaintiff's predecessors during the life of said patents, the words "shredded wheat" and "shredded whole wheat biscuit" were used by the patentee, Perky, and by plaintiff's predecessors, and by the Patent Office as designative of the distinctive type of shredded biscuit or wheat product disclosed in the various shredded wheat patents, and that the Court of Appeals of the District of Columbia in a suit or judicial proceeding to which plaintiff's predecessor,

was a party held and determined that the words "shredded wheat" and "shredded whole wheat biscuit" were merely descriptive of the shredded wheat product as produced by said Perky and his machines for shredding wheat, and that said words are in fact and in law merely and purely descriptive of the product.

10. That the said patents of plaintiff's predecessors as hereinbefore listed gave to plaintiff's said predecessors a substantial monopoly in the products and processes covered thereby and that the words "shredded wheat" and/or "shredded whole wheat biscuit" came actually to indicate the class and type of product made by plaintiff's said predecessors and to constitute the true and generic description of said product then and still known as "shredded wheat" and/or "shredded whole wheat biscuit," and were used in that sense by plaintiff's predecessors and others.

11. That all of said patents on shredded wheat have long since expired as aforesaid, and that upon their expiration the right to use said processes and machinery and to make said formerly patented article as shown in the design patent aforesaid and to use said generic and strictly descriptive words "shredded wheat" and/or "shredded whole wheat biscuit" and to illustrate and describe the product itself, passed to the public with the dedication resulting from the expiration of said patents, whereupon the public acquired thereafter, and for all time, the right to make the product "shredded wheat" and/or "shredded whole wheat biscuit" and to use said generic and strictly descriptive term in all its forms and with the fullest liberty by affixing such name to the containers of the product, by referring to it in advertisements, by picturing it and the shredded wheat product itself in illustrations or

putting the product itself on display subject only to the condition, bearing equally upon all competitors, that the generic or descriptive name must not be so used as to deceive the public, or to deprive others of their lawful rights; subject also to the right of all new manufacturers to advise the public that the product formerly made only by the patentees, is subsequently being made lawfully by other manufacturers; subject also to the right of a new manufacturer of the old patent-expired product to be protected from oppression, confusion, deception or monopoly practices deliberately fostered or directed against it by the former owners of the expired patent monopoly; and subject finally to the condition that the new maker of the patent-expired product shall not be burdened with any competitive restrictions, to which the former patent-expired maker is unwilling or unable to submit, and which will be equivalent to the destruction of the right of free competition of the newcomer in the field.

12. That for many years since the expiration of the shredded wheat patents defendant has endeavored fairly and in good faith to exercise its lawful right to enter into the manufacture of shredded wheat and the sale thereof throughout the several states but that throughout said efforts it has been impeded, injured, oppressed and held back by the avowed claims of plaintiff and its predecessors in and to a complete and perpetual monopoly, in commerce among the several states, in and to the name "shredded wheat," the form, size and style of the biscuit itself, the claimed exclusive right to use the word "shredded" as a trade-mark and even in the explanatory matter on the carton and, finally, the claimed exclusive right to illustrate or represent the biscuit, and defendant alleges that these efforts of plaintiff and its predecessors constitute a direct violation of sections 1 and 2, and particularly

section 2, of the Sherman Anti-Trust Act, U. S. Code, Title 1, Chap. 1, Sections 1 and 2, Act of July 2, 1890, c. 647, 26 Stat. 209.

13. That defendant's efforts to enter into free and fair competition in the manufacture and sale of shredded wheat have been continuously exerted since a period long prior to January, 1923; that defendant has prepared for the manufacture and has manufactured and sold to the public, except so far as its business has been interfered with and impeded by the unlawful acts of plaintiff, a shredded whole wheat biscuit; that the same has always been made from whole wheat of the highest grade and quality and has always been made with great skill and care so as to retain the body and substance of the wheat in said biscuit, and was and is made in buildings and structures specially designed for the purpose and built at great expense and by mechanism also especially designed with particular regard to purity and cleanliness, and in such manner that said shredded whole wheat biscuit passes directly from the factory to the consumer free from contamination by human touch or by odors or any foreign substance; and that during all of said period defendant and its predecessor Kellogg Toasted Corn Flake Company have spent large sums of money in scientific investigation for the purpose of continually maintaining and improving and perfecting the method of manufacture and quality of said biscuit, and that defendant has applied for and secured patents covering new and improved machinery for the manufacture of such shredded wheat biscuit, and has expended large sums of money in all its efforts as above set forth, and in advertising its own special proprietary brands known as Kellogg's Whole Wheat Biscuit and Kellogg's Shredded Whole Wheat Biscuit.

14. That the general shape or design of shredded whole wheat biscuit is an unavoidable result of the process of manufacture of the biscuit as hereinbefore set forth but that defendant for the purpose of imparting a distinctive size and appearance to its biscuit and of improving its qualities, appearance and taste, materially shortened its biscuit as compared with the previously patented biscuit of plaintiff and also caused its biscuit to be toasted or baked on both its bottom and its top as compared with plaintiff's biscuit which is baked only on top, and caused its biscuit to be rounded on the bottom as well as the top as compared with plaintiff's biscuit with its flattened bottom, and defendant also used materially finer shreds in its biscuit, and defendant also enclosed its biscuit in its standard and individual sized cartons, for all of which reasons defendant's biscuit is and was distinctive and readily distinguishable from any other biscuit on the market, until plaintiff, some years after defendant had adopted its peculiar size of biscuit, first began to market a biscuit substantially indistinguishable in size, length and shape from defendant's biscuit, as will hereafter appear.

15. That for the purpose of further distinguishing its biscuits as of its special production, defendant has at all times packed its biscuit in distinctively colored and distinctively shaped cartons prominently marked with the green and red colors which are well known to the trade and the public as associated with defendant's Kellogg's Toasted Corn Flakes and other known cereal products; that said cartons are marked with and dominated by defendant's well known trade-mark Kellogg's and are incapable of being confused with the cartons of any competitor; that defendant's said shredded whole wheat biscuit are packed 15 biscuits to defendant's standard carton with a total net weight of 12½

ounces, and two biscuits to the "individual" or restaurant size of trade-marked cartons.

16. That for the twofold purpose of enabling defendant to distribute its biscuit to consumers in distinctive form, and of also enabling the restaurant and hotel trade to supply customers with individual orders of defendant's biscuit in distinctive cartons, defendant puts up its shredded whole wheat biscuit in what are known to the trade as "individual cartons" as aforesaid, the same being miniature cartons of short length capable of holding only two of defendant's biscuit, and that defendant at all times has actively pushed the distribution and sale of these individual size and distinctively trade-marked cartons, not only by distributing them in very large amounts to individual consumers as samples but also by selling them to the restaurant and hotel trade for direct service to customers in the carton.

17. That the physical characteristics and the toasting or baking and other processes to which shredded wheat biscuit are subjected during their production are such that no practical method of individually and physically marking the biscuit itself has been discovered although many experiments have been undertaken with that end in view and that no method of individually identifying shredded wheat biscuit outside the regular carton (except by shortening the biscuit and/or by double toasting and/or by enclosing two biscuits in an individual size carton), without subjecting defendant's product to a commercial handicap which is equivalent to destruction of defendant's right of free competition with plaintiff, is known to defendant, and that no such method of individually identifying shredded wheat biscuit (except by using individual cartons and making a shorter biscuit, double

toasted as aforesaid) without destruction of the right of free competition, has been suggested by plaintiff to defendant although defendant has requested plaintiff to disclose such a method if it knows one, and defendant has offered to agree with plaintiff to go as far as plaintiff is willing or able to go in so identifying its biscuit outside the carton; and that defendant at all times desires that its biscuit shall go to the final consumer in the restaurant and hotel trade in its individual cartons, and exerts itself in every known way to achieve that end.

18. That defendant fosters and encourages in every way the sale of its distinctive sized and double toasted biscuits in the individual carton containing two biscuits and that plaintiff also offers and supplies its single-toasted, longer biscuit to the trade in individual sized cartons each containing two biscuits, presumably as a means of making unnecessary the servicing of its product outside of its carton and as the only practical means it has been able to devise for bringing its biscuit to the restaurant or hotel consumer in its Niagara Falls carton.

19. That defendant has expended large sums of money in advertising, sampling and distributing its Kellogg's Whole Wheat Biscuit in large and "individual" sized cartons to the trade and to consumers throughout the United States, and that said distinctive size of defendant's double-or-top-and-bottom-toasted biscuit and said distinctive cartons of individual and of standard size, carrying prominently displayed thereon defendant's said exclusive trade name Kellogg's, and said extensive advertising and sampling of defendant's shredded wheat to consumers and the trade throughout the several States, have all had the effect of informing and notifying the trade and the

public alike that shredded whole wheat biscuit are now and for some years past have been obtainable from different and competitive sources of manufacture, and defendant alleges that no consumer of average intelligence would or has confused defendant's regular or individual cartons or defendant's advertisements, or defendant's distinctively shortened and double toasted shredded wheat biscuit with any other cartons, advertisements or shredded wheat biscuit coming from any other source of manufacture, until plaintiff recently began to market a short shredded wheat biscuit obviously copied after defendant's product and substantially indistinguishable therefrom.

20. That at all times since 1910 defendant's predecessor and defendant have had a plant at Battle Creek, Michigan, where said biscuit has been and is being made; that said plant at Battle Creek, Michigan, has been open to the public and the complete process of the manufacture of said biscuit has been disclosed to the public; that in order to assure a complete inspection, defendant's said predecessor and defendant have employed guides at said plant at Battle Creek, Michigan, and said guides conduct all visitors throughout said plant and explain in detail the various processes of manufacture, and that said plant is visited and inspected by many thousand persons annually.

21. That defendant and its said predecessor continuously from 1905 to the present date has been one of the largest producers and distributors among the several states of prepared cereal foods in package form and that defendant's well-known products such as Kellogg's Corn Flakes, Kellogg's Pep Bran Flakes, Kellogg's All Bran, Kellogg's Wheat Krumbles, Kellogg's Rice Krispies, Kellogg's Kaffee Hag Coffee and other Kellogg products have caused defendant to

be well and favorably known throughout the entire grocery trade of the country as one of the largest and best known producers of cereal food products, and that the introduction upon the general grocery market throughout the several States by defendant of its Kellogg's Whole Wheat Biscuit of distinctive size and toasted both on the bottom and the top and marketed in distinctively shaped and specially colored Kellogg's packages of miniature and standard size, and defendant's wide sampling of its shredded wheat product to consumers and its extensive advertising of its whole wheat biscuit, have had the effect of notifying and educating the trade and consumers alike, that shredded wheat biscuit are now being made and extensively marketed by defendant in full, fair and open competition with other sources of production.

22. That from about the year 1918 or 1919 until about the year 1922, defendant's predecessor put up its shredded whole wheat biscuit in cartons bearing prominently displayed on the front and rear face thereof:

Kellogg's
SHREDDED
WHOLE WHEAT
BISCUIT

THE ORIGINAL HAS THIS SIGNATURE

W. K. Kellogg

KELLOGG TOASTED CORN FLAKE CO.
BATTLE CREEK, MICH., and TORONTO, CANADA

Net Weight 12 ounces

23. That from about February, 1927 to about July, 1930, defendant put up its shredded whole wheat biscuit in cartons bearing prominently marked on the front and rear faces thereof:

Kellogg's
SHREDDED
WHOLE WHEAT
BISCUIT

HELP YOURSELF TO HEALTH

W. K. Kellogg
KELLOGG COMPANY
BATTLE CREEK, MICHIGAN

Davenport, Iowa London, England London, Canada
Sydney, Australia

NET WEIGHT 9 OUNCES

24. That from about July 1930, to the present date, defendant has put up its shredded whole wheat biscuit in cartons carrying prominently on one face thereof the words:

Kellogg's
WHOLE WHEAT
BISCUIT

(with picture of two shredded wheat in a dish of cream)

CERTIFIED
for
FOOD VALUE

15 biscuits 12½ ounces

and on the other face thereof

Kellogg's
WHOLE WHEAT
BISCUIT

(with picture of two shredded wheat in a dish of cream)

CERTIFIED
for
FOOD VALUE

MADE OF DELICIOUSLY FLAVORED WHOLE WHEAT SHREDS,
DOUBLE TOASTED.

25. That from about July, 1930, until the present date, defendant has continued to put up its shredded whole wheat biscuit in cartons marked prominently on the face and rear thereof as "Kellogg's Shredded Whole Wheat Biscuit, W. K. Kellogg, Kellogg Company, Battle Creek, Michigan," and that defendant from March, 1928 to July, 1930, as far as possible in the face of plaintiff's illegal monopoly practices, distributed its "Kellogg's Shredded Whole Wheat Biscuit" throughout the channels of trade among the several States, but that from approximately July, 1930, until the present date, defendant by reason of the unlawful monopoly, threats, claims and practices of the plaintiff, as hereinafter set forth, has marketed its said "Kellogg's Shredded Whole Wheat Biscuit" in said "Kellogg's Shredded Whole Wheat Biscuit" cartons only in a small way and solely for the purpose of asserting and maintaining its lawful right to market its said biscuit among the several States under said name "Kellogg's Shredded Whole Wheat Biscuit" until it could be freed from the unlawful threats and monopolistic claims, demands and practices of the plaintiff and be enabled to resume the sale thereof on a regular commercial scale.

26. That notwithstanding defendant's rights and its persistent efforts to engage in fair and lawful competition in the sale of its distinctively sized, top-and-bottom toasted biscuit in its regular and individually sized and distinctively colored and trade-marked cartons, plaintiff has persistently, unfairly and unlawfully acted and contrived to prevent defendant from making or selling its biscuit and to intimidate and coerce the trade and others so as to cause them to refuse to buy, handle or sell defendant's biscuit for fear of being sued or otherwise prosecuted by plaintiff.

27. That plaintiff and its said predecessors, long after the expiration of the patents aforesaid of its predecessors, has acted in every way to assert and maintain a complete but unlawful monopoly in shredded wheat among the several States, embracing and including therein:

1. the exclusive right to make and vend throughout the several States, wheat biscuit made in the aforesaid particular, and allegedly distinctive shape, appearance and structure as disclosed and claimed in said expired Perky patents as aforesaid.

2. the exclusive right in and to the names "Shredded" and "Shredded Wheat" in connection with said shredded whole wheat biscuit throughout the United States and among the several States.

3. the exclusive right in and to the representation or picture of said shredded whole wheat biscuit made in said allegedly distinctive shape, appearance and structure throughout the several States.

4. the exclusive right in and to the r presentation of said shredded wheat biscuit of allegedly particular and distinctive shape, appearance or structure placed in a dish throughout the several States.

28. That the creation and maintenance by plaintiff throughout the trade within the several States, of a monopoly of the nature above outlined constitutes a bar to the lawful entry into said trade of other manufacturers as competitors of plaintiff, in that said monopoly and its enforcement acts to deter and has the effect of deterring defendant from making said patented shredded wheat biscuit or from calling it by its

true and descriptive name, or from making true and exact pictures of it alone or in a plate, and it also deters the trade and consumers from buying, handling or selling defendant's product, and generally throws over defendant's business and customers, a paralysis of threat, coercion, intimidation and unfair competition.

29. That the methods devised and pursued by plaintiff and its predecessors for setting up and maintaining this complete and unlawful monopoly in a patent-expired product, and in its pictorial representation have been to claim the before-described wide and exclusive rights and to threaten the trade into refusing to handle or into boycotting defendant's competing product; and that in pursuance of said unlawful monopoly, plaintiff has made unlawful registrations in the Patent Office of the name "Shredded Wheat" as an exclusive trade mark not susceptible of lawful use by others in any way whatever; and plaintiff has repeatedly warned and threatened defendant with litigation in advance of its entry into the field in a fair and lawful way; and has brought suit against defendant and permitted it to drag untried, while spreading all kinds of threatening propaganda by word of mouth and otherwise against defendant throughout the trade to convince the dealers and consumers that defendant's goods are outlaw products of a spurious nature and that it is dangerous to carry them, push their sale or consume them.

30. That plaintiff has registered in the United Patent Office and elsewhere as its exclusive trademark the words "Shredded Wheat," as shown by the following trademark registrations in the United States Patent Office:

1. Certificate No. 178,725 (Act of March 19, 1920), issued January 15, 1924, claiming as a trademark the words "Shredded Wheat" and stating

that "The trademark has been continuously used and applied to said goods in applicant's business since January first, 1894."

2. Certificate No. 89071 issued November 5, 1912 "for shredded wheat in class 46, Foods and ingredients of foods" covering a picture of a food factory and stating that "no claim is made herein to the words 'The Home of Shredded Wheat'."

3. Certificate No. 85,186 issued January 30, 1912, illustrating a plate and spoon and stating "no claim being made to the representation of a shredded wheat biscuit."

4. Certificate No. 216,593, issued August 17, 1926, illustrating a plate of shredded wheat.

5. Certificate No. 213,456, issued May 25, 1926, on the words "Shredded Wheat" claimed as an exclusive trademark used since January 1, 1894. Copies of said registrations are attached hereto.

30-a. That said registrations and each of them are void, unlawful, against public policy, monopolistic, fraudulent, in view of previous denial of registration, unfair, oppressive of defendant and others, a burden upon interstate commerce, and an unlawful restriction upon the rights of defendant and others.

31. That plaintiff and its predecessors, by threats and notices and by claims of exclusive and other rights and by threats of litigation and other acts of coercion, and by changing its corporate name, on May 15, 1908, from The Natural Food Company to the Shredded Wheat Company, has endeavored to deter defendant and others from entering into competition with plaintiff at a time both before and after plaintiff regarded said competition as prospective or tentative rather than actual.

32. That about 1921 defendant started manufacturing its short-sized shredded whole wheat biscuit and had invested large sums of money in the machinery for producing the same and that in or about February, 1922, plaintiff's predecessor notified defendant of their claimed exclusive rights in and to shredded wheat biscuit of the form, size, and style manufactured by them and of the name shredded wheat, and by reason of this notice and of the threats and coercive measures employed by plaintiff, defendant was forced, against its will, to cease to market its shredded wheat biscuit and did so cease.

33. That defendant continued to be restrained by said unlawful threats of plaintiff until about the year 1927 when defendant again prepared actively to enter the market as manufacturer of its distinctively sized biscuit in cartons, distinctively colored and trade-marked, and that in or about the month of February, 1927, defendant introduced its said product upon the market in full, free and fair competition with plaintiff.

34. That in or about April, 1927, plaintiff again threatened defendant and its trade customers with litigation and other coercive measures on account of its manufacture of patent-expired shredded wheat; that defendant refused longer to be deterred by these threats; that plaintiff thereupon, in or about the early part of 1928, instituted suit against certain of defendant's customers in the United States District Court for the District of Connecticut; and that upon the institution of such action, plaintiff instigated and fostered throughout the press of the country a series of newspaper and magazine attacks upon defendant, designed to create and actually creating the impression that defendant's distinctive sized, top-and-bottom toasted and distinctively cartoned shredded wheat biscuit was an outlaw product and that penalties would be incurred

by all of those who bought, sold or otherwise dealt in and with the same; that plaintiff's agents and salesmen thereupon began and continued to defame, slander and attack defendant and its said distinctive shredded wheat biscuit in the market and to threaten and coerce defendant's dealers and the trade with litigation and other oppressive and monopoly methods.

34-a. That plaintiff failed and neglected to bring said suit to trial although the cause had been long at issue and that in or about the month of July, 1930, as the result of the threatening and damaging acts and monopoly claims and trade oppressions of plaintiff and its agent as aforesaid, and on account of the resulting trade resistance to the marketing and sale of defendant's said shredded wheat biscuits as directly resulting from and produced by plaintiff's said threats and other wrongful acts as aforesaid, defendant, under force of said threats and monopoly acts, and without prejudice to its rights in the matter, changed the name of its shredded wheat biscuit from "Kellogg's Shredded Whole Wheat Biscuit" to "Kellogg's Whole Wheat Biscuit" and defendant, since July, 1930, has continued to market its product as "Kellogg's Whole Wheat Biscuit" while continuing to sell its "Kellogg Shredded Whole Wheat Biscuit" only in such nominal amounts as would serve to assert, protect and reserve its right to market its product as shredded wheat.

35. That plaintiff thereupon dismissed, without prejudice, the suit theretofore pending in Connecticut against certain defendants who had purchased and resold defendant's shredded wheat product, and that defendant had not appeared in or become a party to said suit, the court having no jurisdiction over defendant therein.

36. That in or about the Spring of 1932 plaintiff, in pursuance of its said attempt unlawfully to monopo-

lize interstate commerce in shredded wheat biscuits and to oppress and injure defendant, produced and began to sell and market a new size of biscuit, which, on information and belief, was designed by plaintiff to be substantially indistinguishable from defendant's regular size of biscuit and is in fact substantially indistinguishable in size from defendant's said biscuit, and that plaintiff, by this act, sought purposely to wipe out and in fact did wipe out the theretofore existing clear and substantial size distinction between defendant's and plaintiff's biscuit, and plaintiff thus purposely, maliciously and in pursuance of its scheme of unlawful monopoly, oppression and unfair competition placed into the channels of trade a shredded wheat biscuit designed by plaintiff to be, and capable of being, unfairly substituted by designing persons for defendant's biscuit by removing the same from their cartons.

37. That in further pursuance of said illegal attempt to monopolize interstate commerce in shredded wheat and to oppress defendant, plaintiff has recently employed as its sales manager in charge of sales of shredded wheat a former general sales manager of defendant's at the time of the former litigation aforesaid, and that at or about the time of plaintiff's said employment of defendant's former general sales manager, and of plaintiff's putting out of a biscuit approximately equal to defendant's biscuit in size, plaintiff instituted this new suit in equity against defendant in the U. S. District Court for the District of Delaware, setting up the monopoly claims as aforesaid and at the same time renewing in the trade its unfair, slanderous, threatening and coercive attacks upon defendant, its shredded wheat product and its dealers, and that said attacks upon its shredded wheat product and dealers therein have since continued and have been and are damaging to defendant, its reputation and business.

38. That by reason of the unlawful acts of plaintiff as aforesaid defendant has been unlawfully damaged in an amount in excess of one million dollars.

WHEREFORE defendant prays that the bill of complaint may be dismissed with costs to defendant to be taxed.

KELLOGG COMPANY,
(Sgd.) By W. K. KELLOGG,
(Corporate Seal) *President.*

(Sgd.) E. ENNALLS BERL,
Solicitor for Defendant.

(Sgd.) CRICHTON CLARKE,
Attorney and Counsel for Defendant,
71 West 23d Street,
New York, New York.

VERIFICATION.

STATE OF MICHIGAN,
COUNTY OF CALHOUN, } *ss.:*

W. K. KELLOGG, being duly sworn, deposes and says that he is the president of Kellogg Company, the defendant named in the foregoing answer; that he has read the said answer and that the facts therein stated are true to his own knowledge, except as to such facts as may be stated on information and belief, and as to such facts he believes it to be true; and that the reason why this verification is not made by the defendant personally is that defendant is a corporation of which affiant is a duly qualified officer.

(Sgd.) W. K. KELLOGG.

Subscribed and sworn to before me this fifth day of August, A. D. 1932.

(Sgd.) THERESA F. GIBBONS,
(Seal) *Notary Public.*
My commission expires December 3, 1933.

PLAINTIFF'S REPLY TO DEFENDANT'S AFFIRMATIVE DEFENSE.

(Filed August 30, 1932.)

Reply of plaintiff, National Biscuit Company, to the affirmative defense of defendant, Kellogg Company.

1. Plaintiff admits the allegations contained in paragraph numbered "1" of defendant's answer.

2. Plaintiff admits the allegations contained in paragraph numbered "2" of defendant's answer.

3. Plaintiff, for reply to the allegations contained in paragraph numbered "3" of defendant's answer, admits that its predecessors and it have been and are engaged in the manufacture and sale of a whole wheat biscuit; that its said biscuit has been known as "Shredded Whole Wheat" and "Shredded Wheat"; that Letters Patent of the United States No. 548,086 was granted in October, 1895, to Henry D. Perky; that said Letters Patent No. 548,086 was the property of plaintiff's predecessors, Cereal Machine Company, a Colorado corporation (the name of which was duly changed to Shredded Wheat Company) and The Natural Food Company, a New York corporation (the name of which was duly changed to The Shredded Wheat Company); that said Henry D. Perky was the original promoter of the said enterprise and that it was heretofore conducted by plaintiff's predecessors and is now being conducted by plaintiff, but it denies the conclusions and any other allegations contained therein.

4. Plaintiff denies the allegations contained in paragraph numbered "4" of defendant's answer in the manner and form pleaded, and alleges that its

predecessors were vested with title to Perky United States Patent No. 548,086 and that the process for manufacture thereunder was as disclosed in said letters patent, a copy of which is attached hereto.

5. Plaintiff, for reply to the allegations contained in paragraph numbered "5" of defendant's answer, admits that design Letters Patent of the United States No. 24,668 was issued on September 17, 1895 on the invention of and to Henry D. Perky, but it denies that the design of the biscuit shown in said patent resulted necessarily from the process of manufacture.

6. Plaintiff, for reply to the allegations contained in paragraph numbered "6" of defendant's answer, admits the allegations contained therein except as to the year and avers that the business of said Cereal Machine Company in the manufacture and sale of said product was begun in the year 1893.

7. Plaintiff, for reply to paragraph numbered "7" of defendant's answer, admits the allegations contained therein, except that the numbers of the following letters patent recited therein are incorrect: 571,285, 884,788, 681,656, 713,793, and alleges that the correct numbers of said letters patent are 571,235, 684,788, 681,655 and 713,795, respectively.

8. Plaintiff, for reply to paragraph numbered "8" of defendant's answer, admits that Letters Patent of the United States identified therein No. 548,086 and No. 548,087, have expired; that the terms of all of the other letters patent set forth in paragraph numbered "7" of defendant's answer have also expired but it is not informed and therefore denies the conclusion that the subject matter thereof has fallen into the public domain and alleges that because of the

long and continued manufacture and sale of plaintiff's said whole wheat biscuit which has been carried on continuously since the year 1893, and which was carried on without material alteration or change in distinctive and peculiar shape and appearance and without competition with other manufacturers prior to and from and after the expiration of the letters patent enumerated in paragraph numbered "7" of defendant's answer and because, since the expiration of each of said letters patent, the public has continued and now continues to associate the said biscuit of plaintiff of distinctive and peculiar shape and appearance as of the origin, manufacture and sale of plaintiff, plaintiff is vested with the exclusive right to manufacture and sell its said whole wheat biscuit made in said distinctive and peculiar shape and appearance.

9. Plaintiff, for reply to the allegations contained in paragraph numbered "9" of defendant's answer, denies the allegations contained therein that in letters patent, trade-mark registrations and advertisements of plaintiff's predecessors, during the terms of the letters patent enumerated in paragraph numbered "7" of defendant's answer, the words "Shredded Wheat" and "Shredded Wholé Wheat Biscuit" were used by said Henry D. Perky and by plaintiff's predecessors as designative of plaintiff's said shredded whole wheat biscuit; denies the other allegations contained therein but admits that the United States Patent Office and the Court of Appeals of the District of Columbia in a suit in which plaintiff's predecessor was a party made a ruling that the words "Shredded Whole Wheat" were descriptive of the shredded whole wheat biscuit produced by plaintiff's predecessor; and alleges that plaintiff's predecessor and plaintiff have continued to use the words and terms "Shredded Whole Wheat Biscuit", "Shredded Wheat Biscuit"

and "Whole Wheat" in connection with and to designate the origin of the said biscuit of distinctive and peculiar shape and appearance from and after the expiration of the letters patent identified in paragraph numbered "7" of defendant's answer and that the use of the said words and terms by plaintiff's predecessors and plaintiff has been exclusive except for the use thereof or parts thereof by defendant in unfair and wrongful competition with plaintiff and that the origin of plaintiff's said biscuit is known to the trade and public by said words or terms.

10. Plaintiff, for reply to the allegations contained in paragraph numbered "10" of defendant's answer, admits that the letters patent of plaintiff's predecessors enumerated in paragraph numbered "7" of defendant's answer gave to plaintiff's said predecessors a substantial monopoly in the apparatus, products and processes covered thereby and that the words "Shredded Wheat" and/or "Shredded Whole Wheat Biscuit" came actually to indicate the class and type of product made by plaintiff's said predecessors but it denies that said terms "Shredded Wheat" and/or "Shredded Whole Wheat Biscuit" constitute the true and generic description of said product or that said words were used in that sense by plaintiff's predecessors and others, but alleges that said terms "Shredded Wheat" and "Shredded Whole Wheat Biscuit" were and are now employed by plaintiff and are known to and by the public as the marks or indicia of origin of the said whole wheat biscuit of plaintiff of distinctive and peculiar shape and appearance.

11. Plaintiff, for reply to the allegations contained in paragraph numbered "11" of defendant's answer, admits that all of the letters patent identified in paragraph numbered "7" of defendant's answer have expired but it denies each and every of the other

allegations contained therein and alleges that by reason of the long and continued use of the terms "Shredded Wheat" and "Shredded Whole Wheat Biscuit" and continuation thereof, subsequent to the expiration of the said letters patent identified in paragraph numbered "7" of defendant's answer, to identify and designate the said whole wheat biscuit of plaintiff's predecessors and plaintiff made in distinctive and peculiar shape and appearance, without competition with any other manufacturer or manufacturers, have been employed to designate plaintiff as the source or origin of the said biscuit of distinctive and peculiar shape and appearance and that the public knows and understands the said terms as indicating the origin in plaintiff of plaintiff's said biscuit.

12. Plaintiff, on information and belief, denies each and every of the allegations contained in paragraph numbered "12" of defendant's answer.

13. Plaintiff, for reply to the allegations contained in paragraph numbered "13" of defendant's answer, denies, on information and belief, that "defendant's efforts to enter into free and fair competition in the manufacture and sale of shredded wheat have been continuously exerted since a period long prior to January, 1923"; admits that defendant has prepared for the manufacture and has manufactured and sold to the public a shredded whole wheat biscuit but it denies that it (plaintiff) has by unlawful act or otherwise interfered with and impeded the business of defendant; admits that defendant has advertised its whole wheat biscuit as "Kellogg's Whole Wheat Biscuit" and "Kellogg's Shredded Whole Wheat Biscuit" but it has no knowledge of the other allegations contained in said paragraph of defendant's answer and therefore denies the same.

14. Plaintiff, for reply to the allegations contained in paragraph numbered "14" of defendant's answer, denies that the general shape or design of the shredded whole wheat biscuit is an inevitable result of the process of manufacture of the biscuit, but plaintiff is not informed as to the other allegations contained in said paragraph of the answer of defendant and therefore denies the same.

15. Plaintiff, for reply to the allegations contained in paragraph numbered "15" of defendant's answer, admits that defendant's whole wheat biscuit are packed fifteen biscuit in a carton with a total net weight of 12½ ounces and two biscuit to the "individual" or so-called restaurant size; but plaintiff is not informed as to the other allegations contained in said paragraph of defendant's answer and therefore denies the same.

16. Plaintiff, for reply to the allegations contained in paragraph numbered "16" of defendant's answer, admits that defendant has packaged its whole wheat biscuit in so-called individual cartons containing two biscuit in each but it has no information as to the other allegations contained in said paragraph and therefore denies the same and alleges that from in and prior to the year 1910 and continuously thereafter plaintiff's predecessor and plaintiff have and are now packaging their said whole wheat biscuit in so-called individual cartons containing two biscuit in each.

17. Plaintiff denies each and every of the allegations contained in paragraph numbered "17" of defendant's answer and alleges that any person, firm or corporation desiring to manufacture a whole wheat biscuit could produce the same in form and appearance readily and easily distinguishable from the biscuit of the manufacture of plaintiff's predecessors and plain-

tiff of distinctive and peculiar shape and appearance and could, if desired, suitably mark the said biscuit to designate the origin of manufacture thereof.

18. Plaintiff, for reply to the allegations contained in paragraph numbered "18" of the answer of defendant, admits that defendant encourages the sale of its biscuit in individual cartons and that plaintiff in the conduct of its business encourages the sale of its said biscuit in individual cartons but denies each and every of the other allegations contained therein.

19. Plaintiff is without knowledge as to the allegations contained in paragraph numbered "19" of defendant's answer and therefore denies the same.

20. Plaintiff, on information and belief, admits that defendant has a plant at Battle Creek, Michigan, but it is without knowledge as to the other allegations contained in paragraph numbered "20" of defendant's answer and therefore denies the same.

21. Plaintiff, for reply to the allegations contained in paragraph numbered "21" of defendant's answer admits that defendant has been a producer and distributor of products identified therein but it is not informed that plaintiff is one of the largest producers of such products and therefore denies the same and it denies each and every of the other allegations contained in the said paragraph of defendant's answer.

22. Plaintiff, for reply to the allegations contained in paragraph numbered "22" of defendant's answer, admits that defendant's predecessor put up shredded whole wheat biscuit in cartons bearing the marking set forth in said paragraph of defendant's answer but it alleges that the use of the words or terms "Shredded" and "Shredded Whole Wheat" upon its cartons containing said product was a palpable violation and invasion of plaintiff's rights in and to the

words "Shredded" and "Shredded Whole Wheat" for shredded whole wheat made and formed in said biscuit form, and that defendant discontinued the use thereof upon notice from plaintiff's predecessor of defendant's invasion of the rights of plaintiff's predecessor.

23. Plaintiff, for reply to the allegations contained in paragraph numbered "23" of defendant's answer admits that defendant put up shredded whole wheat biscuit in cartons bearing the marking set forth in the said paragraph of defendant's answer but plaintiff alleges that the use of the words or terms "Shredded" and "Shredded Whole Wheat" thereon was a palpable violation and invasion of the rights of plaintiff in and to the said words or terms for shredded whole wheat made and formed in said biscuit form, and that defendant discontinued the same after receipt of notice from plaintiff's predecessor of defendant's invasion of the rights of plaintiff's predecessor.

24. Plaintiff, for reply to the allegations contained in paragraph numbered "24" of defendant's answer, admits that defendant put up shredded whole wheat biscuit in cartons bearing the marking stated therein but it alleges that the use of the indicia or term "Whole Wheat" in association with the picture of two said shredded wheat biscuit in a dish of cream by defendant were so employed by defendant in violation of the rights of plaintiff which are complained of in this suit.

25. Plaintiff, for reply to the allegations contained in paragraph numbered "25" of defendant's answer, admits that defendant, from and after July, 1930, put up, and is now putting up a shredded whole wheat biscuit in cartons and that marked prominently on the face and rear of its cartons are the words "Shredded Whole Wheat Biscuit"; that from March, 1928, to July, 1930, defendant distributed a shredded whole wheat

biscuit in the channels of trade among the several States of the United States packed in cartons on which were marked, on the face and rear thereof, the words "Shredded Whole Wheat Biscuit" and that, from approximately, July, 1930, and continuously and at this time, defendant is manufacturing and selling a shredded whole wheat biscuit which it packs in cartons and marks with the words "Shredded Whole Wheat Biscuit" but plaintiff denies each and every of the other allegations contained in the said paragraph of defendant's answer, and alleges that defendant employs upon the cartons in which its said biscuit are packed the word "shredded" and the word "shreds."

26. Plaintiff denies each and every of the allegations contained in paragraph numbered "26" of defendant's answer.

27. Plaintiff, for reply to the allegations contained in paragraph numbered "27" of defendant's answer, denies that it has acted to assert and maintain its rights in an unlawful manner as an "unlawful monopoly" and the conclusion that plaintiff's said biscuit of distinctive and peculiar shape and appearance was "disclosed and claimed in said expired Perky patents as aforesaid" but it admits each and every of the other allegations contained in the said paragraph of defendant's answer.

28. Plaintiff denies each and every of the allegations contained in paragraph "28" of defendant's answer.

29. Plaintiff denies each and every of the allegations contained in paragraph numbered "29" of defendant's answer.

30. Plaintiff admits each and every of the allegations contained in paragraph numbered "30" of defendant's answer.

31. Plaintiff denies each and every of the allegations contained in paragraph numbered "30a" of defendant's answer.

32. Plaintiff denies each and every of the allegations contained in paragraph numbered "31" of defendant's answer but alleges that it does by this cause endeavor to restrain defendant from its wrongful invasion of its established rights.

33. Plaintiff, for reply to the allegations contained in paragraph numbered "32" of defendant's answer, admits that in or about 1921 defendant started manufacturing a shredded wheat biscuit; that in or about February, 1922, plaintiff's predecessor notified defendant of its exclusive rights in and to the shredded wheat biscuit of the form, size and style manufactured by it and of the name "Shredded Wheat," and that by reason of said notice defendant ceased to market said shredded wheat biscuit but plaintiff denies each and every of the other allegations contained in said paragraph of defendant's answer.

34. Plaintiff, for reply to the allegations contained in paragraph numbered "33" of defendant's answer, admits that from about the year 1922 until the year 1927 defendant did not market a whole wheat biscuit but that in the year 1927 defendant began to market a whole wheat biscuit but plaintiff denies each and every of the other allegations contained in said paragraph of defendant's answer.

35. Plaintiff, for reply to the allegations contained in paragraph numbered "34" of defendant's answer, admits that in or about the early part of 1928 its predecessor instituted a suit against defendant and certain of defendant's customers in the District Court of the United States for the District of Connecticut to restrain unfair competition in the marketing of defendant's

whole wheat biscuit but plaintiff denies each and every of the other allegations contained in said paragraph numbered "34" of defendant's answer.

36. Plaintiff, for reply to the allegations contained in paragraph numbered "34a" of defendant's answer, admits that the said suit referred to in paragraph "34" of defendant's answer was not tried on final hearing; that defendant changed the name of its shredded wheat biscuit from "Kellogg's Shredded Whole Wheat Biscuit to "Kellogg's Whole Wheat Biscuit"; that since July, 1930, defendant has continued to market its product as "Kellogg's Whole Wheat Biscuit" and "Kellogg's Shredded Whole Wheat Biscuit" but it denies each and every of the other allegations contained in said paragraph numbered "34a" of defendant's answer, and alleges that defendant did not wholly cease or desist the use of the word "Shredded" or "shreds" in connection with the sale of its said whole wheat biscuit.

37. Plaintiff, for reply to the allegations contained in paragraph numbered "35" of defendant's answer, admits that the said suit referred to in paragraph numbered "34" of defendant's answer was dismissed, without prejudice; that said suit was brought against defendant herein and other defendants who purchased and resold defendant's shredded whole wheat biscuit; that defendant in this case was named as a party defendant in said suit, and took charge of the defense of the said suit by counsel of its selection; that said suit was discontinued without prejudice on written stipulation providing that should plaintiff or its successors desire or find it necessary to sue again upon the same cause of action or to bring any other litigation involving the same or related subject matter against defendants in said case or their successors, representatives, agents or privies the proceedings, order, testimony or

depositions taken therein may be used to the same extent and for the same purpose as though the same had been taken, had or done in such further litigation; and that defendant was a party to and duly signed the said stipulation.

38. Plaintiff denies each and every of the allegations contained in paragraph numbered "36" of defendant's answer and alleges that since on or about the year 1932 plaintiff has manufactured and marketed a shredded whole wheat biscuit which is smaller in size than its said whole wheat biscuit of distinctive and peculiar shape and appearance, and that the said smaller biscuit of the manufacture and sale of plaintiff's predecessor and plaintiff was made in the same distinctive and peculiar shape and appearance as the said larger biscuit of plaintiff's predecessors and plaintiff.

39. Plaintiff denies the allegations contained in paragraph numbered "37" of defendant's answer except that it admits the institution of this suit and alleges that defendant's former general sales manager referred to in the said paragraph of defendant's answer was employed by plaintiff's predecessor from on or about July, 1900, until in or about December, 1910; that, on information and belief, defendant induced its said former general sales manager to leave the employ of plaintiff's predecessor and to accept employment with defendant; that said former general sales manager of defendant was employed by defendant from in or about December, 1910, to in or about November, 1928; that in or about November, 1928, defendant discharged its said former general sales manager; that thereafter, defendant's said former sales manager was employed by others in no manner related or connected with plaintiff and that thereafter, in or about the month of April, 1932, defendant's said former sales manager became and now is employed by plaintiff.

40. Plaintiff denies the allegations contained in paragraph numbered "38" of defendant's answer.

NATIONAL BISCUIT COMPANY,

By (Sgd.) C. F. Bliss,
Vice-President.

(Sgd.) Hugh M. Morris,
Solicitor for Plaintiff,
Dupont Building,
Wilmington, Delaware.
Drury W. Cooper,
C. A. Vilas,
Hugh M. Morris,
Of Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

C. F. BLISS, being duly sworn deposes and says that he is vice-president of National Biscuit Company, the plaintiff named in the above-identified case; that he has read the foregoing reply to defendant's affirmative defense and that the facts therein stated are true to his own knowledge except as to such facts as may be stated on information and belief, and as to such facts he believes it to be true; and the reason why this verification is not made by plaintiff personally is that plaintiff is a corporation of which affiant is a duly qualified officer.

(Sgd.) C. F. BLISS.

Subscribed and sworn to before me this twenty-ninth day of August, 1932.

(Sgd.) A. T. BULLOCK.
Notary Public, Queens Co. No. 230.
Registered in Queens Co. No. 22.
Certificate filed in New York Co. No. 12.
Registered in New York Co. No. 4-B-6.
Commission expires March 30, 1934.

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO.

BREAD AND METHOD OF PREPARING SAME.

SPECIFICATION forming part of Letters Patent No. 548,066, dated October 15, 1895.

Application filed March 15, 1894. Serial No. 503,777. (No specimens.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented a certain new and useful Article of Food or Bread and the Preparation of the Same; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

An object of the invention is the production of an article of food or bread, consisting of externally-rough porous threads or filaments of wheat or similar grain, having the outer nutrition bran and gluten of the entire berry visibly mingled with the interior starchy portion thereof and adapted by their composition of entire grain-berries and their rough and porous thread-like or shred-like form to constitute, without other shortening or aeration, bread of especially light and wholesome character.

A further object of the invention consists in the novel art or method of preparing the grain or berry and reducing it to form without taking from the grain any of the beneficial qualities provided by nature and presenting the same in convenient form for service as a superior article of food without the aid of experts or skilled labor now required to produce palatable bread.

The usual methods practiced in the manufacture of flour and the resultant bread therefrom are such as to detract from the natural and healthful properties possessed by the grain in its original state. The addition of shortening, yeast, baking-powder, alum, or other foreign ingredients to render the bread light is also detrimental, and the entire method consumes a large amount of time and labor.

According to the improved method which I am now about to describe, the wheat is taken in the whole or berry form, and after being cleaned and thoroughly washed is boiled until corked, without destroying the whole or individual form of the berry. The time of boiling is usually about one hour. This opens and adherent extraneous matter. It also destroys all insect life and removes the traces thereof. Before removal from the boiler the grain is seasoned with salt. The wheat, still in berry form, is, nevertheless, just after the boiling quite soft and its interior or starchy portion especially is watery. It can be easily mashed between the finger and thumb and is not in condition for proper compression until its inner and outer portions are brought more upon an equality in point of consistence. To this end the grain, being removed from the boiler, is allowed to dry for some hours—from twelve to twenty hours being usually sufficient—until the interior of the berry has, from the loss of some of its water, become more consistent. The grain should be constantly stirred or agitated during this part of the process to hasten the drying-out action and to prevent incipient fermentation. I prefer, therefore, to dry out the grain in rotating wire-cloth barrels or cage-tumblers. The berries should now have sufficient interior consistence to enable their outer and interior portions to be effectively incorporated with each other, such incorporation being accomplished by passing the grain between compression-rollers, one or both of which is provided with a series of fine circumferential grooves whereby the berries are mashed and their outer bran-coats, gluten layers, and starchy interior portion thoroughly incorporated together and forced into the grooves of the roller or rollers, whence the resultant food is discharged, by means of a comb or scraper, in the form of long fine filaments or threads of porous character and having a rough exterior admirably adapted to cause them to adhere together when being massed to form loaves or biscuit. The sinuous form and rough or jagged exterior shape of the filaments is designed also to provide small interstices throughout the mass, whereby the bread is thoroughly aerated and made very light.

The food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways. The food presented is pure wheat and all the parts of the berry are given to the consumer in [illegible] form. No chemical change is

HENRY D. PERKY, OF DENVER, COLORADO.

BREAD AND METHOD OF PREPARING SAME.

SPECIFICATION forming part of Letters Patent No. 548,088, dated October 15, 1895.

Application filed March 18, 1894. Serial No. 503,777. (No specimens.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented a certain new and useful Article of Food or Bread and the Preparation of the Same; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

An object of the invention is the production of an article of food or bread, consisting of externally-rough porous threads or filaments of wheat or similar grain, having the outer nutrition bran and gluten of the entire berry visibly mingled with the interior starchy portion thereof and adapted by their composition of entire grain-berries and their rough and porous thread-like or shred-like form to constitute, without other shortening or aeration, bread of especially light and wholesome character.

A further object of the invention consists in the novel art or method of preparing the grain or berry and reducing it to form without taking from the grain any of the beneficial qualities provided by nature and presenting the same in convenient form for service as a superior article of food without the aid of expert or skilled labor now required to produce palatable bread.

The usual methods practiced in the manufacture of flour and the resultant bread therefrom are such as to detract from the natural and healthful properties possessed by the grain in its original state. The addition of shortening, yeast, baking-powder, alum, or other foreign ingredients to render the bread light is also detrimental, and the entire method consumes a large amount of time and labor.

According to the improved method which I am now about to describe, the wheat is taken in the whole or berry form, and after being cleaned and thoroughly washed is boiled until cooked, without destroying the whole or individual form of the berry. The time of boiling is usually about one hour. This operation, in addition to cooking the grains, removes from them the outer siliceous coating and adherent extraneous matter. It also destroys all insect life and removes the traces thereof. Before removal from the boiler the grain is seasoned with salt. The wheat, still in berry form, is, nevertheless, just after the boiling quite soft and its interior or starchy portion especially is watery. It can be easily mashed between the finger and thumb and is not in condition for proper compression until its inner and outer portions are brought more upon an equality in point of consistence. To this end the grain, being removed from the boiler, is allowed to dry for some hours—from twelve to twenty hours being usually sufficient—until the interior of the berry has, from the loss of some of its water, become more consistent. The grain should be constantly stirred or agitated during this part of the process to hasten the drying-out action and to prevent incipient fermentation. I prefer, therefore, to dry out the grain in rotating wire-cloth barrels or cage-tumblers. The berries should now have sufficient interior consistence to enable their outer and interior portions to be effectively incorporated with each other, such incorporation being accomplished by passing the grain between compression-rollers, one or both of which is provided with a series of fine circumferential grooves whereby the berries are mashed and their outer bran-coats, gluten layers, and starchy interior portion thoroughly incorporated together and forced into the grooves of the roller or rollers, whence the resultant food is discharged, by means of a comb or scraper, in the form of long fine filaments or threads of porous character and having a rough exterior admirably adapted to cause them to adhere together when being massed to form loaves or biscuit. The sinuous form and rough or jagged exterior shape of the filaments is designed also to provide small interstices throughout the mass, whereby the bread is thoroughly aerated and made very light.

The food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways. The food presented is pure wheat and all the parts of the berry are given to the consumer in attractive form. No chemical change is set up therein by the use of ferments or other

foreign ingredients, and the percentage of water in the food is much less than in ordinary bread.

The article as produced is a food or bread composed of superposed or massed layers or deposits of dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch, and gluten of the entire berry, and which is absolutely free from leavening or raising material or their products.

The fine thread-like character of the component filaments of the bread and their disposition therein renders it tender, so that shortening is not required. All the nutritious and beneficial qualities of the berry are preserved in this admirable article of food, while its form gives it tenderness and lightness without the admixture of foreign ingredients.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. A food or bread composed of superposed or massed layers or deposits of dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch, and gluten of the entire berry, and which is absolutely free from leavening or raising material, or their products.

2. The process of reducing cereals for food, consisting, first, in cooking the grain with wait, after it has been thoroughly cleaned, without destroying the whole berry form, second, partially drying the grain with constant agitation until its interior and exterior portions are of substantially the same consistency, and finally, compressing the grain to intimately commingle the outer or bran coats, gluten layers, and starchy, interior portions in the form of porous, rough filaments or threads, substantially as described.

In testimony whereof I affix my signature in the presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

Certificate to Letters Patent No. 548,086.

It is hereby certified that in Letters Patent No. 548,086, granted October 15, 1895, upon the application of Henry D. Perky, of Denver, Colorado, for an improvement in "Bread and Methods of Preparing Same," an error appears in the printed specification requiring correction, viz: In line 47, page 1, the word "corked" should read cooked; and that the said Letters Patent should be read with this correction therein that the same may conform to the record of the case in the Patent Office.

Signed, countersigned, and sealed this 29th day of October, A. D. 1895.

[SEAL.]

JNO. M. REYNOLDS,
Assistant Secretary of the Interior.

Countersigned:
S. T. FISHER,
Acting Commissioner of Patents.

PLAINTIFF'S INTERROGATORIES AND DEFENDANT'S ANSWERS THERETO.

(Interrogatories Filed December 27, 1932.)

(Answers Filed May 22, 1933.)

Interrogatory No. 1. When did defendant or its decessor, if any, first begin the manufacture and e in the United States of a whole wheat edible prod-

Answer: Year 1912.

Interrogatory No. 2. State when the manufacture, e and distribution in commerce in the United States he whole wheat product, inquired about in interrog- ry numbered "1," was discontinued.

Answer: Year 1920.

Interrogatory No. 3. Did defendant or its prede- or cook the whole wheat used in the edible product erred to in defendant's answer to interrogatory bered "1"?

Answer: Yes.

Interrogatory No. 4. Did defendant or its prede- or before or after cooking the whole wheat edible duct referred to in defendant's answer to interrog- y numbered "1" add any ingredient whatsoever eto?

Answer: Yes.

Interrogatory No. 5. If the answer to interroga- numbered "4" is "yes", state what such added edient or ingredients was or were added and at t stage of the preparation or making of such prod- such ingredient or ingredients was or were added.

Answer: Ingredients added—sugar, salt and water d at time of cooking. In war time, by requirement ood Administration, corn flour and rye were sub- ted for a portion of the wheat.

Interrogatory No. 6. State the form, state or condition of the whole wheat at the time of beginning the operation of baking the whole wheat product inquired about in interrogatory numbered "1".

Answer: In the form of unbaked, flavored shredded whole wheat biscuit.

Interrogatory No. 7. State whether or not defendant has in its possession or under its control a specimen or specimens of said whole wheat product, inquired about in interrogatory numbered "1", and, if so, state where the same may be examined by plaintiff's representatives or its counsel.

Answer: Have none of the flavored biscuit.

Interrogatory No. 8. State whether or not defendant or its predecessor, if any, advertised to the trade or public in the United States in letters, circulars, newspapers, trade or other publications, the whole wheat product inquired about in interrogatory numbered "1" and, if so, state the name or names and place or places of publication of any such publication or publications and the time or approximate time when any such advertisements were published.

Answer: Yes.

Christian Herald, April 23, 1913;
Home Life, April, 1913;
Cosmopolitan, July, 1913;
Good Housekeeping, April, 1913;
Collier's, July, 1913;
Smart Styles, November 1, 1913;
Collier's, May, 1914;
Popular Mechanics, August, 1913;
Munsey's, May, 1913.

Interrogatory No. 9. State whether or not defendant has in its possession or under its control a cut, picture, description, drawing or other representation or copy of any circular or other advertisement of the

whole wheat product, inquired about in interrogatory numbered "1" and, if so, produce the same and state where plaintiff's representatives or counsel may examine the same.

Answer: Yes—can be seen at office of Kellogg Company, Battle Creek, Michigan, on notice.

Interrogatory No. 10. If the answer to interrogatory numbered "9" is in the negative, state whether or not defendant knows whether any cut, picture, drawing or other representation of such whole wheat product or any advertisement thereof is extant, and where the same is located and who possesses the same.

Answer: Answered under No. "9".

Interrogatory No. 11. State whether or not defendant manufactured, sold and distributed in commerce in the United States whole wheat biscuit which was packaged in cartons or containers marked "Shredded Whole Wheat Biscuit"?

Answer: Yes, except that the cartons described the product as "Kellogg's" shredded whole wheat biscuit.

Interrogatory No. 12. If the answer to interrogatory numbered "11" is in the affirmative, state when defendant began the manufacture, sale and distribution in commerce in the United States of said whole wheat biscuit.

Answer: Early in 1922.

Interrogatory No. 13. If the answer to interrogatory numbered "11" is in the affirmative, state when defendant discontinued the manufacture, sale and distribution of such whole wheat biscuit.

Answer: October, 1922.

Interrogatory No. 14. If the answer to interrogatory numbered "11" is in the affirmative, state whether defendant has in its possession or under its control a specimen or specimens of said whole wheat biscuit and, if so, state where the same may be examined by plaintiff's representatives or counsel.

Answer: Yes, can be seen at office of Kellogg Company, Battle Creek, Michigan, on notice.

Interrogatory No. 15. If the answer to interrogatory numbered "11" is in the affirmative, state whether defendant has in its possession or under its control cartons for or a cut, picture, drawing or other representation, circular, description or advertisement of said whole wheat biscuit, and, if so, produce the same and state where plaintiff's representatives or counsel may examine the same.

Answer: Yes, can be seen at office of Kellogg Company, Battle Creek, Michigan, on notice.

Interrogatory No. 16. If the answer to interrogatory numbered "15" is in the negative, state whether or not defendant knows whether any cartons for or cut, picture, drawing or other representation of said whole wheat biscuit or circular, description or advertisement thereof are extant and if so whether it knows where the same are located and who possesses the same.

Answer: Answered under No. "15".

Interrogatory No. 17. Did defendant or its predecessor cook the whole wheat used in the whole wheat biscuit referred to in defendant's answers to interrogatories numbered "11" to "16", both inclusive?

Answer: Yes.

Interrogatory No. 18. Did defendant or its predecessor before or after cooking the whole wheat referred to in defendant's answers to interrogatories numbered "11" to "16", both inclusive, add any ingredient whatsoever thereto?

Answer: No—cooked only in water.

Interrogatory No. 19. If the answer to interrogatory numbered "18" is "yes", state what such added ingredient or ingredients was or were and at what stage of the preparation or making of such whole wheat such ingredient or ingredients was or were added.

Answer: See answer to No. "18".

Interrogatory No. 20. State whether or not defendant manufactured, sold and distributed in commerce in the United States whole wheat biscuit of the size, shape and design of the whole wheat biscuit contained in the carton or package which is presented herewith and marked "Plaintiff's Exhibit 1".

Answer: Defendant manufactured, sold and distributed in commerce in the United States shredded whole wheat biscuit of the size, shape and design of the biscuit contained in cartons like that identified as "Plaintiff's Exhibit 1", which exhibit appears to be one of defendant's cartons.

Interrogatory No. 21. State whether or not the whole wheat biscuit contained in said carton marked "Plaintiff's Exhibit 1" is the whole wheat biscuit of the manufacture and sale of defendant and whether the said carton or package containing the same is that of defendant and is the same as cartons in which defendant packaged and distributed in commerce in the United States said whole wheat biscuit.

Answer: See answer to Q. "20".

Interrogatory No. 22. If the answers to interrogatories numbered "20" and "21" are in the affirmative, state when defendant began the manufacture, sale and distribution in commerce in the United States of the said whole wheat biscuit.

Answer: In 1922, as to the biscuit referred to in answer to Q. "20", in cartons describing the product as Kellogg's shredded whole wheat biscuit. Kellogg's whole wheat biscuit cartons like "Plaintiff's Exhibit No. 1", first used by Kellogg Company, August, 1930. The said biscuit have been toasted top and bottom to a darker brown shade since 1927.

Interrogatory No. 23. If the answer to interrogatory numbered "20" is in the affirmative, state whether

or not defendant is now engaged in the manufacture, sale and distribution in commerce in the United States of the said whole wheat biscuit.

Answer: Yes, as explained in answer to No. "22".

Interrogatory No. 24. State when defendant began the use of the representation of two biscuit placed in a saucer as shown on the package or carton marked "Plaintiff's Exhibit 1", and whether it was employing the same upon its cartons containing said whole wheat biscuit at and prior to the filing of the bill of complaint in this cause.

Answer: Representation of two biscuits in a bowl as on carton marked "Plaintiff's Exhibit No. 1", first employed in August, 1930.

Interrogatory No. 25. State whether or not defendant has employed in its advertisements of or on its packages or cartons containing whole wheat biscuit the representation of the biscuit like the biscuit contained in "Plaintiff's Exhibit 1".

Answer: Yes.

Interrogatory No. 26. If the answer to interrogatory numbered "25" is in the affirmative, state when defendant began to employ the representation of a biscuit in its advertisements or upon its packages and whether it did so prior to the filing of the bill of complaint in this cause.

Answer: In 1912.

Interrogatory No. 27. State whether or not defendant has used or employed the name "Shredded" in its advertisements of its whole wheat biscuit like the whole wheat biscuit contained in "Plaintiff's Exhibit 1".

Answer: Defendant has employed the descriptive word "shredded" in its advertisements of the whole wheat biscuit referred to in the answer to Q. "20".

Interrogatory No. 28. If the answer to interrogatory numbered "27" is in the affirmative, state when

defendant began the use of the name "Shredded" in its advertisements of its said whole wheat biscuit and whether or not it did so prior to the filing of the bill of complaint in this cause.

Answer: Defendant first used the descriptive word "shredded" in its advertising of flavored shredded whole wheat biscuit in 1912 and of unflavored shredded whole wheat biscuit in 1922.

Interrogatory No. 29. State whether or not defendant has employed in connection with its advertisement of its said whole wheat biscuit inquired about in interrogatory numbered "20" a cut, representation or picture of a whole wheat biscuit in association with the name "Shredded" and, if so, state when defendant began to do so, whether or not it did so prior to the filing of the bill of complaint in this cause and produce true and correct copies of two or three such advertisements of defendant and state where they may be examined by plaintiff's representatives or counsel.

Answer: Defendant in 1922 began to use the descriptive word "shredded" in advertisements of its shredded whole wheat biscuit in association with a picture thereof. Specimens may be inspected at office of Kellogg Company in Battle Creek, Michigan, on notice.

Interrogatory No. 30. State whether or not defendant has employed the name "Shredded Wheat" in connection with its advertisements of its whole wheat biscuit inquired about in interrogatory numbered "20" and, if so, state whether it did so prior to the filing of the bill of complaint in this cause and produce copies or specimens of such advertisements.

Answer: Defendant at times in 1922 and at times during the period from 1927 to August, 1930, used in its advertisements the descriptive phrase "shredded whole wheat biscuit" coupled with the name Kellogg's, and defendant since August, 1930, in certain territories continuously used the phrase "Kellogg's shredded

whole wheat biscuit". It has not featured the descriptive phrase "shredded wheat" in connection with product marketed by it in cartons like "Plaintiff's Exhibit 1".

Interrogatory No. 31. State whether or not defendant's customers advertised to the public in the United States defendant's said whole wheat biscuit inquired about in interrogatory numbered "20" and, if so, whether or not any of defendant's customers for said whole wheat biscuit employed in their advertisements of defendant's said whole wheat product the name "Shredded Wheat" and, if so, whether such advertisements were published in the United States prior to the filing of the bill of complaint in this cause.

Answer: Tear sheets of dealer-advertising in files of Kellogg Company indicate that some grocers have referred to Kellogg's shredded whole wheat biscuit as "Kellogg's Shredded Wheat". Some of these dealer-advertisements are dated prior to the filing of the bill of complaint in this case. Defendant has no supervision or control over such dealer-advertisements.

Interrogatory No. 32. State whether or not defendant has in its possession or under its control any advertisements of its customers inquired about in interrogatory numbered "31" and, if so, produce the same and state where plaintiff's representatives or counsel may examine the same.

Answer: Defendant has in its possession dealer-advertisements which may be examined at defendant's office at Battle Creek, Michigan, on notice.

Interrogatory No. 33. State whether or not the whole wheat biscuit of the manufacture and sale of defendant in commerce in the United States, identified in interrogatories numbered "20" and "21" have been or are being sold to members of the public in the United States in restaurants, hotels and/or boarding houses

outside of and independent of the packages in which they are packaged when shipped by defendant.

Answer: For the restaurant and hotel trade defendant provi's individnal cartons containing two biscuit. Those cartons have the name Kellogg's prominently displayed thereon. Kellogg's distinctively sized and colored whole wheat biscuit referred to in the answers to interrogatories Nos. "20" and "22" are to the best of defendant's knowledge and belief sold to members of the public in the United States in restaurants, hotels, etc., packaged in the original distinctive Kellogg Company individual cartons in which they are packed when shipped. A scattering few restaurants may remove the biscuit from the carton before serving, but usually in presence of customer. The volume of defendant's business in individual sized cartons put up for restaurants and hotels, is from about two to three per cent. of its total measured in number of biscuits sold, and the percentage of restaurants which remove the biscuit from the carton when serving, as aforesaid, is estimated by defendant as not exceeding one per cent. of the total volume of defendant's individual carton business, making a proportion of approximately one to 5000 as applied to defendant's total volume of whole wheat biscuit business.

Interrogatory No. 34. If the answer to interrogatory numbered "33" is in the affirmative, state whether or not any identifying marks or indicia appear upon defendant's said whole wheat biscuit when sold to members of the public.

Answer: Defendant's biscuit are distinctively sized, shaped, colored and toasted top and bottom and were always clearly distinguishable both inside and outside of their cartons from plaintiff's product until plaintiff sought to neutralize or obliterate such size distinction by copying defendant's biscuit as to size

at a date long subsequent to defendant's adoption and use of its said distinctive small size of biscuit.

Interrogatory No. 35. Did defendant cook the whole wheat used in the whole wheat biscuit referred to in defendant's answer to interrogatory numbered "20"?

Answer: Defendant cooks the wheat used in all the shredded wheat biscuit made by it.

Interrogatory No. 36. Did defendant before or after cooking the whole wheat referred to in defendant's answer to interrogatory numbered "20" add any ingredient whatsoever thereto?

Answer: From 1922 to the present the wheat is cooked only in water. Disregarding such water no ingredients have been added.

Interrogatory No. 37. If the answer to interrogatory numbered "36" is "yes", state what such added ingredient or ingredients was or were and at what stage of the preparation or making of such whole wheat biscuit such ingredient or ingredients was or were added.

Answer: See answer to No. "36".

Interrogatory No. 38. State whether or not the carton which is presented herewith and marked "Plaintiff's Exhibit 2", is a specimen of cartons in which whole wheat biscuit were packaged and distributed in commerce in the United States by defendant.

Answer: Yes.

Interrogatory No. 39. If the answer to interrogatory numbered "38" is in the affirmative, state when defendant began to use cartons like "Plaintiff's Exhibit 2" for packaging its whole wheat biscuit.

Answer: Early part of 1927.

Interrogatory No. 40. State whether or not defendant is now using cartons like "Plaintiff's Exhibit 2" for packaging whole wheat biscuit of its manufacture and sale in commerce in the United States and, if

not, state when the use by defendant of cartons like "Plaintiff's Exhibit 2" was discontinued.

Answer: No. Use discontinued about February, 1928.

Interrogatory No. 41. State whether or not the whole wheat biscuit of the manufacture and sale of defendant packaged in cartons like "Plaintiff's Exhibit No. 2" are the same in design and appearance as the whole wheat biscuit contained in "Plaintiff's Exhibit 1", and if not, describe the design of such biscuit or produce a specimen, cut or other representation of the same and state where the same may be examined by plaintiff's representatives or counsel.

Answer: The shredded wheat biscuit packaged in cartons like "Plaintiff's Exhibit 2" were the same in design and appearance as those packaged in cartons like "Plaintiff's Exhibit 1".

Interrogatory No. 42. State whether or not the carton which is presented herewith and marked "Plaintiff's Exhibit 3", is a specimen of cartons in which whole wheat biscuit were packaged and distributed in commerce in the United States by defendant.

Answer: Yes.

Interrogatory No. 43. If the answer to interrogatory numbered "42" is in the affirmative, state when defendant began to use cartons like "Plaintiff's Exhibit 3" for packaging its whole wheat biscuit.

Answer: Defendant first began to use cartons identical with "Plaintiff's Exhibit No. 3" in the early part of 1928. Cartons of substantially the same style, design and size were used by the defendant for a short time during the year 1922.

Interrogatory No. 44. State whether or not defendant is now using cartons like "Plaintiff's Exhibit 3" for packaging whole wheat biscuit of its manufacture and sale in commerce in the United States and, if

not, state when the use by defendant of cartons like "Plaintiff's Exhibit 3" was discontinued.

Answer: Yes, with minor differences and in certain interstate markets only.

Interrogatory No. 45. State whether or not the whole wheat biscuit of the manufacture and sale in commerce in the United States of defendant packaged in cartons like "Plaintiff's Exhibit No. 3" are the same in design and appearance as the whole wheat biscuit contained in "Plaintiff's Exhibit 1" and if not, describe the design of such biscuit or produce a specimen or cut or other representation of the same and state where the same may be examined by plaintiff's representatives or counsel.

Answer: The shredded wheat biscuit made and packaged by defendant in cartons like "Plaintiff's Exhibit 3" were the same in design and appearance as those packaged in cartons like "Plaintiff's Exhibit 1".

Interrogatory No. 46. State whether or not the carton which is presented herewith and marked "Plaintiff's Exhibit 4", is a specimen of cartons in which whole wheat biscuit were packaged and distributed in commerce in the United States by defendant.

Answer: Yes.

Interrogatory No. 47. If the answer to interrogatory numbered "46" is in the affirmative, state when defendant began to use cartons like "Plaintiff's Exhibit 4" for packaging its whole wheat biscuit.

Answer: Defendant first began to use cartons like "Plaintiff's Exhibit No. 4" August, 1930.

Interrogatory No. 48. State whether or not defendant is now using cartons like "Plaintiff's Exhibit 4" for packaging whole wheat biscuit of its manufacture and sale in commerce in the United States and, if not, state when the use by defendant of cartons like "Plaintiff's Exhibit 4" was discontinued.

Answer: Cartons like "Plaintiff's Exhibit No. 4" discontinued September 4, 1932.

Interrogatory No. 49. State whether or not the whole wheat biscuit of the manufacture and sale of defendant in cartons like "Plaintiff's Exhibit 4" are the same in design and appearance as the whole wheat biscuit contained in "Plaintiff's Exhibit 1" and, if not, describe the design of such biscuit or produce a specimen, cut or other representation of the same and state where the same may be examined by plaintiff's representatives or counsel.

Answer: The shredded wheat biscuit made and packaged by defendant in cartons like "Plaintiff's Exhibit 4" were the same in design and appearance as those made by defendant and packaged in cartons like "Plaintiff's Exhibit 1."

Interrogatory No. 50. State whether or not the carton which is presented herewith and marked "Plaintiff's Exhibit 5," is a specimen of cartons in which whole wheat discuit were packaged and distributed in commerce in the United States by defendant.

Answer: Yes.

Interrogatory No. 51. If the answer to interrogatory number "50" is in the affirmative, state when defendant began to use cartons like "Plaintiff's Exhibit 5" for packaging its whole wheat biscuit.

Answer: Cartons like "Plaintiff's Exhibit No. 5" were first used by defendant September, 1932.

Interrogatory No. 52. State whether or not defendant is now using cartons like "Plaintiff's Exhibit 5" for packaging whole wheat biscuit of its manufacture and sale in commerce in the United States and, if not, state when the use of cartons like "Plaintiff's Exhibit 5" was discontinued.

Answer: Yes.

Interrogatory No. 53. State whether or not the whole wheat biscuit of the manufacture and sale of de-

fendant in cartons like "Plaintiff's Exhibit 5" are the same in design and appearance as the whole wheat biscuit contained in "Plaintiff's Exhibit 1" and, if not, describe the design of such biscuit or produce a specimen, cut or other representation of the same and state whether the same may be examined by plaintiff's representatives or counsel.

Answer: The shredded wheat biscuit made by defendant and sold in cartons like "Plaintiff's Exhibit 5" were the same in design and appearance as those sold in cartons like "Plaintiff's Exhibit 1."

Interrogatory No. 54. State when defendant began to embody on its cartons in which its whole wheat biscuit was packaged the following statement which appears upon "Plaintiff's Exhibit 1" and "Plaintiff's Exhibit 4":

> "This certified analysis made by the Medical Arts Laboratory of Philadelphia, indicates the splendid food value of Kellogg's Shredded WHOLE WHEAT Biscuit."

Answer: August, 1930.

Interrogatory No. 55. State when defendant began to use upon its cartons in which it packaged its whole wheat biscuit the following which appears upon "Plaintiff's Exhibit 4":

> "Kellogg's
> WHOLE
> WHEAT
> Biscuit
>
> are made of delicately flavored whole wheat shreds. These shredded biscuit are a new convenient size. Two just fit the cereal bowl."

Answer: September 28, 1931.

Interrogatory No. 56. State whether or not defendant is now using upon cartons in which it packages its whole wheat biscuit the statement quoted in interrogatory numbered "55" and, if not, when did defendant discontinue the use of the same upon its cartons.

Answer: The statement quoted in Interrogatory No. "55" was discontinued September, 1932.

Interrogatory No. 57. State whether and, if so, when, the use of the statement quoted in interrogatory numbered "54" was discontinued by defendant upon cartons in which defendant packaged its whole wheat biscuit.

Answer: Discontinued September, 1932.

Interrogatory No. 58. State when defendant began to use upon its cartons in which it packaged its whole wheat biscuit the following statement which appears upon "Plaintiff's Exhibit 5":

"Shredded Wheat in Its Most Delicious Form."

Answer: September 14, 1932. Used on one end panel only.

Interrogatory No. 59. State when defendant began to use upon its cartons in which it packaged its whole wheat biscuit the following statement which appears upon "Plaintiff's Exhibit 5":

"A shredded wheat product."

Answer: September 14, 1932. Used on one end panel only.

Interrogatory No. 60. State whether or not defendant has discontinued the use upon its cartons in which it packages its whole wheat biscuit of either or both the statements quoted in interrogatories numbered "58" and "59".

Answer: No.

Interrogatory No. 61. Did defendant cook the whole wheat used in the whole wheat biscuit packaged in cartons like Plaintiff's Exhibits 2, 3, 4 and 5?

Answer: Yes.

Interrogatory No. 62. Did defendant before or after cooking the whole wheat used in the whole wheat biscuit referred to in defendant's answer to interroga-

tory numbered "61" add any ingredient whatsoever thereto?

Answer: No. Cooked only in water.

Interrogatory No. 63. If the answer to interrogatory numbered "62" is "Yes," state what such added ingredient or ingredients was or were used and at what stage of the preparation or making of such whole wheat biscuit such ingredient or ingredients was or were added.

Answer: See answer to No. "62."

Interrogatory No. 64. If the answer to interrogatory numbered "62" is "yes," state whether or not the addition of such ingredient or ingredients to the whole wheat used in the said whole wheat biscuit has or have been discontinued, and, if so, state the date when the use of the same was discontinued.

Answer: See answer to No. "62."

Interrogatory No. 65. State whether or not the whole wheat biscuit made prior and subsequent to the filing of the bill of complaint in this suit contained any ingredient or ingredients other than those existent in the natural wheat.

Answer: The whole wheat biscuits made prior to the year 1920 contained the added ingredients sugar and salt, and during war time, corn flour and rye were substituted for a portion of the wheat. Since 1920, the whole wheat biscuits have been made from whole wheat without flavoring or other added ingredient.

Interrogatory No. 66. State whether or not the manufacture and sale in the United States of a whole wheat product or biscuit by defendant or its predecessor was interrupted or discontinued at any time or times after such manufacture and sale was first begun.

Answer: Yes.

Interrogatory No. 67. If the answer to interrogatory numbered "66" is "Yes," state the time when each

of such interruptions or discontinuances began and when it ended.

Answer: Manufacture of flavored shredded whole wheat biscuits was discontinued in 1920, and unflavored biscuit was made, and manufacture discontinued, in 1922 as before stated. Manufacture and sale of the unflavored biscuit was resumed in 1927, as aforesaid, and has since continued.

Interrogatory No. 68. State whether or not defendant has packaged its whole wheat biscuit in cartons or packages other than those identified in the foregoing interrogatories by Exhibits Numbered 1 to 5, both inclusive, and, if so, produce a specimen of each other carton in which defendant packaged its said whole wheat biscuit and state where the same may be examined by plaintiff's representatives or counsel.

Answer: Defendant's shredded whole wheat biscuit have been packed in cartons or packages other than those identified in the foregoing interrogatories by "Exhibits Nos. 1 to 5" both inclusive. Specimens of each of these other cartons are in the files of the Kellogg Company at Battle Creek, Michigan, and may be examined by plaintiff's counsel, on notice.

Interrogatory No. 69. State whether or not the attached copy of letter dated January 14, 1922, and marked "Plaintiff's Exhibit 6" is a true and correct copy of a letter written by Kellogg Toasted Corn Flake Co. of Battle Creek, Michigan.

Answer: "Plaintiff's Exhibit No. 6" does not give an addressee on the alleged copy of letter dated January 14, 1922; therefore, defendant is unable to state whether or not "Exhibit No. 6" is a true and correct copy of a letter written by Kellogg Toasted Corn Flake Company, Battle Creek, Michigan.

Interrogatory No. 70. State whether or not other letters of the same tenor and purport as "Plaintiff's Exhibit 6" were written by said Kellogg Toasted Corn

Flake Co. of Battle Creek, Michigan, at or about the time that "Plaintiff's Exhibit 6" was written or within a period of six months from the date of said exhibit, to other parties or concerns in the United States and, if so, produce the same and state where they may be examined by plaintiff's representatives or counsel.

Answer: Defendant's files do not indicate that any letters of the same tenor and purport as "Exhibit No. 6" were written by Kellogg Toasted Corn Flake Company at the dates mentioned.

Interrogatory No. 71. State whether or not the said Kellogg Toasted Corn Flake Company of Battle Creek, Michigan, is the predecessor of defendant in the conduct of the business in which defendant is engaged.

Answer: Kellogg Toasted Corn Flake Company of Battle Creek, Michigan, was the predecessor of the defendant in the conduct of the business in which the defendant is engaged.

Interrogatory No. 72. State when defendant succeeded to the business theretofore conducted by Kellogg's Toasted Corn Flake Company of Battle Creek, Michigan.

Answer: In the year 1922.

Interrogatory No. 73. State whether or not said Kellogg Toasted Corn Flake Company has discontinued the manufacture of its wheat biscuit by or before January 14, 1922.

Answer: Yes.

Interrogatory No. 74. State whether or not defendant has in its possession or under its control a specimen or specimens of said wheat biscuit referred to in "Plaintiff's Exhibit 6" and, if so, state where the same may be examined by plaintiff's representatives or counsel.

Answer: No.

Interrogatory No. 75. State whether or not defendant has in its possession or under its control a cut,

picture, description, drawing or other representation or copy of any circular or other advertisement of the wheat biscuit referred to in "Plaintiff's Exhibit 6" and, if so, produce the same and state where plaintiff's representatives or counsel may examine the same.

Answer: Defendant has a cut or picture or advertisement of the flavored shredded whole wheat biscuit made by defendant's predecessor, and same can be seen at defendant's office in Battle Creek, Michigan, on notice.

Interrogatory No. 76. State whether or not defendant has in its possession or under its control a carton in which the wheat biscuit referred to in "Plaintiff's Exhibit 6" was packaged and, if so, produce the same and state where plaintiff's representatives or its counsel may examine the same.

Answer: Defendant has in its possession a carton in which its predecessor's flavored shredded whole wheat biscuit was packaged prior to June 14, 1922. Same may be examined at the offices of Kellogg Company, Battle Creek, Michigan, on notice.

Interrogatory No. 77. State whether or not the attached copy of letter dated January 19, 1922, addressed to Kellogg Toasted Corn Flake Company and marked "Plaintiff's Exhibit 7" is a true and correct copy of a letter received by said Kellogg Toasted Corn Flake Company and, if so, state the date on which the said letter was received.

Answer: Yes—received about January 21, 1922.

Interrogatory No. 78. State whether or not the attached letter dated April 8, 1927, and marked "Plaintiff's Exhibit 8," is a true and correct copy of a letter addressed to defendant, Kellogg Company and whether the said letter was received by defendant, and, if so, state the date on which it was received.

Answer: Yes—received about April 10, 1927.

Interrogatory No. 79. State whether or not the attached copy of letter dated April 22, 1927, and marked "Plaintiff's Exhibit 9," is a true and correct copy of a letter written on behalf of defendant to Messrs. Breed, Abbott & Morgan, 32 Liberty Street, New York, N. Y., and whether or not the letter was mailed on or about the date that it bears.

Answer: Yes.

Interrogatory No. 80. State whether or not the attached copy of letter dated May 10, 1927, and marked "Plaintiff's Exhibit 10," addressed to W. H. Crichton Clarke, is a true and correct copy and state the date on which it was received.

Answer: Yes—received about May 11, 1927.

Interrogatory No. 81. State whether or not the attached copy of letter dated May 16, 1927, and marked "Plaintiff's Exhibit 11," addressed to Messrs. Breed, Abbott & Morgan, is a true and correct copy of said letter and whether or not it was sent on or about the date which it bears.

Answer: Yes.

Interrogatory No. 82. Attached hereto and marked Plaintiff's Exhibits 12-a to 12-pp, both inclusive, are advertisements of defendant's whole wheat biscuit. In connection with each advertisement, the publication in which it was published and the place and date of publication appear.

State with reference to each of said exhibit advertisements (a) whether or not it is an advertisement of defendant of its whole wheat biscuit and (b) whether the said advertisements were published in the newspapers at the places and on or about the dates appearing in connection with the said exhibit advertisements.

Answer: (a) Yes, with the qualification that in some of the exhibits advertisements of others appear. For example, one of the advertisements on "Exhibit 12-pp" is obviously that of plaintiff and another adver-

tisement, "Exhibit 12-u," refers to Kellogg's corn flakes. (b) Yes.

Interrogatory No. 83. If the answer to interrogatory numbered "82" is in the affirmative, state whether or not any or all of the said advertisements referred to in defendant's answer to interrogatory numbered "82" were published by defendant or by its direction or authority in newspapers, periodicals, trade or other publications, other than those recited in connection with interrogatory "82," and, if so, state the name of each of such publication, the places of publication of each and the particular exhibit advertisements among Exhibits 12-a to 12-pp which were so published in the United States.

Answer: Yes. List of papers, town and state and advertisements attached.

Interrogatory No. 84. State the full period (time when begun and when ended) during which each of the said exhibit advertisements referred to in defendant's answers to interrogatories numbered "82" and "83" were published by defendant in newspapers, periodicals, trade or other publications published in the United States.

Answer: From week of February 29, 1932, to week of September 12, 1932, over much of the country. In 1931 appeared throughout the year, but not at the same time in all sections of the country. Of course, none of the advertisements appeared in every issue of every paper.

Interrogatory No. 85. If the answers to interrogatories numbered "82" and "83" are in the negative, in whole or in part, state whether or not any or all of the said exhibit advertisements, identified in defendant's answers to interrogatories numbered "82" and "83" were published in the United States by an agent, agents or representatives of defendant and, if so, identify the particular advertisement or advertisements which was

or were published by an agent, agents or representatives of defendant, the publications in which published, the place and date of publication.

Answer: See answers to interrogatories "82" and "83."

Interrogatory No. 86. If the answer to interrogatory numbered "85" is in the affirmative, state whether or not defendant paid, in whole or in part, for the publication in the United States of any or all of said advertisements and, if so, state whether defendant paid the full amount of the cost of each of said advertisements or what proportion of the cost of publication thereof defendant paid.

Answer: Memorandum on "Plaintiff's Exhibits 12-a to 12-pp." All exhibits in this group cover regular copy prepared and released by defendant's agency to newspapers as part of newspaper campaign on the shredded wheat biscuit made by defendant, also paid for by defendant through its agency, except as follows:

Exhibit 12-y. This is a news story released by defendant's agency, but for which no payment was made by the defendant.

Exhibit 12-ii. In this exhibit the only copy and space paid for by the defendant is the advertisement with the heading "Certified for Food Value". All other mention of Kellogg's whole wheat biscuit in dealer-advertising was inserted and paid for by the dealer in whose copy such mention was made, with no allowance from defendant.

Exhibit 12-jj. The only copy and space paid for by the defendant is the advertising with the heading "Just Try This New Whole Wheat Biscuit". All other mention of Kellogg's whole wheat biscuit in dealer-advertising was inserted and paid for by the dealer in whose copy such mention was made, with no allowance by defendant.

Exhibit 12-mm. All advertising appearing in this publication is free—that is, the space is free to the advertisers of the Tulsa Tribune, in this publication which is distributed free among the retail trade.

Exhibit 12-nn. The only copy and space paid for by the defendant is the advertisement with the heading "Seeing is believing". All other mention of Kellogg's whole wheat biscuit in dealer-advertising was inserted and paid for by the dealer in whose copy such mention was made, with no allowance by defendant.

Exhibit 12-pp. The advertisement "A New Whole Wheat Biscuit" is an advertisement paid for by the defendant. The advertisement to the right obviously is an advertisement of the plaintiff.

Exhibit 12-g. Same comments as on "Exhibit No. 12-mm".

Exhibit 12-s. Same comments as on "Exhibit No. 12-mm".

Exhibit 12-u. Corn flakes advertisements.

"Plaintiff's Exhibit 12-d" indicates the Courier-Post to be a Philadelphia newspaper. This is incorrect. Courier-Post is published in Camden, New Jersey.

Interrogatory No. 87. If the answer to interrogatory numbered "85" is in the affirmative, state whether or not defendant or its duly authorized representative or representatives furnished any of the material comprised in any or all of the said exhibit advertisements identified in defendant's answers to interrogatories numbered "82" and "83" and, if so, state what portion or portions of each of said exhibit advertisements was or were furnished by defendant and to whom furnished.

Answer: Answer to this question was covered by information given in answer to Interrogatory No. "86".

Interrogatory No. 88. If the answer to interrogatory numbered "85" is in the negative, in whole or in part, state whether or not defendant approved advertisements of its agents or representatives of whole wheat biscuit and identify the particular advertisement or advertisements which were so approved by defendant.

Answer: Advertisements paid for by the defendant were approved by defendant or defendant's agencies. Advertisements paid for by grocers were not submitted to, prepared or approved by defendant.

Interrogatory No. 89. Attached hereto and marked Plaintiff's Exhibits 13-a to 13-c, both inclusive, are advertising panels or displays of defendant's whole wheat biscuit.

State with reference to the said exhibit advertising panels or displays whether or not each of them is an advertising panel or display of defendant, whether each of them was distributed in the United States, the period (when begun and when ended) during which each of them was distributed in the United States and whether or not they relate to the whole wheat biscuit of the manufacture and sale of defendant.

Answer: Defendant is unable to identify "Exhibit 13-a". It looks like main panel of a Kellogg carton "Exhibits Nos. 13-b and 13-c were dealer display window pieces and related to Kellogg's shredded whole wheat biscuit. "Exhibit 13-b" distributed among the retail trade from January, 1929 to September, 1930. "Exhibit 13-c" from March, 1929 to September, 1930.

Interrogatory No. 90. State the approximate number of each advertising panel or display referred to in defendant's answer to interrogatory numbered "89" which was made and distributed by defendant or under its direction or authority, in the United States, the particular state or states in which each of

them was distributed, and to whom (as a class) they were distributed and the use that was intended to be made thereof.

Answer: 35,000 of "Exhibit 13-b" and 15,000 "Exhibit 13-c". These advertising pieces distributed among the retail grocer trade to promote sale of defendant's product.

Interrogatory No. 91. State whether or not the said exhibit advertising panels or displays referred to in defendant's answer to interrogatory numbered "89" were prepared and distributed for the purposes of advertising to the public the whole wheat biscuit of the manufacture and sale of defendant.

Answer: Yes.

Interrogatory No. 92. Attached hereto and marked Plaintiff's Exhibits 14-a to 14-ee, both inclusive, are advertisements. In connection with such advertisements the publications in which they were published and the dates of the publications containing the same appear. Among the said exhibit advertisements some were not published in newspapers or other publications. The latter are marked Plaintiff's Exhibits 14-z to 14-ee, both inclusive.

State with reference to the said exhibit advertisements, Nos. 14-a to 14-ee whether or not each of the said parties, corporations or concerns named therein are customers of defendant for its whole wheat biscuit, whether or not the references to shredded whole wheat biscuit appearing therein are to the whole wheat biscuit of defendant, whether or not the said advertisements (Plaintiff's Exhibits 14-a to 14-y) were published in the newspapers shown in connection with said exhibit advertisements on or about the dates appearing in connection with the said exhibit advertisements and whether or not the advertisements, Plaintiff's Exhibits 14-z to 14-ee, were put out and distributed by the concerns and at the places indicated thereon.

Answer: Kellogg Company has no control over these dealer-advertisements referred to in this question, and has nothing to do whatsoever with the wording of advertisements, price, etc. Several of these exhibits do not show the name of the dealer releasing the copy. The package electros were furnished to the dealers by Kellogg Company.

Interrogatory No. 93. State whether or not defendant, its agent, agents, or representatives, paid, in whole or in part, for the advertisements comprised in Plaintiff's Exhibits 14-a to 14-y, referred to in interrogatory numbered "92."

Answer: The defendant, its agents or representatives did not pay in whole or in part for any of the advertisements comprised in "Plaintiff's Exhibits 14-A to 14-Y" referred to in Interrogatory No. "92". The package electros were, however, supplied by the defendant.

Interrogatory No. 94. State whether or not defendant, its agent, agents or representatives paid, in whole or in part, for the printing or distribution of the advertisements comprised in Plaintiff's Exhibits 14-z to 14-ee.

Answer: The defendant, its agents or representatives did not pay in whole or in part for the printing and distribution of the advertisements comprised in "Plaintiff's Exhibits 14-z to 14-ee".

Interrogatory No. 95. State whether or not defendant, its agent, agents or representatives furnished any of the material comprised in any or all of the said exhibit advertisements, Plaintiff's Exhibits 14-a to 14-ee, and if so, state what portion or portions thereof was or were furnished by defendant, its agent, agents or representatives, for each of said exhibits and to whom furnished.

Answer: The defendant, its agents or representatives did not furnish any of the material compris-

ing advertisements in "Plaintiff's Exhibits 14-a to 14-ee" with the exception of the package electros, which were sent either direct to the dealer or through newspapers carrying advertising schedules.

Interrogatory No. 96. State whether or not the defendant, its agent, agents or representatives approved any or all the advertisements comprised in Plaintiff's Exhibits 14-a to 14-ee as to defendant's shredded whole wheat biscuits before the same were published and/or distributed and, if so, state which of said advertisements were so approved.

Answer: No. The Kellogg Company has no control over this type of dealer-advertising. The copy is run arbitrarily by the dealer and is not prepared by, submitted to, or approved by defendant.

[Note: Answers to Interrogatories signed by "Ross T. Adams, Secretary," and verified by him May 4, 1933.]

LIST REFERRED TO IN ANSWER TO INTERROGATORY No. 83.

WHOLE WHEAT BISCUIT.

DALLAS TERRITORY No. 2.

Reporter	Abilene	Texas
News	Abilene	Texas
Globe	Amarillo	Texas
News	Amarillo	Texas
American	Austin	Texas
Statesman	Austin	Texas
Enterprise	Beaumont	Texas
Journal	Beaumont	Texas
Bulletin	Brownwood	Texas
Times-Herald	Dallas	Texas
Chronicle	Houston	Texas
Avalanche	Lubbock	Texas
Journal	Lubbock	Texas
News	Paris	Texas
Times	San Angelo	Texas
Standard	San Angelo	Texas
Light	San Antonio	Texas
Telegram	Temple	Texas
Courier Times	Tyler	Texas
Telegraph	Tyler	Texas
Record	Wichita Falls	Texas
Times	Wichita Falls	Texas
Democrat	Sherman	Texas
Herald	Brownsville	Texas
News Tribune	Waco	Texas
Times Herald	Waco	Texas

DENVER TERRITORY No. 2.

Gazette	Colorado Springs	Colorado
Telegraph	Colorado Springs	Colorado
Post Register	Idaho Falls	Idaho
Tribune	Pocatello	Idaho

WHOLE WHEAT BISCUIT.

Denver Territory No. 2.

Gazette	Billings	Montana
Gazette	Billings	Montana
Montana Standard	Butte	Montana
Post	Butte	Montana
Journal	Albuquerque	New Mexico
Journal	Albuquerque	New Mexico
Herald Post	El Paso	Texas
Tribune Herald	Casper	Wyoming
Tribune Leader	Cheyenne	Wyoming
Tribune	Salt Lake City	Utah
Telegram	Salt Lake City	Utah
Star Journal	Pueblo	Colorado
Gazette	Phoenix	Arizona
Republican	Phoenix	Arizona
Standard Examiner	Ogden	Utah

Boston Territory No. 1.

Journal	Augusta	Maine
News	Bangor	Maine
LaMessenger (French)	Lewiston	Maine
Journal	Lewiston	Maine
Sun	Lewiston	Maine
Express	Portland	Maine
Press Herald	Portland	Maine
Sentinel	Waterville	Maine
Enterprise	Brockton	Massachusetts
Herald News	Fall River	Massachusetts
Times	New Bedford	Massachusetts
Transcript	North Adams	Massachusetts
Eagle	Pittsfield	Massachusetts
News	Salem	Massachusetts
Sentinel	Keene	New Hampshire
Leader	Manchester	New Hampshire
Union	Manchester	New Hampshire

WHOLE-WHEAT BISCUIT.

Boston Territory No. 1.

Telegraph	Nashua	New Hampshire
Times	Pawtucket	Rhode Island
Bulletin	Providence	Rhode Island
Free Press	Burlington	Vermont

Cleveland Territory No. 1.

Beacon Journal	Akron	Ohio
Times Gazette	Ashland	Ohio
Messenger	Athens	Ohio
Herald	Circleville	Ohio
Dispatch	Columbus	Ohio
Citizen	Columbus	Ohio
News	Dayton	Ohio
Gazette	Delaware	Ohio
Courier	Findlay	Ohio
Advocate	Greenville	Ohio
Gazette	Lancaster	Ohio
News	Mansfield	Ohio
Journal	Mansfield	Ohio
Star	Marion	Ohio
Banner	Mt. Vernon	Ohio
Republican News	Mt. Vernon	Ohio
Call	Piqua	Ohio
Sun	Springfield	Ohio
News	Springfield	Ohio
Republican	Findlay	Ohio
Democrat	Kenton	Ohio
News	Lima	Ohio
Star	Lima	Ohio

WHOLE WHEAT BISCUIT.

Chicago Territory No. 1.

Beacon News	Aurora	Illinois
Pantagraph	Bloomington	Illinois
News Gazette	Champaign	Illinois
Commercial News	Danville	Illinois
Courier News	Elgin	Illinois
Journal Standard	Freeport	Illinois
Register Mail	Galesburg	Illinois
Herald News	Joliet	Illinois
Star Courier	Kewanee	Illinois
Journal	Peoria	Illinois
Transcript	Peoria	Illinois
Register Republic	Rockford	Illinois
Star	Rockford	Illinois
Gazette	Sterling	Illinois
Post Crescent	Appleton	Wisconsin
News	Beloit	Wisconsin
Press Gazette	Green Bay	Wisconsin
Gazette	Janesville	Wisconsin
Northwestern	Oshkosh	Wisconsin
Capital Times	Madison	Wisconsin
Press	Sheboygan	Wisconsin
Record Herald	Wausau	Wisconsin
News	Kenosha	Wisconsin

Minneapolis Territory No. 2.

Journal	Minneapolis	Minnesota
Dispatch	St. Paul	Minnesota
Pioneer Press	St. Paul	Minnesota
Forum	Fargo	North Dakota
Forum	Fargo	North Dakota
Herald	Duluth	Minnesota
News Tribune	Duluth	Minnesota
Free Press	Mankato	Minnesota
Tribune	Bismarck	North Dakota

WHOLE WHEAT BISCUIT.

Minneapolis Territory No. 2.

Herald	Grand Forks	North Dakota
Herald	Grand Forks	North Dakota
Tribune & Leader Press	La Crosse	Wisconsin
Telegram	Eau Claire	Wisconsin
Leader	Eau Claire	Wisconsin

New York Territory No. 1.

Post	Bridgeport	Connecticut
Telegram	Bridgeport	Connecticut
News	Danbury	Connecticut
Times	Hartford	Connecticut
Record	Meriden	Connecticut
Register	New Haven	Connecticut
Hour	Norwalk	Connecticut
Advocate	Stamford	Connecticut
Republican	Waterbury	Connecticut
American	Waterbury	Connecticut

Oklahoma City Territory No. 2.

News	Ada	Oklahoma
Times Democrat	Altus	Oklahoma
Enterprise	Bartlesville	Oklahoma
Eagle	Enid	Oklahoma
News	Enid	Oklahoma
Phoenix	Muskogee	Oklahoma
Times Democrat	Muskogee	Oklahoma
Oklahoma	Oklahoma City	Oklahoma
Times	Oklahoma City	Oklahoma
Democrat	Okmulgee	Oklahoma
Times	Okmulgee	Oklahoma
News	Stillwater	Oklahoma
Tribune	Tulsa	Oklahoma

WHOLE WHEAT BISCUIT.

Pittsburgh Territory No. 1.

Review	E. Liverpool	Ohio
Times	Marietta	Ohio
Tribune Chronicle	Warren	Ohio
Times	Erie	Pennsylvania
Tribune	Johnstown	Pennsylvania
News Telegraph	Sharon	Pennsylvania
Eagle	Butler	Pennsylvania
News	New Castle	Pennsylvania
Press	Pittsburgh	Pennsylvania
Herald	Uniontown	Pennsylvania
Genius	Uniontown	Pennsylvania
Tribune Republican	Meadville	Pennsylvania
Republican	Meadville	Pennsylvania
News	Wheeling	West Virginia

Kansas City Territory No. 2.

News	Hutchinson	Kansas
Herald	Hutchinson	Kansas
Beacon	Wichita	Kansas
Capital	Topeka	Kansas
Globe	Joplin	Missouri
News Herald	Joplin	Missouri
News Press	St. Joseph	Missouri
Gazette	St. Joseph	Missouri
Headlight	Pittsburg	Kansas
Sun	Pittsburg	Kansas

Memphis Territory No. 1.

Gazette	Little Rock	Arkansas
Times	Shreveport	Louisiana
News	Chattanooga	Tennessee
News Sentinel	Knoxville	Tennessee
Banner	Nashville	Tennessee

WHOLE WHEAT BISCUIT.

Des Moines Territory No. 2.

Register	Des Moines	Iowa
Tribune	Des Moines	Iowa
Gazette & Republican	Cedar Rapids	Iowa
Democrat & Leader	Davenport	Iowa
Times	Davenport	Iowa
Courier	Waterloo	Iowa

Detroit Territory No. 1.

News	Alpena	Michigan
News	Ann Arbor	Michigan
Tribune	Cheboygan	Michigan
Journal	Lansing	Michigan
Press	Pontiac	Michigan
News	Sault Ste. Marie	Michigan
Record Eagle	Traverse City	Michigan
Press	Grand Rapids	Michigan
Sentinel	Holland	Michigan
Chronicle	Muskegon	Michigan
Times Herald	Port Huron	Michigan
Journal	Sturgis	Michigan
News Sentinel	Fort Wayne	Indiana
News Times	South Bend	Indiana

Richmond Territory No. 1.

Ledger Dispatch	Norfolk	Virginia
News Leader	Richmond	Virginia
Times	Roanoke	Virginia
World News	Roanoke	Virginia
News	Greenville	Virginia
Piedmont	Greenville	Virginia

Pittsburgh Territory.

Herald-Star	Steubenville	Ohio

WHOLE WHEAT BISCUIT.

Seattle Territory No. 2.

Statesman	Boise	Idaho
Statesman	Salem	Oregon
Herald	Bellingham	Washington
Spokesman Review	Spokane	Washington
Chronicle	Spokane	Washington
World	Wenatchee	Washington
Herald	Yakima	Washington
Republic	Yakima	Washington
Register-Guard	Eugene	Oregon
Mail Tribune	Medford	Oregon
Herald	Everett	Washington
Bulletin	Walla Walla	Washington

San Francisco Territory No. 2.

Bee Republican	Fresno	California
Sun & Press Telegram	Long Beach	California
Herald Express	Los Angeles	California
Times	Los Angeles	California
Star News	Pasadena	California
Sun	San Diego	California
Californian	Bakersfield	California
Signal	Huntington Park	California
Sun	San Bernardino	California
Telegram	San Bernardino	California
Register	Santa Ana	California

St. Louis Territory No. 1.

Journal	Springfield	Illinois
Globe Democrat	St. Louis	Missouri
Post Dispatch	St. Louis	Missouri
Press	Springfield	Missouri
Tribune	Terre Haute	Indiana

WHOLE WHEAT BISCUIT.

Syracuse Territory No. 1.

Advertiser	Elmora	New York
Star Gazette	Elmora	New York
Democrat & Chronicle	Rochester	New York
Times Union	Rochester	New York
Union Star	Schenectady	New York
Journal	Syracuse	New York
Post Standard	Syracuse	New York
News	Albany	New York
News	Batavia	New York

Atlanta Territory No. 1.

Times Union	Jacksonville	Florida
Herald	Miami	Florida
Tribune	Tampa	Florida
Journal	Atlanta	Florida

Cincinnati Territory No. 1.

Palladium	Richmond	Indiana
Item	Richmond	Indiana
Gazette	Chillicothe	Ohio
Telegraph	Bluefield	West Virginia
Sunset News	Bluefield	West Virginia
Gazette	Charleston	West Virginia
Advertiser	Huntington	West Virginia
Herald Dispatch	Huntington	West Virginia

Omaha Territory No. 2.

Journal	Sioux City	Iowa
Journal	Sioux City	Iowa
Journal	Lincoln	Nebraska
Journal	Lincoln	Nebraska
Star	Lincoln	Nebraska
World Herald	Omaha	Nebraska
World Herald	Omaha	Nebraska
Sun	Beatrice	Nebraska

WHOLE WHEAT BISCUIT.

PHILADELPHIA TERRITORY No. 1.

Every Evening	Wilmington	Delaware
Call	Allentown	Pennsylvania
Express	Easton	Pennsylvania
News	Harrisburg	Pennsylvania
Patriot	Harrisburg	Pennsylvania
New Era	Lancaster	Pennsylvania
Intelligencer Journal	Lancaster	Pennsylvania
Eagle	Reading	Pennsylvania
Daily	Sunbury	Pennsylvania
Sun	Williamsport	Pennsylvania
Gazette Bulletin	Williamsport	Pennsylvania
Gazette & Daily	York	Pennsylvania
Press	Bloomsburg	Pennsylvania
Sentinel	Carlisle	Pennsylvania
Public Opinion	Chambersburg	Pennsylvania
Times	Gettysburg	Pennsylvania
Sun	Hanover	Pennsylvania
Sentinel	Lewistown	Pennsylvania
Standard	Lykens	Pennsylvania
Review	Towanda	Pennsylvania
Herald	Hagerstown	Maryland
Mail	Hagerstown	Maryland
Gazette	Trenton	New Jersey
Times	Trenton	New Jersey
News	Bridgeton	New Jersey
Republican	Millville	New Jersey
Courier	Camden	New Jersey
Post	Camden	New Jersey

PLAINTIFF'S EXHIBIT NO. 1.

Specimen of Carton of Defendant.

PLAINTIFF'S EXHIBIT NO. 2.

Specimen of Carton of Defendant.

PLAINTIFF'S EXHIBIT NO. 3.

Specimen of Carton of Defendant.

PLAINTIFF'S EXHIBIT NO. 4.

Specimen of Carton of Defendant.

PLAINTIFF'S EXHIBIT NO. 5.

Specimen of Carton of Defendant.

Plaintiff's Exhibit 6.

KELLOGG TOASTED CORN FLAKE CO.
Battle Creek, Mich.

January 14, 1922.

Dear Sir:

We have your letter of January 7, making inquiry of our Wheat Biscuit.

We have discontinued the manufacture of this product at the present time, and so are unable to supply you. We suggest, however, that you offer your customers some Shredded Krumbles, when they ask for Wheat Biscuit. This is a fine whole wheatfood and of the same nature as the Biscuit except that it is not in Biscuit form.

Yours very truly,

KELLOGG TOASTED CORN FLAKE CO.
J. F. Eckert
District Sales Manager

Plaintiff's Exhibit 7.

THE SHREDDED WHEAT COMPANY

January 19th, 1922.

Kellogg Toasted Corn Flake Company,
Battle Creek,
Michigan.

Gentlemen:

We have heard in trade circles that your Company is contemplating placing on the market a whole wheat biscuit similar to the biscuit produced and sold by us for many years.

We also notice on the carton of Kellogg's Corn Flakes, a list of Kellogg's Ready to Eat Products, containing the item "Shredded Whole Wheat Biscuit."

As you know, our Company claims that it possesses certain rights in the use of the name "Shredded Wheat", together with the peculiar form, size and style of biscuit, which is universally recognized as a product of this Company.

Our object in writing you is to frankly inquire whether the information obtained by us in the trade is or is not correct. You will, of course, realize that if it is your intention to market a whole wheat biscuit, we would like to have you understand thoroughly the legal claims which we make before you incur any expense in manufacturing or marketing a biscuit which so nearly resembles our product as to be calculated to deceive the public.

Yours very truly,

THE SHREDDED WHEAT COMPANY

A. J. Porter
President

Plaintiff's Exhibit 8.

April 8, 1927.

Kellogg Company,
Battle Creek,
Michigan.

Dear Sirs:

Our attention has been called by our client, The Shredded Wheat Company, of Niagara Falls, N. Y., to the fact that you are now offering for sale a cereal food similating in appearance the product sold by our client for upwards of thirty years past, and offered

to the trade in cartons and cases inscribed "Shredded Whole Wheat Biscuit."

Some four or five years ago, you offered for sale a produce of a wholly different character and appearance, labelled "Shredded Whole Wheat Biscuit." At that time, immediately on learning that you were applying to that product the name "Shredded Whole Wheat Biscuit", we protested to you in writing, and the sale of this product was discontinued so shortly thereafter that we had no occasion to resort to the processes of law to enforce our client's rights.

Your re-entry into the use of the name "Shredded Whole Wheat Biscuit" and the use of that name in connection with a product similating in appearance the distinctive and widely known product of our client is unfair and unlawful, and we are instructed by our client to demand that you discontinue forthwith the sale of this product, and also to discontinue any and all use of the name "Shredded Whole Wheat Biscuit", or any name similar thereto, and that you furnish satisfactory assurance against any resumption of either of those practices. Should you fail to comply with this demand, our instructions are to proceed against you at once for an injunction against continuance of this unfair and unlawful practice and for an accounting of the damages sustained by our client.

Yours very truly,

BREED, ABBOTT & MORGAN

SF:EL

Plaintiff's Exhibit 9.

W. H. CRICHTON CLARKE
71 West 23rd Street
New York.

April 22nd, 1927.

Breed, Abbott & Morgan, Esqs.,
32 Liberty Street,
New York City.

REGISTERED MAIL

Gentlemen:

In further answer to your letter of April 8, 1927 I refer you to my letters to the Shredded Wheat Company dated January 25, 1922 and to the Canadian Shredded Wheat Company, Ltd. dated August 5, 1925.

Those letters represent the position to which the Kellogg Company has always adhered and will continue to adhere. We have marketed Kellogg's Shredded Wheat and Kellogg's Shredded Wheat Biscuit for many years and we propose to continue to do so. We decline to recognize in the Shredded Wheat Company any valid monopoly in the same Shredded Wheat for biscuit or other shredded products. We have never in any way simulated any packages or exclusive features of the Shredded Wheat Company.

We never took any goods off the market on the request, demand or notice of the Shredded Wheat Company but have always asserted our rights and exercised them, and we propose to continue in the future to exercise our rights freely and independently and without any reference to or recognition of any exclusive rights in the Shredded Wheat Company in or to the words Shredded Wheat.

We have always made our position perfectly clear to your client and it is rather late now for your client

to affect any misunderstanding of our attitude and rights and intentions.

We have exercised our right to apply the descriptive term "Shredded Wheat" to our products for some years. We answered your demands of some years back with a firm assertion and employment of our right. Your clients never had any lawful grounds on which to complain of our activities and it is too (w)
late not to attempt to revive a situation in which it was your client who backed down in the face of our asserted rights, intentions and activities, and who declined to take the prompt action which we so firmly challenged them at that time to take.

Yours very truly,
W. H. CRICHTON CLARKE

Plaintiff's Exhibit 10.

May 10, 1927.

W. H. Crichton Clarke, Esq.,
71 West 23rd Street,
New York City.

Dear Sir:

We acknowledge the receipt of your letter of April 22nd in which you assert the intention of your client to exercise what you term its rights, regardless of the rights of our client, The Shredded Wheat Company. We are replying to your letter solely because of the erroneous statement of facts it contains.

The Kellogg Company has not for a number of years, as you imply, marketed a whole wheat biscuit in the semblance of the product made by our client. Information has only recently come to us indicating that your client is now offering for sale, in a limited way, a biscuit which does resemble our client's product and is calculated to deceive the consumer.

A number of years ago, the Kellogg Company, or its predecessor, manufactured and sold for a time a product which it called "Kellogg's Toasted Wheat Biscuit." Thereafter the Kellogg Company commenced calling its product "Shredded Whole Wheat Biscuit." Upon this fact coming to the attention of The Shredded Wheat Company, it protested against the infringement of its rights in the use of this name.

You thereupon, in behalf of your client, wrote a letter asserting the invention of your client to proceed without regard to our client's rights, but your client advised the trade that it had discontinued the manufacture of this product, so that there was no occasion for The Shredded Wheat Company to take further action at at time.

Now, after a lapse of a considerable period of time, the Kellogg Company has changed the form of its product so as to closely imitate the biscuit of our client and is offering that product for sale under the name "Shredded Whole Wheat Biscuit."

Whatever may have been the intention of the Kellogg Company in the past, and there are indications of its desire to appropriate the good-will of The Shredded Wheat Company if this could be done with impunity, the tentative efforts made along these lines appear to have been abandoned following the protests made by our client notwithstanding the statement made in your letter that the rights of our client would be ignored.

If the Kellogg Company now persists in the unlawful practices to which we have called attention, we shall take such steps as may be proper to stop these practices.

Yours very truly,

BREED, ABBOTT & MORGAN

SF
WCB.P

Plaintiff's Exhibit 11.

W. H. CRICHTON CLARKE
71 West 23rd Street
New York.

May 16th, 1927.

Breed, Abbott & Morgan, Esqs.,
32 Liberty Street,
New York City.

Gentlemen:

I have your letter of May 10th in the matter of the Shredded Wheat Company against the Kellogg Company.

I deny emphatically that the Kellogg Company has ever discontinued the manufacture of Shredded Wheat or Shredded Wheat Biscuit on account of any rights claimed by the Shredded Wheat Company. It has marketed these products in the past and intends to continue to market the same in the fugure.

There is only one law in this country and that law works for us as well as against us. My client, then known as Toasted Corn Flake Company once tried to stop the Quaker Oats Company from marketing Toasted Corn Flakes a formerly patented product as Shredded Wheat Biscuit is. The courts held those words to be descriptive although they are less so than the term Shredded Wheat is. We are willing to prove to you at any time you choose that the law of this country will protect us as certainly as it protected the Quaker Oats Company.

We have marketed Shredded Wheat Biscuit for years and we propose to continue our operations.

We courteously advised you of our operations and rights some years ago. You should have acted then. It is too late now to complain, although even then you had no lawful monopoly in the name or product.

I can only repeat that our position has been set forth in letters written to you in the past as well during the present correspondence.

We deny that you have any exclusive rights in the words Shredded Wheat or in the biscuit itself and we are proceeding now as we have in the past to exercise our own independent rights in the matter.

Yours very truly,

W. H. CRICHTON CLARKE

Plaintiff's Exhibit No. 12-a.

"LOS ANGELES EVENING HERALD,"
March 25, 1932.

ADVERTISEMENT

MANY FEATURES FOR NEW SHREDDED BISCUIT

Kellogg's WHOLE WHEAT Biscuit Set New Standard for This Type of Cereal

Local grocers are featuring a new shredded biscuit developed by the Kellogg Company of Battle Creek, Michigan, which is a decided improvement in many ways. The improved Kellogg biscuit is "pressure-cooked" by a special process that retains the complete food value of the whole wheat. At the same time, delightful flavor is baked in.

Other improvements are a biscuit of more convenient, economical size. Two of these new biscuits just fit the cereal bowl. You get 15 to the package instead of the usual dozen. And every biscuit is toasted a rich golden brown on both top and bottom—not just one side. This makes them exceptionally crisp.

These new biscuits have been analyzed by the Medical Arts Laboratory of Philadelphia and found to be so rich in food value that every package is certified. Any mother can now be certain her family is getting a well-balanced food with these new Kellogg biscuits.

Kellogg's WHOLE WHEAT Biscuits are tasty for breakfast, lunch, children's suppers. Enjoy cool with fruits or sweetened with honey—in addition to the milk or cream.

You can identify these new biscuits by the name, Kellogg's, and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-b.

"LANCASTER DAILY INTELLIGENCER JOURNAL,"
March 19, 1932.

MANY FEATURES FOR NEW SHREDDED BISCUIT

Kellogg's WHOLE WHEAT Biscuit Set New Standard for This Type of Cereal

Local grocers are featuring a new shredded biscuit developed by the Kellogg Company of Battle Creek, Michigan, which is a decided improvement in many ways. The improved Kellogg biscuit is "pressure-cooked" by a special process that retains the complete food value of the whole wheat. At the same time, delightful flavor is baked in.

Other improvements are a biscuit of more convenient, economical size. Two of these new biscuits just fit the cereal bowl. You get 15 to the package instead of the usual dozen. And every biscuit is toasted a rich golden brown on both top and bottom—not just one side. This makes them exceptionally crisp.

These new biscuits have been analyzed by the Medical Arts Laboratory of Philadelphia and found to be so rich in food value that every package is certified. Any mother can now be certain her family is getting a well-balanced food with these new Kellogg biscuits.

Kellogg's WHOLE WHEAT Biscuits are tasty for breakfast, lunch, children's suppers. Extra good with fruits or sweetened with honey—in addition to the milk or cream.

You can identify these new biscuits by the name, Kellogg's, and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-c.

"THE HOUSTON CHRONICLE"
(Houston, Texas),
March 25, 1932.

MANY FEATURES FOR NEW SHREDDED BISCUIT

Kellogg's WHOLE WHEAT Biscuit Set New Standard for This Type of Cereal

Local grocers are featuring a new shredded biscuit developed by the Kellogg Company of Battle Creek, Michigan, which is a decided improvement in many ways. The improved Kellogg biscuit is "pressure-cooked" by a special process that retains the complete food value of the whole wheat. At the same time, delightful flavor is *baked in*.

Other improvements are a biscuit of more convenient, economical size. Two of these new biscuits just fit the cereal bowl. You get 15 to the package instead of the usual dozen. And every biscuit is toasted a rich golden brown on both top and bottom—not just one side. This makes them exceptionally crisp.

These new biscuits have been analyzed by the Medical Arts Laboratory of Philadelphia and found to be so rich in food value that every package is certified. Any mother can now be certain her family is getting a well-balanced food with these new Kellogg biscuits.

Kellogg's WHOLE WHEAT Biscuits are tasty for breakfast, lunch, children's suppers. Extra good with fruits or sweetened with honey—in addition to the milk or cream.

You can identify these new biscuits by the name, Kellogg's, and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-d.

"COURIER POST"
(Philadelphia, Pa.),
February, 1932.

NEW SHREDDED BISCUIT MORE ECONOMICAL

Just One of the Improvements Developed for Kellogg's WHOLE WHEAT Biscuits

When the Kellogg Company were perfecting their new shredded biscuit, they decided that one of the improvements would be in the size of the biscuit. Kellogg's WHOLE WHEAT Biscuits are a new convenient size. Two are just right for a [illegible] in the cereal bowl without crumbling. Also you get 15 to the package, instead of the usual dozen.

The new Kellogg biscuits have a most delicious taste and crispness. They are "pressure-cooked"—a special process that *bakes in* the rich flavor. And every biscuit is double toasted—browned on both top and bottom.

Of even greater interest is the fact that Kellogg's WHOLE WHEAT Biscuits are so rich in food value that every package is certified by the Medical Arts Laboratory of Philadelphia. "Pressure-cooking" retains all the food value of the whole wheat, as well as making the biscuit easier to digest.

You'll find these new shredded biscuits a very welcome improvement. Delightful served with hot or cold milk or cream—fruits or honey added—for breakfast, lunch the children's supper.

Grocers say that sales are steadily increasing. Identify this improved cereal by the familiar red-and-green Kellogg's package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-e.

"MIAMI, FLA., HERALD,"
April 27, 1932.

NEW SHREDDED BISCUIT MORE ECONOMICAL

Just One of the Improvements Developed for Kellogg's WHOLE WHEAT Biscuits

When the Kellogg Company were perfecting their new shredded biscuit, they decided that one of the improvements would be in the size of the biscuit. Kellogg's WHOLE WHEAT Biscuits are a new, convenient size. Two are just right for a serving and fit the cereal bowl without crumbling. Also you get 15 to the package, instead of the usual dozen.

The new Kellogg biscuits have a most delicious taste and crispness. They are "pressure-cooked" —a special process that *bakes* in the rich flavor. And every biscuit is double toasted—browned on both top and bottom.

Of even greater interest is the fact that Kellogg's WHOLE WHEAT Biscuits are so rich in food value that every package is certified by the Medical Arts Laboratory of Philadelphia. "Pressure-cooking" retains all the food value of the whole wheat, as well as making the biscuit easier to digest.

You'll find these new shredded biscuits a very welcome improvement. Delightful served with hot or cold milk or cream — fruits or honey added—for breakfast, lunch, the children's supper.

Grocers say that sales are steadily increasing. Identify this improved cereal by the familiar red-and-green Kellogg's package. Made by Kellogg in Battle Creek.

—Advertisement.

Plaintiff's Exhibit No. 12-f.

"LOS ANGELES EVENING HERALD"
(Los Angeles, California),
March 15, 1932.

NEW SHREDDED BISCUIT MORE ECONOMICAL

Just One of the Improvements Developed for Kellogg's WHOLE WHEAT Biscuits

When the Kellogg Company were perfecting their new shredded biscuit, they decided that one of the improvements would be in the size of the biscuit. Kellogg's WHOLE WHEAT Biscuits are a new, convenient size. Two are just right for a serving and fit the cereal bowl without crumbling. Also you get 15 to the package, instead of the usual dozen.

The new Kellogg biscuits have a most delicious taste and crispness. They are "pressure-cooked"—a special process that *bakes in* the rich flavor. And every biscuit is double toasted—browned on both top and bottom.

Of even greater interest is the fact that Kellogg's WHOLE WHEAT Biscuits are so rich in food value that every package is certified by the Medical Arts Laboratory of Philadelphia. "Pressure-cooking" retains all the food value of the whole wheat, as well as making the biscuit easier to digest.

You'll find these new shredded biscuits a very welcome improvement. Delightful served with hot or cold milk or cream—fruits or honey added—for breakfast, lunch, the children's supper.

Grocers say that sales are steadily increasing. Identify this improved cereal by the familiar red-and-green Kellogg's package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-g.

"LOS ANGELES TIMES MERCHANDISER,"
April, 1932.

NEW SHREDDED BISCUIT MORE ECONOMICAL

Just One of the Improvements Developed for Kellogg's WHOLE WHEAT Biscuits

When the Kellogg Company were perfecting their new shredded biscuit, they decided that one of the improvements would be in the size of the biscuit. Kellogg's WHOLE WHEAT Biscuits are a new, convenient size. Two are just right for a serving and fit the cereal bowl without crumbling. Also you get 15 in the package, instead of the usual dozen.

The new Kellogg biscuits have a most delicious taste and crispness. They are "pressure-cooked" —a special process that *bakes in* the rich flavor. And every biscuit is double toasted—browned on both top and bottom.

Of even greater interest is the fact that Kellogg's WHOLE WHEAT Biscuits are so rich in food value that every package is certified by the Medical Arts Laboratory of Philadelphia. "Pressure-cooking" retains all the food value of the whole wheat, as well as making the biscuit easier to digest.

You'll find these new shredded biscuits a very welcome improvement. Delightful served with hot or cold milk or cream—fruits or honey added—for breakfast, lunch, the children's supper.

Grocers say that sales are steadily increasing. Identify this improved cereal by the familiar red-and-green Kellogg's package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-h.

LIMA, OHIO.

NEW SHREDDED BISCUIT TOASTED ON BOTH SIDES

Extra Crispness Just One of Many Improvements Developed for Kellogg's WHOLE WHEAT Biscuit

LIMA-DTD

In line with its policy of constant improvement, the Kellogg Company some time ago introduced a new shredded whole wheat biscuit which offers several outstanding improvements in this type of cereal.

The new Kellogg biscuit is "pressure-cooked" by a special process that retains the full food value of the whole wheat. At the same time it produces a delicious mellow flavor and makes the biscuit very easy to digest.

The biscuits are also much crisper and crunchier, for they are toasted on both top and bottom—not just one side. Incidentally they are also a new, convenient size to fit the cereal bowl without crumbling. And you get 15 to the package instead of the usual dozen.

As evidence of the high food value of the Kellogg biscuit, the Medical Arts Laboratory of Philadelphia made a careful analysis and certify every package.

Grocers say Kellogg's WHOLE WHEAT Biscuits are winning wide favor. Healthful and delightful for any meal. Especially good with hot milk. Identify this improved food product by the name Kellogg's and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-i.

"NORFOLK LEDGER DISPATCH"
(Norfolk, Virginia),
March 29, 1932.

NEW SHREDDED BISCUIT TOASTED ON BOTH SIDES

Extra Crispness Just One of Many Improvements Developed for Kellogg's WHOLE WHEAT Biscuit

In line with its policy of constant improvement, the Kellogg Company some time ago introduced a new shredded whole wheat biscuit which offers several outstanding improvements in this type of cereal.

The new Kellogg biscuit is "pressure-cooked" by a special process that retains the full food value of the whole wheat. At the same time it produces a delicious mellow flavor and makes the biscuit very easy to digest.

The biscuits are also much crisper and crunchier, for they are toasted on both top and bottom—not just one side. Incidentally they are also a new, convenient size to fit the cereal bowl without crumbling. And you get 15 to the package instead of the usual dozen.

As evidence of the high food value of the Kellogg biscuit, the Medical Arts Laboratory of Philadelphia made a careful analysis and certify every package.

Grocers say Kellogg's WHOLE WHEAT Biscuits are winning wide favor. Healthful and delightful for any meal. Especially good with hot milk. Identify this improved food product by the name Kellogg's and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-j.

"ST. LOUIS DAILY GLOBE-DEMOCRAT,"
March 30, 1932.

NEW SHREDDED BISCUIT TOASTED ON BOTH SIDES

Extra Crispness Just One of Many Improvements Developed for Kellogg's WHOLE WHEAT Biscuit

In line with its policy of constant improvement, the Kellogg Company some time ago introduced a new shredded whole wheat biscuit which offers several outstanding improvements in this type of cereal.

The new Kellogg biscuit is "pressure-cooked" by a special process that retains the full food value of the whole wheat. At the same time it produces a delicious mellow flavor and makes the biscuit very easy to digest.

The biscuits are also much crisper and crunchier, for they are toasted on both top and bottom—not just one side. Incidentally they are also a new, convenient size to fit the cereal bowl without crumbling. And you get 15 to the package instead of the usual dozen.

As evidence of the high food value of the Kellogg biscuit, the Medical Arts Laboratory of Philadelphia made a careful analysis and certify every package.

Grocers say Kellogg's WHOLE WHEAT Biscuits are winning wide favor. Healthful and delightful for any meal. Especially good with hot milk. Identify this improved food product by the name Kellogg's and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-k.

BRIDGETON, PA., DAILY PAPER,
March 30, 1932.

NEW SHREDDED BISCUIT TOASTED ON BOTH SIDES

Extra Crispness Just One of Many Improvements Developed for Kellogg's WHOLE WHEAT Biscuit

In line with its policy of constant improvement, the Kellogg Company some time ago introduced a new shredded whole wheat biscuit which offers several outstanding improvements in this type of cereal.

The new Kellogg biscuit is "pressure-cooked" by a special process that retains the full food value of the whole wheat. At the same time it produces a delicious mellow flavor and makes the biscuit very easy to digest.

The biscuits are also much crisper and crunchier, for they are toasted on both top and bottom—not just one side. Incidentally they are also a new, convenient size to fit the cereal bowl without crumbling. And you get 15 to the package instead of the usual dozen.

As evidence of the high food value of the Kellogg biscuit, the Medical Arts Laboratory of Philadelphia made a careful analysis and certify every package.

Grocers say Kellogg's WHOLE WHEAT Biscuits are winning wide favor. Healthful and delightful for any meal. Especially good with hot milk. Identify this improved food product by the name Kellogg's and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-1.

"WAUSAU HERALD,"
(Wausau, Wisconsin),
April 1, 1932.

NEW SHREDDED BISCUIT EXTRA RICH IN VITAL FOOD ELEMENTS

Laboratory Certifies the Improved Kellogg's WHOLE WHEAT Biscuit

Before the new Kellogg's WHOLE WHEAT Biscuit was introduced, the Kellogg Company submitted it to the Medical Arts Laboratory of Philadelphia, which found it so rich in food value that every package could be certified.

This means that mothers can now know definitely that their children are getting a well-balanced food whenever they serve the new Kellogg biscuits and milk—rich in minerals, vitamins, proteins—nourishing and healthful.

And Kellogg's WHOLE WHEAT Biscuits offer many other features. The biscuits are "pressure-cooked" by a special process that *bakes in* the delicious flavor. At the same time, it retains all the valuable food elements of the whole wheat.

Kellogg's WHOLE WHEAT Biscuits are much crisper and tastier because they are toasted a tempting brown on both top and bottom—not just one side. They are baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package.

Naturally this tasty new biscuit is welcome for breakfast, lunch, children's suppers—any meal, in fact. Ready to serve with hot or cold milk or cream. Sold by grocers in the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-m.

"THE EVENING BULLETIN"
(Providence, Rhode Island),
March 22, 1932.

NEW SHREDDED BISCUIT EXTRA RICH IN VITAL FOOD ELEMENTS

Laboratory Certifies the Improved Kellogg's WHOLE WHEAT Biscuit

Before the new Kellogg's WHOLE WHEAT Biscuit was introduced, the Kellogg Company submitted it to the Medical Arts Laboratory of Philadelphia, which found it so rich in food value that every package could be certified.

This means that mothers can now know definitely that their children are getting a well-balanced food whenever they serve the new Kellogg biscuits and milk—rich in minerals, vitamins, proteins—nourishing and healthful.

And Kellogg's WHOLE WHEAT Biscuits offer many other features. The biscuits are "pressure-cooked" by a special process that *bakes in* the delicious flavor. At the same time, it retains all the valuable food elements of the whole wheat.

Kellogg's WHOLE WHEAT Biscuits are much crisper and tastier because they are toasted a tempting brown on both top and bottom—not just one side. They are baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package.

Naturally this tasty new biscuit is welcome for breakfast, lunch, children's suppers—any meal, in fact. Ready to serve with hot or cold milk or cream. Sold by grocers in the red-and-green package. Made by Kellogg in Battle Creek.

—Advertisement

Plaintiff's Exhibit No. 12-n.

"DAILY TIMES"
(Erie, Pennsylvania),
March 25, 1932.

NEW SHREDDED BISCUIT MAKING BIG HIT

Grocers Say Housewives Welcome Many Improvements in Kellogg's WHOLE WHEAT Biscuit

Local grocers have pronounced the new Kellogg's WHOLE WHEAT Biscuit one of the most up-to-date food products on the market. It offers many outstanding and popular features. For one thing, the biscuits are toasted a golden brown on both top and bottom—not just one side.

The new Kellogg biscuit is also baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package instead of a dozen.

Mothers will especially be interested in the fact that every package is certified for food value by the Medical Arts Laboratory of Philadelphia. These new biscuits are considered a splendid food for both adults and children. With either hot or cold milk, you achieve a well-balanced amount of vitamins, minerals, proteins and carbohydrates.

The Kellogg Company uses a special process of "pressure-cooking" which retains all the food value of the whole wheat and makes it very easy to digest. At the same time it develops delicious flavor.

These improved biscuits can be identified by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-c.

"THE GREENSBORO, N. C., RECORD"
(Greensboro, North Carolina),
March 25, 1932.

NEW SHREDDED BISCUIT MAKING BIG HIT

Grocers Say Housewives Welcome Many Improvements in Kellogg's WHOLE WHEAT Biscuit

Local grocers have pronounced the new Kellogg's WHOLE WHEAT Biscuit one of the most up-to-date food products on the market. It offers many outstanding and popular features. For one thing, the biscuits are toasted a golden brown on both top and bottom—not just one side.

The new Kellogg biscuit is also baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package instead of a dozen.

Mothers will especially be interested in the fact that every package is certified for food value by the Medical Arts Laboratory of Philadelphia. These new biscuits are considered a splendid food for both adults and children. With either hot or cold milk, you achieve a well-balanced amount of vitamins, minerals, proteins and carbohydrates.

The Kellogg Company uses a special process of "pressure-cooking" which retains all the food value of the whole wheat and makes it very easy to digest. At the same time it develops delicious flavor.

These improved biscuits can be identified by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-p.

"DES MOINES TRIBUNE"
(Des Moines, Iowa),
April 1, 1932.

ADVERTISEMENT.

NEW SHREDDED BISCUIT MAKING BIG HIT

Grocers Say Housewives Welcome Many Improvements in Kellogg's WHOLE WHEAT Biscuit

Local grocers have pronounced the new Kellogg's WHOLE WHEAT Biscuit one of the most up-to-date food products on the market. It offers many outstanding and popular features. For one thing, the biscuits are toasted a golden brown on both top and bottom—not just one side.

The new Kellogg biscuit is also baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package instead of a dozen.

Mothers will especially be interested in the fact that every package is certified for food value by the Medical Arts Laboratory of Philadelphia. These new biscuits are considered a splendid food for both adults and children. With either hot or cold milk, you achieve a well-balanced amount of vitamins, minerals, proteins and carbohydrates.

The Kellogg Company uses a special process of "pressure-cooking" which retains all the food value of the whole wheat and makes it very easy to digest. At the same time it develops delicious flavor.

These improved biscuits can be identified by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-q.

"THE DAILY NORTHWESTERN"
(Oshkosh, Wisconsin),
March 25, 1932.

NEW SHREDDED BISCUIT MAKING BIG HIT

Grocers Say Housewives Welcome Many Improvements in Kellogg's WHOLE WHEAT Biscuit

Local grocers have pronounced the new Kellogg's WHOLE WHEAT Biscuit one of the most up-to-date food products on the market. It offers many outstanding and popular features. For one thing, the biscuits are toasted a golden brown on both top and bottom—not just one side.

The new Kellogg biscuit is also baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package instead of a dozen.

Mothers will especially be interested in the fact that every package is certified for food value by the Medical Arts Laboratory of Philadelphia. These new biscuits are considered a splendid food for both adults and children. With either hot or cold milk, you achieve a well-balanced amount of vitamins, minerals, proteins and carbohydrates.

The Kellogg Company uses a special process of "pressure-cooking" which retains all the food value of the whole wheat and makes it very easy to digest. At the same time it develops delicious flavor.

These improved biscuits can be identified by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-r.

"ST. PAUL DISPATCH"
(St. Paul, Minnesota),
March 22, 1932.

NEW SHREDDED BISCUITS CONTAIN IRON AND VITAMIN B

Kellogg's WHOLE WHEAT Biscuit Certified for Food Value by Philadelphia Laboratory

Local grocers are featuring an improved shredded biscuit which contains both iron and Vitamin B. Kellogg's WHOLE WHEAT Biscuits are made by a special process known as "pressure-cooking," which retains the full food value of the whole wheat. In fact, the Medical Arts Laboratory of Philadelphia certifies each package. "Pressure-cooking" likewise gives the biscuits a finer flavor and makes it easier to digest.

The new Kellogg's biscuits are also toasted on both top and bottom —not just one side. Naturally, they are much crisper and tastier, as well as more appetizing in appearance.

The biscuits are likewise a more convenient, economical size—two just fit the cereal bowl. And there are 15 to the package instead of the usual dozen.

Kellogg's WHOLE WHEAT Biscuits are very popular for breakfast—and are finding increasing favor for lunch, children's suppers and late snacks. Especially enjoyable with fruits or sweetened with honey.

You can easily identify this improved cereal by the name, Kellogg's, and the familiar red-and-green package. Sold by grocers. Made by Kellogg in Battle Creek.

—Advertisement.

Plaintiff's Exhibit No. 12-a.

"THE RETAILER"
(Miami, Florida),
March, 1932.

NEW SHREDDED BISCUITS CONTAIN IRON AND VITAMIN B

Kellogg's WHOLE WHEAT Biscuit Certified for Food Value by Philadelphia Laboratory

Local grocers are featuring an improved shredded biscuit which contains both iron and Vitamin B. Kellogg's WHOLE WHEAT Biscuits are made by a special process known as "pressure-cooking," which retains the full food value of the whole wheat. In fact, the Medical Arts Laboratory of Philadelphia certifies each package. "Pressure-cooking" likewise gives the biscuits a finer flavor and makes it easier to digest.

The new Kellogg's biscuits are also toasted on both top and bottom — not just one side. Naturally, they are much crisper and tastier, as well as more appetizing in appearance.

The biscuits are likewise a more convenient, economical size — two just fit the cereal bowl. And there are 15 to the package instead of the usual dozen.

Kellogg's WHOLE WHEAT Biscuits are very popular for breakfast — and are finding increasing favor for lunch, children's suppers and late snacks. Especially enjoyable with fruits or sweetened with honey.

You can easily identify this improved cereal by the name, Kellogg's, and the familiar red-and-green package. Sold by grocers. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-t.

"EAU-CLAIRE TELEGRAM"
(Eau-Claire, Wisconsin),
April 4, 1932.

NEW SHREDDED BISCUITS CONTAIN IRON AND VITAMIN B

Kellogg's WHOLE WHEAT Biscuit Certified for Food Value by Philadelphia Laboratory

Local grocers are featuring an improved shredded biscuit which contains both iron and Vitamin B. Kellogg's WHOLE WHEAT Biscuits are made by a special process known as "pressure-cooking," which retains the full food value of the whole wheat. In fact, the Medical Arts Laboratory of Philadelphia certifies each package. "Pressure-cooking" likewise gives the biscuits a finer flavor and makes it easier to digest.

The new Kellogg's biscuits are also toasted on both top and bottom — not just one side. Naturally, they are much crisper and tastier, as well as more appetizing in appearance.

The biscuits are likewise a more convenient, economical size — two just fit the cereal bowl. And there are 15 to the package instead of the usual dozen.

Kellogg's WHOLE WHEAT Biscuits are very popular for breakfast — and are finding increasing favor for lunch, children's suppers and late snacks. Especially enjoyable with fruits or sweetened with honey.

You can easily identify this improved cereal by the name, Kellogg's, and the familiar red-and-green package. Sold by grocers. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-u.

"TULSA RETAILERS' TRIBUNE"
(Tulsa, Oklahoma),
March, 1932.

NEW SHREDDED BISCUITS CONTAIN IRON AND VITAMIN B

Kellogg's WHOLE WHEAT Biscuit Certified for Food Value by Philadelphia Laboratory

Local grocers are featuring an improved shredded biscuit which contains both iron and Vitamin B. Kellogg's WHOLE WHEAT Biscuits are made by a special process known as "pressure-cooking," which retains the full food value of the whole wheat. In fact, the Medical Arts Laboratory of Philadelphia certifies each package. "Pressure-cooking" likewise gives the biscuits a finer flavor and makes it easier to digest.

The new Kellogg's biscuits are also toasted on both top and bottom — not just one side. Naturally, they are much crisper and tastier, as well as more appetizing in appearance.

The biscuits are likewise a more convenient, economical size — two just fit the cereal bowl. And there are 15 to the package instead of the usual dozen.

Kellogg's WHOLE WHEAT Biscuits are very popular for breakfast — and are finding increasing favor for lunch, children's suppers and late snacks. Especially enjoyable with fruits or sweetened with honey.

You can easily identify this improved cereal by the name, Kellogg's, and the familiar red-and-green package. Sold by grocers. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-v.

"DANVILLE, ILL., COMMERCIAL NEWS"
(Danville, Illinois),
April 22, 1932.

LOCAL GROCERS DISPLAYING NEW SHREDDED BISCUIT

Kellogg's WHOLE WHEAT Biscuit One of Most Improved Foods Introduced in Recent Years

Kellogg's WHOLE WHEAT Biscuits offer many new and outstanding features which appeal to the housewife. For one thing, the biscuits are toasted a golden brown on both top and bottom—not just one side. That seems to double the crispness.

The new Kellogg biscuit is also baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package instead of a dozen.

Mothers will especially be interested in the fact that every package is certified for food value by the Medical Arts Laboratory of Philadelphia. These new biscuits are considered a splendid food for both adults and children. With hot or cold milk or cream, they supply a healthful variety of vitamins, minerals, proteins and carbohydrates.

In baking these improved biscuits, the Kellogg Company uses a special process of "pressure-cooking" which retains all the food value of the whole wheat and makes it very easy to digest. At the same time it develops a tempting, delicious flavor.

These improved biscuits can be identified by the name, Kellogg's, and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-w.

"HARTFORD TIMES"
(Hartford, Connecticut),
March, 1932.

ADVERTISEMENT

NEW SHREDDED BISCUIT EXTRA GOOD WITH HOT MILK

Kellogg's WHOLE WHEAT Biscuits Offer Many Improvements

Kellogg's WHOLE WHEAT Biscuits are especially delightful with hot milk. And many mothers are taking advantage of this in serving a healthful and most convenient breakfast treat these cold mornings.

Before the new Kellogg's WHOLE WHEAT Biscuit was introduced, the Kellogg Company submitted it to the Medical Arts Laboratory of Philadelphia, which found it so rich in food value that every package now carries a certificate.

This means that mothers can now know definitely that their children are getting a well-balanced food whenever they serve the new Kellogg biscuit—extra rich in minerals, vitamins, proteins.

Kellogg's WHOLE WHEAT Biscuits are "pressure-cooked" by a special process that *bakes* in the delicious flavor. At the same time, it retains all the valuable food elements of the whole wheat.

The biscuits are much crisper and tastier because they are toasted a tempting brown on both top and bottom—not just one side. They are baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package.

Identify this improved cereal by the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-x.

(LINCOLN, NEBRASKA),
April 21, 1932.

NEW SHREDDED BISCUIT CERTIFIED FOR FOOD VALUE

Philadelphia Laboratory Certifies the Improved Kellogg's WHOLE WHEAT Biscuit

One of the greatest tributes to quality ever paid a food product is the fact that the Medical Arts Laboratory of Philadelphia now certifies every package of the new, improved Kellogg's WHOLE WHEAT Biscuit for food value.

These delicious biscuits are unusually rich in proteins, minerals, vitamins and other important food elements. One reason for this, is the fact that the biscuits are "pressure-cooked"—a process that retains all the food value of the whole wheat. "Pressure-cooking" also bakes in a rich, tempting flavor that every one praises.

The new Kellogg biscuit has many welcome features. It is toasted brown on both top and bottom—not just one side. It is made in a new, convenient size. Two biscuits just fit the cereal bowl; and you get 15 to the package—which means added economy.

Served with hot or cold milk or cream, fruit or honey added—Kellogg's WHOLE WHEAT Biscuits are delightful and wholesome for breakfast, lunch, children's suppers. Easy to digest and very nourishing.

Local grocers report that this improved shredded biscuit is meeting with hearty acceptance. It may be identified by the familiar red-and-green Kellogg's package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-y.

"BULLETIN OF MERCHANDISING AND SALES PROMOTION,"
"BRIDGEPORT POST & TELEGRAM"
(Bridgeport, Connecticut),
March 21, 1932.

CERTIFIES THE NEW SHREDDED BISCUIT

Philadelphia Laboratory Rates Kellogg's Whole Wheat Very Rich in Food Value

One of the reasons for the popularity of the new Kellogg's Whole-Wheat Biscuits is the food value of this tasty ready-to-eat cereal. The improved Kellogg's biscuit is "pressure-cooked" by a special process that bakes in delicious flavor and retains all the food elements of the whole wheat. As a result, the Medical Arts Laboratory of Philadelphia, after careful analysis, now certifies every package for food value.

The new Kellogg biscuit also offers several other distinct improvements. The biscuits are a many convenient, economical size. Two just fit the cereal bowl—and you get 18 to the package instead of the usual dozen.

And every biscuit is toasted a golden, rich brown on both top and bottom—not just one side. This makes it crisper and tastier than ever before. Also, "pressure-cooking" and "double toasting" make Kellogg's Whole Wheat Biscuits easier to digest.

The new Kellogg's biscuit is delicious with hot or cold milk or cream; extra appetizing with the addition of fruits or honey. Local grocers are featuring this improved ready-to-eat cer-

Plaintiff's Exhibit No. 12-z.
"THE EVENING BULLETIN"
(Providence, Rhode Island),
April 1, 1932.

GROCERS DISPLAYING NEW IMPROVED SHREDDED BISCUIT

Kellogg's WHOLE WHEAT Biscuit Making Hit with Housewives

One of the biggest improvements in cereals for many years is the new Kellogg's WHOLE WHEAT Biscuit. Grocers say that it is gaining in popularity every day.

The new Kellogg biscuit is "pressure-cooked" by a special process that bakes in the rich flavor and retains all the food value of the whole wheat. It makes the biscuit easier to digest, as well.

Kellogg's WHOLE WHEAT Biscuits are also toasted golden-brown on both top and bottom—not just one side. This makes them wonderfully crisp and crunchy. They are also a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package, instead of the usual dozen.

Of special interest is the fact that the Kellogg biscuit is certified for food value by the Medical Arts Laboratory of Philadelphia, whose statement appears on every package.

Kellogg's WHOLE WHEAT Biscuits are proving a boon to mothers, because of their outstanding deliciousness and health value. A tasty treat for breakfast, lunch, children's suppers. Delightful with hot or cold milk or cream, fruits or honey. Sold by grocers in the red-and-green package. Made by Kellogg in Battle Creek.

—Advertisement

Plaintiff's Exhibit No. 12-aa.

"PRESS-TELEGRAM"
(Long Beach, California),
April 28, 1932.

NEW SHREDDED BISCUITS OFFER MANY ADVANTAGES

Local Grocers Say Customers Delighted with Kellogg's WHOLE WHEAT Biscuit

Grocers are now featuring a new shredded biscuit which offers many new features. Kellogg's WHOLE WHEAT Biscuits are "pressure-cooked" by a special process that retains the complete food value of the whole wheat. At the same time, delightful flavor is *baked in*.

These new biscuits have been analyzed by the Medical Arts Laboratory of Philadelphia and found to be so rich in food value that every package is certified. Any mother can now be certain her family is getting a well-balanced and tempting dish whenever she serves these new Kellogg biscuits with either hot or cold milk or cream.

Other improvements are a biscuit of more convenient, economical size. Two of these new biscuits just fit the cereal bowl. You also get 15 to the package instead of the usual dozen. And every biscuit is toasted a rich golden brown on both top and bottom — not just one side. This makes them exceptionally crisp and appetizing.

Kellogg's WHOLE WHEAT Biscuits are tasty for breakfast, lunch, children's suppers. Extra good with fruits or sweetened with honey.

You can identify these new biscuits by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-bb.
"MANILA DAILY BULLETIN",
(Manila, Philippine Islands),
March 11, 1932.

(Toasted and Shredded)

A NEW TASTE THRILL

DOUBLE toasted for extra crispness. The biscuits are also a new, convenient size — two just fit your cereal bowl. Certified for food value. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-cc.
"JOHNSTOWN TRIBUNE"
(Johnstown, Pennsylvania),
August 21, 1931.

JOHN

(Toasted and Shredded)

HERE'S A NEW TREAT!

TRIBUNE

8/21/31

THE biscuits are toasted on both sides — extra crisp. New, convenient size — two fit the bowl. Just packed with tasty flavor! Certified for food value. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-dd.
"BANGOR DAILY NEWS"
(Bangor, Maine),
April 11, 1931.

Just compare these improved biscuit

(shredded)

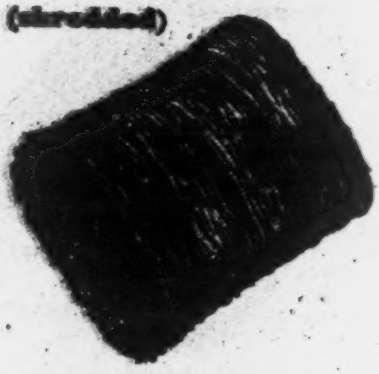
YOU get a lot of new features in Kellogg's WHOLE WHEAT Biscuit. They're packed with tempting flavor. Convenient new size to fit the cereal bowl. 15 biscuits to the package.

Toasted on *both* sides — — extra crisp. And certified for food value. You get 10 important mineral salts and 5ve vitamins. At your grocer's. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-ee.
"FALL RIVER HERALD NEWS"
(Fall River, Massachusetts),
April 3, 1931.

Just compare these improved biscuit

(shredded)



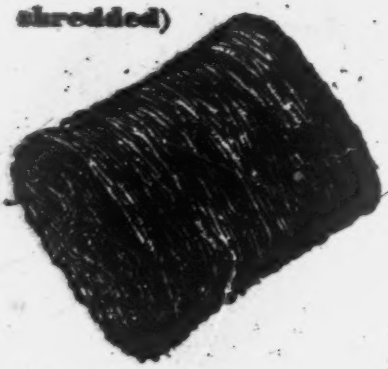
YOU get a lot of new features in Kellogg's WHOLE WHEAT Biscuit. They're packed with tempting flavor. Convenient new size to fit the cereal bowl. 15 biscuits to the package.

Toasted on *both* sides — — extra crisp. And certified for food value. You get 10 important mineral salts and five vitamins. At your grocer's. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-ff.
"MARION STAR"
(Marion, Ohio),
April 3, 1931.

Just compare these improved biscuit

shredded)



YOU get a lot of new features in Kellogg's WHOLE WHEAT Biscuit. They're packed with tempting flavor. Convenient new size to fit the cereal bowl. 15 biscuits to the package.

Toasted on *both* sides — — extra crisp. And certified for food value. You get 10 important mineral salts and five vitamins. At your grocer's. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-gg.
"ST. PAUL DISPATCH"
(St. Paul, Minnesota),
April 9, 1931.

Just compare these improved biscuit

(shredded)

YOU get a lot of new features in Kellogg's WHOLE WHEAT Biscuit. They're packed with tempting flavor. Convenient new size to fit the cereal bowl. 15 biscuits to the package.

Toasted on *both* sides — — extra crisp. And certified for food value. You get 10 important mineral salts and five vitamins. At your grocer's. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-hh.
"CIRCLEVILLE HERALD"
(Circleville, Ohio),
March 27, 1931.

Certified for Food Value

Never before have mothers known a cereal like this

THINK of the advantage! A crisp, delicious, ready-to-eat cereal — very economical — and *certified for* balanced *food value* by a prominent analytical laboratory, whose seal appears on every package.

By eating Kellogg's WHOLE WHEAT Biscuit you are sure of getting vital food elements that are so often lacking in the average meal — especially breakfast. Elements that are necessary to real health.

Tasty, tempting biscuit! Double toasted — therefore crunchy-crisp on both sides. Made of whole wheat by a special Kellogg process that retains practically all the wonderful food value.

Serve for breakfast, for lunch, for the nursery supper — as afternoon nourishment for the children. 50 calories of energy per biscuit. Two biscuits just fit the bowl.

Think of the health-silver! Consider the benefits to children and grown-ups alike! Calcium and phosphorus for better teeth and bones. Iron and copper for rich blood. Chlorine for digestion. Protein for tissue-building. Vitamins for health and resistance to disease. A *certified* cereal!

Ask your grocer for Kellogg's WHOLE WHEAT Biscuit. Look for the *certified* analysis on the red-and-green package. Made by Kellogg in Battle Creek.

(Circleville, Ohio),
March 27, 1931.

Certified for Food Value

Never before have mothers known a cereal like this

THINK of the advantage! A crisp, delicious, ready-to-eat cereal — very economical! — and *certified for* balanced food value by a prominent analytical laboratory, whose seal appears on every package.

By eating Kellogg's WHOLE WHEAT Biscuit you are sure of getting vital food elements that are so often lacking in the average meal — especially breakfast. Elements that are necessary to real health.

Tasty, tempting biscuit! Double toasted — therefore crunchy-crisp on both sides. Made of whole wheat by a special Kellogg process that retains practically all the wonderful food value.

Serve for breakfast, for lunch, for the nursery supper — as afternoon nourishment for the children. 20 calories of energy per biscuit. Two biscuits just fit your bowl.

Think of the health-values! Consider the benefits to children and grown-ups alike! Calcium and phosphorus for better teeth and bones. Iron and copper for rich blood. Cellulose for digestion. Protein for tissue-building. Vitamins for health and resistance to disease. A *certified* cereal!

Ask your grocer for Kellogg's WHOLE WHEAT Biscuit. Look for the certified analysis on the red-and-green package. Made by Kellogg in Battle Creek.

Each package of Kellogg's WHOLE WHEAT Biscuit is certified for food value. Look for the analysis on the side panel. Each biscuit contains 10 important mineral salts. A bowl of milk and two biscuits will supply about half your daily requirement of calcium . . . half the phosphorus you need . . . nearly a fourth the iron, as well as many other food elements, including the vitamins A, B, C, D, E, G. (IMPORTANT: Copper is present, which makes the iron safe to the more assimilable. Recent scientific research indicates that copper is necessary to prevent anemia.

Plaintiff's Exhibit No. 12-ii.

"LANCASTER, OHIO, DAILY GAZETTE"
(Lancaster, Ohio),
April 3, 1931.

Certified for Food Value

Never before have mothers known a cereal like this

Think of the advantage! A crisp, delicious, ready-to-eat cereal — very economical — and certified for balanced food value by a prominent analytical laboratory, whose seal appears on every package.

By eating Kellogg's WHOLE WHEAT Biscuit you are sure of getting vital food elements that are so often lacking in the average meal — especially breakfast. Elements that are necessary to good health.

Tasty, crunchy biscuit! Double texture — three-fine quality-crisp on both sides. Made of whole wheat by a special Kellogg process that retains practically all the wonderful food value.

Serve for breakfast, for lunch, for the nursery supper — an afternoon nourishment for the children. 20 calories of energy per biscuit. Two biscuits just fit the bowl.

Think of the health-values! Consider the benefits to children and grown-ups alike! Calcium and phosphorus for better teeth and bones. Iron and copper for rich blood. Chlorine for digestion. Protein for tissue-building. Vitamins for health and resistance to disease. A certified cereal!

Ask your grocer for Kellogg's WHOLE WHEAT Biscuit. Look for the certified analysis on the red-and-green package. Made by Kellogg in Battle Creek.

(Lancaster, Ohio),
April 3, 1931.

Certified for Food Value

Never before have mothers known a cereal like this

Think of the advantage! A crisp, delicious, ready-to-eat cereal — very economical — and certified for balanced food value by a prominent analytical laboratory, whose seal appears on every package.

By eating Kellogg's WHOLE WHEAT Biscuit you are sure of getting vital food elements that are so often lacking in the average meal — especially breakfast. Elements that are necessary to real health.

Tasty, nourishing biscuit! Double-toasted — delicious crunchiness on both sides. Made of whole wheat by a special Kellogg process that retains practically all the wonderful food values.

Serve for breakfast, for lunch, for the nursery supper — as afternoon nourishment for the children. 80 calories of energy per biscuit. Two biscuits just 5¢ the bowl.

Think of the health-shout! Consider the benefits to children and grown-ups alike! Calcium and phosphorus for better teeth and bones. Iron and copper for rich blood. Chlorine for digestion. Protein for tissue-building. Vitamins for health and resistance to disease. A certified cereal!

Ask your grocer for Kellogg's WHOLE WHEAT Biscuit. Look for the certified analysis on the red-and-green package. Made by Kellogg in Battle Creek.

Each package of Kellogg's WHOLE WHEAT Biscuit is certified for food value. Look for the analysis on the side panel. Each biscuit contains 10 important mineral salts. A bowl of milk and two biscuits will supply about half your daily requirement of calcium . . . half the phosphorus you need . . . nearly a fourth the iron, as well as many other food elements, including the vitamins A, B, C, D, E, G. IMPORTANT: Copper is present, which makes the iron more all the more assimilable. Recent scientific research indicates that copper is necessary to prevent anemia.

Here's the New Kellogg WHOLE WHEAT Bis

HELP YOURSELF TO HEALTH IN THIS NEW WAY

Nearly every person today knows that vitamins and mineral salts are most important elements in our diets. But, unless one has been specially trained, there is not sufficient knowledge of the means to insure an adequate supply of them in our food.

How delightful and how helpful, then, it is, to find that the problem has been solved—the whole matter made easy by Kellogg in Battle Creek—world's largest manufacturer of ready-to-eat cereals.

For now there is a cereal that contains Vitamins A, B, C, D.....a delicious dish that contains iron salts, copper salts, calcium salts, and phosphorous salts ... and is absolutely certified for its food value. Kellogg's Whole Wheat Biscuit!

For feeding the children, this delightful cereal is very helpful. For it enables you to make sure that your child is receiving Vitamin A to increase his resistance to disease and particularly to colds; Vitamin B to help his growth; Vitamin C for his nervous system, and Vitamin D—the "sunshine vitamin"—to aid him in developing strong, straight bones and fine teeth.

And, in addition, it furnishes iron for red blood and rosy cheeks, calcium so necessary to bone growth and the formation of the teeth, copper that helps the iron along, and phosphorous, which also enters very prominently into the formation of bone structure.

And for grown-ups who want to stay young in health, this is a really healthful and at the same time delightful dish. Two of them toasted biscuits just fit the bowl. They are extra crisp and delicious because they are toasted on both sides.

Just try this new WHOLE WHEAT BISCUIT (SHREDDED)

Different in size ... different in crispness ... different in flavor!

YOU get a lot of new features in Kellogg's WHOLE WHEAT Biscuit. They're made of delicious wheat shreds — just packed with flavor.

Every biscuit is toasted on the *bottom* as well as the *top* — crisper than ever.

Kellogg's WHOLE WHEAT Biscuit are a new, convenient size too — just the *right* size to fit your cereal bowl. Fifteen biscuits to the package.

And here's the biggest point of all. Every package of Kellogg's WHOLE WHEAT Biscuit is *certified for food value*. For these tempting biscuits are made by a special process that guards practically all the elements of the rich, whole wheat.

Each time you eat Kellogg's WHOLE WHEAT Biscuit, you get calcium and phosphorus for teeth and bones. Iron and copper for red blood. Vitamins for health ... as well as many other vital food elements.

Served with milk or cream, two of these tempting biscuits supply more than a third of the average person's daily mineral requirements.

Order a package of Kellogg's WHOLE WHEAT Biscuit from your grocer. Made by Kellogg in Battle Creek.

Kellogg's
WHOLE WHEAT
BISCUIT

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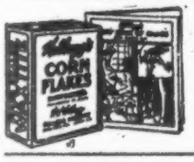
Friday and Saturday SPECIALS

Potatoes	Home Grown	Per Bu.	69c
Pears, Bartlett,		Per Box	$2.29
Watermelon,	Dixie Belle		49c
Hills Bros. Coffee		Per Lb.	39c
Soap,	P. & G. and Bob White	10 for	29c

Fresh Wax Beans, Cauliflower, Head Lettuce, Egg Plant, Radishes, Beets, Tomatoes, Celery.



The Kellogg Story Book of Games FREE with a purchase of Two packages of Kellogg's Whole Wheat Biscuit or your choice of any one of Kellogg's products with one package of the new Whole Wheat Biscuit. Two packages for 25c

Red Front Grocery
PHONE 43

Be sure and get Your Story Book of Games from your grocer
We feature and recommend the New Kellogg Whole Wheat Biscuit.

New Ulm Grocery Co.

FAIR WEEK SPECIALS — AT — SAFFERT'S

Our Excellent Line of COLD MEATS Will Help You Make a Quick and Tasty Fair Dinner.

ROASTS—	Per Lb.
BEEF	15c
VEAL	15c
PORK	18c

PORK SHOULDERS, per lb. 15½c

Delicious Prepared VEAL LOAF

PICNIC HAMS, per lb. 16c

GERMAN CLUB CHEESE, lb. 25c

BACON SQUARES, lb. 19½c

FRUITS and VEGETABLES

The Kellogg Story Book of Games FREE with a purchase of Two packages of Kellogg's Whole Wheat Biscuit or your choice of any one of Kellogg's products with one package of the new Whole Wheat Biscuit. Two packages for 25c

Always FRESH— Butter-Nut The Coffee Delicious

BUTTERNUT COFFEE, per lb. 45c
We Redeem Butternut Coffee Coupons.

WELCOME VISITORS

SAFFERT'S PROVISION MARKET

"WHERE YOU BUY QUALITY"
Phone 144. 217-19 N. Minnesota St. New Ulm, Minn.

UNITED STORES

Phone 244 We Deliver

Specials for Friday and Saturday

Mason Jar Covers		Per Doz.	22c
SOAP, Bob White		10 Bars for	29c
CORN, Hillcrest	No. 2 Can	3 for	33c
YEAST FOAM			8c
Butter-Nut Coffee,		Per lb.	45c
Pineapple,	Happy Isle No. 2½ Can		17c
Tomatoes,	No. 2 Can	3 for	26c
PEAS,	SPRINGTIME No. 2½ Can	for	33c

A surprise for the children—One Kellogg Story Book of Games FREE—with two packages of Kellogg's Whole Wheat Biscuit or one package of Whole Wheat Biscuit and your choice of Kellogg's Corn Flakes, Pep, Bran Flakes, Krumbles, Rice Krispies, or All Bran. Two packages for 25c

Our Most Popular Coffee—
Butter-Nut The Coffee Delicious
WE REDEEM YOUR COUPONS

PURITY GROCERY
H. M. GILBENBRUNNER, Prop.
PARKING SPACE IN REAR OF STORE

Specials for Friday and Saturday — AT THE — SCHNEIDER'S GROCERY

Picnic Hams Per Lb.	16c	LARD Per Lb.	10c
CORN PEAS TOMATOES	Buy a dozen or case now They will be higher. Per Doz.		$1.20
SOAP 10 Bob White Bars	32c	CONCORD GRAPES Basket	30c

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BUTTERNUT COFFEE, per lb. 45c
We Redeem Butternut Coffee Coupons.

Schneider's Grocery
Phone 1100 We Deliver

Scandia Minis
Toasted Marshmallow
Toilet Paper
Blend Carrots
MATCHES
Preserves
Gum and Mints
Beans
Pears
Paper Napkins

HAVE YOU TRIED THIS WAY

Baked Bean Ca

Cook 1 small onion and 1 green [illegible] butter until tender and [illegible] can B.&B. Pork and Beans and mix in alternate layers with ½ cup grated cheese with buns on top. Top [illegible] and bacon slices. Bake in moderate [illegible]

Baked Bean Ro

To 2 cups cooked navy or [illegible] Beans which have been mashed and [illegible] butter and 2 tbs. flour. Cook until [illegible] grated cheese and hot milk. Season [illegible] grated onion. Serve platter [illegible]

Ham Bird

Cover thin slices of ham with [illegible] Roll, and bake or [illegible]

LIVER SAUSAGE,
BLOOD TONGUE,
U.S. FRUIT VEGETA
CANTALOUPES,
ORANGES, 288 Sun
CELERY, per bunch
HEAD LETTUCE,

INDEPENDENT GROC

Get These
BEN. I. W
The I. G.
Phone 207

's the New Kellogg WHOLE WHEAT Biscuit!

URSELF EALTH IN S NEW WAY

your child is receiving Vitamin A to increase his resistance to disease and, particularly to colds; Vitamin B to help his growth; Vitamin C for his nervous system, and Vitamin D—the "sunshine vitamin"—to aid him in developing strong, straight bones and fine teeth.

And, in addition, it furnishes iron for red blood and rosy cheeks, calcium so necessary to bone growth and the formation of the teeth, copper that helps the iron along, and phosphorous, which also enters very prominently into the formation of bone structure.

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Just try this new WHOLE WHEAT BISCUIT (SHREDDED)

Different in size... different in crispness... different in flavor!

YOU get a lot of new features in Kellogg's WHOLE WHEAT Biscuit. They're made of delicious wheat shreds — just packed with flavor.

Every biscuit is toasted on the bottom as well as the top — crisper than ever.

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Served with milk or cream, two of these tempting biscuits supply more than a third of the average person's daily mineral requirements.

Order a package of Kellogg's WHOLE WHEAT Biscuit from your grocer. Made by Kellogg in Battle Creek.

Kellogg's
WHOLE WHEAT
BISCUIT

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We feature and recommend the New Kellogg Whole Wheat Biscuit.

New Ulm Grocery Co.

nd Saturday CIALS

ome own	Per Bu.	69c
lett,	Per Box	$2.29
l,	Dixie Belle	49c
offee	Per Lb.	39c
d e	10 for	29c

, Cauliflower, Head nt, Radishes, Beets, y.

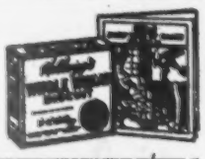
The Kellogg Story Book of Games FREE with a purchase of Two packages of Kellogg's Whole Wheat Biscuit or your choice of any one of Kellogg's products with one package of the new Whole Wheat Biscuit. Two packages for 25c

nt Grocery ONE 43

EK SPECIALS AT 'ERT'S

COLD MEATS Will Help You and Tasty Fair Dinner.

PORK SHOULDERS, per lb.	15½c
Delicious Prepared VEAL LOAF	
GERMAN CLUB CHEESE, lb.	25c
FRUITS and VEGETABLES	



SH— er-Nut Coffee Delicious per lb. 49c
rnut Coffee Coupons.

E VISITORS 'ERT'S ON MARKET BUY QUALITY" Minnesota St. New Ulm, Minn.

Sat., Aug. 29, to Sept. 4 Inclusive

Scandia Mints	15c
Toasted Marshmallows	25c
Toilet Paper IGA 9 for 27c	3 rolls 19c
Diced Carrots IGA	2 cans 25c

MATCHES Regular Size, 6 Pkgs. 15c

Preserves IGA	25c
Gum and Mints IGA	3 pkgs. 10c
Beans IGA Pork, Green or Wax, Cut, No. 2 Can	3 cans 37c
Pears Bartlett, Halves, No. 2½ Can	2 cans 39c
Paper Napkins IGA	2 pkgs. 15c

HAVE YOU TRIED THEM THIS WAY?

Baked Bean Casserole

Cook 1 small onion and 1 green pepper chopped fine in 2 tbs. butter until tender and golden brown. Add 1 can I.G.A. Pork and Beans and mix thoroughly. Arrange in alternate layers with ½ cup grated cheese in greased casserole with bread on top. Top with buttered crumbs and bacon slices. Bake in moderate oven for 30 minutes.

Baked Bean Rarebit

Toast 2 cups soaked with add 1 can I.G.A. Pork and Beans which have been mashed and blended with 2 tbs. butter and 2 tbs. flour. Cook until thickened. Add 1 cup grated cheese and let melt. Season with salt, pepper and grated onion. Serve piping hot on toast.

Ham Birds

Cover thin slices of ham with I.G.A. Pork and Beans Roll, and bake or broil.

LIVER SAUSAGE, per lb. 15c
BLOOD TONGUE, per lb. 20c

IGA FRUITS VEGETABLES

CANTALOUPES, HOME GROWN EACH	10c
ORANGES, 288 Sunkist, Lge.	28c
CELERY, per bunch	15c
HEAD LETTUCE, each	15c

INDEPENDENT GROCERS ALLIANCE

UNITED STORES

Phone 244 We Deliver

Specials for Friday and Saturday

Mason Jar Covers	Per Doz.	22c
SOAP, Bob White	10 Bars for	29c
CORN, Hillcrest	No. 2 Can - 3 for	33c
YEAST FOAM	-	8c
Butter-Nut Coffee,	Per lb.	45c
Pineapple,	Happy Isle No. 2½ Can -	17c
Tomatoes,	No. 2 Can - 3 for -	26c
PEAS,	SPRINGTIME No. 2½ Can - 3 for -	33c

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Specials for Friday and Saturday

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SCHNEIDER'S GROCERY

Picnic Hams Per Lb.	16c	LARD Per Lb.	10c
CORN PEAS TOMATOES	Buy a dozen or case now They will be higher. Per Doz.		$1.20
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Schneider's Grocery

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Get These

BEN. I. W

The I. G.

Phone 207

Plaintiff's Exhibit No. 12-jj.
"BROWN COUNTY JOURNAL,"
(New Ulm, Minnesota),
August 28, 1931.

145

Plaintiff's Exhibit No. 12-kk.
"THE PITTSBURGH PRESS"
(Pittsburgh, Pennsylvania),
April 1, 1932.

Just try this new
WHOLE WHEAT BISCUIT
(SHREDDED)

Different in size . . . different in crispness . . . different in flavor!

YOU get a lot of new features in Kellogg's WHOLE WHEAT Biscuit. They're made of delicious wheat shreds—just packed with flavor.

Every biscuit is toasted on the *bottom* as well as the *top*—crisper than ever.

Kellogg's WHOLE WHEAT Biscuit are a new, convenient size too—just the *right* size to fit your cereal bowl. Fifteen biscuits to the package.

And here's the biggest point of all. Every package of Kellogg's WHOLE WHEAT Biscuit *is certified for food value.* For these tempting biscuits are made by a special process that guards practically all the elements of the rich whole wheat.

Each time you eat Kellogg's WHOLE WHEAT Biscuit, you get calcium and phosphorus for teeth and bones. Iron and copper for red blood. Vitamins for health . . . as well as many other vital food elements.

Served with milk or cream, two of these tempting biscuits supply more than a third of the average person's daily mineral requirements.

Order a package of Kellogg's WHOLE WHEAT Biscuit from your grocer. Made by Kellogg in Battle Creek.

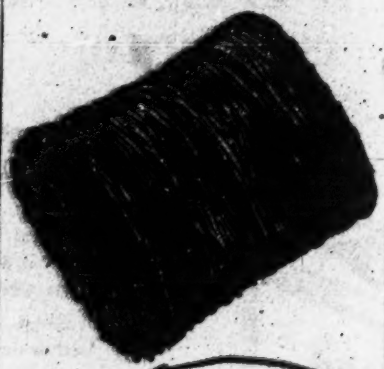
★ *Each package of Kellogg's WHOLE WHEAT Biscuit is certified for food value. Look for the analysis on the side panel. Each biscuit contains 10 important mineral salts. A bowl of milk and two biscuits will supply about half your daily requirement of calcium . . . half the phosphorus you need . . . nearly a fourth the iron, as well as many other food elements, including the vitamins A, B, C, D, E, G. IMPORTANT: Cereal is accepted, edible . . .*

Kellogg's
WHOLE WHEAT

Plaintiff's Exhibit No. 12-ll.

"THE JANESVILLE DAILY GAZETTE"
(Janesville, Wisconsin),
May 19, 1931.

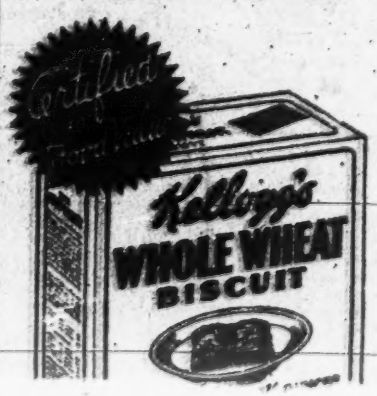
Deliciously Improved by Kellogg



HERE'S a new shredded biscuit you'll want to try. Wonderfully improved in taste and size. Made of delicately flavored whole-wheat shreds.

The biscuits are a new convenient size. Two just fit the cereal bowl. *Double toasted.* Crunchy-crisp top and bottom. 15 biscuits to the red-and-green package.

Ask your grocer for Kellogg's WHOLE WHEAT Biscuit. Made by Kellogg in Battle Creek.



Plaintiff's Exhibit No. 12-mm.
"TULSA RETAILERS' TRIBUNE"
(Tulsa, Oklahoma),
August, 1931.

Check Whole Wheat Biscuit for Food Value

Two Whole Wheat Biscuits With Milk Supply Six Vitamins

Ten different mineral salts and six vitamines in a single dish of cereal and cream is the latest achievement of scientific food planning at the Kellogg company plant. Kellogg's Whole Wheat Biscuits, the manufactured product of this careful planning, are certified by the Medical Arts Laboratory of Philadelphia for their high food value.

Two biscuits with milk or cream supply about half of the average person's daily requirements of both calcium and phosphorous, and one-fourth the iron necessary, as well as many other minerals.

INTERESTING PROCESS

The analysis of the Philadelphia laboratory reveals in Whole Wheat Biscuits, served with milk or cream, vitamins A, B, C, D, E, and G. The biscuits themselves are a good source of vitamin G.

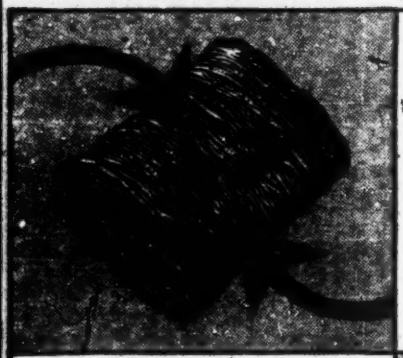
Made from whole wheat, the biscuits are the product of a most interesting process of manufacture. Having been thoroughly cleaned, the wheat is cooked in rotary steam cookers, after which it is tempered. It is then fed through several mills with grooved rollers, which form the fine shreds seen in the finished product. Machines shape the biscuits and drop them onto trays, which are then passed through the ovens, double-toasting the biscuits and giving them a rich, golden brown color on both sides. An evaporator reduces the moisture content to between 1 and 2 per cent, thus insuring the crispness of the biscuits. A steady stream of trays moves from the evaporator to the packing machines where the biscuits are placed in cartons, 15 in each package. A recently developed corrugated strip, designed to minimize breakage in shipment is placed between each layer of biscuits.

The delicious flavor of Kellogg's Whole Wheat Biscuits gives them a tremendous appeal aside from their food value.

They supply energy, build up the [illegible], bones and teeth, as well as [illegible] the entire system.

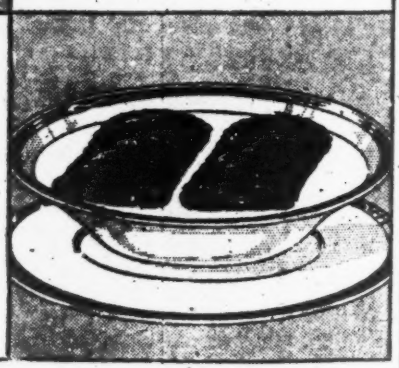
Purina Dog Chow
[illegible] Your Grocer

Seeing is believing— look at this new and improved Whole Wheat Biscuit



See how they are toasted on both sides

See how nicely two fit in the bowl



DON'T put off trying Kellogg's WHOLE WHEAT Biscuit. They're extra crisp because they're toasted top and bottom. And every red-and-green package is certified for food value.

When you eat two of these rich whole-wheat shreds with milk or cream your system gets ten important mineral salts and six vitamins. *Think of it*—more than a third of your daily mineral requirements.

Order from your grocer. Fifteen biscuits to the package. Made by Kellogg in Battle Creek.

Kellogg's WHOLE WHEAT BISCUIT

Wa... County's Locally Owned Grocer...

OFFER... AT LOW PRICES. THEIR MONEY STAYS AT HOME. HELP BUILD YOUR...

"Bartlesville, Okla., Daily Enterprise" (Bartlesville, Okla.) Sept. 18, 1931

Circus Employes Rob... (By the Associated Press)

LANCASTER Mo., ... scores of salary claim... filed with the prosecuting attorney of Schuyler county for alleged back salary from the Robbins Brothers circus, which returned to its winter quarters here last Monday night.

Until Canada continued to buy sixty per cent of her imports from Uncle Sam last year. But you won't hear the professional free traders mention this.

RED STAR YEAST

Grown from Grain

AIDS DIGESTION

RED STAR YEAST is rich in vitamins and aids digestion. Eat 3 cakes daily, either in cake form, spread on crackers or dissolved in milk or fruit juices as preferred.

Ask for RED STAR YEAST at soda fountains, restaurants and lunch counters.

★ ★ STRICTLY INDEPENDENT—SINCE 1861 ★ ★

Skates to Meet

Jack Rikard, a Londoner from Winnipeg, N. C., figured to attend the Detroit convention hotel week, but he has an overstem to timber driving, swimmin and walking. He has skated all the way, a distance of 1,500 miles, spending 54 days and eight nights on wheels. He wore out three pairs of shoes but says he gained 10 pounds.

Civil War Veterans Elect New Officers

(By the Associated Press)

DES MOINES, Ia. Sept. 18.—Emanuel P. Town, of Philadelphia, Pa., yesterday was elected commander-in-chief of the Grand Army of the Republic at the close of the 63d annual encampment.

The Rev. Frank Heston, of Knightsville, Ind., was elected commander-in-chief of the Sons of Union Veterans.

William L. Anderson of Boston was elected senior vice commander and W. D. Manger, of Des Moines, junior vice commander.

Death Sentence for Mutineers

(By the Associated Press)

SANTIAGO, Chile, Sept. 18.—Six leaders of the recent naval mutiny in Chile were condemned to death yesterday by a court martial. Two others were sentenced to prison for life and four received prison terms of fifteen years. Ten year sentences were imposed upon two of the defendants.

It is claimed that free speech is not allowed in this country, and they say at least prove that the dogs are not allowed to bark in some neighborhoods.

Business Men Will Sponsor Auction Sale

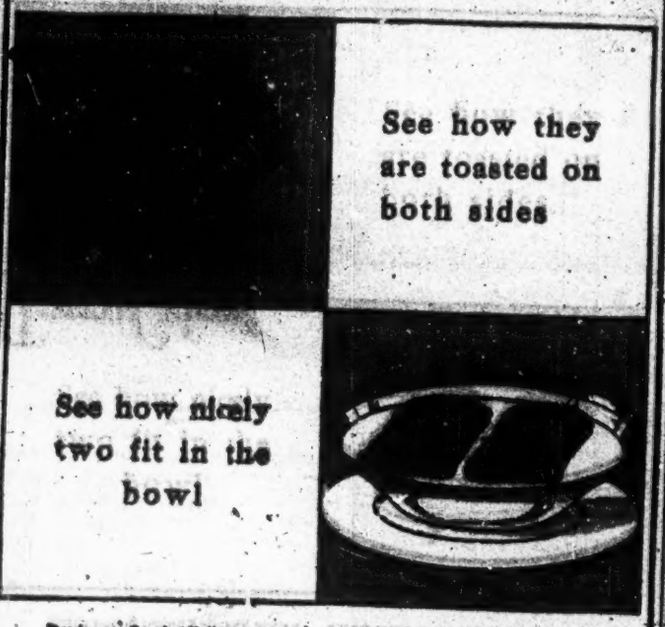
Bartlesville's chamber of commerce has decided to discontinue its sponsorship of the monthly sale day in the city and the regular sale on next Monday will be in charge of the Washington County Business Men's association. The association however has not decided definitely whether or not it will conduct more than the one sale. A committee from the board of directors will assume responsibility of the sale and investigate its possibilities. If this committee reports to the organization favorably, the association will probably continue the monthly sales and if not Monday's sale will probably be the last.

A casualty at Bedford, South Africa, is roasting a puppy and a lamb.

Surprised Captain Miller

When Captain and Mrs. Dave Miller returned to their home overlooking on North Osage avenue last night following their open air meeting in the business section they found a crowd of friends had gathered for a surprise party in honor of Captain Miller's birthday. There were games and an informal good time for the remainder of the evening.

Seeing is believing— look at this new and improved Whole Wheat Biscuit



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When you eat two of these rich whole-wheat shreds with milk or cream your system gets ten important mineral salts and six vitamins. *Think of it*—more than a third of your daily mineral requirements.

Order from your grocer. Fifteen biscuits to the package. Made by Kellogg in Battle Creek.

Kellogg's WHOLE WHEAT BISCUIT

PICK & I... GROCE...

E. E. Jolley

401 W. 3rd

Sugar, 10 lbs. .. .. ..

Country Sorghum, g...

Potatoes, peck ...

Pick & Pay Coffee, lb. 78c

Ginger Sn... 2 lbs. ...

Flour, 24 lbs. .....

Salt, 10 pounds .....

Beans, Navy, 5 pounds .....

Milk, 3 tall cans .....

Sweet Potatoes, 10 lbs .....

Green Beans, nice, lb. .....

Apples, Jonathan, 10 lbs. ...

Fresh Tomatoes, 3 pounds for ...

Brooms, each .....

Ritchies

GROCERY AND MARKET

Phone 1507 — 200 North Seminole

Good Potatoes, 15 lbs.	19c
10 bars Quick Naptha Soap	29c
Peaches or Pineapple, No. 2½ can	20c
Spinach, No. 2½ can	19c
Good Sweet Potatoes, 8 lbs.	25c
Yellow Onions, 6 pounds	25c
Aero Cookies, pound (Airplane Free.)	28c
Apple Butter, quart jar	23c
Pure Honey, quart jar	45c
Kellogg's Whole Wheat Biscuits, 2 for 25c (Story Book Free)	
Red Star Flour, 24 pounds	65c
Town Crier Flour, 24 pounds	65c
Good Fresh Tomatoes, 4 pounds	15c
Center Cut Chuck Beef Roast lb.	15c
Pork Roast (little pig) lb.	14c
Country Style Pure Pork Sausage	15c
Fresh Pig Shanks, 3 pounds	25c

Quapaw Gro...

Phone 221—200 Quapa...

Fryers, dressed, lb.	
Bacon, Wilson's Certified, sliced	
Cottage Cheese, lb.	
Celery, large bunch	
Bananas, 4 lbs.	
Head Lettuce, head	
Tall Pink Salmon, 2 cans	
Tuna Fish, white	
Parlor Brooms, each	
Gallon Sorghum	
Sweet Potatoes, 7 pounds	
Dozen Sunkist Oranges	
Quart Jar Honey	
Gold Medal Flour, 24 lb. sack	
Coffee, K. W. G., a fine blend, gr... pound	
Jersey Brand: Wheat and Bran Flakes	
Nu-Jem Rice Flakes	
Corn Flakes	
Kellogg's Whole Wheat Biscuits, Story Book Free, 2 pkgs.	

VIADUCT GROCERY

AND MARKET

Phone 2120 — 1100 Maple

FREE DELIVERY

Saturday Specials

Sweet Pickles, 32 oz. jar	25c
Yellow Cling Peaches, No. 3 can	19c
Pork and Beans, No. 3 can	10c
Brown Beauty Beans, No. 2 can	10c
Richnut Sandwich Spread, 16 oz. size	20c
Creamery Butter, pound	22c
Macaroni or Spaghetti, 6 for	25c
Fresh Country Sorghum, gallon	95c

MILK "From Contented Cows" 6 tall cans 29c

Agrees with Babies (good for Cooking, too) 5 small cans 25c

Folgers Coffee, lb. 38c

10 quart Galvanized Bucket; Large Package Oxydol; 5 bars P. & G. Soap; 2 bars Camay Toilet Soap; 1 package Ivory Snow 79c

Sweet Potatoes, 6 pounds	25c
Pork Chops, pound	20c
Beef Steak, pound	20c
Beef Roast, pound	15c
Pork Ham Roast, pound	15c
Pickwick Coffee, pound	39c
Kellogg's Whole Wheat Biscuits, 1 pkg., 15c; 2 pkgs. 25c (Story Book Free)	

for Baby's Bottle —for children to drink

The best of milk 6 tall cans 29c. 6 small cans 25c

St. Clair Grocery & Mkt.

FRED SERNING, Mgr.

Phone 3106 — Free Delivery — 211 Keeler Ave.

FOR SATURDAY

PRICES THAT SAY "STOCK UP"

Flour 24 lbs. ..... 58c — 48 lbs. $1.10

Flour, 48 pounds, guaranteed	75c
Sweetheart Meal, 10 pounds	35c
Milk, Pickwick or Armour's, 4 tall cans	25c
Coffee, fresh ground, 2 pounds	25c
Ice Tea, bulk, 1-2 pound	15c
Table Salt, 5 pound sack	12c
Ginger Snaps, 2 pounds	25c
APPLES Good Jonathan 8 lbs.	25c
Procter & Gamble Laundry Soap, 10 big bars	27c
Cheese, full cream, 2 pounds	35c
Navy Beans, 10 lbs.	49c
Pinto Beans, 10 pounds	39c
Nut Oleo, 2 pounds	35c
Creamery Butter, quarters, pound	30
Libby's Red Salmon, 25c; 2 cans	45c
Green Beans, pound	5c
Golden Ripe Bananas, doz., 15c; 2 doz.	25c
Oranges, nice and juicy, 23c; 2 doz.	45c
Malgo Grapes, lb., 10c; 3 lbs.	25c
Pickwick Coffee, lb., 33c; 3 lbs.	95c

Head Lettuce and Celery, Nice and Crisp

Large Juicy Mangoes

SUGAR 10 lbs. 53c

Steak, Veal Round, 2 pounds	35c
Steak, Baby Beef Loin, 2 pounds	35c
Bacon, sugar cured, 1-2 or whole, lb.	17½c
Pork Steak, pound	12½c
Pork Roast, lb.	11c
Baby Beef Boil lb., 10c; 3 lbs.	25c
Dry Salt Side Pork, pound	10c
Spare Ribs, meaty, pound	10c
Hamburger or Sausage, pound	10c
5 pound Box Sliced Bacon	89c
Fresh Pig Hearts, lb., 10c; 3 lbs.	25c

Hughes' Grocery

Phone 22

"BARTLESVILLE, OKLA., DAILY ENTERPRISE (Bartlesville, Oklahoma). September 18, 1931. Plaintiff's Exhibit No. 12-am.

10 lbs. Pure Can...	
Folgers, Hills C...	
3 Tall cans Milk	
No. 2½ cans Pumpkin, 3	
6 boxes Matches	
Apricots or Peach Butte...	
Hales Leader Coffee, 3	
10 bars Laundry Soap	
48 lbs. Red Star Flour	
Large Bottle Catsup...	
Quart jar Sour Pickles	
Large Package Oxydol	
3 cans Tomatoes	
Frank Gibbo...	
Spring Chickens pound	
Sausage, Hambu...	
Light Bacon, half or wh...	
Bacon Squares, pound	
Picnic Hams, pound ...	
Whole Smoked Hams, 8	
Beef Steak, pound	
Beef Boil, pound, 10c; 3	
Chuck Roast, pound	
Pork Roast, pound	
Spare Ribs, pound	
Baby Link Sausages, per	

We Buy Chickens and Eggs

Free Delivery

Caulk... Grocer...

The Batavia Store

Phone 555-556. 111 W. 13th

Sugar Cane, 10 lbs. 5...

Butter lb. 2...

Apricots in Syrup, No. 2½ ca...	
Pineapple in Syrup, No. 2½ ca...	
Peaches in Syrup, No. 2½ can	
Pears in Syrup, No. 2½ can ...	
White King, large box ...	
Crystal White Soap, 10 bars ...	
Big 4 Soap, 10 bars ...	
Cocoa Hardwater Soap, 3 ba...	

Story Book Free With Kellogg's Whole Wh...

Choice Fruits, Vegetables, ...

Meats and Frying Chick...

Gold Medal FLOUR, 24 lbs. ..... 5(...

County's Locally Owned Grocerys

AT LOW PRICES. THEIR MONEY STAYS AT HOME. HELP BUILD YOUR TOWN

Skates to Meet

Jack Hyland, a Lumberjack from Wilson, N. C., started to attend the Detroit convention next week, but 24 hrs on exercise to trains, flying, automobiles and walking. He hitched all the way. A distance of 1,000 miles, spending 24 days and eight nights on wheels. He wore out three pairs of skates but says he gained 10 pounds.

Civil War Veterans Elect New Officers

(By the Associated Press)

DES MOINES, Ia. Sept. 18.—Janet P. Town, of Philadelphia, yesterday was elected commander-in-chief of the Grand Army of the Republic at the close of the 61th annual encampment.

The Rev. Frank Haston of Knightsville, Ind., was elected commander-in-chief of the Sons of Union Veterans.

William L. Anderson of Boston was elected senior vice commander and Al D. Bunger, of Des Moines, junior vice commander.

Death Sentence for Mutineers

(By the Associated Press)

SANTIAGO, Chile, Sept. 18.—Six leaders of the recent naval mutiny in Chile were condemned to death yesterday by a court martial. Two others were sentenced to prison for life and four received prison terms of fifteen years. Ten year sentences were imposed upon two of the defendants.

It is claimed that free speech is not allowed in this country, and they can at least prove that the dogs are not allowed to bark in some neighborhoods.

Business Men Will Sponsor Auction Sale

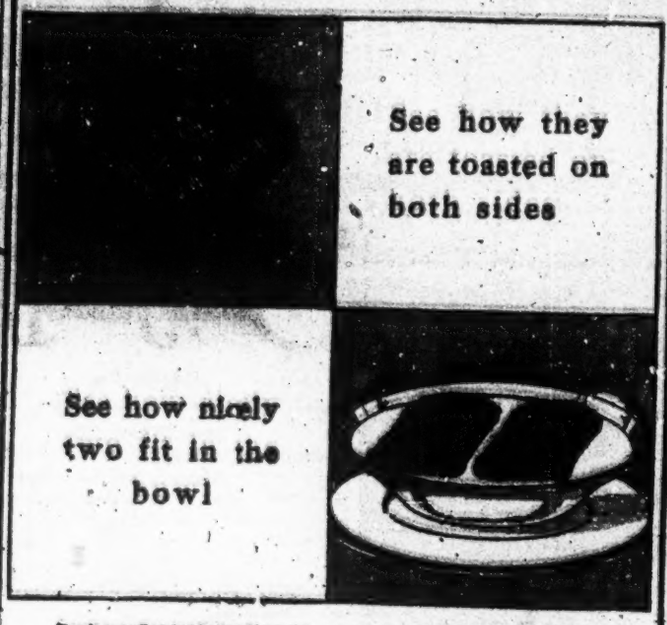
Bartlesville's chamber of commerce has decided to discontinue its sponsorship of the monthly sales day in the city and the regular sale on next Monday will be in charge of the Washington County Business Men's association. The association however has not decided definitely whether or not it will conduct more than the one sale. A committee from the board of directors will assume responsibility of the sale and investigate its possibilities. If this committee reports to the organization favorably, the association will probably continue the monthly sales and if not Monday's sale will probably be the last.

A spaniel at Bedford, South Africa, is rearing a puppy and a lamb.

Surprised Captain Miller

When Captain and Mrs. Ben Miller returned to their home quarters on North Osage avenue last night following their open air meeting in the business section they found a group of friends had gathered for a surprise party in honor of Captain Miller' birthday. There were games and an informal good time for the remainder of the evening.

Seeing is believing—
look at this new and improved
Whole Wheat Biscuit



Don't put off trying Kellogg's WHOLE WHEAT Biscuit. They're extra crisp because they're toasted top and bottom. And every red-and-green package is certified for food value.

When you eat two of these rich whole-wheat shreds with milk or cream your system gets ten important mineral salts and six vitamins. *Think of it*—more than a third of your daily mineral requirements.

Order from your grocer. Fifteen biscuits to the package. Made by Kellogg in Battle Creek.

Kellogg's WHOLE WHEAT BISCUIT

PICK & PAY GROCERY
E. E. Jolley
401 W. 3rd Phone 308

Sugar, 10 lbs. 53c
Country Sorghum, gal., 74c
Potatoes, peck 24c
Pick & Pay Coffee, lb. 28c
Ginger Snaps, 3 lbs. 29c
Flour, 24 lbs. ..
Salt, 10 pounds 19c
Beans, Navy, 5 pounds 25c
Milk, 3 tall cans 19c
Sweet Potatoes, 10 lbs. 29c
Green Beans, nice, lb. 5c
Apples, Jonathan, 10 lbs. 19c
Fresh Tomatoes, 3 pounds for 9c
Brooms, each 25c

Quapaw Grocery
Phone 221—209 Quapaw

Fryers, dressed, lb. 25c
Bacon, Wilson's Certified, sliced, lb. 25c
Cottage Cheese, lb. 20c
Celery, large bunch 15c
Bananas, 4 lbs. 25c
Head Lettuce, head 10c
Tall Pink Salmon, 2 cans 25c
Tuna Fish, white 10c
Parlor Brooms, each 35c
Gallon Sorghum 75c
Sweet Potatoes, 7 pounds 25c
Dozen Sunkist Oranges 35c
Quart Jar Honey 20c
Gold Medal Flour, 24 lb. sack 69c
Coffee, K. W. G., a fine blend, guaranteed, pound 25c
Jersey Brand:
Wheat and Bran Flakes 10c
Nu-Jem Rice Flakes 10c
Corn Flakes 10c
Kellogg's Whole Wheat Biscuits, with Story Book Free, 2 pkgs. 25c

St. Clair Grocery & Mkt.
FRED SEHNING, Mgr.
Phone 3106 Free Delivery 311 Keeler Ave.

FOR SATURDAY
PRICES THAT SAY "STOCK UP"

Flour 24 lbs. 58c
48 lbs. $1.10

Flour, 48 pounds, guaranteed 78c
Sweetheart Meal, 10 pounds 35c
Milk, Pickwick or Armour's 4 tall cans 25c
Coffee, fresh ground, 2 pounds 35c
Ice Tea, bulk, 1-2 pound 15c
Table Salt, 5 pound sack 19c
Ginger Snaps, 2 pounds 25c
APPLES Good Jonathan 8 lbs. 25c
Procter & Gamble Laundry Soap, 10 big bars 37c
Cheese, full cream, 2 pounds 35c
Navy Beans, 10 lbs. 49c
Pinto Beans, 10 pounds 59c
Nut Oleo, 2 pounds 35c
Creamery Butter, quarters, pound 30
Libby's Red Salmon, 25c; 2 cans 55c
Green Beans, pound 5c
Golden Ripe Bananas, doz., 15c; 1 doz. 15c
Oranges, nice and Juicy, 25c; 2 doz. 45c
Malgo Grapes, lb., 10c; 3 lbs. 25c
Pickwick Coffee, lb., 33c; 3 lbs. 95c
Head Lettuce and Celery, Nice and Crisp
Large Juicy Mangoes
SUGAR 10 lbs. 53c
Steak, Veal Round, 2 pounds 35c
Steak, Baby Beef Loin, 2 pounds 35c
Bacon, sugar cured, 1-2 or whole, lb. 17½c
Pork Steak, pound 12½c
Pork Roast, lb. 11c
Baby Beef Both lb., 10c; 2 lbs. 25c
Dry Salt Side Pork, pound 10c
Spare Ribs, meaty, pound 10c
Hamburger or Sausage, pound 10c
5 pound Box Sliced Bacon 50c
Fresh Pig Hearts, lb., 10c; 3 lbs. 25c

Hughes' Grocery
Phone 22

10 lbs. Pure Can
Folgers, Hills C
3 Tall cans Milk
No. 2½ cans Pumpkin,
6 boxes Matches
Apricots or Peach Butt
Hales Leader Coffee, 3
10 bars Laundry Soap
48 lbs. Red Star Flour
Large Bottle Catsup
Quart jar Sour Pickles
Large Package Oxydol
3 cans Tomatoes
Frank Gibbo
Spring Chickens
pound .. .. ..
Sausage, Hambu
Light Bacon, half or wh
Bacon Squares, pound
Picnic Hams, pound
Whole Smoked Hams, 8
Beef Steak, pound
Beef Boil, pound, 10c; 3
Chuck Roast, pound
Pork Roast, pound
Spare Ribs, pound
Baby Link Sausages, po
We Buy Chickens and Eggs
Free Delivery

Plaintiff's Exhibit No. 12-mn.
"BARTLESVILLE, OKLA., DAILY ENTERPRISE
(Bartlesville, Oklahoma),
September 18, 1931.

Caulk's Grocery
The Batavia Store
Phone 555-556. 111 W. 13th Street

Sugar Cane, 10 lbs. **55c**
Butter lb. **27c**

Apricots in Syrup, No. 2½ can ... 19c
Pineapple in Syrup, No. 2½ can... 19c
Peaches in Syrup, No. 2½ can 17c
Pears in Syrup, No. 2½ can 19c
White King, large box 19c
Crystal White Soap, 10 bars 29c
Big 4 Soap, 10 bars 25c
Cocoa Hardwater Soap, 3 bars 19c
Story Book Free With Kellogg's Whole Wheat Biscuits
Choice Fruits, Vegetables, Fresh Meats and Frying Chickens

Gold Medal FLOUR, 24 lbs. **59c**

151

Washington Coun

OFFER YOU BEST FOODS AT LOW PRIC

City Lines

Mrs. Louise Neal of this city, is visiting Miss Etta Ringo in Nowata.

Auto glass. "Tatrom." tf

R. S. Bedford of this city, made a business trip to Independence, Kan., this week.

Home Portraits. Griggs. R-tf.

Mrs. Mabel Hoskins of this city visited friends in Independence, Kan., this week.

Eat with Sue: 316 E. 3rd. R-tf.

Mrs. Margaret Scott returned this week to her home in Cyclone, Pa., after a six weeks visit in the C. P. Lube home, northwest of the city.

Beginners violin outfits $1.00 per week. Jenkins Music Co. R-tf.

Jos Uwanawich Trial Sept 24

The case of the state against Joe Uwanawich alias Johnson, local Gypsy youth, charged with petty larceny under the habitual criminal act, has been set for trial in district court Thursday September 24.

Hull School of Music. Register now. Piano, theory, ear training, and harmony. Get your high school and university credits. We give them. R-tf

To Play Baseball Sunday

A Bartlesville baseball team, composed of outstanding players who were members of teams in the City league which recently closed its season, will journey to Nowata Sunday where a game has been scheduled with the Nowata city team. The game will be called at 2 o'clock.

Butchers Grocery

4th and Shawnee Phone 568

Saturday Specials

10 pounds Sugar	35c
No. 1 Red Bliss Potatoes, peck	30c
Sweet Potatoes, peck	39c
5 pounds White Navy Beans	25c
6 pounds Pinto Beans	25c
No. 2½ Spinach	19c
No. 2 Spinach	15c
No. 1 Spinach	10c
24 lbs. Red Star Flour	63c
48 lbs. Red Star Flour	$1.19
24 lbs. Gold Medal Flour	80c
48 lbs. Gold Medal Flour	$1.15

MILK "From Contented Cows" Agree with Babies Good for Cooking, too! 3 tall cans 20c 6 small cans 20c

2 Kelloggs Shredded Wheat Biscuits with Story Book Free	25c
3 bars Ivory Soap	25c
3 bars Palmolive Soap	22c
4 bars Cocoa Hard Water Soap	25c
4 lbs. White Pickling Onions	25c

Grapes... Plums... Fresh Tomatoes
Hubbard Squash

Cooking Apples, peck	20c

We Deliver

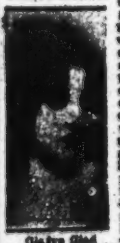
Town Crier Ready Mixed 25t

Great Care In Plastic

By GLADYS GLAD

"America's Most Famous Beauty"

MOST PEOPLE have the idea that plastic surgery is strictly an invention of the present age. But people who harbor this notion are several centuries out of the way of being correct. For facial surgery was practiced even as far back as the 24th century. In the middle ages, when dueling was an common, there were a good many hot-headed gentlemen who had themselves patched up by this means. One lad who lost his nose in a duel had a new one made for himself out of a flap taken from the upper arm.



Gladys Glad

It was mostly nose operations that were required in that age of fisticuffs and duels. And it is nose operations that seem to interest people the most even today. Not operations to restore noses that have been lost, of course. But operations to reshape noses that are instinctively termed.

Plastic surgery has advanced in such an extent in the past number of years that there are very few nasal defects that cannot be remedied. Such noses, bent, broken, bumped noses and hideous noses can all be transformed into shapely pleasing facial appendages through the administrations of a skilled surgeon.

The operation to transform an extremely crooked nose into a straight and more classically formed one is considered the easiest of the nose operations by most surgeons. In this operation, a wedge is cut out of the partition between the nostrils, and the two sides are then brought together and stitched. This draws the point of the nose back and downward, and gives the nose a far more pleasing shape.

The operation to correct a hooked nose is more complicated, and demands far more skill. Sometimes it requires the removal of cartilage, so that the point of the nose may be more pleasingly formed.

In the case of a humped nose, the skin is usually divided and the hump removed with a delicate chisel. The incision is then stitched, and the nose assumes pleasingly straight and well-formed.

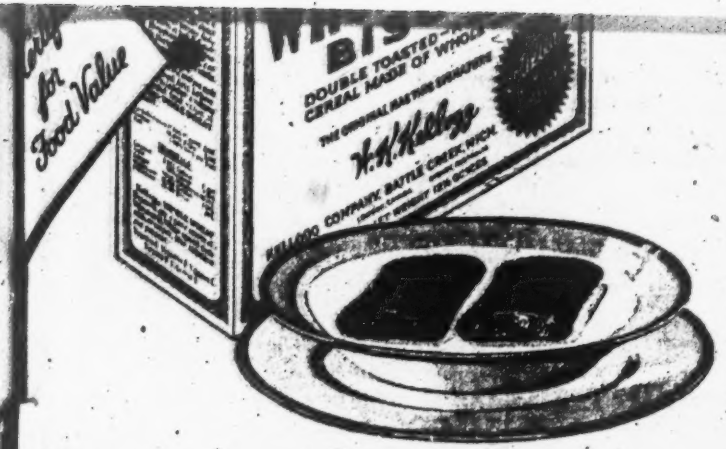
A bulbous nose is usually the most distressing. But it can be remedied by the transplantation of small pieces of bone, and can be made to present a most normal appearance.

Such operations, however, to be successful must be performed by a skilled surgeon only. Never permit a surgeon of questionable reputation to attempt such an operation on your nose. For an untrained sur-

Jews Will Observe Yom Kippur Sunday

Jews in every part of the world who last week celebrated the Jewish New Year, will begin to observe Yom Kippur, the day of atonement, at sunset Sunday evening. The day is the most sacred in the year and is marked by prayer and fasting.

The Day of Atonement climaxes a ten-day period of self-searching penitence. Traditionally Yom Kippur is looked upon as that day upon which God seals the fate of every human being. The Jew seeks



★ *Each package of Kellogg's* WHOLE WHEAT *Biscuit is certified for food value. Look for the analysis on the side panel. Each biscuit contains 10 important mineral salts. A bowl of milk and two biscuits will supply about half your daily requirement of calcium . . . half the phosphorus you need . . . nearly a fourth the iron, as well as many other food elements, including the vitamins A, B, C, D, E, G. IMPORTANT: Copper is present, which makes the iron suits all the more assimilable. Recent scientific research indicates that copper is necessary to prevent anemia.*

Biscuits are made by a special process that guards practically all the elements of the rich whole wheat.

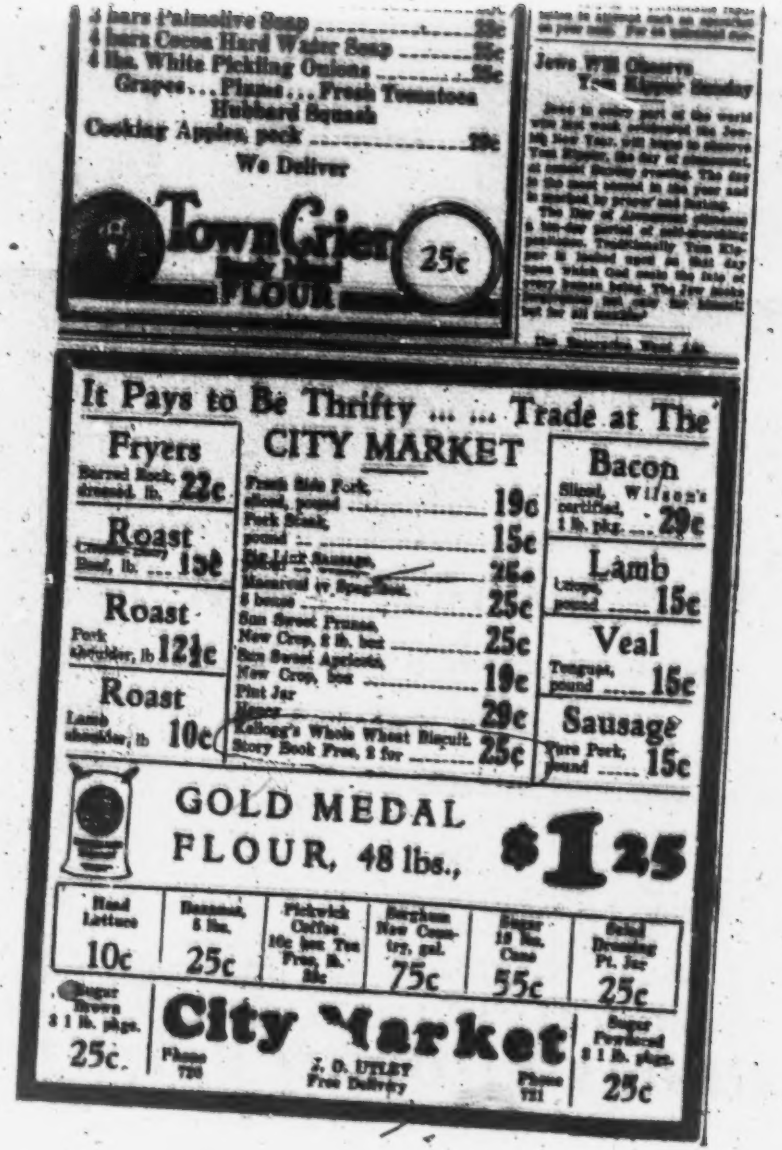
Each time you eat Kellogg's WHOLE WHEAT Biscuit, you get calcium and phosphorus for teeth and bones. Iron and copper for red blood. Vitamins for health . . . as well as many other vital food elements.

Served with milk or cream, two of these tempting biscuits supply more than a third of the average person's daily mineral requirements.

Order a package of Kellogg's WHOLE WHEAT Biscuit from your grocer. Made by Kellogg in Battle Creek.

Kellogg's

WHOLE WHEAT BISCUIT

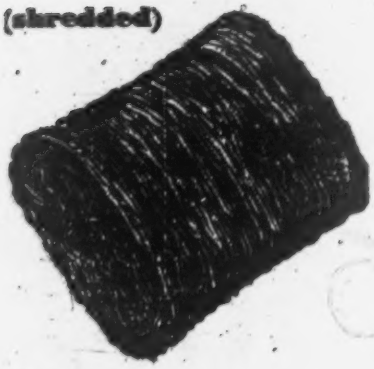

4 bars Palmolive Soap
4 bars Cocoa Hard Water Soap
4 lbs. White Pickling Onions
Grapes... Pigmt... Fresh Tomatoes
Hubbard Squash
Cooking Apples, peck
We Deliver
Town Crier
FLOUR
25c
Jews Will Observe Yom Kippur Monday
It Pays to Be Thrifty ... ... Trade at The
CITY MARKET
Fryers
Roast
Roast
Roast
Bacon
Lamb
Veal
Sausage
GOLD MEDAL FLOUR, 48 lbs., $1.25
Head Lettuce 10c
Bananas, 6 lbs. 25c
Pickwick Coffee 10c lbs. Tea Free, lb. 25c
Heinz New Sauerkraut, qt. 75c
Sugar 10 lbs. Cane 55c
Gold Drop Pt. Jar 25c
Sugar Beets 21 lb. pkg. 25c.
City Market
J. D. UTLEY
Free Delivery
Phone 720
Phone 721
Sugar Powdered 21 lb. pkg. 25c

Plaintiff's Exhibit No. 12-oo.

"NEW BEDFORD TIMES"
(New Bedford, Massachusetts),
May 19, 1931.

A new WHOLE WHEAT Biscuit

(shredded)



KELLOGG'S WHOLE WHEAT Biscuit are made of delicious shreds of whole wheat. They have a rich flavor that you'll delight in. And many other improvements. Every biscuit is toasted top and bottom — extra crisp on *both* sides.

Kellogg's WHOLE WHEAT Biscuit are a convenient size — two just fit the cereal bowl. And you get 15 biscuits in every red-and-green package.

Order these different biscuits from your grocer. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-pp.

"THE BETHLEHEM GLOBE-TIMES"
(Bethlehem, Pennsylvania),
April 7, 1931.

A new
WHOLE WHEAT
Biscuit
(shredded)

KELLOGG'S WHOLE WHEAT Biscuit are made of delicious shreds of whole wheat. They have a rich flavor that you'll delight in. And many other improvements. Every biscuit is toasted top and bottom — extra crisp on both sides.

Kellogg's WHOLE WHEAT Biscuit are a convenient size—two just fit the cereal bowl. And you get 15 biscuits in every red-and-green package.

Order these different biscuits from your grocer. Made by Kellogg in Battle Creek.

Donald's home life is pleasant and cheerful, a product of good management and of the harmony which exists between [illegible]. It is no [illegible] stands [illegible] his feet, greets the [illegible] a smile and every new [illegible]ience with eager interest.

Such a background is the birthright of every child. With good health and a fine, sensible home back of him, he can start without handicaps to make the acquaintance of the larger world outside his home.

He is ready to make friends. His pleasant personality and engaging eagerness send him off on the right foot. He is all set to meet the world and enjoy it.

The child whose home conditions

Genuine Steam Waves

Shamp[illegible] Finger Wave $4.00
All Our Work [illegible]
Manicuring 35c
Facials ..... [illegible]
Finger Waves .....
Hair Trims .....
Phone 4722 for Appointment

SUPERCURLINE BEAUTY SALON
715 W. Third St., Bethlehem, South Side
CATHERINE BURNS, Mgr.

SHREDDED WHEAT

WITH ALL THE BRAN OF THE WHOLE WHEAT

"MEET AT MY HOUSE!"

Telephone your friends—make it a "date." They'll e[illegible] a party at your h[illegible]

TELEPHON[illegible]

Plaintiff's Exhibit No. 13-a.

Kellogg's
SHREDDED
WHOLE WHEAT
BISCUIT
15 BISCUITS
HELP YOURSELF TO HEALTH
W. K. Kellogg
15 BISCUITS
KELLOGG COMPANY, BATTLE CREEK, MICH.
CLEVELAND, OHIO LONDON, ENGLAND LONDON, CANADA SYDNEY, AUSTRALIA

Plaintiff's Exhibit No. 13-b.

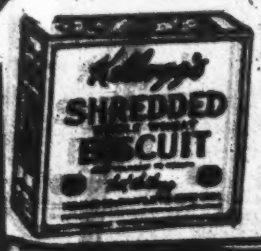
Plaintiff's Exhibit No. 13-c.

Kellogg's SHREDDED whole wheat BISCUITS

15 Biscuits in every Package

2 for

Plaintiff's Exhibit No. 14-a.
"MOON-JOURNAL"
(Battle Creek, Michigan),
May 10, 1929.



Kellogg's Shredded Wheat Biscuit.. 11c

XXXX Sugar Per lb. . . 10c

Cucumbers Good Size . . 10c

HEAD LETTUCE Solid Heads 2 for 25c

RINSO Large Pkg. . . 23c

Quality Service BUTTER 1-Pound Carton . . 49c

Plaintiff's Exhibit No. 14-b.

"MOON-JOURNAL"
(Battle Creek, Michigan),
May 10, 1929.

Plaintiff's Exhibit No. 14-c.

"MOON-JOURNAL"
(Battle Creek, Michigan),
May 10, 1929.

Bananas Fancy Fruit 5c

Kellogg's Shredded Wheat Per Pkg. 10c

Sugar Pure Cane **10** lbs. **57c**

Bring Your Fould's Coupons to the R Stores

RADIO Reserve R-Grocer's Friday program time. It's 8:15 P. M. (Eastern Time) **WJR** (Detroit)

E OWNED Chain Stores—Rite-Way System

Plaintiff's Exhibit No. 14-d.

"MOON-JOURNAL"
(Battle Creek, Michigan),
May 10, 1929.

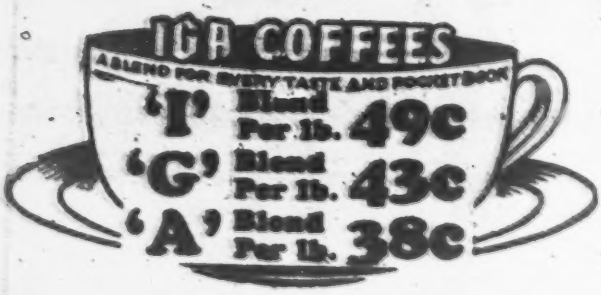
Kellogg's Shredded Wheat 11¢

Puffed Wheat Quaker Pkg. **12¢**

Lux Soap Flakes Pkg. **10¢**

Apricots Del Monte Peeled No. 2 Can ..... **20¢**

Pork and Beans Campbell's Can **9¢**



Mayonnaise I.G.A. 8-oz. Jar **23¢**

Wax Beans I.G.A. **2** No. 2 Cans **37¢**

Plaintiff's Exhibit No. 14-c.

"MOON-JOURNAL"
(Battle Creek, Michigan),
May 10, 1929.

15 CRISPY BISCUITS FOR 10c

RINSO

SOAKS CLOTHES CLEAN

BIG BOX 21c

This is Campbell's Soup Week

1 different Soup for every day!

Asparagus	Mulligatawny
Bean	Mutton
Beef	Ox Tail
Bouillon	Pea
Celery	Pepper Pot
Chicken	Printanier
Chicken Gumbo	Tomato
Clam Chowder	Tomato-Okra
Consommé	Vegetable
Julienne	Vegetable-Beef
Mock Turtle	

Campbell's famous 21 kinds

YOUR CHOICE

6 CANS FOR.. 57c

Hello!

YOU ARE INVITED!

For Your Health's Sake TO A

Demonstration OF THE WORLD-FAMOUS

BATTLE CREEK SANITARIUM HEALTH FOODS

At our downtown store all thihe week. You are offered free consultation with our expert dietician.

Turnstile Coffee Per Lb. 37c

FRESHLY ROASTED ALWAYS

HEINZ Fresh Cucumber Pickles, Big Jar 19c

HEINZ Fresh Cucumber Relish Big Jar 19c

Kidney Beans 2 Cans for... 25c

JOAN OF ARC

Lima Beans 2 Cans for 25c

Plaintiff's Exhibit No. 14-f.
"ENQUIRER & EVENING NEWS"
(Battle Creek, Michigan),
May 10, 1929.

Limit 3 Pkgs. three cakes

Kellogg's **Shredded Wheat** 11¢

Good Peaches Large Can .... 25¢

Milk Pet or Carnation 3 Large Cans 29¢

Gold Dust Large Package ..... 23¢

SUGAR, XXXX ..... 10¢

Cucumbers Good Size ..... 10¢

Head Lettuce Solid Heads, 2 for 25¢

Rinso Large Package ..... 23¢

Quality Service Butter 49¢

SUGAR 5 lbs. ..... 29¢

Strawberries qt, box ..... 25¢

Nice Clean Full Measure. *"When we say good — we mean good."*

Mershon's Grocery
208 Cherry St. Phone 7711

Brown & Johnson

Wm. Murray
786 Maple St. Phone 5714

Alliance Merc. Co.
43 Aldrich St. Phone 2312

Wm. R. Alden
572 Maple St. Phone 2-3732

H. F. Smith
633 Lake Avenue Phone 7311

Frank Cumano

Plaintiff's Exhibit No. 14-g.
"ENQUIRER & EVENING NEWS"
(Battle Creek, Michigan),
May 10, 1929.

Kellogg's Shredded Wheat 11¢

Mayonnaise *I.G.A. 8-oz. Jar* **23¢**

Wax Beans *I.G.A.—2 No. 2 Cans* **37¢**

Raisins *I.G.A. Seedless—2 lb. pkg.* **19¢**

Salt *I.G.A.—Iodized or Free Running—2-lb. pkg.* **10¢**

Oriental—No. 2 Can
Bean Sprouts 19¢

Sweet Pickles *Quart Jar—* **39¢**

Dill Pickles *Quart Jar—* **25¢**

Inspiration *Cleaner—Can* **35¢**

Tune in on WMAQ and Hear "Al" and "Pete," Inspiration Cleaner Stars — Four Times Every Week

HOME OWNED STORES

IGA MEANS Independent Grocers' Alliance

IVORY AND BLUE FRONTS

Kellogg's Shredded Wheat 11¢

Good Peaches Large Can .... 25¢

Milk Pet or Carnation 3 Large Cans 29¢

Gold Dust Large Package ..... 23¢

SUGAR, XXXX ..... 10¢

Cucumbers Good Size ..... 10¢

Head Lettuce Solid Heads, 2 for 25¢

Rinso Large Package ..... 23¢

Quality Service Butter 49¢

SUGAR 5 lbs. ..... 29¢

Strawberries qt. box ..... 25¢

Nice Clean Full Measure. *"When we say good — we mean good."*

Merchen's Grocery
208 Cherry St. Phone 7711

Brown & Johnson
400 W. Mich. Ave. Phone 3797

A. J. Pooley Grocery
188 Meachem Ave. Phone 9422

Wm. Murray
756 Maple St. Phone 5714

Alliance Merc. Co.
43 Aldrich St. Phone 8812

Ed. O'Connor
98 Meachem Ave. Phone 4212

J. R. Doig
249 E. Mich. Ave. Phone 7811

Wm. R. Alden
572 Maple St. Phone 2-3732

H. F. Smith
633 Lake Avenue Phone 7311

Frank Cusmano
256 Main St. Phone 2-3611

P. L. Meehan
456 Lake Ave. Phone 9322

Kellogg's Shredded Wheat 11¢

Mayonnaise *I.G.A. 8-oz. Jar* 23¢

Wax Beans *I.G.A.—2 No. 2 Cans* 37¢

Raisins *I.G.A. Seedless—2 lb. pkg.* 19¢

Salt *I.G.A.—Iodized or Free Running—2-lb. pkg.* 10¢

Oriental—No. 2 Can

Bean Sprouts 19¢

Sweet Pickles *Quart Jar—* 39¢

Dill Pickles *Quart Jar—* 25¢

Inspiration *Cleaner—Can* 35¢

Tune in on WMAQ and Hear "Al" and "Pete," Inspiration Cleaner Stars — Four Times Every Week

HOME OWNED STORES

IGA MEANS Independent Grocers' Alliance

IVORY AND BLUE FRONTS

Plaintiff's Exhibit No. 14-h.
"ENQUIRER & EVENING NEWS"
(Battle Creek, Michigan),
May 10, 1929.

Know the joys of marketing with a crowd—yet being alone. At Pi
Wiggly you enter—just one at a time—no confusion—no waiting. It's a pl
ure to shop the Piggly Wiggly way, because you are privileged to use
own judgment without interference or suggestion.

Strawberry—Raspberry—Peach—Blackberry ar
Pineapple.

BUTTER
Fresh Creamery
Riverside—Our Best—
Pound Carton 49c
Plain Wrapped—It's Good—
Pound 45c

Pure Preserves Pound Jar 25
New Cabbage Per Pound 5
Head Lettuce Each 8½
Palmolive Soap 3 Bars for 20

15 CRISPY
BISCUITS FOR
10c

THIS IS CAMPBELL'S SOUP WEEK

Plaintiff's Exhibit No. 14-i.

"EATON RAPIDS JOURNAL"
(Eaton Rapids, Michigan),
April 24, 1931.

CULVER'S

All Week Specials

SHREDDED WHEAT (Kellogg's) package	10c
FIG BARS, 2 pounds	25c
PINEAPPLE, fancy, No. 2½ can	26c
CALUMET BAKING POWDER, pound can	27c
PRUNES, extra large, per pound	13c
OXYDOL, large package	23c
PICKLES, Flavorite, 6 oz. bottle	8c
COCOA, 2 pound can	25c
RADIUM FLOUR, per sack	53c
CHASE & SANBORN'S COFFEE, per pound	37c
TEA ROLLS, dozen in package	5c

Fresh Fruits and Vegetables
for Easter

E. M. CULVER

Phone 47 F 2 We Deliver

Plaintiff's Exhibit No. 14-j.

"EATON RAPIDS JOURNAL"
(Eaton Rapids, Michigan),
April 24, 1931.

All Week Specials

ALL WEEK SPECIALS — April 25 to May 2

PINEAPPLE, large 2½, fancy Dole 1, per can 26c
PRUNES, 30-40 size, per, pound 13c
FLAVORITE PICKLES 8c
SHREDDED WHEAT BISCUIT, Kellogg's 10c
RED BEANS per can 6c
MILK, Libby's, 3 large cans 23c
SOAP CHIPS, Quick Arrow, 2 large packages 35c
(Two Sunbrite Cleanser Free)
SALSODA, 2½ pound package, 2 packages 15c
SPINACH, Chef, 2½ can, per can 18c
LUX TOILET SOAP, 3 bars 20c

— SATURDAY SPECIALS —

Rinso, large package 21c
Radium Flour, 24½ pound sack 54c
Chef Coffee, per pound 36c
Liquid Veneer Furniture Polish, large 59c
Crepette Dust Cloth Free (regular 25c value)
Fresh Fruits, Vegetables, Strawberries

W. W. KNAPP

Phone '82 — Eaton Rapids

C. P. SPRINGER

Phone 305 F 5 — Petrieville

Plaintiff's Exhibit No. 14-k.
"ENQUIRER & EVENING JOURNAL"
(Battle Creek, Michigan),
May 10, 1929.

Banner Nut Oleo 25c Quality **2 Lbs. 35c**

One Pound Crisco 25c

One Measuring Glass FREE with Each 1-lb. Tin

Head Lettuce Fresh and Crisp Per Head **10c**

Grapefruit Full of Juice ..... **4 for 25c**

Bananas Fancy Fruit ..... **3 Lbs. 23c**

Kellogg's Shredded Wheat Per Pkg. **10c**

Sugar Pure Cane 10 Lbs. 57c

Bring Your Fould's Coupons to the R Stores

RADIO Reserve R-Grocer's Friday program time. It's 8:15 P. M. (Eastern Time) **W J R** (Detroit)

E OWNED Chain Stores—Rite-Way System

Plaintiff's Exhibit No. 14-1.
"THE HERALD-STAR"
(Steubenville, Ohio),
September 4, 1931.

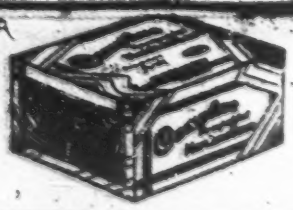
Sq

Whether you go a
week-end, you wi
that will furnish a

Saturd

Ft. Steuben
MILK
4 cans 23¢

Kellogg's Shredded Wheat Biscuit 2 pkgs. 25¢



Campfire
Marshmallows
lb. . . . . 22¢

Fresh Fruits & Vegetables

Plaintiff's Exhibit No. 14-m.
"CIRCLEVILLE HERALD"
(Circleville, Ohio),
March 27, 1931.

Plfs. Ex. 14-m.

TRADE MARK SERV-U-WEL

SHREDDED WHEAT Kellogg's pkg. 13c

Tomato Ketchup	Beechnut	Sm.	13c
		lge.	23c
Crisco		3 lb. can	71c
Soda Crackers		2 lb. box	33c
Macaroni Spaghetti	Crescent Brand	3 pkgs.	23c

Laurelville Flour		24 lb. bag	65c
Butter	Gold Bar	lb.	37c
Salmon		tall can	14c
Canned Peas	Tender Early June	can	15c

SERV-U-WELL COFFEE lb. 32c

Oranges	160 Size Navels	doz.	41c
Onion Sets	lb. 10c	3 lbs.	28c
Celery	Large Stalks	each	14c
Sweet Potatoes		3 lbs.	25c

Grape Fruit	54-64 Size	4 for	30c
Spinach		2 lbs.	23c
Cabbage	New	lb.	5c
Head Lettuce		each	10c

Serv-U-Wel Toilet Tissue 4 rolls 27c

Matches	6 Box Carton		21c
Ivory Soap		3 bars	22c
Peanut			

Ivory Flakes	Sm.	10c
	Lg.	23c
Pumpkin	No. 2½ can	15c

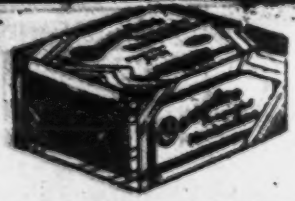
Sq

Whether you go a
week-end, you wi
that will furnish a

Saturd

Ft. Steuben
MILK
4 cans 23¢

Kellogg's Shredded Wheat Biscuit 2 pkgs. 25¢



Campfire
Marshmallows
lb. . . . . 22¢

Fresh Fruits & Vegetables

Malaga Grapes, 2 lb. 19c

Pkg. Ref. 14 — m.

TRADE MARK

SERV-U-WEL

SHREDDED WHEAT Kellogg's pkg. 13c

Tomato Ketchup	Beechnut	sm.	13c
		lge.	23c
Crisco		3 lb. can	71c
Soda Crackers		2 lb. box	33c
Macaroni			
Spaghetti	Crescent Brand	3 pkgs.	23c

Laurelville		24 lb.	
Flour		bag	65c
Butter	Gold Bar	lb.	37c
Salmon		tall can	14c
Canned Peas	Tender Early June	can	15c

SERV-U-WELL COFFEE lb. 32c

Oranges	150 Size Navels	doz.	41c
Onion Sets		lb. 10c 3 lbs.	28c
Celery	Large Stalks	each	14c
Sweet Potatoes		3 lbs.	25c

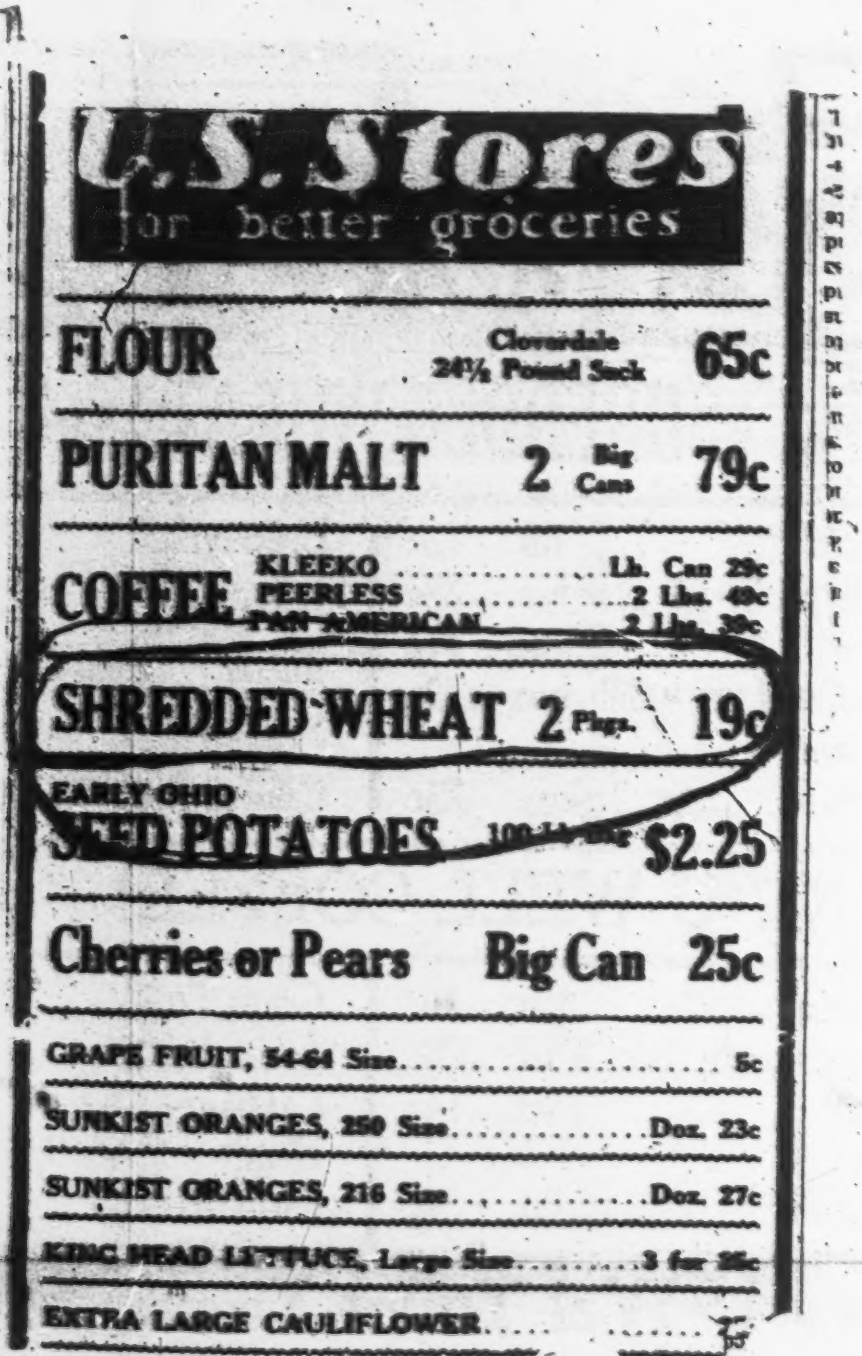
Grape Fruit	54-64 Size	4 for	30c
Spinach		2 lbs.	23c
Cabbage	New	lb.	5c
Head Lettuce		each	10c

Serv-U-Wel Toilet Tissue 4 rolls 27c

Matches	6 Box Carton		21c
Ivory Soap		3 bars	22c
Peanut Butter	Full Pint Jars		22c

Ivory Flakes	Sm.		10c
	Lg		23c
Pumpkin		No. 2½ can	15c
Royal Anne Cherries		No. 2½ can	32c

Plaintiff's Exhibit No. 14-n
"CIRCLEVILLE HERALD"
(Circleville, Ohio),
March 27, 1931.



U. S. Stores
for better groceries

FLOUR Cloverdale 24½ Pound Sack 65c

PURITAN MALT 2 Big Cans 79c

COFFEE
KLEEKO ..... Lb. Can 29c
PEERLESS ..... 2 Lbs. 49c
PAN-AMERICAN ..... 2 Lbs. 39c

SHREDDED WHEAT 2 Pkgs. 19c

EARLY OHIO
SEED POTATOES 100-Lb. Bag $2.25

Cherries or Pears Big Can 25c

GRAPE FRUIT, 54-64 Size 5c

SUNKIST ORANGES, 250 Size ..... Doz. 23c

SUNKIST ORANGES, 216 Size ..... Doz. 27c

KING HEAD LETTUCE, Large Size ..... 3 for 25c

EXTRA LARGE CAULIFLOWER 7c

Plaintiff's Exhibit No. 14-c.

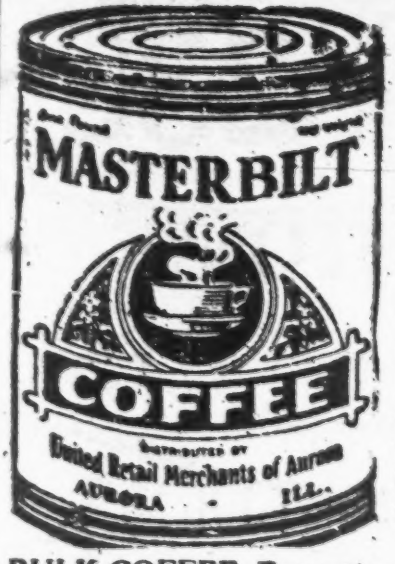
"THE AURORA-BEACON-NEWS"
(Aurora, Illinois),
October 16, 1931.

Large Size..21c

KELLOGG SPECIALS—

SHREDDED WHEAT or
RICE KRISPIES, pkg..... **10c**

Model Airplane and 1 lb. Masterbilt Coffee 50c



The plane is the "Unbreakable Ace" a $1.50 value that will rise off the ground, fly 75 to 200 feet and stand nearly any crash without injury.

The coffee is one of the world's best. Masterbilt has given continuous satisfaction to Urma customers for many years.

BULK COFFEE, Exceptional drinking qualities for a coffee at this price. Lb. **23c**

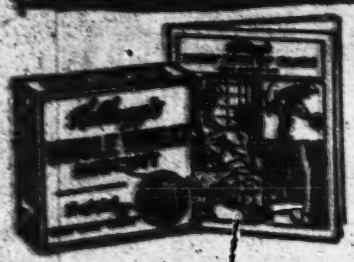
Plaintiff's Exhibit No. 14-p.

"THE DAILY NORTHWESTERN"
(Oshkosh, Wisconsin),
March 18, 1932.

Unsweetened Milk 4 Cans 25c

Wax or Green Beans
a good quality 2 Cans 19c

Kellogg's Shredded Wheat



Story and Game Book Free

2 pkgs
23c

JOHNSTON'S

Graham Dots Pkg 15c

A New Graham Cereal

Cookies Special lb 23c

Sandwich Shorts—Delicious Cream Filling. Regular 30c Value

Enzo Jel All Flavors 3 Pkgs 19c

Orga Coffee Blue Pkg lb 21c

Gold Dust Large Pkg 21c

Oranges 28c 2 for 53c

Plaintiff's Exhibit No. 14-q.

"NEW ENGLAND GROCER AND TRADESMAN"
(Cambridge, Massachusetts),
January 8, 1932.

(C. M. Kimball Co., Whitbread, Mass.)

Baking Powder

Davis O. K. and Davis Dry Yeast

	Per case
8c. (8 oz.) 2 doz.	$1.44
10c. (6 oz.) 2 doz.	1.80
15c. (6 oz.) 2 doz.	2.70
25c. (10 oz.) 1 doz.	2.25
5 lb., ½ doz.	4.75
10 lbs., ½ doz.	8.50

Royal

	Per Doz.
2 oz.	.22½
4 oz.	1.80
8 oz.	2.45
12 oz.	4.80
2½ lb.	13.70
5 lb.	24.50

Wagon Service on 2½ ozs. Royal Gelatin flavored in 24c. per doz. and one oz. plain $1.44 a doz.

Rumford

	Per doz.
¼-lb	.96
½-lb.	1.86
1-lb.	3.86
2-lb.	6.50
5-lb.	13.50

Slade's

Slade's ¼-lb. tins	.96
Slade's ½-lb. tins	1.80
Slade's 1-lb. tins	2.70
Slade's 5-lb. tins	10.00

Calumet

	Per case
24-4 oz. cans	3.60
72-4 oz. cans	8.00
24-8 oz. cans	4.70
48-8 oz. cans	7.60
24-1 lb. cans	6.60
48-1 lb. cans	12.00
12-2½ lb. cans	7.00
6-5 lb. cans	6.05
6-10 lb. cans	9.30

Beverages

Jo-Rex Fruit Syrups

Assorted cases, 12 pints 2.40

Punch, Orange, Lemon, Raspberry, Lemon & Lime, Pineapple, Strawberry, Grape and Cherry.

Kellogg Kaffee Hag

12 1-lb. cans 6.15

General Foods Sales Co., Inc.

Postum Cereal, 24-oz., 1 doz. $3.35
Instant Postum, 24 4-oz. tins 5.40
Instant Postum, 12 8-oz. tins 4.50

Simpson Spring Ginger Ale

Gold Label, 15½ oz., 2 doz. 2.00
Pale Dry, 12½ oz., 2 doz. 2.00

(Sparkling Water, Vimor, Lime Juice, White Label Ginger Ale, Carbonated Nerve Tonic, Certified Fruit Pulp and Fruit Syrups. For particulars write Simpson Spring Co., 80 Boston, Mass.)

Cakes

Berwick Cake Co.

	Per lb.
Mocha Layer, 8 in box	60c
Cocoanut Layer, 3 in box	60c
Raisinette, 8 in box	15c
Nut Package, 9 in box	15c
Snow Flake, 8 in box	15c
Canda Fruit, 8 in box	15c
Rosbud Sponge, 1 in box	15c
Jelly Rolls, 1 in box	15c
Sponge	15c
Chocolate Layer, 3 in box	15c
Orange Layer, 3 in box	14c
Pineapple Layer, 3 in box	14c
Raspberry Layer, 3 in box	14c
Lemon Loaf, 3 in box	15c
Weekly Special, 3 in box	15c
Duchess Plain, 3 in box	20c
Duchess Nut, 3 in box	20c
Duchess Fruit, 3 in box	20c
Duchess Raisin, 3 in box	20c
Duchess Dark Fruit, 3 in box	20c
Duchess Marble, 3 in box	20c
3 Layer Nut & Choc., 3 in box	14c
Boxes Devil Dogs	30c
Box Buddies Chocolate	24c
Box Pals (Cream)	30c
Box Cups (Cocoanut)	30c
Box Cups (Raisin)	30c
DeLuxe Oriental 1-Lb. Pan	25c
Boxes Plain Slices	45c
Boxes Raisin Slices	45c
Boxes Nut Slices	45c
Boxes Oriental Slices	45c
Sponge Layer, 3 in box	10c
Creamy Fudge, 3 in box	12c
8 Layer Nut	25c
Mocha Creme Pie, 3 in box	20c
Layer Sponge	15c
2 lb. loaf Plain	20c
2 lb. loaf Raisin	20c
2 lb. loaf Marble	20c
2 lb. loaf Nut	20c
4 lb. loaf Dark Fruit	20c
Cocoanut Bar, 2 in box	20c
Choc. Silver Bar, 2 in box	20c
Orange Bar, 2 in box	20c
Jenny Lee, 6 in box	24c
Whoopee Box of 8	30c
Creme Pies of 8	30c

Certo

(Minimum shipment 10 cases)

	Per case
24-8oz. bottles	$6.30

Coffee

Maxwell House Coffee

	Per lb.
Maxwell House Coffee, 1 lb.	.32

(Packed 24, 36 or 48 to case)

Genuine Arabian Mocha & Java ..... .43

(Packed 12 cans to case)

Bliss Coffee ..... .24½

(Packed 12 or 24 cans to case)

Specify: Whole Bean, Percolator-Steel Cut Ground, or Pulverized.

Samba Coffee

12-1 lb. tins..... 5.50

24 10-oz. pkgs..... 2.70
[illegible]
Kellogg's Shredded Whole Wheat Biscuit
12 [illegible]..... 1.80
60 pkgs. 1½ oz..... 1.10

Quak. Oats, Lge., 12 24-oz.	$2.30
Quick Q. O., Lge., 12 24-oz.	2.30
Mothers Oats, 24, 12 24-oz.	2.30
Quk. Meth. O., 24, 12 24-oz.	2.30
Meth. Oats, China, 12 24-oz.	2.25
Quk. Meth. O., Ch., 12 24-oz.	2.25
Scot. Pearl Barley, reg., 24s	2.20
Quak. Tel. Cereal, reg. 24s	1.45
Quak. Tel. Cereal, lge., 12s	1.35
Quak. White Corn., reg. 24s	1.35
Quaker Hom. Grits, reg. 24s	1.35
Quaker Hom. Grits, lge. 12s	1.35
Quaker Pearl Hom., reg. 24s	1.35
Pettijohns Break. Food, 12s	2.30
Quaker F. S. Farina, 24s...	2.10
Puffed Wheat 12s.....	2.30
Muffets 24s	2.70
Quak. Cracknuts 24s.....	2.15
Grape Nuts, 2 doz.....	2.80
Grape Nuts, 100	2.75
Post Toasties, 2 doz.....	2.85
Post Toasties, 4 doz.....	2.85
Post Toasties, pkgs.....	2.00
Post Bran Flakes, 2 doz.....	2.70
Post Bran Flakes, 100 indiv.	2.00
Wheatena, 24-2 oz.....	2.70
Wheatena, 100-1 oz.....	2.00
Wheatina, 48-1 oz.....	1.10

(Washburn Crosby Co., 729 North Station Industrial Bldg., 160 Causeway St., Boston, Mass.)

Chili Sauce

Curtiss Brothers Co.

	Per doz.
Blue Label, 24 8-oz.	2.10
Blue Label, 24 14-oz.	3.00

Cocoa and Chocolate

Baker's Breakfast Cocoa

	Per case
12-1 lb. tins	6.10
2 boxes, ¼ lb., 12 each	6.60
2 boxes, 1-6 lb., 90 each	6.70
12-6 lb.	22.20

Baker's Chocolate

Premium No. 1

	Per case
½ lb., 2 boxes, 12	5.00
¼ lb., 2 boxes, 24	5.20
1-6 lb., 2 boxes, 30	5.40

German Sweet

¼ lb., 2 boxes, 24	3.70
1-10 lb., 10 boxes, 24	24.00

Baker's Caracas Sweet

2 oz., 24 boxes, 12 each	19.20
¼ lb., 2 boxes, 36 each	5.00
Tablets, 36 boxes, 24 packets	19.20

Baker's Dot Sweet

	Per case
¼ lb. boxes, 12	5.10
1-6 lb. 24-lb. boxes, 12	32.80

Plaintiff's Exhibit No. 14-r.
"EVENING WORLD-HERALD"
(Omaha, Nebraska),
April 8, 1932.

...onte Crushed
...eapple
...lands, Sunrise
No. 2½ can .. 15c

Silver Bar Country Gentleman, Golden Bantam or Crosby
CORN 3 for 29c
No. 2 can..

H. J. Heinz
KETCHUP
Large Size Bottles
Each, 17¢ 3 for 49c

Sunset Creamery
BUTTER
1-Pound carton 18c
Do not churn this butter with butter quotes monthly sold at so called bargain prices.

...el Monte Fancy ...arly Garden
PEAS
No. 2 Cans .. 15c

SUGAR
G. W. 10-lb. Cloth Bag 45c
Domino Sugar, 2-lb Car...

KELLOGG'S PRODUCTS
Corn Flakes
Large Size Pkg. 10c
Shredded Wheat
Biscuits, Nursery Rhyme Book Free, Pkg. 10c

...ch of Eden Preserved
FIGS
16-oz. Glass 23¢ 2-oz. Can 10c

Silver Leaf
SOAP
Bar 2c
Box of 100 Bars, $2.00

Del Monte Royal Anne Cherries:
No. 1 can, ...19¢, No. 2, 23¢, No. 2½, 31¢
Del Monte Fruit Salad,
No. 1 can, ...21¢, No. 2, 25¢, No. 2½, 33¢
...rple Tomatoes, medium can .....3 for 25¢
...ge brand Sifted Peas; No. 2 can .....10¢

Plaintiff's Exhibit No. 14-a.

"HOUSTON CHRONICLE"
(Houston, Texas),
March 25, 1932.

Butter 27c

Plato Salad Oil
Pint Cans 19c

Shredded Wheat
(KELLOGG'S)
Per Pkg. 10c

OCEAN SPRAY
Cranberry Sauce 17-oz. Can 2 for 31c
(2—4-oz. Ocean Spray Cranberry Juice Cocktail F R E E)

[illegible] WHY YOU LOOK AT IT I.G.A. COFFEES SATISFY

[illegible] Vacuum Packed Coffee Delicious Cup 35c

EXTRA FANCY
Winesap Apples 2 Dozen for 25c
Calif. Red Ball Lemons doz. 13c
Prices Slightly Higher at Points Outside Houston Account of Transportation Charges

I.G.A. STORES
THOUSANDS OF STORES FROM COAST TO COAST

There Are 15 "Miss Classifieds" at Your Service—Each One

Plaintiff's Exhibit No. 14-t.

"WICHITA FALLS DAILY TIMES"
(Wichita Falls, Texas),
June 19, 1931.

THE RED & WHITE STORES

Kuner's Economy No. 2 Can 12½c

SHREDDED WHEAT
Kellogg's Large Package 10c

COMPOUND
Flake White Pure Vegetable 3 Pounds 85c

MILK
Red and White 6 Small or 3 Tall 21c

FLOUR
Wichita Leaf 24 Pounds 53c
48 Pounds 96¢

3 Cans 21c

SOAP
Procter & Gamble's "Luna" White Laundry 10 Bars 25c

GRAPE JUICE
Church's
Quarts 39c Pints 21c

COFFEE
Maxwell House 1 Lb. Can 29c

TEA
Red and White The Perfect Blend
½-lb. 44c — ¼-lb. 23c

Plaintiff's Exhibit No. 14-u.

"SALT LAKE CITY TRIBUNE"
(Salt Lake City, Utah),
May , 1931.

SEWELL'S United Stores

335 So. State	404 6th Ave.	871 E. 9th So.	501 E. 3rd So.
575 E. 1st So.	485 N. 2nd W.	1246 S. 9th E.	608 W.N. Tem.
54 E. 1st So.	679 So. State	1067 E. 21st S.	684 E. 21st S.

We Reserve the Right to Limit Quantities.

Peanut Butter Bulk..... **2 lbs. 35c**
Shredded Wheat Kellogg's **Pkg. 10c**
Potato Chips—Bulk ..... **Lb. 33c**
Old Dutch Cleanser, 3 Cans 25c

ORANGES
SUNKIST
2 doz. 25c

WHITE KING
Granulated Soap
Lg. pkg. 39c.
20-oz. pkg. **23c**

Lettuce Solid Heads..... **2 for 9c**
Green Peas..... **lb. 8c**
Lemons Sunkist..... **Doz. 25c**
Spinach Fresh Cut..... **4 lbs. 9c**
New Potatoes..... **5 lbs. 19c**
Onions Sweet Spanish..... **10 lbs. 15c**
Oranges Large, Full of Juice..... **Doz. 29c**
Asparagus New Utah..... **2 lbs. 15c**

SATURDAY MARKET BARGAINS

To economize in your home, it pays to purchase quality at all times, regardless of the item you need. If you are one of the few who are not purchasing your meats at one of our markets, drop in Saturday, purchase your wants, then you be the judge.

Stewing Hens Sewell's Quality..... **lb. 17c**
Yearling Mutton Grain-Fed, Leg Roast.. **lb. 17c**
Pork Roast Shoulder Hock End..... **lb. 14c**
Baby Beef Pot Roast Shoulder Cuts ..... **lb. 10c**
Young Mutton Breast 3 lbs. 25c
Pork Roast Pig Pork, Shoulder Best Cuts **lb. 19c**
Rolled Rump Tender and **lb. 35c**

Prime [illegible] Oven Roast Steer Baby [illegible]

Plaintiff's Exhibit No. 14-v.

"THE DAILY REPORT"
(Ontario, California),
September 3, 1931.

It For Less At

)KIN'S

123 West "B" St.

e the Crowds Go"—

Specials for FRIDAY and SATURDAY
Sept. 4th and 5th

only give you sands of good d that — Our ns fresh goods **Price** —the lowest, of course, due to our tremendous volume and buying power— **Service** through our big force of competent clerks — ready to serve you with a smile—

1-lb. Can **35c**

2-lb. Can **69c**

31c

Dish FREE with Each Deal

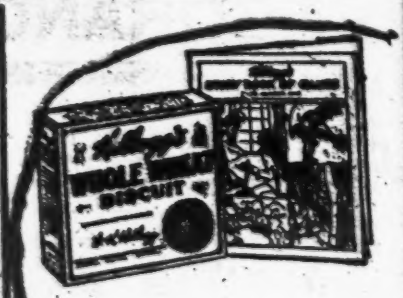
29c

Potato Chips

Large 25c bag

3 for

19c



1 Pkg. Kellogg's Corn Flakes

Pkg. Kellogg's Shredded Wheat

1 Pkg. Kellogg's Rice Krispies

All for . . . **29c**

And a Story Book of Games—FREE

Graber's

Ketchup | Salmon

Plaintiff's Exhibit No. 14-w.
BOULDER, COLORADO, NEWSPAPER,
April 3, 1931.

Solitaire Coffee **HOME OWNED STORES** Solitair GROCERIES

YOU WILL FIND MERCHANDISE OF FIRST QUALITY AND PRICED CHEAPER IN ALL HOME-OWNED STORES

Salad Wafers
2-lb. Package
26c
Merchants Biscuit Company
Supreme Quality

MARSHMALLOWS, Lb. . . . 23c
Fresh, Bulk
RICE, Large Head, 2-lb. Pkg. 23c
SOC-JEL, H Whips, 3 Pkgs. 23c
DR. PRICE'S BAKING POWDER, 12-oz. 23c
BAKER'S Chocolate, ½ lb. 23c
BAKER'S COCOA, ½ lb. . . . 23c
SUGAR, Powdered, 2½ lbs. 23c
SUGAR, Brown, 2½ lbs. . . . 23c

Fresh Asparagus
2 Pounds
25c
No. 1 Grats
at a very attractive price.

SOLITAIRE VANILLA EXTRACT 4-oz. Bottle **38c**

Potatoes
15 Pounds
19c
Firm White
A Colorado Product

PEACHES, Dried, lb. 23c
PRUNES, Good Size, 2 lbs., 23c
BLACK FIGS, 2 lbs. 23c
APRICOTS, Dried, lb. 23c
RAISINS, Seedless, 2 lbs. . . 23c
RAISINS, Seeded, Pkg. . . . 13c
KELLOGG'S SHREDDED WHEAT, 2 Pkgs. 25c
FOOD OF WHEAT 28-oz pkg 15c

Oranges
Per Dozen
27c
Large, Juicy

THOMPSON'S ICE CREAM AND MALTED MILK 42-

Plaintiff's Exhibit No. 14-x.

"JOURNAL"
(Minneapolis, Minnesota),
April 15, 1932.

Fairway Fine Foods

Specials for Saturday, April 16

Why spend your valuable time "shopping" for food values when you'll find them so easily at your nearest Fairway store! Every Fairway value is of known high quality, too. Notice these low prices for these products you prefer to buy—and remember that every item in our store is priced low to give your food dollars greater buying power. Shop quickly and wisely—the Fairway.

TOMATO SOUP FAIRWAY Real Tomato Flavor Seasoned Just Right 4 CANS 23c

SUGAR PURE GRANULATED 10 LBS. 45c

COFFEE SERV-WELL Mild, Mellow Flavor Vacuum Sealed 1 LB. CAN 34c

QUAKER CRACKLE PKG. 10c

JELL-O CHOICE OF ALL FRUIT FLAVORS 4 PKGS. 25c

RAP-IN-WAX

The quality waxed paper of many uses. Better for usual uses and useful in many ways never before considered possible with waxed paper.

SENIOR ROLL 19c

BRILLO

Cleans, scours, polishes in one operation! Twice as fast—five times easier! Unequalled for aluminum and all kitchen utensils, glass, enamelware, etc.

LARGE PKG. 19c

PABST-ETT CHEESE PKG. 15c

SODA CRACKERS WALDORF Fresh Crisp 2 LB. CADDY 21c

PEAS SERV-WELL small Sifted 2 NO. 2 20c

KELLOGG'S SHREDDED WHEAT PKG. 10c

PINEAPPLE SERV-WELL 2 CANS 35c

IVORY FLAKES LARGE PKG. 21c

LAUNDRY SOAP BIG 4 or CRYSTAL WHITE 10 BARS 25c

FRUITS AND VEGETABLES

Rhubarb	Fancy Mammoth Strawberry Variety	2 LBS. 17c
Oranges	Medium Size Sweet Navels	2 DOZ. 55c
Asparagus	Fancy Green	2 ½-LB. BUNCHES 11c
Carrots	Fancy California	6 LARGE [illegible]

Plaintiff's Exhibit No. 14-y.

"JANESVILLE DAILY GAZETTE"
(Janesville, Wisconsin),
May 19, 1931.

SWANSON'S

ONE CALL FOR ALL

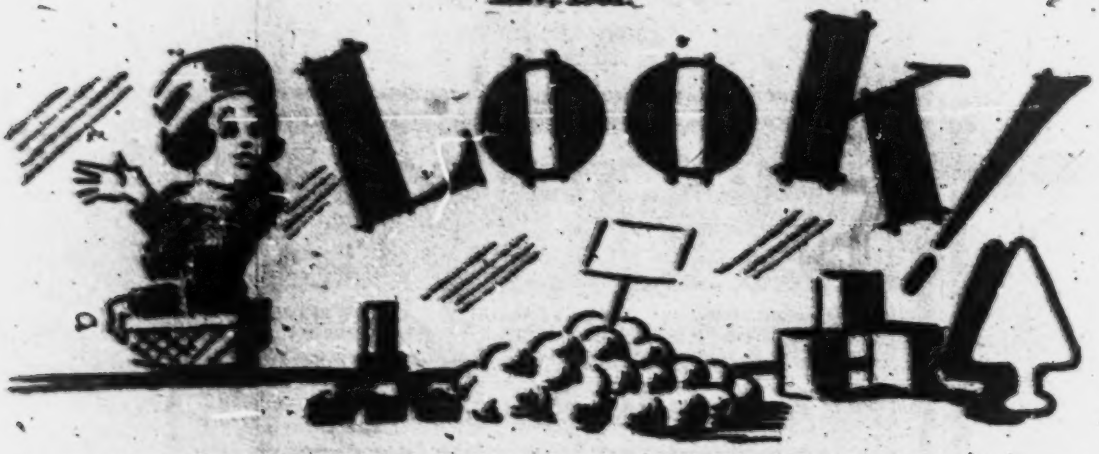
633 Western Ave. Phone 128 | 16 Racine Phone 855. | 318 Western Ave. Phone 2611

Hills Bros. Coffee, lb.	39c
Butter, Fresh Creamery, lb.	21c
Swanson's Best Blend Coffee, lb.	33c
Bananas, Yellow Fruit, lb.	5c
Green Onions or Radishes, home grown, 3 bunches	10c
Milk, 3 tall cans	21c
Soda or Graham Crackers, 2-lb. box	25c
Flour, Mandalay, ½ sack	49c
Flour, Cooper's Best, ½ sack	65c
Shredded Wheat, pkg.	10c
P & G Soap, 10 bars	28c
Chipso Soap Chips, large pkg.	18c
Boiling Beef, lb.	11c
Ham Bones, lb.	12c
Hamburg or Pork Sausage, 2 lbs.	25c

Plaintiff's Exhibit No. 14-a.

PRESQUE ISLE, MAINE—PAUL X. BEAULIEU.

May, 1931.



PAUL X. BEAULIEU

PRESQUE ISLE MAINE

PRICES EFFECTIVE MAY 22nd to MAY 28th, 1931

IVORY SNOW

2 Pkgs. for 25¢

CUT WAX BEANS

HATCHET — Trim Round Strings

Number Two Cans Per Can 19¢

Cloverdale Ginger Ale

PALE DRY AND GOLDEN

16 Oz. Bottles 2 Bottles for 29¢

Silver Bar TOMATOES

— SOLID PACK —

Number Two Can 2 Cans for 23¢

Large Can 2 Cans for 29¢

SILVER BAR — Packed in Heavy Syrup

PEACHES Large Can 21¢

PEARS Large Can 25¢

HATCHET SWEET CORN

— HATCHET —

GOLDEN BANTAM CORN

Sweet and Tender

3 Cans for 44¢

DAUFUSKI OYSTERS

10 Oz. Can 25¢

Diamond Matches

— EVERY MATCH PERFECT —

6 Pkgs. for 20¢

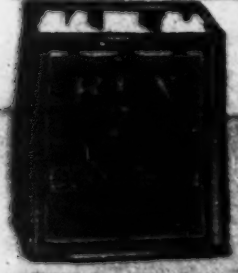
Hatchet Brown Bread

Tall Can 18¢

— BRIT FANCY —

Norwegian Sardines

Per Tin 11¢



REX C. C. BEEF

— READY TO SERVE —

Number One Tin 23¢

KELLOGG'S SHREDDED WHEAT

Pkg. 11¢

Plaintiff's Exhibit No. 14-aa.

LEE & CADY, FLINT, MICHIGAN.
August, 1931.

CAMAY SOAP, 72s, CASE	4.38
V. C. SARDINES, TOMATO OR MUSTARD, 1s, 48s	3.89
TABLE KING MILK, BABY, 48s, CASE	1.30
FRENCH'S BIRD GRAVEL, 12s	.84
DAZZLE BLACK LIQUID SHOE POLISH, 12s	1.24
FAMO PANCAKE FLOUR, 10-5lb., BALE	2.21
KELLOGG SHREDDED WHEAT, 24s	2.42
WAX PAPER, RAPINWAX, 30-ft. ROLL, 10c, 50s	3.04
WAX PAPER, RAPINWAX, 100-ft. ROLL, 25c, 25s	4.03
WILLIAMS' SHAVING SOAP, 12s, CARTON	.44

KEN-L-RATION,	
MILLER'S HIGH	
L. & C. MACHIN	
SNOWY PASTRY	
AMMCO RAZOR	
GOLD DUST CL	
TUNA FISH, QU	
WET SHRIMP,	
L. & C. PLAIN Q	
L. & C. PRESER	

Kellogg's Pep, 24s, Case .	$2.16
Post Bran Flakes, 24s, Case	$2.16
Kellogg Bran Flakes, 24, Cs.	$1.99

Ex
CHOICE OF W
PER
59

White House Coffee

(VACUUM PACKED)

1-lb., Can, 12s, Case .	$3.72

S(
60
$

Plaintiff's Exhibit No. 14-bb.

BETTER STORES, ALTOONA, PENNSYLVANIA.
August 14 and 15, 1931.

BETTER STORES VALUES

YOUR DOLLAR BUYS

FRIDAY AUGUST

25 Recipe Cards **Free** With Two Packages

Kellogg's Whole Wheat Biscuits

2 packages 19c

The new certified for food value cereal
10 minerals 6 vitamins

Sandwich Spread
Knighthood 8 oz. 19c

Mayonnaise –
Knighthood 8 oz. 19c

Sweet Pickles
Knighthood quarts 39c

Pickles
Sour or Dill 32 oz. 25c

Deli
Hot Weat

PINEAPPLE,
First, place a slice o
tuce leaves and then add
apricots with cooked rice
apple and add Knighthoo

Extra Fancy Sliced K
Pineapple

Fancy broken slices
Glory Pineapple

Fairmont
Better Butte

Pickles 8
Morning Glory Qua
Low

Sweets –
Sweet Mixed – Pe

Plaintiff's Exhibit No. 14-cc.

CINCINNATI, OHIO, COMMUNITY STORES.
April 13 to 18, 1931.

Visit the Food Show at the Auditorium—Next Week, April 13 to 18

COMMUNITY STORES

TWIN CITIES

The following items will be on sale Friday, April 10th and Saturday, April 11th.

Oranges Large Sunkist. Per doz. **37c**

Head Lettuce Fancy Solid ..... 2 for **17c**

Potatoes Fancy Baking. Per peck **39c**

Celery Hearts Per bunch **17c**

Sugar 10 lb. cloth bags **54c**

KELLOGG'S Shredded Wheat Per pkg. **10c**

Macaroni or Spaghetti ..... 3 for **19c**

JELLY POWDER
True Fruit Flavors
3 for 19c

Raisins Fancy Seedless, 15 oz. pkgs. ..... 2 for **19c**

Time O' Day Coffee A Special Blend in the new vacuum; 1 lb. tin **39c**

Bread Good quality, 1 lb. loaf **5c**

Apricots Very meaty, strictly fancy quality. Per lb. **29c**

Dates
- Time O' Day, 10 oz. package **19c**
- Time O' Day, Pitted, 10 oz. pkg. **23c**

PEAS
Time O' Day, Garden Run, No. 2 Cans
2 for **37c**
Tonka, Sifted Sweet, No. 2 Cans
2 for **25c**

CORN
Time O' Day, Golden Bantam, No. 2 Cans
2 for **35c**
Tonka Golden, No. 2 Cans
2 for **25c**

Sardines
- Time O' Day, Fey. Norway Smoked, in pure olive oil, No. ½ cans ..... 2 for **37c**
- Erick Brand, Special Norway Smoked, in pure olive oil, ¼ cans ..... 2 for **23c**

Powdered Bon Ami 2 for **25c**

Fels Naptha Soap 4 for **25c**

Crystal White Soap 10 ... **31c** 1 LARGE BALLOON Free

Plaintiff's Exhibit No. 14-dd.
TAYLOR-McLEISH, FLINT, MICHIGAN.
March—April, 1932.

30 to Case

$4.54

$3.09

30 to

$2.

24 to Case

$2.09

Red Seal Lye

24 to Case

$2.19

Bow

$1.

All Items Subject To Prior Sale, and Prices Subjec

Specials Good March 23 to Ap

Taylor - McLei

Cash and Ca

716 Harrison Street

Phone 2-2921

Plaintiff's Exhibit No. 14-cc.

"NATION WIDE"
(Staunton, Virginia),
March—April, 1932.

NATION-WIDE
SERVICE GROCERS

MONEY SAVED is MONEY MADE

— And where can you save with safety as in your Nation-Wide store —where you know the owner — the owner knows you and takes a personal interest in serving you with quality items at money saving prices.

NATION-WIDE HOME OWNED SERVICE GROCERS

WEEK OF MARCH 28th TO APRIL 2nd

Combination Sale
ONE POUND PACKAGE
Madison Hall
Cello-Sealed Coffee 25c
2 Pounds Gran. Sugar 7c
BOTH FOR **32c**

One YO-YO FREE
WITH EACH HALF POUND
CAN OF
Toddy Chocolate
Malted Milk 25c

MARIPOSA BRAND
California
Sliced Peaches 16 OZ. CAN **10c**

Flako
PIE CRUST
2 pkgs.
25c

LONDON HILL BRAND
White and Green
LIMA BEANS
No. 2 CAN **10c**

Kellogg's
Corn Flakes
2 **15c**

KEEP ON HAND A BOX
Cutrite
Wax Paper

KELLOGG'S
SHREDDED
WHOLE WHEAT
BISCUIT
2 for **19c**

Purity White

OPINION OF THE COURT.

(Filed January 11, 1935.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

NATIONAL BISCUIT COMPANY,
Plaintiff,
v.
KELLOGG COMPANY,
Defendant.
No. 980. IN EQUITY.

This is a suit in equity by National Biscuit Company, a New Jersey corporation, against Kellogg Company, a Delaware corporation. The bill charges unfair competition. It avers that plaintiff is vested with the exclusive right to whole wheat biscuit made in a particular and distinctive shape, appearance and structure; to the name "Shredded" and "Shredded Wheat" in connection with whole wheat biscuit; and to the representation or picture of whole wheat biscuit made in a particular and distinctive shape, appearance and structure generally and shown in a saucer or dish. Plaintiff prays the court to enjoin defendant "from, directly or indirectly, manufacturing or selling whole wheat biscuit made in imitation and simulation of the said whole wheat biscuit of the manufacture and sale of plaintiff, of particular and distinctive shape, appearance and structure; from employing upon cartons, in advertisements or otherwise the name 'Shredded' in connection with said biscuit; from employing in advertisements or upon cartons containing said biscuit a cut

502378	August 1, 1893
520496	May 29, 1894
521810	June 26, 1894
532286	January 8, 1895
532480	January 15, 1895
532481	January 15, 1895
532697	January 15, 1895
532698	January 15, 1895
533551	February 5, 1895
533552	February 5, 1895
533553	February 5, 1895
533554	February 5, 1895
533555	February 5, 1895
533821	February 5, 1895
24688	September 17, 1895
548086	October 15, 1895
548087	October 15, 1895
25318	March 31, 1896
571284	November 10, 1896
571235	November 10, 1896
598745	February 8, 1896
28785	June 7, 1898
614338	November 15, 1898
618288	January 24, 1899
625696	May 23, 1899
681656	August 27, 1901
35511	December 21, 1901
684788	October 22, 1901
685671	October 29, 1901
683100	September 24, 1901
684789	October 22, 1901
683101	September 24, 1901
678127	July 9, 1901
667892	February 12, 1901
678625	July 16, 1901
681655	August 27, 1901
713795	November 18, 1902
746145	December 8, 1903
770159	September 14, 1904
797604	August 22, 1905
785554	March 21, 1905

Throughout these patents the word "shredded" is used repeatedly and always as descriptive of the product.

The Perky basic patent No. 548,086, covering both plaintiff's product and process relating to shredded wheat, was granted on October 15, 1895. All subsequent patents claimed by plaintiff and listed on its food packages, as above set forth, have long since expired by limitation, and the subject matter thereof has fallen into the public domain.

The product made by plaintiff is wheat formed into filaments and baked into the form of a pillow shaped loaf. The basic patent discloses a process of boiling the original whole wheat berry, partially drying it and then forcing it between compression rollers one or both of which has peripheral grooves which mash the several parts of the berry into a soft paste. This paste is then forced out by means of combs or scrapers, so as to emerge in thin filaments or shreds. The shreds or fila

ents which proceed from the combs are carried off upon an endless belt and are built up by a succession of layers until a band of the desired thickness is secured. This band is cut into biscuit lengths by knives, leaving the biscuits pressed together at the two ends. The biscuits are then cooked in an oven which raises the top, except at the ends, separating the shreds and making more obvious the interstitial texture of the whole. This patent expired by limitation October 15, 1912.

On September 17, 1895 Perky took out a design patent No. 24,688 upon a biscuit shown in accompanying drawings. One drawing showed a biscuit in plan view. The other drawing showed an end view. This patent would expire by limitation September 17, 1909. In 1908 Judge Kohlsaat declared this design patent invalid upon proof that Perky in his application swore falsely that the design had not been in public use more than two years. Natural Food Company v. Henry P. Bulkley, et al. No. 28,530 N. Dist. Ill., East. Div. Instead of removing notice of the Perky design patent from the carton or otherwise notifying the public it was no longer claiming protection under the patent, plaintiff continued for seven years thereafter to warn the public not to make the biscuit as it was under the protection of the government by virtue of this design patent. By its professions and conduct plaintiff secured a monopoly not for fourteen years but actually for twenty years.

In 1905 plaintiff filed an application for the registration of the words "Shredded Whole Wheat" as a trade-mark under the so called "ten year clause" found in the Act of February 20, 1905 (33 Stat. 724, Chap. 592). William E. Williams filed notice of opposition. The proceeding was carried through the patent office to the Court of Appeals of the District of Columbia. The court found that early in 1894 Williams built a machine

"the function of which was to convert the whole grains of wheat into shreds". The court held:

> "Since these words [Shredded Whole Wheat] accurately and aptly describe an article of food, which according to the testimony has been produced by Williams and others for more than ten years, it follows that they are descriptive within the meaning of the Statute, and that they cannot be appropriated as a trade-mark by appellant unless it has been the exclusive user of the words during the ten years' period. . . . No claim is made of any attempt on the part of Williams to deceive the public, or that the product of his machines is not in fact as much entitled to be called shredded whole wheat as is the product of appellant's machines. That he did not use the words as a trade-mark, but merely in a descriptive sense is of no moment. He in common with all other manufacturers of shredded whole wheat had the same right to properly designate their product as did The Natural Food Company [the plaintiff here]. The fact that the Patent Office for more than ten years has been granting patents for machines for converting cereals into shreds adds cogency to the contention that the words 'Shredded Whole Wheat' properly describe the product of Williams' machines."
>
> . . . . . .
>
> "Moreover, it is open to question whether appellant in fact used these words as a trade-mark until after the enactment of the "ten years clause' in 1905. The carton used by appellant prior to 1905 contains the figure of a woman holding a torch and a sheaf of wheat. The word 'trade-mark' appears immediately under this figure, indicating quite clearly that The Natural Food Company [the plaintiff here] claimed the figure as its trade-mark and not the words 'Shredded Whole Wheat' which were apparently then used to merely describe the contents of the package." Natural Food Co. v. Williams, 30 App. D. C., 348.

Notwithstanding this adverse experience in the Court of Appeals under the ten year clause of the 1905 Act plaintiff secured two registrations of the words Shredded Wheat under the Act of 1920. Unlike registration under the Act of 1905, registration under the Act of 1920 does not carry any presumption of validity or ownership. No move was made to cancel those registrations.

About 1915, some three years after the expiration of plaintiff's basic patent and six years after the expiration of plaintiff's design patent, three employees of plaintiff organized The Ross Food Company, a New York corporation, located at Batavia, for the purpose of entering into competition with plaintiff. Their carton differed from plaintiff's in shape and color. Printed upon the face of their package was an exact reproduction of plaintiff's biscuit with the words "Ross's Whole Wheat Biscuit". They had no small cartons for purchasers of only one or two biscuits. In this situation plaintiff brought suit charging unfair competition. The case was carried to the court of appeals of the Second Circuit. The court held that Ross Food Company had the right to make a biscuit of the exact size and appearance of the biscuit made by plaintiff because by patenting the biscuit plaintiff had dedicated the product, process and design to the public and upon expiration of the patents they were open to public use. The Ross Company was directed to endeavor to band or mark its biscuit, if it could do so, without being under such handicap as would destroy its "indubitable right" to compete with plaintiff by making a biscuit identical with that made by plaintiff.

In a short dissenting opinion Judge Ward indicated the substantial agreement of all members of the

court in the application of general principles except as to the necessity of marking biscuits sold to customers without cartons. He said:

> "After the expiration of the complainant's product and design patents, the public generally had the right to manufacture the same article under the same name and in the same form. This was the condition on which the expired monopolies were granted. The defendant concededly does not use the same name, nor sell the article in a similar carton. It sells its article as 'Whole Wheat' biscuit, in entirely different cartons, nor is there any evidence of unfair advertising.
>
> I understand the court to agree that the defendant may make and sell its biscuit in the same form, color, and size as complainant's. The only question is what, if any, protection the complainant should have, in view of the secondary meaning its product has acquired from its mere appearance. When both parties mark their product, unfair imitation of the original producer's mark should be enjoined, as in Singer v. June Manufacturing Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. In this case, however, neither party marks the biscuit itself, and it would obviously impair the strength and deform the appearance of this very fragile biscuit to do so.
>
> The complainant's claim to be protected in any secondary meaning its goods have acquired can go no further than its injury, and that is only so far as the public buys or is likely to buy the defendant's product supposing that it is the complainant's. The retail dealer and the purchaser of cartons are not misled. Guests in boarding houses and hotels on the American plan take what they are given. It is only a very small part of the public, namely, those who patronize lunch rooms, restaurants, or hotels on the European plan, and who order biscuit which they see on the

counters, or on plates or saucers, supposing they are the complainant's, when they are really the defendant's manufacture. This seems to me an insufficient reason for giving the complainant a monopoly for all time of what apparently is the best size of this ordinary commercial article, unless the defendant and other manufacturers adopt distinguishing marks which either increase the cost of manufacture or deform and weaken the product.

Moreover, I think that the form and size of the biscuit as always made by the complainant are functional, and that imitation of these features is no evidence of unfair competition. The form evidently tends to strengthen a product made out of such fragile material and the size is apparently the best fitted for use as a breakfast food on a saucer. I think the bill should be dismissed." Shredded Wheat Co. v. Humphrey Cornell Co., 250 Fed. 960, 967.

In that case the Court of Appeals entered the following decree:

"First, by relieving the defendants of any injunction in the sale of such biscuits as shall reach the last purchaser in cartons; second, all biscuits reaching the last purchaser outside of their cartons must either bear a letter, cross, or other plain symbol, impressed in their substance, or have fastened upon them a wrapping, tag, or band, stating that they are made by the Ross Food Company; third, the defendant at the end of six months may apply to the District Court to be relieved of the second requirement, upon showing that after a bona fide trial of all possible expedients it cannot comply with that provision, except at an expense which would make impossible any continued competition in the business of selling biscuits outside the cartons with any assurance of reasonable profit."

Andrew Ross testified in this case about the effort of his company to mark or band the biscuit:

"Q. 66. Did the Ross Food Company do anything with regard to that second clause of the modified decree, concerning the marking of the biscuit with a letter, cross, or other plain symbol? If they did, I wish you would relate to me in narrative form what was done and what results or conclusions were reached? A. We experimented as to what might be done to comply with that requirement, although we felt, with all proper respect to the Court, that they had no conception of trade conditions or they would never have made such a decision.

. . . . . .

However, we made experiments as to what might be done in the way of marking the biscuit. We tried to make an impression in the top of the biscuit, and we found that frequently it broke the shreds and distorted the biscuit, spoiled it. And when it did not do that, we found that, in the baking, when the biscuit rose, the marking disappeared.

Then we tried making a mark, or making a raised mark in the bottom of the pan, so that the delicate shreds, when they were fed out of the pan, would adjust themselves to that raised portion, so that that might, in the baking, leave a mark. But we found that that used to distort it and it was a very poor mark. We did not find any practical way of complying with that requirement.

Q. 68. Did you apply, at the end of six months, to be relieved of that second requirement as being impossible to carry out? A. No.

Q. 69. You did not apply at all? A. No.

Q. 70. Why was that, Mr. Ross? A. By that time, our capital was exhausted. We had no resources with which to do anything on those matters."

Next, defendant entered the field and challenged plaintiff's pretentions to monopoly. Defendant is the largest manufacturer of breakfast cereals in the country. It is the successor to Kellogg's Toasted Corn Flake Company and operates a factory at Battle Creek, Michigan. Kellogg's line of cereal products, like Kellogg's Corn Flakes, Kellogg's Bran and Kellogg's Pep are well known in the grocery trade and to the public. For years the name "Kellogg's" has been a distinctive household name meaning a particular maker of cereal foods. These foods have been widely advertised and are well known. Approximately a billion and a half cartons are put out each year. Since 1905 defendant has spent $50,000,000 in advertising its products. The name "Kellogg's" has appeared in every advertisement. From 1912 to 1919 defendant manufactured a shredded biscuit marketed in cartons marked "Kellogg's Toasted Wheat Biscuit". From the Fall of 1921 to the Fall of 1922 defendant manufactured and sold a shredded whole wheat biscuit of small size and pillow-shape. The size was less than two thirds the size of plaintiff's biscuit. In 1927 defendant resumed the manufacture of the small shredded wheat biscuit and still continues to market that biscuit in cartons marked "Kellogg's Shredded Whole Wheat Biscuit". Since 1930 defendant also marketed this small biscuit in cartons marked "Kellogg's Whole Wheat Biscuit".

In 1928 plaintiff sued two of defendant's dealers. After some depositions were taken plaintiff moved no further until the suit was ripe for dismissal for want of prosecution. In 1930 the suit was discontinued by stipulation. In 1932 the present suit was brought.

Neither party sells its biscuit loose or in bulk but only in cartons. The defendant's carton is in the familiar red and green colors of the old established line

of Kellogg's cereal cartons. The word "Kellogg's" in bold script and printed in red dominates the package. The defendant's cartons are of two sizes. There is a large carton carrying 15 biscuits weighing 12½ ounces. The other Kellogg carton is a two biscuit carton called "individual" and sold for use in the restaurant trade. Plaintiff's cartons are unlike defendant's. They are differently colored and featured by representations of Niagara Falls and of plaintiff's factory near by. Plaintiff has a large carton carrying 12 biscuits weighing 12 ounces and a small carton carrying 2 large biscuits. Plaintiff also has an individual carton carrying 2 biscuits indistinguishable in size from defendant's small biscuits and first put upon the market five years after defendant originated and popularized the small sized biscuit. It should be noted that defendant distinguished its biscuit from plaintiff's by making a different size yet plaintiff wiped out the size distinction by duplicating defendant's small biscuits.

Both parties encouraged the sale of their regular size shredded wheat biscuit to the restaurant, lunch room and hotel trade in individual cartons. Approximately 97½ per cent. of defendant's trade is supplied with biscuits in the large 15 biscuit carton. The remaining 2½ per cent. is divided into two parts: 98 per cent. of this 2½ per cent. receives the biscuits in individual cartons; the remaining 2 per cent. of said 2½ per cent. of defendant's total business or about 1 in every 5,000 biscuits is served apart from a carton yet is distinguishable because of its smaller size.

The marked difference in the cartons of the parties prevents confusion. Defendant's cartons bear no resemblance to plaintiff's and can not be mistaken for them. This is apparent from the following reproductions:

TOP OF PLAINTIFF'S CARTON

READY-COOKED, READY-TO-EAT
O INSURE CRISPNESS, HEAT BEFORE SERVING

READY-COOKED, READY-TO-EAT
TO INSURE CRISPNESS, HEAT BEFORE SERVING

FRONT OF PLAINTIFF'S CARTON

SHREDDED WHEAT

TRADE MARK REG. U. S. PAT. OFF.

COPYRIGHT 1933 BY NATIONAL BISCUIT COMPANY

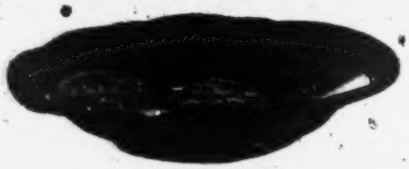
SHREDDED WHEAT

TRADE MARK REG. U. S. PAT. OFF. COPYRIGHT 1933 BY NATIONAL BISCUIT COMPANY

12 BISCUITS AS MADE SINCE 1893 12 OUNCES

Made of the whole wheat—nothing added, nothing taken away.

100% whole wheat with all its bran, minerals and other vital substances. A nutritious cereal food, ready-cooked, ready-to-eat.



TRADE MARK REG. U. S. PAT. OFF.

It is equally nourishing for breakfast, for lunch, for dinner. Delicious with berries, sliced bananas, or other fruits.

HEAT THE BISCUIT IN OVEN TO INSURE CRISPNESS

HOT SHREDDED WHEAT CEREAL

6 Shredded Wheat Biscuits
3 Cups Boiling Water...Salt

Crumble Shredded Wheat Biscuits. Into boiling water stir crumbled Shredded Wheat. Salt to taste. Boil gently 5 minutes, stirring occasionally. 6 portions.

Hot Shredded Wheat—Heat Shredded Wheat Biscuit in a hot oven. Serve with hot milk and add cream if desired and salt or sugar to taste.

NATIONAL BISCUIT COMPANY
"Uneeda Bakers"

MADE IN U.S.A. ADDRESS: NEW YORK, N.Y.

SHREDDED WHEAT BAKERIES
NIAGARA FALLS, N. Y.
OAKLAND, CAL.

THE CANADIAN SHREDDED WHEAT COMPANY, LTD.
NIAGARA FALLS, CANADA

THE SHREDDED WHEAT COMPANY, LTD.
WELWYN GARDEN CITY
HERTS, ENGLAND

ALL THE BRAN IN THE WHEAT

BOTTOM OF PLAINTIFF'S CARTON

HANDLE WITH CARE

SHREDDED

WHEAT

SHREDDED WHEAT

TRADE MARK REG. U. S. PAT. OFF. COPYRIGHT 1933 BY NATIONAL BISCUIT COMPANY

12 BISCUITS AS MADE SINCE 1893 12 OUNCES

Made of the whole wheat—nothing added, nothing taken away.

100% whole wheat with all its bran, minerals and other vital substances. A nutritious cereal food, ready-cooked, ready-to-eat.

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WELWYN GARDEN CITY
HERTS, ENGLAND

ALL THE BRAN IN THE WHEAT

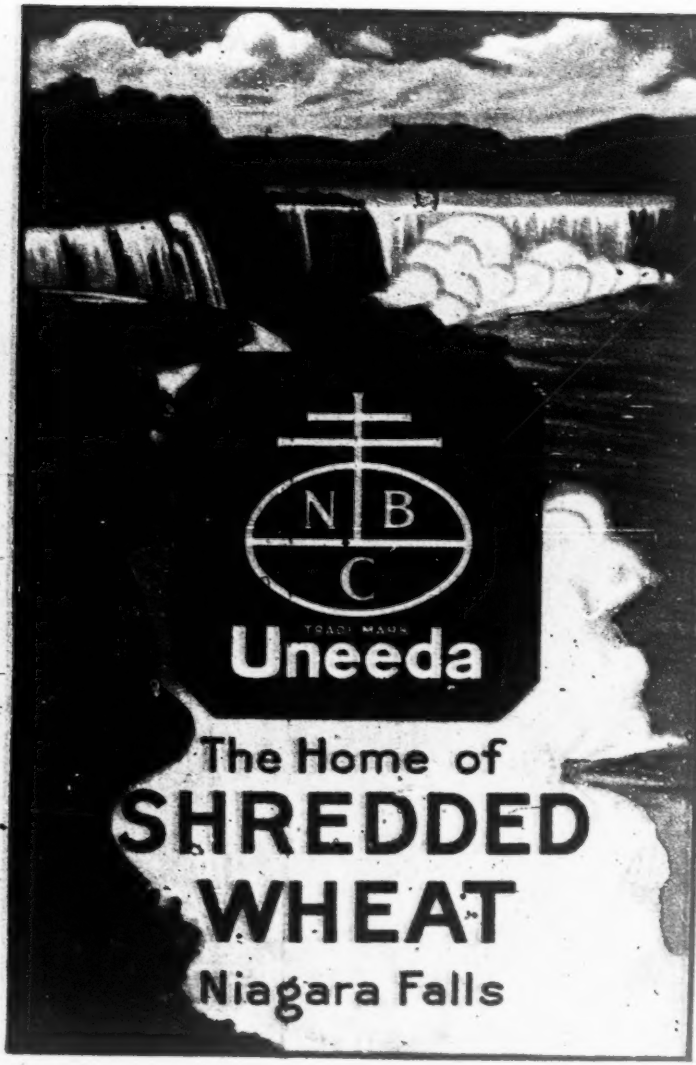
BOTTOM OF PLAINTIFF'S CARTON

HANDLE WITH CARE

SHREDDED WHOLE WHEAT

HANDLE WITH CARE

N B C
Uneeda
e Home of
REDDED
VHEAT
agara Falls


N B C
TRADE MARK
Uneeda
The Home of
SHREDDED
WHEAT
Niagara Falls

(Bottom and Back Same as Above)

15 BISCUITS

Kellogg's

15 BISCUITS

SHREDDED WHOLE WHEAT BISCUIT

6-30-F

MADE IN U. S. A.

Kellogg's

SHREDDED

WHOLE WHEAT

BISCUIT

HELP YOURSELF TO HEALTH

15 BISCUITS

Kellogg's

15 BISCUITS

SHREDDED WHOLE WHEAT BISCUIT

6-30-F

MADE IN U. S. A.

Kellogg's

SHREDDED WHOLE WHEAT BISCUIT

HELP YOURSELF TO HEALTH

W. K. Kellogg

15 BISCUITS

KELLOGG COMPANY, BATTLE CREEK, MICH.

LONDON, ENGLAND LONDON, CANADA SYDNEY, AUSTRALIA

NET WEIGHT 12½ OUNCES

(CASE NO. 324)

PR. BY KELLOGG COMPANY

TRADEMARKS REG. U.S.PAT. OFF.

21

ENDS OF DEFENDANT'S
"SHREDDED WHOLE WHEAT BISCUIT" CARTON

Kellogg's
SHREDDED
WHOLE WHEAT
BISCUIT

This delicious, nourishing food is made from entire whole wheat. Contains all the elements necessary for the proper nourishment of the human body. In these biscuits you get all the valuable food elements of rich whole wheat—combined with the laxative properties of bran.

SPECIAL NOTICE

To restore crispness place in oven for a minute or two just before serving. To avoid over-toasting leave the oven door open about two inches.

Kellogg's
SHREDDED
WHOLE WHEAT
BISCUIT

Are delicious with milk or cream and a special treat with berries, peaches, prunes, bananas, canned pears and other fresh or preserved fruits. To serve, pour hot or cold milk or cream over the biscuit. Add sugar or salt to suit taste —also delicious with honey. The biscuits are especially appetizing when split open, buttered and browned in oven.

SPECIAL NOTICE

To restore crispness place in oven for a minute or two just before serving. To avoid over-toasting leave the oven door open about two inches.

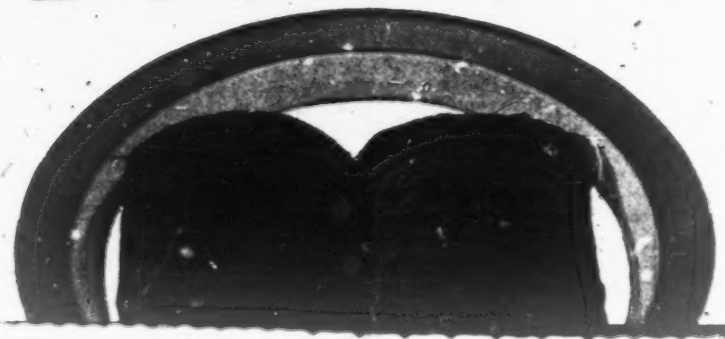
15 Biscuits Kellogg's 12½ Ounces

WHOLE WHEAT BISCUIT

Kellogg's

WHOLE WHEAT

BISCUIT



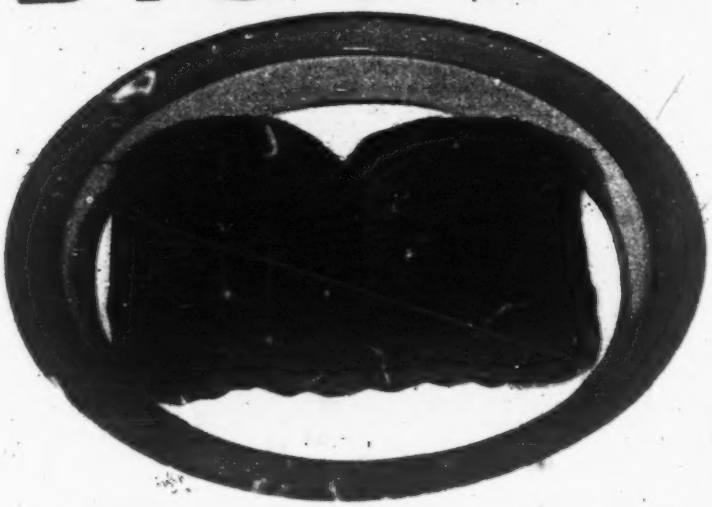
15 12½

Kellogg's

WHOLE WHEAT BISCUIT

Kellogg's

WHOLE WHEAT BISCUIT



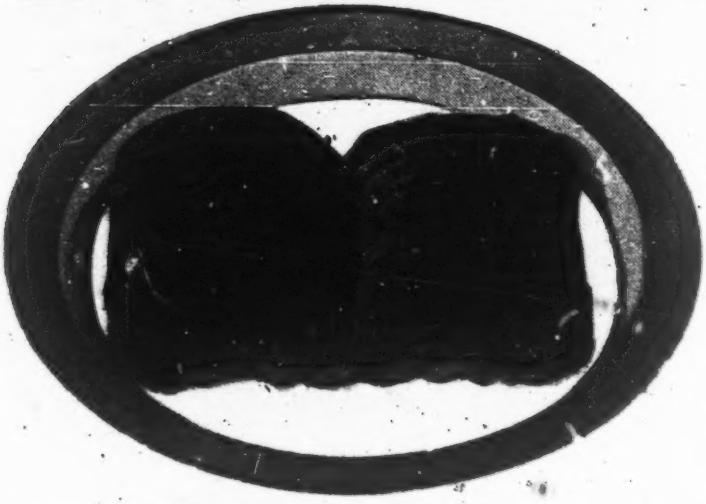
15 BISCUITS

12½ OUNCES

MADE BY KELLOGG IN BATTLE CREEK, MICH., U. S. A.

Kellogg's

WHOLE WHEAT BISCUIT



HOLE
HEAT

DOUBLE
TOASTED

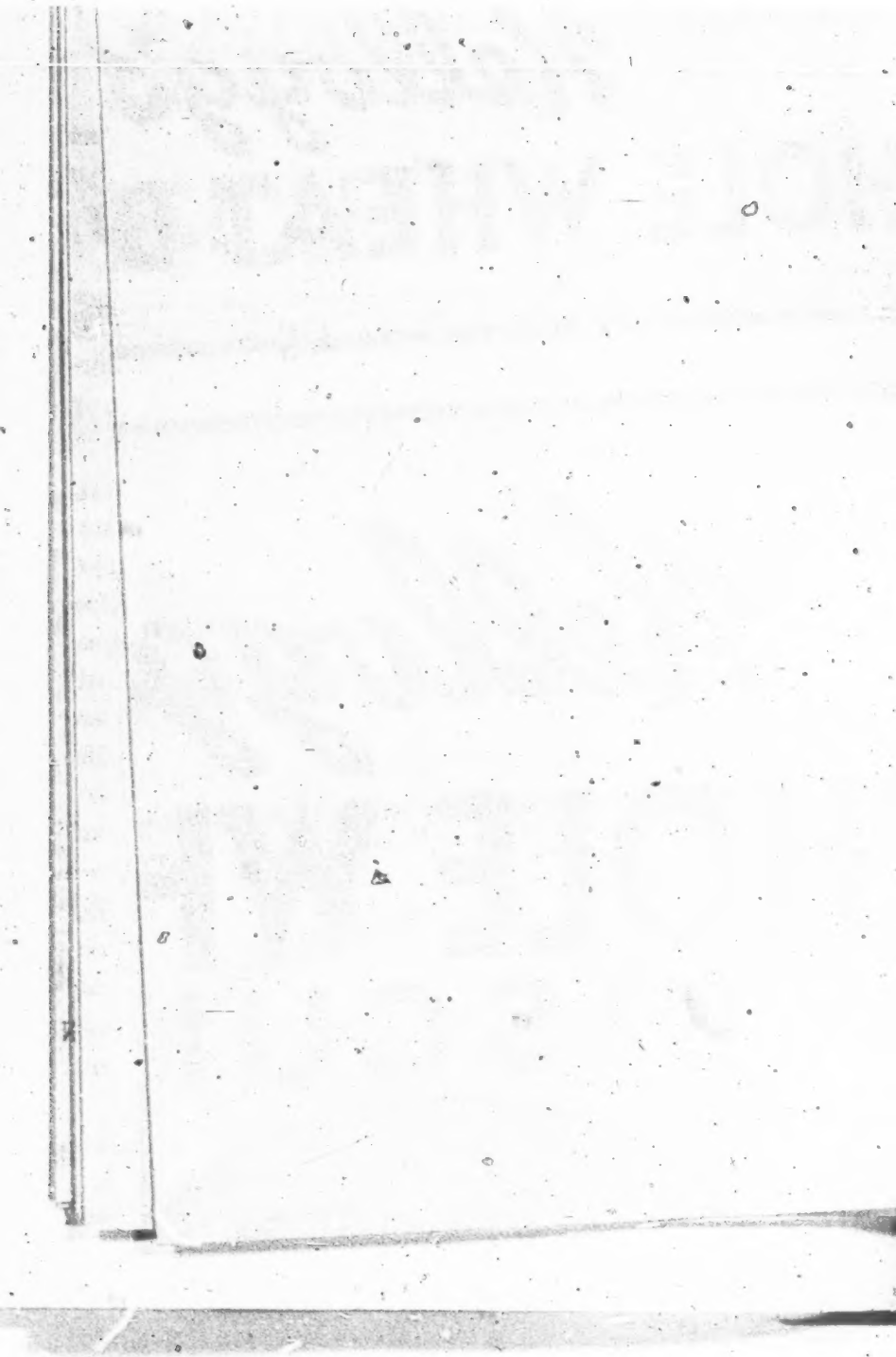
ADE BY KELLOGG COMPANY, BATTLE CREEK, MICH., U. S. A.

BY KELLOGG CO. 1933

TRADE MARKS REG. U. S. PAT. OFF.

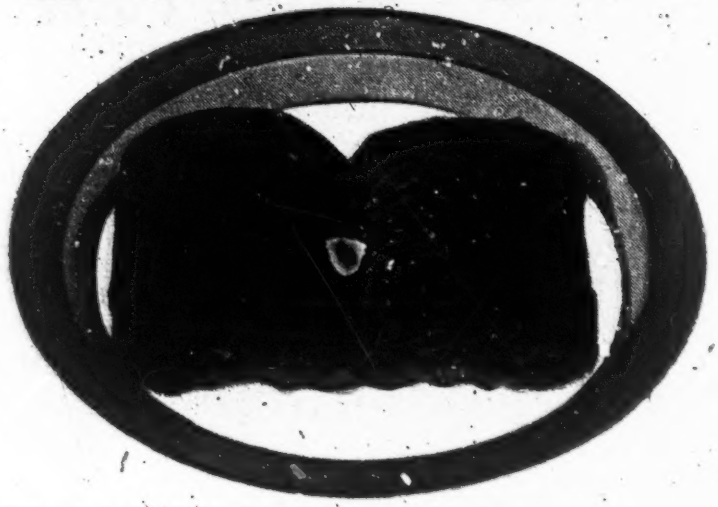
PATENT PENDING ON METHOD AND MEANS OF PACKING CONTENTS HEREOF

Biscuits Kellogg's 12½ Ounces



Kellogg's

WHOLE WHEAT BISCUIT



WHOLE WHEAT

DOUBLE TOASTED

MADE BY KELLOGG COMPANY, Bbattle CREEK, MICH., U. S. A.

©R. BY KELLOGG CO. 1933

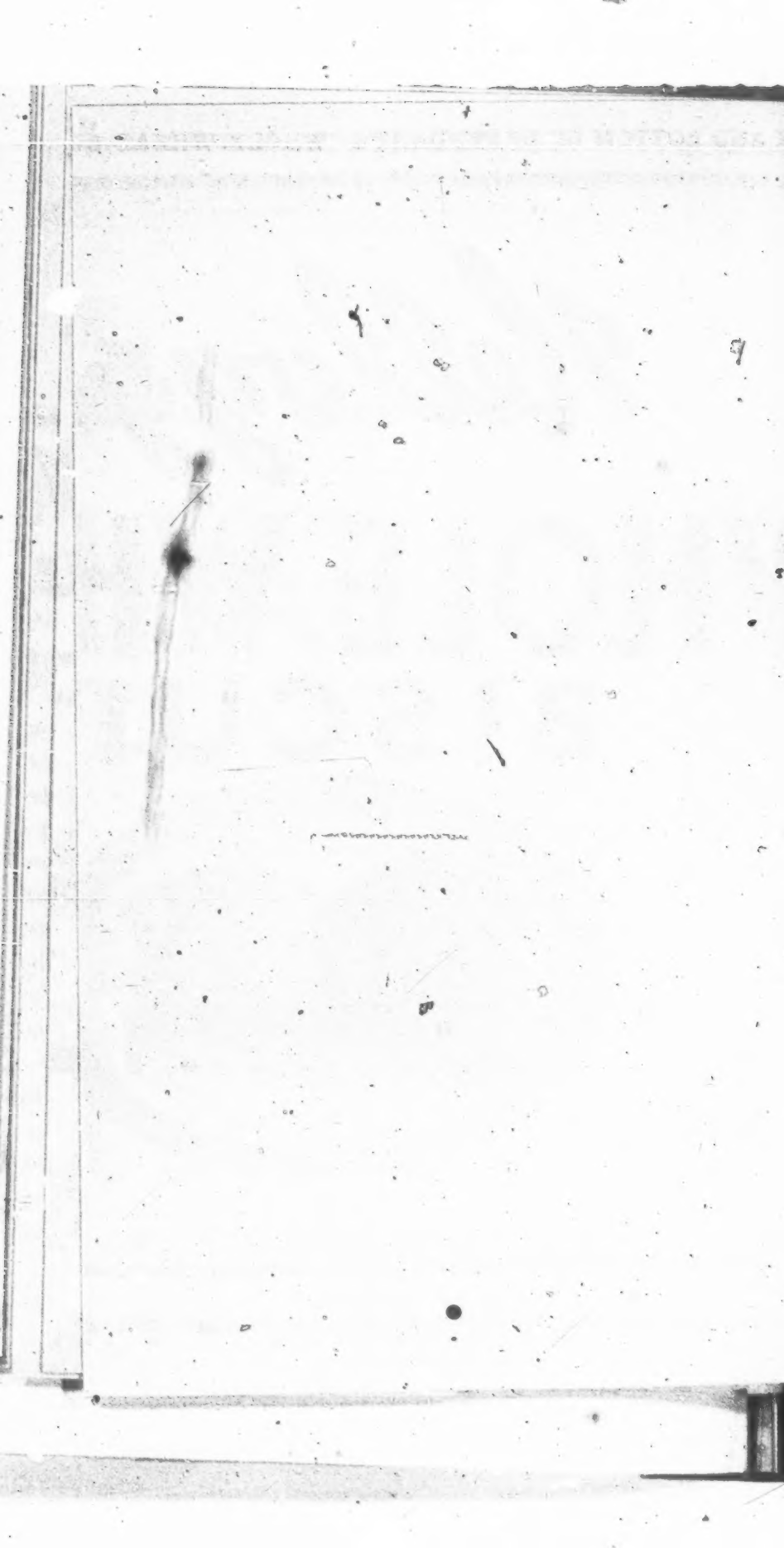
TRADE MARKS REG., U. S. PAT. OFF.

PATENT PENDING ON METHOD AND MEANS OF PACKING CONTENTS HEREOF

5 Biscuits Kellogg's 12½ Ounces

WHOLE WHEAT BISCUIT

6-34-F



Kellogg's

WHOLE WHEAT BISCUIT

(A SHREDDED WHEAT PRODUCT)

are delicious served with hot or cold milk or cream; and a special treat with berries, peaches, prunes, bananas or other fresh or preserved fruits. Add sugar or salt to suit taste —or sweeten with honey.

Split and toast the biscuits and serve with butter or use instead of short cake with fruits.

These nourishing, easy-to-digest biscuits are excellent for lunch as well as breakfast. Ideal for children's suppers or for a late bed-time snack.

Especially appetizing with hot milk on cold mornings.

KELLOGG COMPANY
BATTLE CREEK, MICHIGAN

Kellogg's

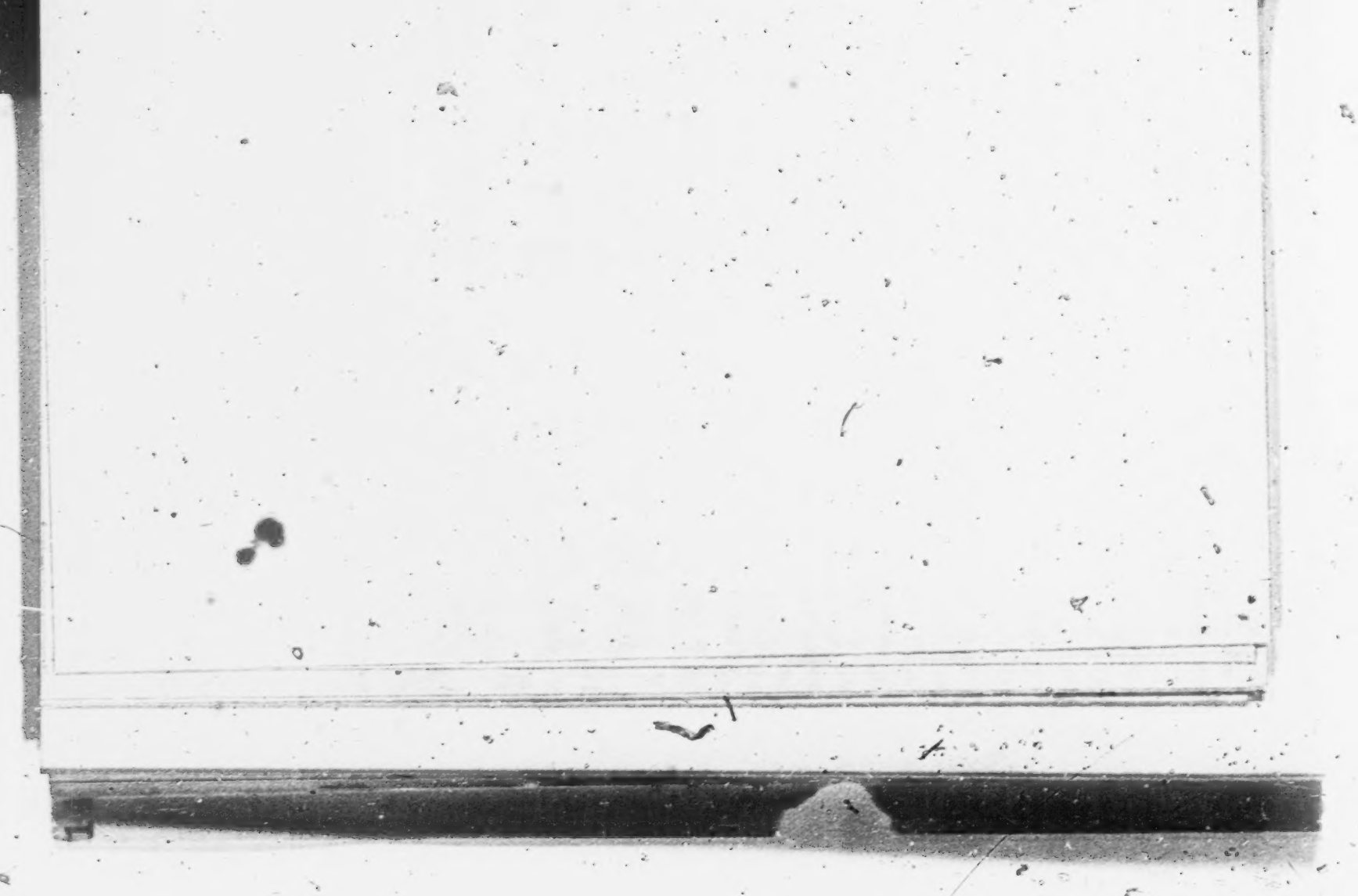
WHOLE WHEAT BISCUIT

(SHREDDED WHEAT IN ITS MOST DELICIOUS FORM)

are made of wheat, thoroughly cooked, shredded and toasted. These biscuits are a new convenient size — two just fit the bowl. Toasted on both sides the natural nut-sweet flavor of the wheat is made even better.

KELLOGG'S WHOLE WHEAT BISCUIT contain Vitamin B, the appetite and growth-promoting vitamin. They have an excellent supply of iron, the mineral necessary for red blood and protein for tissue building. The bran is retained so they are an aid to proper elimination.

(CASE NO. 324)



Biscuits of both parties are sold in some one of the above cartons. Since the bringing of this suit defendant has cut a window in one side of its carton eliminating the illustration of two biscuits in a saucer. The window is covered with cellophane through which the ends of the biscuits may be seen. The 12 or 15 biscuit cartons cover the great bulk of both plaintiff's and defendant's trade. As appears by the above representations the respective cartons of the parties are readily distinguishable so that no confusion can result. The small or individual cartons with the same distinctive markings remove all confusion in the lunch room, restaurant and retail service. By making its biscuit substantially smaller than plaintiff's, and using individual cartons, defendant has met the requirements of the decree of the Circuit Court of Appeals for the Second Circuit in the Ross case. In this case the proof fully confirms the testimony of Andrew Ross that the biscuit itself can not be branded or marked. With each biscuit distinctively marked by carton and by size, there can be no excuse for confusion or deception. Had the proof in this case as to marking been before the Court of Appeals in the Ross case the opinion of Judge Ward would doubtless have been the opinion of the court.

Plaintiff seeks equitable relief not only on the ground of unfair competition but also on the ground of alleged infringement of trade-marks. Plaintiff requests the court to make the following findings:

> "Plaintiff is vested with the exclusive right to manufacture and sell to the public in the United States such biscuit."
>
> "Plaintiff is the owner of and vested with the exclusive right in and to the following trade-marks which were duly registered in the United States Patent Office, to wit:

'Shredded Wheat', registered January 15, 1924, No. 178,725, for biscuit and crackers;

'Shredded Wheat', registered May 25, 1926, No. 213,456, for biscuits, crackers and cereal foods;

A picture of a dish with two whole wheat biscuit, registered August 17, 1926, No. 216,593, for biscuit, crackers and cereal foods."

"All of said trade-marks . . . have been used by the plaintiff in connection with the sale of its said biscuit for many years, and have been so associated with plaintiff's product that they have been and are indicative of source of origin in the plaintiff or its predecessor, the said trade-mark 'Shredded Wheat' having been used since the year 1892."

Whether the case is one of trade-mark infringement or of unfair competition or of both is of no vital consequence. The essential wrong in trade-mark infringement and unfair competition is exactly the same. The Supreme Court says:

"In all cases where rights to the exclusive use of a trade mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities." Canal Company v. Clark, 13 Wall., 311, 322.

And in a later case that court says:

"Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it. The essence of the wrong consists in the sale of the

goods of one manufacturer or vendor for those of another. . . . This essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement. In fact, the common law of trade-marks is but a part of the broader law of unfair competition." Hanover Milling Co. v. Metcalf, 240 U. S. 403, 412.

In this case plaintiff claims in perpetuity the monopolistic right to the descriptive word "shredded" and a monopolistic right in the shape or form of the biscuit. Any right of plaintiff must be based upon the wrong of defendant. Relief must be based upon confusion or palming off, otherwise relief should be denied. Originally patents covered every phase of plaintiff's business. There were product, process and design patents which secured plaintiff a perfect monopoly of the business. These patents have expired and *the case falls into the class of expired patent cases* and is controlled by the Singer case.

In that celebrated case the name "Singer" meant two things; it meant the type of machine and it meant the maker. The fundamental patents in the case had expired over twenty years before suit was brought. There was a large volume of testimony to the effect that when people in the trade were asked "What do you understand by a Singer Machine" invariably they answered "We understand it to be a machine manufactured by the Singer Manufacturing Company". The conduct of the June Manufacturing Company, the defendant, was particularly exasperating. It called its machine an "Improved Singer". It used "J. Mfg. Co." in imitation of "S. Mfg. Co." on plaintiff's machine. As the serial number on Singer machines ran into the millions defendant began with 300,000,000. It also imitated plaintiff's machine in external appearances and even in ornamentation. Yet, because the

patents had expired, the Supreme Court gave to defendant the right to make the Singer Sewing Machine; the right to use the name "Singer"; and the right to make the machines in the form in which the Singer Company had made them. The injunction that issued only went to the extent of requiring the June Company to put its name on its machines. In other words, June was only required to do what the defendant in this case has always done—place the name "Kellogg's" on the packages. The court said:

> "It is self evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. We may, therefore, dismiss without further comment the complaint, as to the form in which the defendant made his machines. It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly, in consequence of the designation having been acquiesced in by the owner, either tacitly, by accepting the benefits of the monopoly, or expressly by his having so connected the name with the machine as to lend countenance to the resulting dedication. To say otherwise would be to hold that although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly. In other words, that the patentee or manufacturer could take the benefit

and advantage of the patent upon the condition that at its termination the monopoly should cease, and yet when the end was reached disregard the public dedication and practically perpetuate indefinitely an exclusive right". Singer M'f'g. Co. v. June M'f'g. Co., 163 U. S., 169, 185.

In a later case the court said:

". . . but when the patent expired the exclusive right to manufacture the article expired with it, while the name which described it became, under the facts of this case, necessarily one of description and did not designate the manufacturers. There was no other name for the article, and in order to obtain it a person would have to describe it by the words 'Rahtjen's Composition'. The words thus became public property descriptive of the article, and the right to manufacture it was open to all by the expiration of the English patent." Holzapfel's Co. v. Rahtjen's Co., 183 U. S., 1, 10.

Where the name is the only name by which the article can be described and is the only name by which it was described during the existence of the patent that name becomes public property upon the expiration of the patent. Here the patented biscuit was known as Shredded Wheat or Shredded Wheat Biscuit. Upon the expiration of the patent that name became public property.

Evidence that Shredded Wheat or Shredded Wheat Biscuit has been understood by the public for years to mean a product produced only by the plaintiff does not establish plaintiff's right to that name. Where a secondary meaning is established even to the exclusion of any other meaning, a competitor has the right to use that name provided he clearly distinguishes his goods. So where a man distinguishes his goods he has fulfilled his duty to his competitors and to the public. What normal person desiring plaintiff's biscuit would take

defendant's package and think he was getting plaintiff's package. Or what person seeing defendant's package would think it was plaintiff's package. Such confusion can not be inferred from the circumstances of the case and there is no proof of it.

The testimony of a hundred witnesses from all parts of the country establishes there was no passing off of defendant's biscuit for plaintiff's or deception of the public to any appreciable extent. Howard Duane, a witness on behalf of plaintiff testified:

> "XQ. You saw right away that the biscuit handed to you in this carton was not the biscuit you had been getting? A. Immediately.
>
> XQ. Did you eat it? A. Yes.
>
> XQ. Did you notice anything about the size when you took it out of the carton? A. Yes, the size was shorter than the Shredded Wheat Biscuit.
>
> XQ. You did not think that was any biscuit made by the National Biscuit Company or the Shredded Wheat Company? A. No, I did not. I knew it was not."

Alvin J. Lee, plaintiff's witness, testified:

> "XQ. 44. Do you recognize this Kellogg's whole wheat biscuit package as one of the general family of Kellogg packages? Are not the colors the red and green colors of the standard Kellogg package?
>
> A. Yes, red and green, and it says Kellogg's.
>
> XQ. 45. You would recognize that as one of the family of Kellogg packages, would you not, that whole wheat biscuit package?
>
> A. Well, with the name on it, yes.
>
> XQ. 46. And you have never seen any of the whole wheat packages that did not have the Kellogg name on it in big red letters, have you?
>
> A. Not as I remember.
>
> XQ. 47. Is there any difference in size between the Kellogg's and the National shredded wheat?

A. I am rather inclined to think that the Kellogg's is smaller."

Mrs. Irma Coiliflower, plaintiff's witness, testified:

"XQ. 49. So, when you asked for shredded wheat and got this product, you knew right away that this brand was not the Niagara Falls product?

A. Why, absolutely.

XQ. 50. You understood right away, as I understand you, that she was giving you a product made by the Kellogg Company. Is that so?

A. Yes."

Mrs. Clara Goodman, plaintiff's witness, testified:

"XQ. 62. I show you this biscuit in Plaintiff's Exhibit No. 6 for identification and I ask you if you recognize any resemblance or any dissimilarity between those two?

A. No. There is a difference in the biscuits.

XQ. 63. What is that difference?

A. The shredded wheat is a larger biscuit.

XQ. 64. And when Mrs. Huber gave you this package of Kellogg's Shredded Wheat, you knew right away it was not the Niagara Falls package that you were getting?

A. Certainly.

XQ. 65. And you recognized instantly that it was a new shredded wheat package?

A. Yes."

Testimony of this sort could be quoted at great length. Unless there is deception or the probability of it there is no unfair competition. The proof is lacking in both respects. Plaintiff is complaining, not of unfair competition but of effective competition.

In conclusion I am of opinion that defendant has the right to make shredded wheat biscuit, to make the biscuit in a pillow form and to use the name "Shredded Wheat"; and that plaintiff has no trade-mark right in the words "Shredded" and "Shredded Wheat" or in the form of shredded wheat biscuit. Defendant is

guilty of no unfair competition by using the words "Shredded" and "Shredded Wheat" or by making shredded wheat biscuit in the form of a pillow or by displaying on its packages the illustration of its biscuit in a bowl.

This opinion contains a statement of the essential facts and of the law applicable thereto in conformity with Equity Rule 70½.

The bill must be dismissed.

JOHN P. NIELDS,
J.

January 11, 1935.

FINAL DECREE.

(Filed January 23, 1935.)

And now, to-wit, this twenty-third day of January, A. D. 1935, this cause having come on to be heard upon pleadings and proof, and briefs having been filed and argument made by counsel for the respective parties, and the same having been maturely considered by the Court, it is now, upon motion of E. Ennalls Berl, Esquire, solicitor for defendant,

ORDERED, ADJUDGED AND DECREED BY THE COURT that the bill of complaint herein be and the same hereby is dismissed, and that the costs of this cause be taxed against the plaintiff.

(Sgd.) JOHN P. NIELDS,
J.

PETITION FOR APPEAL.

(Filed February 13, 1935.)

To the Honorable the Judge of the District Court of the United States for the District of Delaware:

The above-named plaintiff, National Biscuit Company, conceiving itself aggrieved by the final decree made and entered in this cause on the twenty-third day of January, A. D. 1935, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of errors filed herewith, and prays that this appeal may be allowed and that citation be issued as provided by law directed to the above-named defendant, Kellogg Company, commanding it to appear before the United States Circuit Court of Appeals for the Third Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and documents upon which said decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.) Hugh M. Morris,
Solicitor for Plaintiff.

(Sgd.) Drury W. Cooper,
(Sgd.) Charles A. Vilas,
(Sgd.) Thomas J. Byrne,
(Sgd.) Henry J. Savage,
Of Counsel.

ASSIGNMENT OF ERRORS.

(Filed February 13, 1935.)

Now Comes National Biscuit Company, plaintiff in the above-entitled cause, by its solicitor, and presents, with the accompanying petition for appeal from the final decree made and entered herein by this Honorable Court on the twenty-third day of January, A. D. 1935, the following assignment of errors:

(1) That the Court erred in dismissing the bill of complaint.

(2) That the Court erred in failing to find and adjudge defendant guilty of unfair competition in trade with plaintiff.

(3) That the Court erred in failing to grant plaintiff the relief prayed for in and by its said bill of complaint.

(4) That the Court erred in failing to enjoin defendant from further unfair competition in trade with plaintiff.

(5) That the Court erred in failing to adjudge and decree that defendant account to plaintiff for defendant's unfair competition in trade with plaintiff.

(6) That the Court erred in failing to find and hold that plaintiff is the owner of and vested with the exclusive right in and to the trade-mark consisting of the words "Shredded Wheat" for its said whole wheat biscuit, registered in the United States Patent Office on January 15, 1924, No. 178,725, and that defendant has infringed plaintiff's said registered trade-mark.

(7) That the Court erred in failing to find and hold that the plaintiff is the owner of and vested with the

exclusive right in and to the trade-mark consisting of the words "Shredded Wheat" for its said whole wheat biscuit, registered in the United States Patent Office on May 25, 1926, No. 213,456, for biscuit, crackers and cereal foods, and that defendant has infringed plaintiff's said registered trade-mark.

(8) That the Court erred in failing to find and hold that plaintiff is the owner of and vested with the exclusive right in and to the trade-mark comprising picture of a dish containing two of its said whole wheat biscuit registered in the United States Patent Office on August 17, 1926, No. 216,593, for biscuit, crackers and Cereal foods, and that defendant has infringed plaintiff's said registered trade-mark.

(9) That the Court erred in failing to enjoin defendant from further infringement of plaintiff's said registered trade-marks identified in the three next preceding assignments of error.

(10) That the Court erred in failing to adjudge and decree that defendant account to plaintiff for plaintiff's damages and defendant's profits resulting from defendant's infringement of plaintiff's said registered trade-marks.

(11) That the Court erred in failing to find and hold that from the year 1892 until the present time, plaintiff's predecessors and plaintiff have manufactured and sold whole wheat biscuit in the same distinctive shape, structure and appearance (exemplified by Plaintiff's Exhibit 1) without material alteration or change.

(12) That the Court erred in failing to find and hold that the said whole wheat biscuit manufactured by plaintiff's predecessors and plaintiff during all of the said period from 1892 to the present time has been

readily recognized and distinguishable from any other form of food product manufactured or sold in the United States by reason of its said distinctive form and appearance.

(13) That the Court erred in failing to find and hold that the distinctive shape, structure and appearance of plaintiff's said whole wheat biscuit have, through long continued and exclusive use and by reason of extensive sale and advertising, come to indicate and signify the product and biscuit of plaintiff and of plaintiff alone; and that by reason of the uninterrupted use and association therewith for more than forty years of the words or name "Shredded Wheat," said whole wheat biscuit has become universally known to the trade and to the purchasing public as "Shredded Wheat" and the product of plaintiff exclusively.

(14) That the Court erred in failing to find and hold that during all the said period from 1892 to the present time, except for the unauthorized acts of the defendant and of the Ross Food Company, the plaintiff and its predecessors have been the sole manufacturer of whole wheat biscuit of the form, structure and appearance of plaintiff's whole wheat biscuit.

(15) That the Court erred in failing to find and hold that the volume of sales of plaintiff's said whole wheat biscuit of distinctive design and appearance increased continuously from the year 1892 until the year 1928, in which year 2,521,751 cases of said whole wheat biscuit were sold by plaintiff.

(16) That the Court erred in failing to find, adjudge and declare that plaintiff is vested with the exclusive right to manufacture and sell to the public in the United States said whole wheat biscuit of distinctive form, structure and appearance.

(17) That the Court erred in failing to find and hold that the distinctive form, structure and appearance of the plaintiff's said whole wheat biscuit has acquired a secondary meaning and significance as representing only the product of plaintiff.

(18) That the Court erred in failing to find and hold that the words or name "Shredded Wheat" have since the expiration of all patents relating thereto acquired a meaning and significance as indicating only the said whole wheat biscuit of plaintiff and have been accepted by the trade and by the consuming public as designating plaintiff's product exclusively.

(19) That the Court erred in failing to find and hold that defendant manufactures, sells and distributes in interstate commerce a whole wheat biscuit of substantially the same descriptive properties as the said whole wheat biscuit manufactured and sold by plaintiff, in derogation and infringement of plaintiff's property rights in and to said whole wheat biscuit.

(20) That the Court erred in failing to find and hold that each and all of the said registered trade-marks identified in the preceding assignments of error, 6, 7 and 8, have been used by plaintiff in connection with the sale and advertisement of its said whole wheat biscuit for many years and that by reason thereof, said registered trade-marks have become identified with plaintiff's said product, whole wheat biscuit, and have come to be and are now recognized by the trade and by the purchasing public as indicating the source of origin of said whole wheat biscuit in plaintiff; and that the said trade-mark "Shredded Wheat," registration No. 178,725 has been used by plaintiff's predecessors and plaintiff in association with its said whole wheat biscuit continuously since the year 1892.

(21) That the Court erred in failing to find and hold that defendant has employed on cartons and in advertisements in connection with the sale of its said whole wheat biscuit, the name or words "Shredded Wheat," in derogation and infringement of plaintiff's exclusive property rights therein and thereto and in violation of its rights in and to said registered trade-mark No. 178,725.

(22) That the Court erred in failing to find and hold that defendant employs upon its cartons and in advertising in connection with the sale of its said whole wheat biscuit the representation or reproduction of said biscuit in derogation and infringement of plaintiff's exclusive property rights in and to its said product whole wheat biscuit of distinctive shape, structure and appearance.

(23) That the Court erred in failing to find and hold that the representation or picture of the plaintiff's said whole wheat biscuit of distinctive design and appearance, shown in a saucer or dish, is a true trade-mark for said whole wheat biscuit and that the plaintiff is vested with the exclusive right therein and thereto.

(24) That the Court erred in failing to find and hold that defendant has employed on cartons containing its said whole wheat biscuit the reproduction or picture of a dish containing two of said whole wheat biscuit in infringement of plaintiff's right in and to its said registered trade-mark No. 216,593.

(25) That the Court erred in failing to find and hold that defendant has sold and continues to sell its whole wheat biscuit in cartons having cellophane panels or windows devised and designed to expose the ends of said biscuit, and calculated to deceive the prospective purchaser or consumer into the belief that the contents

of said carton is the biscuit manufactured and sold by plaintiff, of distinctive shape, structure and appearance.

(26) That the Court erred in failing to find and hold that the several acts of the defendant were intended to and do, in fact, deceive and mislead the public into the belief that the said biscuit of defendant is the whole wheat biscuit manufactured and sold by plaintiff.

(27) That the Court erred in failing to find and hold that the several acts and practices of defendant were intended to and have enabled its said product whole wheat biscuit to be mistaken for and substituted, sold and passed off as and for the genuine whole wheat biscuit manufactured and sold by plaintiff.

(28) That the Court erred in failing to find and hold that in the year 1922 the defendant commenced the manufacture and sale of a biscuit which it called "Shredded Whole Wheat Biscuit" which exactly resembled the biscuit of plaintiff with the exception of size, and that defendant, upon notice from the plaintiff, ceased to manufacture said biscuit in October, 1922.

(29) That the Court erred in failing to find and hold that both plaintiff's and defendant's whole wheat biscuit reach the ultimate consumer in many instances in restaurants, cafes, hospitals, institutions and homes outside and without the display of the package to the consumer.

(30) That the Court erred in failing to find and hold that the defendant has falsely and continues to falsely represent that the contents of its carton are "A Shredded Wheat Product" and are the "Original" of said product.

(31) That the Court erred in failing to find and hold that the defendant's said biscuit has been passed

off on numerous occasions by storekeepers, restaurant proprietors and others as and for the biscuit of plaintiff.

(32) That the Court erred in failing to find and hold that customers in stores, restaurants, institutions and private homes have received and consumed defendant's biscuit in the mistaken belief that it was the plaintiff's said biscuit.

(33) That the Court erred in finding that for twenty years from 1894 until 1914 the trade-mark of plaintiff was the Goddess Ceres, represented as holding a lighted torch in one hand and a sheaf of wheat in the other.

(34) That the Court erred in finding that the plaintiff and its predecessors made efforts to perpetuate their patent monopoly by the use of trade-marks and the institution of suits against competitors.

(35) That the Court erred in finding that throughout the patents owned by plaintiff and/or by its predecessors the word "Shredded" is used repeatedly and always as descriptive of the product.

(36) That the Court erred in finding as a matter of fact that from 1912 to 1919 defendant manufactured a shredded biscuit marketed in cartons marked "Kellogg's Toasted Wheat Biscuit."

(37) That the Court erred in finding as matters of fact that defendant distinguished its biscuit from plaintiff's by making a different size yet plaintiff wiped out the size distinction by duplicating defendant's small biscuits.

(38) That the Court erred in finding as a matter of fact that approximately 97½ per cent. of defend-

ant's trade is supplied with biscuit in the large 15-biscuit carton; that the remaining 2½ per cent. is divided into two parts: 98 per cent. of this 2½ per cent. receives the biscuits in individual cartons; the remaining 2 per cent. of said 2½ per cent. of defendant's total business or about 1 in every 5000 biscuits is served apart from a carton, yet is distinguishable because of its smaller size.

(39) That the Court erred in holding and concluding as a matter of law that defendant's cartons bear no resemblance to plaintiff's and cannot be mistaken for them.

(40) That the Court erred in holding and concluding that the respective cartons of the parties are readily distinguishable so that no confusion can result.

(41) That the Court erred in its conclusion that with each biscuit distinctively marked by carton and by size there can be no excuse for confusion or deception.

(42) That the Court erred in its conclusion of law that the case falls into the class of expired patent cases and is controlled by the Singer case.

(43) That the Court erred in its conclusion that evidence that "Shredded Wheat" or "Shredded Wheat Biscuit" has been understood by the public for years to mean a product produced only by the plaintiff does not establish plaintiff's right to that name.

(44) That the Court erred in its conclusion of law that where a secondary meaning is established, even to the exclusion of any other meaning, a competitor has the right to use that name provided he clearly distinguishes his goods, and that where a man distinguishes his goods he has fulfilled his duty to his competitors and to the public.

(45) That the Court erred in its finding of fact that the testimony of 100 witnesses from all parts of the country establishes there was no passing off of defendant's biscuit for plaintiff's or deception of the public to any appreciable extent.

(46) That the Court while correctly stating the law to be that unless there is deception or the probability of it, there is no unfair competition, nevertheless erred in finding and holding that the proof is lacking in both respects and that plaintiff is complaining not of unfair competition but of effective competition.

(47) That the Court erred in its conclusion that defendant has the right to make Shredded Wheat Biscuit, to make the biscuit in a pillow form and to use the name Shredded Wheat.

(48) That the Court erred in its conclusion that plaintiff has no trade-mark right in the words "Shredded" and "Shredded Wheat" or in the form of Shredded Wheat Biscuit.

(49) That the Court erred in finding that defendant is guilty of no unfair competition by using the words "Shredded" and "Shredded Wheat."

(50) That the Court erred in finding that defendant is guilty of no unfair competition by making shredded wheat biscuit in the form of a pillow or by displaying on its packages the illustration of its biscuit in a bowl.

WHEREFORE, the plaintiff prays that the decree of the said District Court of the United States for the District of Delaware be reversed and that said Court be instructed to enter a decree reinstating the bill of complaint and granting the relief therein prayed for.

(Sgd.) HUGH M. MORRIS,
Solicitor for Plaintiff.

ORDER ALLOWING APPEAL.

(Filed February 13, 1935.)

AND Now, to-wit, this thirteenth day of February A. D. 1935, upon consideration of the foregoing petition for appeal, the assignment of errors having been filed therewith, it is, upon motion of Hugh M. Morris, Esq., solicitor for National Biscuit Company, petitioner,

ORDERED BY THE COURT that the appeal of said petitioner to the United States Circuit Court of Appeals for the Third Circuit from the final decree entered in this cause on the twenty-third day of January, A. D. 1935, be and the same hereby is allowed, and that a transcript of the record, proceedings and documents and the opinion of this Court filed in this cause upon which said decree was made duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Third Circuit; and it is further

ORDERED BY THE COURT that the petitioner give bond according to law in the sum of Five Hundred Dollars ($500.00) with surety to be approved by the Court.

(Sgd.) JOHN P. NIELDS,
J.

BOND ON APPEAL.

(Filed February 23, 1935.)

KNOW ALL MEN BY THESE PRESENTS, That We, NATIONAL BISCUIT COMPANY, of 449 West 14th Street, New York City, as Principal, and the AMERICAN SURETY COMPANY OF NEW YORK, a corporation organized under the Laws of the State of New York and authorized to do business in the State of Delaware, as Surety, are held and firmly bound unto the above named KELLOGG COMPANY in the sum of Five Hundred

and 00/100 Dollars ($500.00) to be paid to the said Kellogg Company, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated the 18th day of February, 1935.

WHEREAS, the above named NATIONAL BISCUIT COMPANY has prosecuted an appeal to the United States Circuit Court of Appeals for the Third Circuit to reverse the decree dated the 23rd day of January, 1935, rendered in the above entitled suit, in the District Court of the United States for the District of Delaware.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the above named NATIONAL BISCUIT COMPANY shall prosecute its appeal to effect and answer all costs if it fail to make its plea good, then this Obligation shall be void, otherwise to remain in full force and effect.

NATIONAL BISCUIT COMPANY,
By: (Sgd.) C. S. STILWELL,
Vice-President.

(Seal)

AMERICAN SURETY COMPANY
OF NEW YORK,
By: (Sgd.) CARL B. WEED,
Resident Vice-President.

Attest:
(Sgd.) T. M. FORSYTH,
Resident Assistant Secretary.

(Seal)

(Sgd.) H FRANCIS,
As to Surety.

Countersigned:
By (Sgd.) ALEX R. ABRAHAM,
At Wilmington, Del.,
Registered Resident Agent.

(Seal)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

On the eighteenth day of February in the year 1935, before me personally came C. S. Stilwell, to me known, who being by me duly sworn, did depose and say; that he resides in New York County, that he is the vice-president of National Biscuit Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

(Sgd.) A. T. BULLOCK,
(Seal) *Notary Public.*
Notary Public, Queens Co. No. 190.
Registered in Queens Co. No. 203.
Certificate filed in New York Co. No. 92.
Registered in New York Co. No. 6B64.
Commission expires March 30, 1936.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

F. A. ROMAINE, being duly sworn, says: That he is an assistant secretary of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company, and is duly qualified to act as surety under such laws; that said company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An

Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the resources and liabilities of said company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $7,500,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

(Seal) (Sgd.) F. A. ROMAINE.

Subscribed and sworn before me this twelfth day of September, 1934.

(Sgd.) B. L. REHBERGER,
(Seal) *Notary Public.*

Notary Public, Kings County.
Kings Co. Clerk's No. 389, Reg. No. 5057.
New York Co. Clerk's No. 183, Reg. No. 5R107
My commission expires March 30, 1935.

February 23, 1935. The within bond is approved
(Sgd.) JOHN P. NIELDS,
J

CITATION.

(Filed March 2, 1935.)

UNITED STATES OF AMERICA, *ss.:*

THE PRESIDENT OF THE UNITED STATES,

To Kellogg Company, a Corporation of the State of Delaware,

GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Third Circuit in the City of Philadelphia, Commonwealth of Pennsylvania, on the twenty-fifth day of March, A. D. 1935, pursuant to an appeal duly obtained from the final decree of the District Court of the United States for the District of Delaware, signed, filed, and entered on the twenty-third day of January, A. D. 1935, in the cause therein pending wherein National Biscuit Company is plaintiff-appellant, and you are defendant-appellee, and show cause, if any there be, why the final decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand in the City of Wilmington, in the District of Delaware, this twenty-third day of February, A. D. 1935.

(Sgd.) JOHN P. NIELDS,
United States District Judge, District of Delaware.

Service of the foregoing citation, with copy, accepted this second day of March, A. D. 1935.

(Sgd.) E. ENNALLS BERL,
Solicitor for Defendant-Appellee.

RECORD OF PROCEEDINGS AT TRIAL.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

TIONAL BISCUIT COMPANY, *Plaintiff*, —against— KELLOGG COMPANY, *Defendant*.	No. 980. IN EQUITY.

Wilmington, Delaware,
Monday, May 22, 1933,
at 10 o'clock A. M.

Before: HON. JOHN P. NIELDS, United States District Judge.

Appearances: HUGH M. MORRIS, ESQ. (Wilmington, Del.); MESSRS. COOPER, KERR & DUNHAM (New York City), by DRURY W. COOPER, ESQ., C. A. VILAS, ESQ., THOMAS J. BYRNE, ESQ., HENRY J. SAVAGE, ESQ. (District of Columbia), of counsel for plaintiff;

CRICHTON CLARKE, ESQ. (New York City), ARTHUR G. SEIBOLD (Chicago, Ill.), WARD & GRAY (Wilmington, Del.), by E. ENNALLS BERL, ESQ., of counsel for defendant.

Mr. Morris made an opening statement on behalf of the plaintiff and Mr. Clarke made an opening statement on behalf of the defendant, followed by a further statement by Mr. Cooper on behalf of the plaintiff.

PLAINTIFF'S TESTIMONY AT THE TRIAL.

ELWOOD B. CHAPMAN.

DIRECT EXAMINATION.

THE WITNESS: I reside at Swarthmore, Delaware County, Pennsylvania. I have been connected for nearly thirty years with the Stephen F. Whitman & Sons., Inc., until recently. I am no longer taking an active part in the management. The business of that company is manufacturing chocolates and they are located in Philadelphia. I have an office in Philadelphia at the present time.

(Package of Shredded Wheat received in evidence as Plaintiff's Exhibit 1.)

THE WITNESS: I recognize the article which you take out of Plaintiff's Exhibit 1 as the shredded wheat biscuit which I have been eating for a great many years—so long that I can hardly remember—probably twenty or thirty years. I have been a regular consumer of it and use shredded wheat for breakfast almost to the exclusion of other cereals. During the years that I have been using it the product has not altered in appearance to any notable extent. Apparently it is exactly the same as what I knew originally. I frequently order and consume it in places other than my home. I am connected with the Pennsylvania Park Association, which requires constant travel, so that morning after morning when I am on the road I am ordering in hotels and restaurants.

When I order this product for breakfast I ask for it as "shredded wheat" and never by any other name. I never knew there was any necessity for making any distinction or using any other name for the product only within the last year or two.

During all these years I have linked up the expression "Shredded Wheat" with this product which I have known and eaten for so many years, which I have seen made in the Shredded Wheat plant at Niagara Falls. I have visited the plant and seen the process of manufacture.

With reference to my statement about distinguishing the biscuit. The first incident occurred at the Penn Harris Hotel, April 28, 1931. I was on the Forest and Park trip through the State and I went down to get an early breakfast, and in fact I did not look at the menu—almost every one had "shredded wheat" and I called for an order of "shredded wheat" and possibly a glass of milk along with it, and the girl brought me a package that I had never seen before. This was the first time I had seen anything different from your own. I had seen a package like Plaintiff's Exhibit 1 frequently in my home and I have seen a similar package in which two biscuit are put up for an individual order, but this was something entirely new to me at that time, and I saw it at once and picked it up and looked at the name. I saw it was another name and I thought it was some imitation that they were trying to palm off on me and I took exception to it. I complained at once and asked for the original package. The girl told me that this was the only preparation they had. The biscuits were smaller and not as palatable as your own. I did not know the National Biscuit Company had it then and I addressed this letter to the President of the Shredded Wheat Company, not knowing it was taken over by National Biscuit Company.

The reason I took the trouble to take the top off the box and mail it in is that in my connection at Whitman's I have seen so much imitation of trade-mark products that I had been interested in—probably you all know the Sampler Package, which is admitted to be the best known box of candy in the United States,

and which has been imitated again and again, but not always an exact imitation of the Sampler itself or the use of the name, but in such a way that it could be substituted very easily by the drug stores and others who sell it, and it seemed to me that this was an instance of that kind.

THE COURT: I was prone to ask whether or not in the Sampler box you had any shredded wheat covered with chocolate.

WITNESS: No.

THE WITNESS: There is a product in the candy business which is almost similar to shredded wheat. It is made of very fine strands of sugar. The sugar is hard-boiled and thrown in such a way as to nest it one strand on top of the other—very similar to this biscuit, and is known as spun sugar. It is very close to your own product, that is, the method of manufacture.

THE COURT: Is it a corn sugar?

WITNESS: No, pure cane sugar cooked very high, so that it will harden very quickly and then thrown out into these very fine threads which crystallize and harden almost immediately, so that it packs up one on top of the other, making a little nest.

THE COURT: And you covered that?

WITNESS: That is something that is generally known in the business as spun sugar, but it is very similar to this product.

THE WITNESS: It is used as a container for candy, ices and things of that kind on the table at dinner. It is not covered with chocolate.

After the occurrence at the Penn Harris Hotel I wrote to The Shredded Wheat Company. There were other similar occurrences in varying ways, but on that

particular occasion when I protested and asked for shredded wheat I was told that was all they had.

THE COURT: It was served to you with a saucer and cream in a container like this?

WITNESS: Yes. Shall I give the instances which are listed here?

THE COURT: I suggested to the witness a Kellogg container.

THE WITNESS: I was impressed with this, because it was the first time I had ever seen anything that was purported to be a substitute for shredded wheat, and naturally I was on the outlook for it. The same thing occurred the following morning at the same hotel and I went through the same experience trying to get shredded wheat, but I was offered this and could not get anything else.

On May 1st at the Fort Pitt Hotel in Pittsburgh; June 27th at the Nittany Lion, State College, the surrounding circumstances were different in each case, but in some instances they were served outside the package. There was a somewhat different taste and a different size and shape which led me immediately to ask whether this was shredded wheat. In one or two instances I was told it was and I had to ask if it was the original shredded wheat. In a few instances I went to the trouble of going to the proprietor of the hotel.

At the State College instance I felt particularly aggrieved because we were holding a convention there and had practically filled up the hotel and gotten acquainted with the proprietor and I went to him and asked him why they should serve anything of that kind when it was noted on the menu as shredded wheat.

I have a little memorandum here and as I said, in attending a meeting of the Forestry Association I had three instances inside of three days.

At the State College the waiters brought me the Kellogg product although I ordered distinctly shredded wheat. I went to the length of taking this up with the proprietor of the hotel and he assured me that they carried both sizes and went so far as to send to the kitchen for a package of our own product, referring to the shredded wheat. Notwithstanding this the waiters had insisted that Kellogg's was shredded wheat and it was the only thing they had. I only got what I wanted by going to the proprietor of the hotel for it.

I have so many engagements in traveling around as I do that I have carried a diary for the purpose of noting the various engagements that I have had and the places where I stopped. I have a memorandum here of these as I have noted them and then wrote to the Shredded Wheat Company on my return to my office. I took that from the notations which I had made in my memorandum book.

The facts that I have narrated are true, but I did not finish that list. In addition to that there was a Fenway Tea Room at the State College and a day or so later the Hersey Inn; July 1st, the Algonquin Hotel at Cumberland; July 8th the Andrew Jackson, Knoxville, and July 14th, the Green Brier Hotel at White Sulphur Springs, and that is one place where I raised a row and I do not often do it, but I ran a restaurant myself a great many years, and here they charged you up to $25 a day and serving something that was not listed on the menu in substitution for what a guest asked for. I asked for Shredded Wheat and they did not bring it to me. It was a smaller biscuit and a little different in appearance and I had to investigate to find out whether it was Shredded Wheat. It was not brought to me in a package, but in a dish.

Here is the menu that I brought away with me from the Fenway Tea Room and my own mark of

Shredded Wheat, ten cents, is shown by the blue pencil mark around the word "Shredded Wheat."

(Menu card in evidence in connection with testimony of witness—Marked Plaintiff's Exhibit 238.)

WITNESS: My experience as to the method in which Shredded Wheat or this other product that I have mentioned is served in restaurants, cafes and hotels varied in these instances which I stated here. In some it was handed to me in the original package, and in others it was served separately, just on the saucer. There, of course, it required investigation to identify it, but I did in each instance which I stated to you.

During my traveling about in various places Shredded Wheat frequently was served without the production of the package. In the less expensive places they are more apt to hand one the carton, but the higher priced places they often hand it separately. Sometimes both biscuits and sometimes only a single one.

WITNESS: I have no connection with National Biscuit Company nor do I know any one connected with that company, or the Shredded Wheat Company, and I have no interest in the outcome of this litigation.

CROSS-EXAMINATION.

THE WITNESS: I still continue to ask for Shredded Wheat.

XQ. 49. And will you go on for the rest of your life asking for Shredded Wheat?

THE COURT: That is all in the realm of speculation.

WITNESS: On each occasion when the waiter told me Shredded Wheat was made by the Kellogg Company I specified Shredded Wheat. I do not know whether I said orginal, but I asked for Shredded Wheat particu-

larly and told him that this was not what I was trying to order—told him it was not Shredded Wheat at all.

XQ. 52. Is that strictly true? Is it not Shredded Wheat that is made by the Kellogg Company?

A. You are asking a question which requires rather a lengthy answer. I would not——

XQ. 53. Let me split it up.

THE COURT: The witness may give as lengthy an answer as he chooses within reasonable limits.

WITNESS: When you speak of Shredded Wheat it does not seem to me that that is technically a descriptive name of that product.

MR. CLARKE: I object to that.

WITNESS: To me it is not a technical descriptive name, because similar processes in various ways as I have already described in the candy business, how we built up out of a sugar a product almost like that which is called spun sugar.

THE COURT: Is this answer responsive to the question?

MR. CLARKE: I do not think so.

(XQ. 52 was thereupon repeated as recorded.)

MR. CLARKE: Is your answer no to that?

MR. VILAS: Give the witness an opportunity.

THE COURT: The question is in the inflection. Frame the question so that it will appear to be one when read.

MR. CLARKE: I will repeat it.

By MR. CLARKE:

XQ. 54. You say that this product which was handed to you was not shredded wheat made by the Kellogg Company of Battle Creek, Michigan?

A. To my mind Shredded Wheat was directed to one particular problem.

XQ. 55. Is it not capable of a yes or no answer?

I would say no if I might be given that little further chance to explain what my thought of shredded was. The reason for saying no, is this: In replying no to the question it is because as I started to explain, it is my thought shredded is not a technical definition of that. I have explained the one instance which I have already recited, when iron is pulled out into fine threads, it is called drawing, and in our own business again, chocolate is made into very slender cylinders, and it is called pressing there, and I do not know of any technical description of such a thing as that as being shredding.

In the Kellogg Company carton that was handed to me there was a biscuit somewhat similar in appearance to what I had been using, which I presume was made of wheat. It was not shredded under the definition of shredded that I have just attempted to give you, which is my own definition. You might call it by any of those names that I have stated that were ordinarily used, such as wire is known as drawn. If you wanted to find some name to technically describe what you attempted to do in making the fine shreds, you might have called it——

THE COURT: There is nothing fragile about the wire?

WITNESS: No. You could have called it from the sugar spun wheat or pressed wheat if it is pressed out. I do not know the process except in a general way.

XQ. 64. So that what you meant to tell these waiters when you said this was not shredded wheat was that it was not spun wheat or drawn wheat; is that what you mean?

MR. VILAS: I object to that question.

THE COURT: Overruled.

MR. VILAS: Exception.

A. It was somewhat similar to any of those processes. Such a thought did not come up at that time. I never told the waiters that it did not resemble drawn wheat or any of those things.

WITNESS: In several instances the waiter told me it was shredded wheat. In the dispute between myself and the waiters I meant to tell them that it was not the product which I had been asking for and eating for years. It was something that was made by Kellogg.

At first I thought it was an imitation. It looked like other imitations; looked like the original product, but was not. It was the product made by the Kellogg Company at Battle Creek, Michigan. At any rate, I knew right away it was not the product I had been getting for thirty years. When it was served outside of the plate I had to investigate to ascertain for sure just what they were trying to serve me. These later investigations were the result of the cumulative effect of the constant impositions, morning after morning, that made this effect upon me. On each of these occasions I knew it was a different cereal served to me in a plate. I inferred it was the Kellogg product because I remember the original carton that had been handed to me in the Penn Harris Hotel.

In the two or three instances where I went to the hotel proprietor I told him that I had been accustomed to asking for Shredded Wheat for years, and here was something that had been brought to me which was something that I had not been getting. I still had Shredded Wheat. This was particularly noticeable at this time in 1931 when I was traveling a great deal through the parks in western Pennsylvania and Virginia and there seemed to be a circle that had been well

covered by the Kellogg product. In other cases I had not noticed it, like nearby in my own home.

XQ. 78. Even if the Niagara Falls people, that is the plaintiff here, would put the word original on their package, original shredded wheat, would you then call it original shredded wheat?

MR. VILAS: I object to that question as hypothetical and speculative.

THE COURT: This is cross-examination. The objection is overruled.

A. Ought I to be required to suggest——

MR. CLARKE: That is not my question.

(Last question repeated as recorded.)

A. In my own business I would not expect to be original sampler on the top of the package.

XQ. 79. I said if they called it original shredded wheat, would you not call it original shredded wheat when you ordered it?

A. Not unless I noticed it for some continuous length of time that there was a change being made in the package. Do you not realize that for so many years I have been looking at this thing continuously that you do not stop to think that something is being palmed off on you.

THE COURT: Do you desire to supplement the answer?

WITNESS: No, I do not mean to make it too lengthy, but in picking up a package I would not scrutinize it every time unless it was noticeably different.

THE WITNESS: The Stephen F. Whitman & Son, Inc., make a spun sugar, not sponge chocolate. It is not a shredded product—it looks almost like either of the products here, a mass of little shreds, like spun

glass. This is not copyrighted or trade-marked. I merely cited that as something that is being classified as spun.

I knew the shredded wheat process was patented originally, but I understood that that has expired. My thought was that the way the other product was being marketed was under the heading of unfair competition and not infringing of patents.

WITNESS: I did not think that the little square package was the Niagara Falls package that I had been getting for years.

My own product was not copyrighted or trade-marked—it was something that had been made for years and years. Our sampler package has been copied again and again and at one time we had twenty-three imitations of various kinds. We never had to sue for they always stopped fortunately before we progressed very far. We took it up with counsel immediately; twice I think we got almost under way, but it never came to issue. Some imitations were deceptive and some only partially so.

XQ. 93. What was your objection to the ones that were not deceptive?

A. There it was a case of unfair competition by substitution on the part of the retailer. It gave the retailer such a splendid opportunity——

THE COURT: Are we getting away from the issue?

MR. CLARKE: I just wanted to see——

THE COURT: Have you seen?

MR. CLARKE: Yes. I wanted to see what it was in the witness's business that made him see these things.

WITNESS: And as a consumer, too.

WITNESS: I wrote to the complainant about receiving the Kellogg package at the very first instances as I stated in my original testimony. Here is a copy which I addressed to the president of the Shredded Wheat Company.

"May 4th, 1931.

"To the President,
Shredded Wheat Company,
Niagara Falls, N. Y.

Dear Sir:

For untold years I have been a regular consumer of your product. On the morning of April 28th, in the breakfast room of the Penn Harris Hotel, Harrisburg, I called for shredded wheat. The girl brought me a box from which the accompanying top was taken. I complained at once and asked for the original package; she told me that this was the only preparation that they had. The biscuits were much smaller and were not as palatable as your own.

"On the morning of the 29th this transaction was repeated at the Penn Harris, and to my surprise a few days later at the Fort Pitt Hotel in Pittsburgh, too.

"This is clearly illegal, as you are doubtless already aware. Under court decision no dealer has any right to sell a 'substitute' without stating plainly that he does not have the article asked for and is offering the other in its place.

"I am writing you at this length because as the owner of proprietary articles, among them the Whitman Sampler, I am greatly interested in putting a stop to this pernicious practice. If a considerable number of hotels are profiting by substituting this smaller and probably cheaper biscuit it

seems to me that it may have a very serious effect upon the volume of your own sales.

"Very truly yours,

(Signed) ELLWOOD B. CHAPMAN."

I received a reply acknowledging my letter—there was very little correspondence. Most of that developed later.

WITNESS: This Whitman Sampler candy is the one I referred to on direct examination as having a great many copies or imitations, but no case was ever filed. The more serious ones never got to issue in court. They have been repeatedly in the hands of counsel though.

I understand the words "shredded wheat" to mean a biscuit made by National Biscuit Company for twenty or thirty years because that company succeeded to the business of the Shredded Wheat Company.

WITNESS: The waiters said several times that this was shredded wheat. You know how much waiters generally know about the trade-marks and copyrights and names, scarcely anything.

In one or two instances where I could not get any other I consumed the Kellogg biscuit, but if you will refer to the correspondence there is some instances in which I succeeded in getting what I wanted. I cannot remember each individual instance.

Last year was the first time it came to my knowledge that there was any necessity of saying anything more than just shredded wheat. The first time it came to my knowledge was the date mentioned in that first letter.

I always associated Niagara or Niagara Falls with the plaintiff's product because I have seen it so often on the carton and on my visits to the factory itself, I naturally would be in association with it.

EARL T. OAKES.

DIRECT EXAMINATION.

THE WITNESS: I reside at Douglaston, Long Island. I am connected with National Biscuit Company, New York, and have been with that company since May, 1919. I was educated at Columbia University and graduated with degrees of Master of Arts and Doctor of Philosophy in Chemistry. I have been chief chemist of National Biscuit Company since October, 1932. From February, 1929, to October, 1932, I was production manager of the Shredded Wheat Bakeries. Prior to the acquisition of Shredded Wheat Company by National Biscuit Company I had to do with production matters of other products of National Biscuit Company in the New York Bakeries, where at that time we did about 45 per cent. of our entire business and my connection was with the general production, raw materials, processing and packaging of them throughout the plants. When I was production manager of Shredded Wheat Bakeries all my time was spent at the various factories in Niagara Falls, both on the Canadian and American side; Oakland, California, and England.

I am familiar with the machinery by which shredded wheat is produced. The purchase and price paid for raw materials that go into the shredded wheat product has not been under my supervision, but the material itself, the quality and so on has been under my supervision.

I define the kind of wheat we want, when we want it and how much we want and after delivery the wheat comes under my supervision. The wheat arrives in box cars with an inner door and it is boarded up. The cars roll up to the elevators ready to unload and the elevators at Niagara Falls have a capacity of three-quarters of a million bushels. Great care is taken in the selection of a particular grade or kind. As to the

quality, it is all graded at Niagara Falls by the Corn Exchange of Buffalo, the United States inspector passes on referee work on that. We use a No. 1 white winter wheat, which usually comes from New York State; some from Michigan, Ohio and Indiana. Those are about the only places that it is grown. The reason for this selection is based upon experience as to its adaptability for this particular purpose. We maintain a Wheat Research at our Toledo Mills, and there we have financed three State colleges in the development of a higher type of white wheat for this purpose and we are getting results from it. We have isolated a type that is supremely good, but we have not got enough of it to go into the large scale manufacture of it.

We do use a small percentage of Durum wheat, to to get certain results in our production; in places where we cannot get Durum wheat, we do without it. On the West Coast we use the West Coast wheat. In England we use Australian wheat. In Canada we use a local Ontario Province wheat. We do not use the red wheats and the darker heavier wheats of that type.

(Set of twenty-four photographs illustrating plaintiff's apparatus and process received and marked "Plaintiff's Exhibit A for Identification.")

THE WITNESS: The first photograph No. 1 is merely an outside view of the plant itself, showing a sign over the main entrance door—"The Home of Shredded Wheat." So far as I know this sign has been above the door since February, 1929.

MR. COOPER: I may say for the Court, that the principal witness whose testimony was taken on deposition who was connected with the Shredded Wheat Company, has told about the origin of that sign, two or three decades ago, I believe.

THE WITNESS: Photograph No. 2 shows the wheat tanks as they are at Niagara Falls. That is the standard type tank for storing wheat. Each tank holds about 20,000 bushels. The total capacity is around three-quarter million bushels. The wheat is dumped from the box car into the foot of the elevator, and carried up to the top of this place. We have a carload of wheat at a time, and it is transferred to a particular bin. From that point it is transferred to the cleaning room in the factory; and photograph No. 3 shows the so-called receiving and milling separator. The receiving separator has screens large enough to let the wheat through, and screen off the larger particles. The milling separator has smaller screens which screens out the finer particles.

No. 4 shows the cleaning machine, which is known as a Carter disk machine. The stream of wheat passes on a series of discs, with pockets in the face of each disc. These pockets are large enough for a grain of wheat, but too small for a grain of oats; and as the disc turns over, it carries the wheat over on the opposite side, and drops it away from the oats. It is picking out a kernel of wheat from the oats; and the photograph No. 5 shows the stoning machines, which are shakers, and they shake the stones out (the stones being heavier, you get a different specific gravity from the wheat), and separate the stones from the wheat. The stones would be in small particles of the same size as the wheat; everything else would have been screened out before. Machines similar to the oat machines separate the cockle seeds apart from the wheat, except here the pockets are just large enough for the round cockle seeds to get into the pocket, but too small for a grain of wheat.

Photograph No. 6 shows the character of the cleaned wheat after it has been through this cleaning process.

Photograph No. 7 shows the cooking equipment after the wheat is cleaned. It is transferred to a bin above the cookers, and there automatically weighed in lots, as charges for the cookers. The cookers are cylindrical iron tanks with a rotating perforated drum inside. The wheat is loaded into the perforated drum. The water run in there is in excess of the wheat, so that the wheat is all covered up with water—the cooker is enclosed. The whole grain of wheat is cooked. Before the wheat is gotten into this cooker it has been perfectly cleaned. The cooker is then closed with its wheat in water. The drum containing the wheat is rotated and the steam turned on to cook it. The same water is used for the cooking of this wheat as the drinking supply to Niagara Falls or for our other sources. The wheat is cooked or boiled until such time as all of the starch is completely gelatinized; that is, each tiny starch cell is ruptured. Each cell of starch in the grain of wheat originally is surrounded by a tough, more or less impervious membrane, which is ruptured and broken, exploded, as it were, in the cooking; but the kernel itself maintains its identity and is not mushy; it is firm and unbroken. Cutting the grain of wheat after it is cooked shows no white starchy portion such as you get in the raw uncooked.

After the cooking is completed, the cooker is opened and the wheat pours out into the hopper.

The hopper is on the same floor as the cooker itself, and the cooking, of course, results in a wheat which has about 50 per cent. of water. Originally we had around 13 per cent., and after it is cooked, it has almost 50 per cent. of water, and is swollen to about twice its original size. This Photograph No. 9 shows the relative size of the kernels of uncooked and cooked wheat. The cooked being on the right. The large kernels from the hopper into which the cooker discharges the wheat is dropped through cooling towers, because it is hot, hav-

ing been completely drained of the cooking water, and that surface moisture is taken out, and the wheat cooled by dropping it through these towers, which have a screen inside, and these luvres outside, so that the wheat drops through a wall about one inch thick, down the eighteen or twenty feet from the cooker to the floor below. Air is pulled through the luvres in through the blanket of wheat or sheet of wheat, and that cools the wheat and takes the excess moisture from the outside. The wheat comes from the cooker at boiling temperature.

Different wheats and different grades of wheat must be handled a little bit differently. It is impossible to get a pure strain of wheat commercially. If the farmer sows a high grade of wheat, or seed, it is only a year or two until it is contaminated with a number of other varieties. A red wheat will vary like that, and will cook much faster than the white, and depending upon the proportions of these different wheats, we must vary our cooking temperature and pressure, to get a wheat which is not mushy, and at the same time is completely cooked. Those cooling towers then discharge into tanks shown in the photograph.

They are luvres. They are slots really like this (indicating), and the wheat passes down through at the end side, and the air is drawn through these slots, and through the sheet of wheat and through the screen back of this. Those tanks into which the cooling tower discharges, hold about 200 bushels of cooked wheat. The wheat is held in these curing tanks for a period of up to 20 hours, and then it is dropped directly into another series of tanks, exactly the same as these, and held for another period of 14 or 16 hours. The dropping from one set to the other, serves to stir it up without any mechanical handling of it, and from here the wheat is conveyed to the shredding machine itself. The conveyor is a belt conveyor; the wheat is dropped onto

the belt and that belt carries it over to the hopper, above the shredding machine. Above this belt, as the wheat comes to the shredding machine, it is spread out in a thin layer, and the electric magnet is set there to take off any magnetizable material that may have found its way into the concern at all. That would be pieces of metal that might come from the pipes or tanks or something. The shredding machine itself consists of a series of rolls mounted tandem, 29 sets of these rolls are together, making the machine around 60 feet long. The wheat from the hopper is conveyed by a scroll conveyor the entire length of the machine. On each set of rolls there is a down spout from this scroll conveyor into the tiny hopper above the rolls themselves.

Twenty-nine sets of rolls. There is one smooth and one grooved roll on all of this set. We only operate 24 or 25 or 26 rolls at one time, so that we have from 3 to 5 idle rolls at all times; so that if anything goes wrong with one set of rolls, they can be cut off, and another set cut in, without stopping the machine. Each set of rolls is driven by a wooden clutch pin; so that if, from any source at all, the foreign material, sensibly tougher than a grain of wheat, gets into that set of rolls, it has too heavy a load for the wooden clutch pin to carry, and the pin breaks, and the roll stops, and is cleaned out and a new peg put in, and started up again. Each of these rolls are of the same size.

They are 4 inches wide and 4 inches in diameter, and they are driven from the one gear so that the periphery of the two is traveling at the same rate of speed. In other words, there is no slipping of one by the other, and consequently no tearing of the wheat as it goes through. It is a smooth rolling process from start to finish.

The rolls are made of a very hard tool steel. They are pressed up against each other, with a pressure of several thousand pounds. In order to make a clean-

cut of the wheat into the shred that we get from it, in fact, they are pressed so tightly that in time the grooved roll wears into the smooth roll, and they have to be either redressed, or new rolls put in.

The depth of the groove runs from 1/18 thousandth of an inch to 1/24 thousandths of an inch. They are 18,000, 20,000, 22,000 and 24,000ths of an inch; the reason for that being that in order to maintain the weight of the finished biscuit, if we have 25 rolls on the machine, operating one of them more or less will make the difference of 4 per cent. in our weight, which is too great a variation; and by having the different sized grooves we can make a finer adjustment of the weight in the finished biscuit; and also different weather conditions cause the wheat to shred differently, and we may have to put on more heavier rolls, or more lighter rolls to get the biscuit.

Each of these sets of rolls then is rolling out its shreds of wheat, and to accumulate them along the 60 feet of the machine, there is a conveyor that runs completely around the machine, and it picks up the wheat from the first pair of rolls. The second piles on top of that, and the third, and so on, until when we get to the other end, we have 24, 25 or 26 layers, piled one on top of the other; and this conveyor is practically filled to the top.

Photograph No. 13 shows the conveyor chain with the shredded wheat dropping on it. This roll is taken out to get the picture. This chain is made up of individual links. The links are separated by a narrow space all the way through. There are as many layers of this shredded matter on top of one another as we have rolls operating; in other words, about 24, 25 or 26; each set of rolls put on its set of wheat.

No. 14—from the fogginess of these strips looks as if the belt was running—shows the interior rolls laying their shreds on to the chain. This accumulator

chain carries the shreds up to the end of the machine; but it is to my knowledge the only type of machine employing in the biscuit manufacture a suction for panning the biscuits from the machine on to the pan, on which they are baked. The accumulator chain runs up to the end, as far as here, and then turns back to go to the other end, to come back over again. Between each of these links that I speak of, a lower so-called cutter chain operates on a shorter cycle and the knives from that coming up through between the links of the accumulator chain; these are not possibly to be spoken of as knives, because they have a flat surface of about 1/8 of an inch or 1/16 of an inch or 1.32 of an inch, so that they are not sharp.

Above the accumulator chain is a longer so-called panner chain, which operates—these are all numbered, so that we can do this afterwards—so that we have some long accumulator conveyor chain with links with slots in them. The knives on the links from the panner chain above meet those from the cutter coming through from below, and press together, to make the division in this long line of shreds. Then the cutter chain turns back away from those. The panner chain carries on above; each link of the panner chain carries a screen directly over the biscuit, and the hollow chamber above that, the suction operating through the hollow chamber sucks the biscuit up against the screen. The panner chain continues on over the pan itself carrying the biscuit.

Photograph 17 shows the biscuits as they are carried directly over the pan itself, and the suction is knocked off, and this line of biscuits dropped on. That gives a roll of biscuits along the side of the pan. Each pan as it opens, carries four of these rows of biscuits dropped here, and the pan indexed ahead, and another line dropped on.

The cutting operation results in the formation of the biscuit, which is as long as the trough is wide. If you give me about four biscuits I think I can explain that accurately. Now, instead of the biscuits being cut—this is the end of the accumulator chain, where these 24 piles of shreds have been cut, and this is all one mass, and the knife from below comes between the slot and the accumulator chain, and the knife above comes down over that. The two meet, and keep straight on. At the same time, another set of knives come behind them, so that these are cut off. They are not in fact cut off; they are pinched off, so that there is a selvage edge and it makes possible the formation of the biscuit of this kind. Is that clear? From the panning, the pans are conveyed around to the oven. The oven is the so-called reel or ferris wheel type of oven, which consists of a central shaft, from which the spider operates from the central shaft, much the same as the Ferris wheel operates with the buckets suspended from it. From each of these spiders, a shelf runs across; and no matter where this is turned it is always level as the shelf goes around.

Photograph 18 shows two biscuits loaded on to the shelf. Photograph 19 shows a close-up view of the biscuits themselves. You will notice there that they are much wider than the finished biscuit is. After the biscuits are baked, they have shrunk in width and piled up in height. They are thicker but narrower.

Now, as the wheat goes to the cooker, as I said, it has about 12 per cent. to 14 per cent. of moisture. As it comes from the cooker, it has around 50 per cent. of water. It loses a per cent. or two, in traveling from the cooker to the shredder; so that it goes to the oven a little under 50 per cent. of water. It comes from the oven with about half of that water baked out. The shell is thoroughly baked and browned; but the inside is still wet, and must be evaporated. The temperature

in the oven is about 540 degrees and the time about 20 minutes. From the oven the pans are placed in racks.

THE WITNESS: The biscuits are still on the pans and taken directly off of the shelf and into the rack. As they are baked and the pan of baked biscuit is removed from the oven shelf a pan of fresh biscuit is put in its place, so that the oven is always full, except for the pan being removed. Still no hand touching the biscuit; they are still on the pans. From the oven in these racks they are shoved into the drying tunnel and conveyed the length of the drying tunnel. This photograph shows them coming out of the drying tunnel. As they come from there, they are bone dry. The moisture has all been evaporated from them.

They are there about an hour, and at a temperature around 300 degrees. Then they are run over to the packing table and the pans from those racks are fed into the packing table. This is Photograph 22.

Photograph 21 was the evaporator, and Photograph 20 was the coming out of the oven. The packing table takes the pan of biscuits and conveys it the length of the table with girls sitting on either side, and as these pans pass between the rows of girls, they reach in there and pick the biscuits out and put them into the carton. The carton is packed and placed on the conveyor running along the middle of the table, and above the pans.

There is a certain continuity of progression in this. It is modern mass production. Those all travel through in a straight line, as I have narrated it. There is no piece work if you are referring to that. The biscuit are taken off as fast as they come in. It is all timed in together with the work. There are a few spots where it can accumulate. For instance, when the racks are pulled out of the evaporators, they are apt to stand around long enough for the biscuits and pans to cool

off, so that there will be no burning or anything of that sort; and if anything happens there at the packing table, they can accumulate, and the packing can go on later. That is an accident. It is all intended to be one cycle. Then these packed cartons shown in Photograph 23 are conveyed into the so-called sealing machines where the flaps are folded in, glued, and a ribbon of paper placed along the gap between the two folds of the ends of the carton.

Photograph 24 merely shows it made into a biscuit.

As I recall it there are about 200 grains of wheat in one of these biscuits. As to any wastage of material, if you will refer to Photograph No. 19, you will see that there is a different spacing between these rows of biscuits as they are dropped on the pan. This upper pan or chain knife sometimes gets a little bit of wheat gummed on the knife so that when it cuts another biscuit is is liable to tack onto that knife and when it drops it may flip up on another biscuit or the pan may be fed through with a bend on the end, which causes it to turn one way or the other; in other words, there are a number of different causes for one biscuit dropping on top of the other. That is a miscarriage and we have an operator inspecting each pan as it goes by. It is impossible as these pans travel by to adjust the biscuit; in fact, if you have the pan still where you can work on it you can scarcely touch these biscuits, they are so frail, without destroying them in the baking.

We pick these biscuits off the pan and put them into a receptacle and take that receptacle back to the shredder and feed it through a set of rolls which are maintained for the purpose of feeding the shreds back through. Any set of rolls can be used, but you have to take this down-spout off in order to feed them in. In every machine set up with 29 pairs of rolls there is one at least which is so arranged that the material that

has been spoiled in transit, so to speak, is put back through that particular set; the down-spout is hinged so that it can be folded up and the rolls used for re-shredding. Day in and day out there is a substantial amount that is thus retreated. According to my experience in many ways it makes a better biscuit.

Referring to the cutting operation, whereby the trough-full of material is severed to form the biscuit, it is not necessary to have cutters that will form the particular shape of biscuit that is here in court.

Q. 67. How much variation in the form of biscuit can you make at that zone of the operation without otherwise changing the machine than merely substituting one form of cutter for another?

A. I do not know how many different kinds you can make. You can make several different kinds, as many as you can thing of, I should say.

WITNESS: We have caused a variety of different shapes of biscuit to be made by merely changing the form of the cutting mechanism at the zone pointed out on the photographs here at which the severing does take place.

MR. COOPER: Yes, I will offer in evidence now the Plaintiff's Exhibit A for identification, which will be Plaintiff's Exhibit 239.

THE COURT: They are numbered from 1 to 24?

MR. COOPER: Yes.

THE COURT: In order that the record may be clear, you made an objection to the question. The Court overrules that objection.

MR. CLARKE: I take an exception.

THE COURT: Certainly. Let an exception be entered without in any way prejudging ultimately the merits of the very questions that you are now raising, and that is understood in this ruling.

(Received in evidence and marked "Plaintiff's Exhibit No. 239.")

WITNESS: Biscuits were made on the machine described without other variation in the process, except a substitution of other cutting machines for the particular form that produced a pillow-shaped biscuit. No change is made in the equipment except in the method of cutting.

Q. 71. Just what was the method of cutting on this exhibit?

A. These were cut with a hand cutter.

Q. 72. From your knowledge and experience as you have given it, was there any difficulty in applying that sort of a cutter to the machine?

A. No, sir, it is merely a matter of changing the shape of the knives.

MR. COOPER: I will offer in evidence the box and contents, which is Plaintiff's Exhibit 240 for identification.

MR. CLARKE: I make the same objection.

MR. COOPER: I understand it goes to the entire line.

THE COURT: The entire line of interrogation.

(Received in evidence and marked "Plaintiff's Exhibit No. 240.")

SECOND DAY.

May 23, 1933.

WITNESS: The box which Mr. Cooper holds contains samples of another form beside one I testified about yesterday. These biscuits were made on commercial machines, all except the actual cutting of them, the wheat was shredded and delivered from the machine. They were cut by hand, but they were shredded

and delivered from the regular and commercial machine to the hand attachment on the end of the machine.

These biscuits are a sort of cone-shaped triangular form. If I might state, these particular biscuits were cut on the machine, except for the diagonal cut. They were made entirely on the regular machine except for this sectional cut across. They are the pillow form as they came off that part of the machine and then cut diagonally, by hand. That is all there is to this.

We take the biscuits in their soft condition just after the pillow had been formed, then take them off the machine and cut once diagonally across from one corner to the opposite corner of the other end. That is what produced this box of biscuits.

No scissors were used. We have to use blunt knives in order to get the selvedge edge.

These diagonal biscuits or cone-shaped biscuits could be produced in the regular production of the machine by some change in the cutting arrangement.

(Box of cone-shaped biscuit received in evidence and marked "Plaintiff's Exhibit No. 241.")

Witness: I am using Exhibit—Photograph No. 15, in Exhibit 239—which shows the panel chain with its cutting knives, and the cutter chain with its knives, and by leaving these chains exactly as they are, and adding a diagonal knife across from the outer edge of one knife to the inner edge of the following knife, you have a diagonal knife, which would come across, and cut diagonally, while the other two were cutting straight.

The output would be exactly the same in tonnage, and double the number of biscuits. I can show you what I mean by that, if I may take that.

(Received and marked "Plaintiff's Exhibit B for Identification.")

WITNESS: Then the bucket chain would also be split to allow the cutter knife to come up diagonally from below, through it, with the other part of the cutting device, for the miniature biscuit.

(Received and marked "Plaintiff's Exhibit C for Identification.")

WITNESS: These biscuit, which I now hold, are doughnut-shape biscuit. We took the sheet of shreds delivered from the machine, and with a set of hand dies, one from below and one from above; those dies were circular with blunt knives, and a small circle in the middle, and cut the biscuit out as we have it here. It would be quite practicable to add suitable knives to the machine itself, to cut out its doughnut form, that is the ring-shaped forms, with the holes in the middle. This would affect the output of the machine—it would be less in tonnage, but not necessarily in the number of biscuits. They would have to have the center returned for shredding..

In the regular manufacture of round-shaped crackers by National Biscuit Company there is such continual scrap loss, the scrap being fed back into the machinery.

(Box of round-shaped biscuit with holes in the middle received in evidence and marked "P Exhibit No. 242.")

WITNESS: The box of biscuit which you have just shown me were made by us. The shreds were taken from the machine in the manner similar to the others. A round piece of disc was used without any circular hole cut out at the center; otherwise they are like the preceding set, and are of the diameter of about three inches. By furnishing suitable round cutters to the regular machine in its regular process, it would affect the output of the machine only by the amount of scrap

that is cut around from the sides. It would be sent back for retreatment. It is a sacrifice of tonnage, but not of number of biscuits.

(Received in evidence and marked "Plaintiff's Exhibit No. 243.")

WITNESS: Here is another box of biscuits, these being round and I think about two and one-half inches in diameter, made in the same way as the last exhibit as to size of cutter. They were cut by hand as the others were. If a suitable cutter for this size were out on the regular machine it would affect the output of the machine in tonnage, but not in the number of biscuits. The scrap as before would go back in the making of subsequent biscuits. Size is the only difference between this and the last. I think our idea in these was that the width of the sheet would just about carry two of these biscuits and there would not be much scrap returned to the machine. There would be less scrap in the two-inch size than in the three-inch size of the previous exhibit.

(Received in evidence and marked "Plaintiff's Exhibit No. 244.")

WITNESS: These round-shaped biscuits would probably be made by a separate cutter on the machine rather than this cutter chain that we have been talking about. This would be a practical change—applying the same method that we use in manufacturing biscuits to the manufacture of Shredded Wheat.

This other box of biscuits—we made these biscuits by dropping the shreds from a single roll down through a tube and as the amount in the one basket accumulated, that was cut off and the biscuit by sort of a slide arrangement on the outside, the inside of the tube was pressed around the edges and passed into the baking. That is to say, this was a molding process from a sin-

gle pair of rolls—the charge being let down sufficiently to fill a mold and then the charge was cut off. It is a practical way to make biscuits commercially, but I do not think it is a practical way to make Shredded Wheat Biscuit commercially. I will take that back. The Shredded Wheat Biscuit could be made commercially, but I do not think with our equipment developed as it is for making Shredded Wheat biscuits, that it would be sensible to go back to this single unit. It would not be as economical as our present machinery. If we had to start over again this would have been a more economic method of procedure because you are faced with the same thing in going into foreign territories. The production on the present machine is so great that until business had been built up we would only be operating the machine one day a month or a week, and a smaller machine like this, and taking less help would be operated more continuously and therefore more economically.

(Box of molded biscuits received in evidence and marked "Plaintiff's Exhibit No. 245.")

Witness: In this mold form all the material from the shredders would go into the mold and then you would cut off until the next mold came. We have another machine in use which is designated as the Automatic. In this Automatic machine the wheat is treated in exactly the same manner and the shredding is done in the same manner except that the biscuits are dropped in a row of 12, on a single pan. There are about 3000 of these pans just wide enough for a row of biscuits, long enough for 12 biscuits.

These pans are hooked up by a chain at either end so that they are carried along in tandem, one pan behind the other. The biscuits are dropped on the pan and the chain moves forward and another pan comes along and more biscuits are dropped. In this pan the biscuits are carried into the baking part of the oven.

They travel along about 60 feet and then come back and forth for five passages a[illegible] then there is a division of the oven and the biscuits go up into a chamber which has a lower temperature and there they pass through about 13 times, when they have completed their evaporation and are delivered to the packer. Always in the same pan. They are taken off by suction on this machine, except that they are dropped on to a pan which just takes one line of biscuits, and that pan moves on and there is no hand handling of the pan. The pan is carried through the oven itself, or driven through, and there are no free pans to be handled. In this machine also by a variation in knives all these various forms that have been introduced could be made.

In the continuous machine the biscuits that have come from the oven are baked more on the bottom than the ones from the other oven. The biscuits which I now hold in my hand have been made on the automatic. They are transferred from the pans to a canvas belt and from the canvas belt placed in by hand. At one time they were packed automatically without the girls touching them.

(Package of biscuits received in evidence and marked "Plaintiff's Exhibit No. 246.")

WITNESS: The girls who handle these biscuits are given medical examinations to see that there is no infectious disease or anything of that sort, and they are inspected by the forelady to see that they keep their hands clean. This is a regular procedure.

I am familiar with the smaller biscuits of National Biscuit Company, such as have been shown to the Court here, and as to the relative proportion of the entire output of the company in these smaller biscuits, offhand and without looking up the figures, I would say it was in the order of 1 per cent. or thereabouts, perhaps less than that.

As to the daily output of the company in the Shredded Wheat Biscuit, in the summer season it runs about ten thousand cases, and in the winter season about six thousand. A case means 36 cartons of 12 biscuits each—432 biscuits. The winter output, therefore, would be something in the order of about two and a half million biscuits a day. In the summer about ten thousand cases, and that would be about four and a half million biscuits.

CROSS-EXAMINATION.

WITNESS: We discontinued this automatic packing of the biscuits about a year ago, I think. Before that we had been packing the biscuits automatically for a period off and on of three years, I should say. When we used the automatic packing the biscuits were on the trays, a row of 12 on a tray. The rake raked off six of them and brought them in line before two packages. These two packages were side by side, like this (indicating), and the rake at cross angles to the first raked three into one package and three into the other, and then a divider was placed over the first three biscuits, and the next three placed on top, until the carton was filled. Then it was moved out of place and two more cartons brought into place. This automatic shoving machinery shoved the three biscuits over the top of the carton and let them drop over the top of the carton, the first three formed the bottom layers of the packed carton and another machine pushed the partition over from the opposite side and dropped down. If I might have an empty carton I can show that a little better. There was a false bottom that came up through the carton so that the first three biscuits were shoved in on the false bottom, and the false bottom dropped a notch and the insert came on top of that, and then three more came in, and the false bottom dropped

another notch. When packing the biscuit the carton was open at the bottom. When the biscuit is packed by hand the carton is unsealed at the bottom.

The automatic packing was carried on, on and off for about three years. It was in the course of development and we simply operated it long enough to find out places where we wanted to make further development and change until about April, I think, of a year ago, it was operating fairly continuously, and after we had it operating continuously for several days, we put it out of commission. During the three years this was more or less experimental operation.

It is common in the grocery trade to pack other kinds of cereal products by machinery. As far as I know Shredded Wheat Biscuit and that type of cereal, perhaps I might say the product that Kellogg is making, and Muffetts and Shredded Wheat are the only three cereals that I recall now that are in a type that are not packed in a dumped package, as you might call it. They are not a type adapted to dumping, because they have to be placed regularly in the carton or you have to use an oversize carton. If they are not placed regularly in the carton they would be subject to breakage more than they are now. I do not think you can put them in irregularly and get 12 biscuits in without breaking them up. If the oversized carton was used the breakage would come in the movement of the shipment and in handling. Throughout all my connection with the production of Shredded Wheat except those three years experimental operation, the biscuits have been packed by hand. The girls sit alongside of the traveling conveyor that brings the baked and dried biscuit and pick them up and put them in, sometimes one and sometimes two, and insert the partitions. The biscuit then goes on to some machinery which automatically closes the bottom.

The smaller biscuit, being about 1 per cent. in volume, that is made at Niagara Falls, has been made there about a year and a half. These biscuit are packed in little individual packages. This biscuit is partly packed by hand. The two biscuits are taken from the tray and placed in a compartment in a belt. This belt travels, and it is an endless belt with compartments just large enough for the two biscuits that the girl drops on the belt. When the belt comes back they are shoved into a carton which is delivered at that point and the carton is shoved off on a drum and sealed.

As to regular thickness of the shreds of these biscuit, as I recall it, there might have been one or two leads more or less, but they were substantially the same.

Not all of these biscuit are taken with the same number of shreds or strands, and there is no reason why they should have been. To manipulate that we cut off each roll, as many of the rolls as we might want to.

The pointed biscuit which you are showing me is very much arched at the big end than at the little end, and they come off of the belt reversed, the big end, the one at the left, and the big end of the next one at the right. The girls do not reverse them, they pick them up in pairs.

In regard to the full thickness of strands of Shredded Wheat that would be used in packing the regular Shredded Whole Wheat Biscuit, it would be difficult to say just how many. As near as I can make out there are about 12 layers of shreds in half of it and there would be as many in the lower part, I would say there were 20 to 26 strands. That would probably represent the standard thickness of strands. So that this biscuit even at the big end is very much less puffed biscuit than the regular Shredded Wheat Biscuit—running that diagonal cut through there even affects

the arch of the big biscuits, and the little end practically goes down to the vanishing point.

The heat could get in around those shreds for toasting purposes at the little end as at the big end—it is only the outside that is toasted anyhow and so it could be toasted as when it is open.

These biscuits would bake and toast when pressed flat as when the shreds were made homogeneous. They would bake then like a loaf of solid bread, if you pressed and matted them.

The doughnut Shredded Wheat is very much flatter than the regular Shredded Wheat. It has not as many layers of shreds as we have in the regular one. The open texture is there and not the hollowness that we have in the regular biscuit. The shreds are separated one from the other there.

We made dozens of the little doughnut-shaped Shredded Wheat Biscuits. Of the few dozens perhaps a half dozen were brought here. We have experimented on a number of different types other than the pillow-shaped during the course of the last four years, making six or eight different kinds. In the periods when we had a man available we would put him in the laboratory and let him work on those things.

The Shredded Wheat Biscuit is cut in the uncooked state, the biscuit is wider than this one and not so high—in the cooking it rises. If for any reason it did not rise it would go into waste. Possibly half of the shredding machines were cut off to make that doughnut-shaped biscuit.

(Diamond-shaped figures marked "Defendant's Exhibit A for Identification.")

WITNESS: The scrap from the V-shaped portions which are marked "A" would be scrap that would go back. There is no attempt made to figure out the best way of making these to use the least scrap. That al-

ways comes after the product was developed. We never had any difficulty about taking care of any scrap in the industry, I mean fresh scrap from the dough or from the material of this kind. Consequently, when we are designing a new biscuit, we make the best biscuit we can and take care of the scrap afterward, and we never have had any cases where the scrap was not economically taken care of.

The drawing Mr. Clarke made of the diamond-shaped biscuit is about as good as I could make. The V-shaped edge in between here, that material would be wasted in the sense of going back to be reshredded, the material marked "A" in the sketch.

To cut these biscuits we ran them out and dropped them on a long string and dropped them on a solid pan and cut them on that. The shreds were not moving when they were cut.

Our entire production in Canada is run on the automatic machines and about perhaps 15 to 20 per cent. of the production on the American side of the Falls. So that 15 or 20 per cent. of our American production are biscuits that are darker on bottom or toasted more on the bottom than on the top, and about 80 or 85 per cent. are relatively light-bottomed biscuits as compared with the top. The automatic output is fairly well confined to one territory—New England. There is no difference in the cartons between New England territory and the rest of the country, the cartons are the same as standard cartons. There is nothing on the cartons to indicate whether the biscuits on the inside of the cartons are dark-bottomed or light-bottomed.

The triscuit is rolled down and flattened down so that it does not rise so much. That is the way the regular Shredded Wheat is run into a cracker form—the same wheat in the same shreds and in one case you puff it up into the pillow-shaped biscuit and in the other case you run it between rollers to make the triscuit.

The packed down biscuit marked "Plaintiff's Exhibit 245" differs from the Triscuit in packing—This is merely dropped down through a tube and the triscuit comes along on the accumulator chain exactly the same as the Shredded Wheat biscuit does. There is a roll rolling it down flatter or tighter and matting it together a little bit and these are cut out into squares and baked between waffle irons to hold them down and keep them from rising. In Exhibit 245 the shreds are rather more mixed up than in the regular Shredded Wheat biscuit. They run in all different directions because they drop straight down from the roll. This triscuit has not longitudinal axes as the regular Shredded Wheat has.

I recognise the Uneeda Bakers Triscuit, 100 per cent. Whole Wheat Cracker and the statement "Made of shredded whole wheat, compressed into a cracker and baked crisp and brown." Triscuit is a little crisper product, not crispier, but it has been matted down so that it is a little more solid. I do not think that any of the shreds in triscuit are any more welded together than they are in the biscuit. The triscuit is, instead of being cut into separate sections like this, is carried along the width of the biscuit, a sheet of the wheat is dropped on a hot plate. There is a series of these hot plates carried on a chain. The biscuit is dropped the full width on the waffle iron and there is a slit in the middle of the waffle iron as sections raise.

Another waffle iron comes down on top of that and they are held together with some pressure, so that it is impossible for the triscuit to spring and rise. The wheat is a trifle drier than the wheat in the Shredded Wheat biscuit, so that there is not the tendency for the shreds to weld together and here while they are pressed down, perhaps matted, they are still identical shreds for the most part.

There is no tendency to more welding in the Triscuit than in the biscuit. We do use the same wheat

occasionally for the Triscuit that we do for the biscuit, and we do not notice a good deal more welding.

We have used an intermixture of Durum for both the triscuit and the biscuit. We use the waffle iron to prevent the natural springing up. In making the triscuit we use a little less moisture content than in making the biscuit, but it is unnecessary. For a long time we did not do it, and we used the same wheat, and we found it baked out a little drier and made a product that perhaps was a little easier to handle than the other was.

Invariably we use the same wheat in making the biscuit as in the triscuit. There can be some variation, except as to moisture, but not as a general routine. We do not as a matter of fact always use the same proportion of Durum wheat even in our biscuit.

We use the Durum wheat partly as a matter of flavor and partly a matter of economy and partly a matter of the operation of the machine. It is a matter the same as in your own plants you find you can handle certain material to your advantage at certain times.

Output of production or sale of the triscuit has not developed anything like the relative proportion of the biscuit. I would say it was holding up better than the Shredded Wheat itself. The demand of the pillow-shaped biscuit has been falling off more rapidly than the production of the triscuit.

The proportion approximately of production of the two products I should say is about—the triscuit is about 2 or 3 per cent. of the production of the pillow-shaped biscuit.

Besides the three products of Shredded Wheat referred to—Triscuit and the standard or large pillow-shaped biscuit and the small pillow-shaped biscuit, a product called Triscuit, but considerably larger than this present size, was made. Later it was changed to this size.

The so-called scrap from the biscuit after it is toasted and baked, we sell it—the crippled biscuits that do not get on the floor are ground up and sold as Silver Fox food or dog food, and the sweepings off the floor are sold as chicken feed.

Some of the scrap biscuit has been sold in small quantities for human consumption, but I do not believe it is sold now. If it has not been dirtied or contaminated it is just as fit for human food as the regular deformed biscuit.

If we got anything like the price for that that we get for the regular undeformed or broken biscuit we would be away ahead of the business. The profits would be much greater.

We compute the larger profit at a lower price because we have no packaging cost and no handling cost and we have lower shipping cost and lower package material cost. The packaging and the package and the shipping and the selling costs are practically all out of it. Pound for pound, without reward to these other things, the scrap sells for very much less than the price for the finished product. It is sold by the hundred pounds.

There is no retreatment. It is ground uniformly. When it has been on the floor, it goes into chicken feed. The dog food is crippled biscuits that are picked off the pan. The first girl on either side of the packing table is an inspectress as well as a packer. Her duty is to pick off any crippled biscuits and place them in a box beside the packing table.

I did not mean to convey the idea that the percentage of labor on the finished product would be any less or any more, but the regular machine turns out such a quantity that if you had a small outlet, it would be cheaper to operate a small machine continuously than it would to operate a large machine occasionally.

Are you speaking of National Biscuit Company or the Shredded Wheat Company when you ask if we have

tried to market any other products besides the four mentioned? I do not know about the old Shredded Wheat Company, but National Biscuit Company has had a number of these products up that would be marketed in normal times, but due to conditions in the last three years, we have not been able to get our people to authorize the production.

Yes, I am familiar with the product called Muffets. It is not a Shredded Wheat product, this Muffet product. It is a rolled ribbon product—a ribbon wheat product. Rippled Wheat, Muffets, etc., are all made on the same type of machine, and it just depends on what you call it. The first products called Muffets is a ribbon wheat product and you would have to adjust the machines, the rolls are further apart. The slackening off of the tension gives us a ribbon and bringing them up tighter gives us a shred. We have not used ribbons for any purpose in the last two or three years. Before that we did. Then we used them in the summer time when the wheat was a little sticky and the air was hot and light, they had difficulty in holding these biscuits up on the suction plate for panning.

It was then a common practice to open up three or four rolls in the middle of the machine and run a ribbon into the biscuit, so that when the suction worked up through there, it would have a solid piece to work on rather than coming up through the loose shreds, and that would do a better job of panning. The Shredded Wheat would have a sieve-like quality. When we ran the ribbon strip through the center we got a suction that we did not get without it.

XQ. 307. And this rippled wheat, taken from a rippled——

THE COURT: This ribbon is not a shredded thing?

MR. CLARKE: No, it is not shredded, but ribbon wheat.

THE WITNESS: As a matter of fact, none of it is shredded.

By MR. CLARKE:

XQ. 308. It is all ribbon?

A. It is all rolled and you either roll it into a sheet or into shreds.

By MR. CLARKE:

XQ. 309. You do not mean by that answer to say that when the rolls are close together, the product does not come out in these shreds or strings, but in the form of ribbons, did you?

A. Yes, sir. It all depends on how close together you have them. It is very difficult to get them close enough together to cut this wide ribbon into smaller or narrower ribbons or strings or shreds.

XQ. 310. Did you mean to tell me that none of the wheat that you make is shredded wheat in the sense of it being shredded, but it is all ribbon wheat?

A. I would say so, if you are trying to describe it, yes.

XQ. 311. And by ribbon wheat you mean these little shreds that we show in the demonstration machine coming down last night, do you call these little separate shreds?

A. We do not call it ribbon wheat.

XQ. 312. Is it anything like the wheat I have shown you in the rippled wheat or the Muffet wheat?

A. Yes, it is exactly like it, except that the ribbons are not entirely cut apart. Look at this rippled wheat and you will see many places where this ribbon is almost cut into finer parts or bands or shreds.

XQ. 313. I am not interested in your definition of words, but I want to find out what you do. Do you mean to say that your rolls are operated in the same way in making the regular pillow-shaped biscuit which is put on the market as Shredded Wheat Biscuit, that

the rolls are manipulated in making this rippled wheat or muffet?

A. I have never seen either of these articles made, but I would say that we could make this rippled wheat with our rolls——

THE WITNESS: Perhaps our greatest difficulty is to keep from running a product of what you call a ribbon type, so that we are almost always through the day sometimes running ribbons when we wish it were being cut into threads. We adjust the rolls closer together to make threads rather than ribbons. This is a ribbon. You can see those are cut this way. If the rolls are brought a little bit more together, there would be a series of narrower ribbons or threads. The whole surface across here is what you call a ribbon. I can make some on this machine. We do not like to get these tied together in our biscuit. All these are really corrugated ribbons. If these corrugations are cut through, you will get others.

When we find we are running ribbons instead of threads, we adjust the rolls to bring them close enough together to make threads, except in the summer time we used to adjust the rolls to make ribbons in the center of the biscuit. Now we try to prevent that. You cannot keep an operator from occasionally trying it when nobody is around and he is having trouble. We watch the operators so that they will not give us the ribbon form rather than the shredded form. It is very difficult to keep the 29 heads running with the correct adjustment. As the heads run in the morning, they start off cool, and as they operate, the rolls warm up and expand and tighten up and they have to slack off a little bit or adjust the tension one way or another, and that is a constant operation throughout the day.

We object to the ribbons being in the biscuit because we are not making a Muffet. We are trying to make a uniform product and we do not want two or

three different characters in the same biscuit any more than any other manufacturer wants an ununiform product.

(Chart entitled "Educational Exhibit of Shredded Wheat Biscuit" admitted to have been put out by Shredded Wheat Company, was admitted in evidence and read to the witness.)

That chart is a substantially true outline of the process in making Shredded Wheat Biscuit and Triscuit with a few corrections. I think you said 36 sets of rolls in your outline, and there are not now 36. The machinery has been changed occasionally. 36 pairs of corrugated rolls, and there are only 29 now on the standard machine, and the cooking of the wheat cooked by steam—it is not really steamed, but it is boiled. The steam is used to boil the water. Substantially it is the same.

Some rolls have grooves a little deeper. I do not think that we usually make a distinction on where the rolls with the deeper grooves are put. They may be on the bottom or in the middle or at the top of the biscuit.

As to the deeper grooves being always at some certain place on the bank of the 29 machines, it depends on how the machine is being operated. If some of these rolls wear out more rapidly than others, you will have to change the rolls, and if that change happens to come on the bottom, and we need 24 in there, we might put a 24 in there. I do not know that we make any conscious effort to keep them in the middle or on the bottom. We lately have not put them on the top at all. By 24 I mean a twenty-four thousandths of an inch groove. The grooves wear V-shaped. I believe originally they are not quite a V-shape. We did not change them. I say that originally they are milled out with a flat bottom. The cutting tool gives a flat bottom to them, but

as they wear, that flat bottom may be narrowed down to a V-shape finally. They do wear into a slightly different shape. The deepest groove we use is the twenty-four-thousandths. It is immaterial where these grooves go—on the bottom or in the center. The 24 is the deepest groove and 18/1000ths is the shallowest.

I have nothing to do with the marketing of the Shredded Wheat business, just the production. I was directly in charge with headquarters at Niagara Falls until October. Then when I moved to New York, another man was put in charge, who clears through me. In other words, I still have charge of Shredded Wheat manufacture. I am also chief chemist of National Biscuit Company. The production man at Niagara Falls is under me—I am his production superior. J. H. Haddon is directly in charge of the production at Niagara Falls. His title is production manager, Shredded Wheat Bakeries. He reports to me in New York at National Biscuit Company offices. There is a laboratory there. I have a desk in the laboratory where I spend about half of my time during office hours, and a desk in the Production Department proper, where I spend about the other half of the office hours.

I visit the plant at Niagara Falls on the average of once a month.

The so-called waste or scrap which has not been toasted or baked would make better Shredded Wheat when put back through the shredding machines because the re-shredding of it operates much the same as mixing dough. It gives a little more cohesion and gives a longer shred. It can hardly be called dough, though it is more like working dough, but the re-shredding of it does not form a dough by any means. It is probably an action on the gluten in the wheat. The more the gluten is worked and moulded and pressed, and so on, the more cohesion it has and the more it adheres together. The unbaked scrap was fed back through the

rolls. It feeds more easily through the rolls than the wheat grains.

To describe how it goes down—well, as you might pick up an unbaked biscuit and drop it into the rolls, it would be shredded. You could reach into the box and take out a handful and put it in. It is taken back to the shredding rolls as the pan goes by. The inspector takes the biscuit off and places it in a box, and that box is taken back, when it is filled, it is taken back to the re-shredding head and fed into it. Sometimes it is fed into any of the rolls, and usually the downspout of one or two heads is hinged so that it can be folded back and the material fed into that particular one. Actually it may be fed into any of them. From my recollection I would say that the rolls that are hinged are those about eight or ten heads from the top. It may be farther than that. It is an intermittent process.

You ask what elements go into this picking out of the biscuit that makes that twice worked dough and if there is an inspector there. Any biscuit that overlaps another to an extent that that can not be just touched and brought away. If the biscuit goes into the oven overlapping another one, naturally this biscuit is spoiled in the beginning, and this biscuit is spoiled. If there is a very slight overlapping, they get touched and brought away. If it had to be handled to any extent beyond just a slight adjustment, the biscuits are picked out and dropped in this. Either one, depending whether they are baked or not, goes back into the discard. The edge that is formed on the Shredded Wheat Biscuit where the knives cut in the baking, that is a much harder product. It has a thicker ribbon than the rest of it. There is more edge on the samples than there would be in production. I mean the samples were not made with any intent to avoid having an edge on them.

The pillow-shaped biscuit contracts a slight amount under the effect of heat in what might be called a longitudinal direction; the principal contraction is in a direction parallel with the lay of the shreds. There is considerable puffing there.

(It is conceded that so far as counsel are advised, and they believe they are fully advised, no applications for design patents have been filed on any of the forms of sample biscuits produced by witness.)

This puffiness is due to the contraction. The shred, as you see in the grains of wheat, the grains are almost twice the size of the original, so that the shred that comes here is about twice the size it will be after it is evaporated. That shrinkage is offset to some extent by the nature of the baking portion of the steam keeping it in that condition. The shreds were tight at either end, and as they shrink they pull the biscuit together. The outside takes faster, therefore shrinks before the inside does, and in shrinking on the outside, it shoves against these inside shreds, and makes them fold up, and press up the inside in the bottom and the top. You see these up and down folds.

When the machine is adjusted whatever adjustment you want, it automatically shreds the wheat that is fed into the rolls and deposits it down on a traveling belt and gives these long ribs or strips of wheat shreds. The machine as it is now automatically cuts into the pillow-shaped form ready for toasting and baking. With the present equipment it cannot produce anything else except the pillow-shaped form of biscuit.

The biscuit is first baked and then dried. We never try to define baking very definitely, but baking usually does resolve in some browning, and the operation is to put the biscuit into the oven for baking and transfer it to the evaporator for drying.

We consider the cooking is all done in the cooking machine, and the cookers—in the wheat before it is shredded. All we do from the baking is to really brown it and cook it on the outside and not on the inside. That is practically all the baking, the starch, the wheat itself has been thoroughly boiled, which you can consider cooking, if you like. The baking oven browns the outside and dries it out to an extent, and the browning is merely evidence of the starch being dextrinized by the heat. There is not much of any other effect that can take place in the oven, unless it is carried far enough to carbonize them in baking them. From there on we do not regard it as a cooking operation, but merely as a drying operation—the remaining moisture is dried out.

I have been connected with the Shredded Wheat only since National Biscuit Company took over the Shredded Wheat Company. My experience with Shredded Wheat has been since 1929.

Mr. John H. Hadden who is directly in charge of production of Shredded Wheat is also a National Biscuit Company man.

As to men who were with Shredded Wheat before National Biscuit Company took it over, we have Wallace, who is in charge of the English plants, who has been with the company since they moved to Niagara Falls; Mr. Wheeler, who is in charge of the Erie Avenue plant, Niagara Falls, and who has been with us since they came to Niagara Falls; Mr. Reed in the Buffalo Avenue plant, who has been there 15 or 20 years; Mr. Campbell, who is in charge of the Oakland plant, and who has been with the company for 15 to 20 years or 25 years. There are a dozen others I could mention.

Mr. Wallace who is abroad now has already testified by deposition.

By Mr. Cooper:

RDQ. 414. Can you conveniently, Mr. Oakes, illustrate on this little shredding machine which is here in court, how an adjustment could be made, so as to get what counsel called "ribbons" in place of what are distinguished as threads or shreds?

Witness: These rolls are driven exactly the same as any pair of rolls on the regular machine. In other words, there is one pinion gear back here operating on a gear directly attached to the roll. That gear drives the same sized gear on the other rolls, so that the two are moving in exactly the same speed all the time. There is no slippage of one roll past the other. These two bolts go through and hook on to the back rail, and by tightening them up, the one roll is pressed up tight against the other. As that is slacked off, there is space between the grooved roll and the smooth roll, so that the wheat can go through.

The Court: Which is grooved and which is smoothed there?

The Witness: This back roll is a grooved roll, and this one is the smoothed (operating machine)

Mr. Clarke: Both are grooved on this machine.

Witness: No, sir. This is a smoothed roll, but due to the operation, the grooves have cut tiny marks on the smooth roll.

RDQ. 415. Now you have adjusted the machine so that the product is coming through in a ribbon-like form?

The Witness: These ribbons are almost cut through into tiny ribbons. They can be opened up wider, so that you get a solid sheet down through

there, and in places you can see they are almost cut through. By setting up the two rolls closer against one another you can get them in a narrower form—as we tighten these just enough to bring the grooved roll up against the smooth roll, the product comes out in the form of, you might say, a great many very narrow ribbons, instead of one wide ribbon. It is the same as the wheat itself cut in the middle. Now, by opening the machine up still wider, you get a product of a slightly different character; with the bran of the wheat appearing as spots, instead of being rolled out into portions, by opening the machine still further.

THE WITNESS: We do not manufacture this product—by opening it up still further, the wheat will come out as rolled wheat, exactly the same as rolled oats would come out if they were put through a set of rolls.

MR. COOPER: If your Honor please, I may say I know of no way to preserve as evidence, those products of the machine. My suggestion would be that I might mark for identification the machine itself. That might be called D for identification, and it is the machine with which the two members B and C, the parts of the mould we previously used; and I presume that if in an Appellate Court, for example, it were desired to see these, we would simply have to operate the machine over again before the Court and show its product.

MR. CLARKE: There is no claim that this is a replica of any production.

MR. COOPER: No claim made for anything, except that the witness was asked on direct examination about that difference, and I was simply illustrating the difference.

RE-CROSS-EXAMINATION.

THE WITNESS: This wheat that was just out through this machine was cooked Saturday night about seven o'clock. We do not keep it that long in regular production if we can help it. We have operated on that on a cycle. There is not much difference in the biscuit. You may have a little more difficulty in the operating, but the handling is easier. The wheat is a little shorter and more of a tendency for the shreds to break as they fall down from the rolls to the accumulator chain. The wheat of the shred will break up before it gets long enough to reach the chain—the tendency is a thinner thread itself. I do not know that there is much difference in the baked shred.

WILLIAM A. HANNIGAN.

DIRECT EXAMINATION.

My name is William A. Hannigan and I live in Wilmington, Delaware. I am in the wholesale grocery business. The name of the company is J. D. Sissler Company located on King Street—at Third and King—Wilmington, Delaware. I am president of the company and have been with the company twenty-seven years—1906 to 1933. The business of the company is distribution of food products in a wholesale way. We purchase from the manufacturer and sell to the retailer. During all the twenty-seven years we have handled a product known as Shredded Wheat. Originally we knew of Shredded Wheat as being made at Niagara Falls.

Plaintiff's Exhibit 1, which you hand me is the package that I referred to a moment ago as Shredded Wheat. When we ordered or desired that product from the manufacturer we ordered so many cases of Shredded Wheat. Shredded Wheat I think it com-

monly went as. It was known to the trade as Shredded Wheat. The product was ordered from us by the retailer as Shredded Wheat. That term indicated to me, one of the members of the trade, the source or origin of that product. We handled it continuously; we handled it in supplies of duration of about two weeks period. We figured how much we would use in that time and placed our orders accordingly. Without definite records I should assume that we sold between 1200 and 1500 cases a year. Our territory was from Wilmington to Cape Charles, embracing about 12 counties in Delaware, Maryland and Virginia. We covered all of the territory known as the Delmarva Branch.

CROSS-EXAMINATION.

I am not actually out of the wholesale grocery business yet. My connection is still the same. I am winding up, or liquidating our business. It is not fully liquidated yet. It went into liquidation about eight months ago. I was in the wholesale grocery business up until that time and even right now. We still have merchandise to sell.

We did handle the Kellogg Whole Wheat Biscuit in our business and sold it to the grocery trade whenever it was called for. Unless Kellogg's biscuit was specified, this biscuit was always sent (indicating Plaintiff's Exhibit 1). That was up until about eight months ago.

I do not know anything about orders for Niagara Shredded Wheat being sent on orders for Shredded Wheat—I know only about my own business. It has been done, but I would not say that it was done specifically towards Shredded Wheat.

I was a wholesale grocer at the time that the Shredded Wheat Company was taken over by National Biscuit Company. We received a circular from Na-

tional Biscuit Company advising that the biscuit would be distributed from their local office, but we still continued to buy from the local office paying their price in order to accommodate our trade.

We did not have any special buying arrangement with the Niagara Falls Company—the National Biscuit Company, only general. Just the same as applied to all other purchases that we made; that we send our orders in in the regular fashion and keep our credit in good shape and consequently were able to purchase.

After National Biscuit Company took over Shredded Wheat Company we still continued to receive the product and we could not have been cut off.

We did receive a notice that thereafter they expected to serve the trade directly rather than through jobbers. If there was a delay occasioned by the notice it was only because of the selling out of the stock we had on hand—without putting any new orders in. We did that naturally, to keep our stock fresh. We gauged a couple of days in advance. At the time this notice came from National Biscuit Company there was a departure for the time being from that practice, we sold out what we had on hand without overlapping the order for a new supply.

Before they were out we made arrangements for purchase. National Biscuit Company then made arrangements allowing as to continue as a jobber, and up to the time of our liquidation we continued as a regular jobber for the National Biscuit Company product. This arrangement did not make any difference in our efforts to sell either the Kellogg product or National Biscuit product. We were distributors and we did not go out and push the sale of any particular product, because advertising usually obliged us to fill the demand for it. That is until we went into liquidation.

We handle the rest of the Kellogg line, but not the rest of the National line—just the Shredded Wheat. Kellogg's is known as a Shredded Wheat biscuit and was known to ourselves as a Shredded Wheat biscuit. It looked like Shredded Wheat, but I am not competent to judge whether it was wheat. I was only a seller. I would not make the statement whether either of them was a shredded biscuit. I only know them as called for by trade.

HARRY W. FRAZIER.

Direct Examination.

The Witness: I reside in Wilmington, Delaware. I am in the retail grocery business and my store is located at 822 Market Street. I have been located there I guess about 39 years, 38 or 39 years. The name of the company is Thomas J. Lawson Company. The company has been operating that store for a number of years. I have been with Thomas J. Lawson Company forty-eight years in all. That includes the John P. Allman and the Lawson Company. We were originally located at Eighth and Market where the Union Bank is. At the present time I am the owner of the Thomas J. Lawson Company.

I know what Shredded Wheat is from the selling of it. The package marked "Plaintiff's Exhibit 1" is the package we sell as Shredded Wheat. I cannot say exactly how long I have known Shredded Wheat, but I venture to say 30 or 35 years.

When we ordered the product in the carton similar to Plaintiff's Exhibit 1, we ordered Shredded Wheat and when customers asked for Shredded Wheat we supplied Plaintiff's Exhibit 1—this package of Shredded Wheat.

CROSS-EXAMINATION.

We handle the Kellogg's Shredded Whole Wheat Biscuit marked on the carton. We have bought some of that this year, one carton. We call the Kellogg's Whole Wheat Biscuit. We know it is a Shredded Wheat Biscuit that the Kellogg Company is making. I have read from the end of the package that it was Kellogg's Whole Wheat Biscuit made from a process with Shredded marked on the package.

I have seen the Kellogg Biscuit outside of the package. It looks similar and is very much like this biscuit, but a little shorter. I have no doubt that it is a Wheat Biscuit. I do not think I have any doubt that it is a Shredded Biscuit. It looks to me to be very similar in many respects. In fact it looks like the Shredded Wheat.

We sell so little of the Kellogg Biscuit that I do not know we have ever tried to explain what it is or what it is made of. Our calls or demands are for Shredded Wheat almost entirely. We will sell a case or two of this a week and we bought one whole case of the Whole Wheat Biscuit since last fall. That is not the first time we handled it, as we have cereals of all kinds. I should say we have handled the Kellogg product about two or three years.

We have never tried to sell it, representing that it was National Biscuit Company product. If some one asks for Kellogg's Whole Wheat Biscuit we will want the goods to supply the order.

We never practice substitution as we are very much opposed to it.

XQ. 37. As a practice in the grocery trade, that type of fraudulent substitution is practically obsolete?

MR. MORRIS: In the witness' store, or is the question now intending to——

THE COURT: Is fraud obsolete among grocers, I do not know that that is relevant, and it is sustained.

XQ. 38. It certainly is obsolete in your store?

MR. MORRIS: That is an inference that——

MR. CLARKE: I think that is directed absolutely to the issues.

THE COURT: I know about that store since I am six years old.

MR. CLARKE: But the issue of this case is exactly that, as I understand it, on the law. There is no law that has been cited here except fraudulent or deceptive substitution and the question has been put to practically every grocer without any reflection.

MR. MORRIS: That has nothing to do with the question as to whether it is obsolete in Mr. Frazier's store.

THE COURT: There is an innuendo there. The inference is that it previously existed.

MR. CLARKE: I did not intend that.

WITNESS: There are times when goods might be substituted, but we aim to call the customer and ask them if they would care to have us send something else in case of our being out of some particular item, but to substitute for our trade will not work.

We have handled Kellogg product about three years. We have had one case this season. We put that case in to fill a consumer demand for the Kellogg product; if one calls for it.

I do not know whether I can answer correctly about whether the customers ask for Kellogg Whole Wheat Biscuit or Kellogg Shredded Wheat Biscuit, but I would say that they would ask for Kellogg's Whole

Wheat Biscuit—if we received orders for Kellogg's Whole Wheat Biscuit—if they would ask for Shredded Wheat, we would send this—Plaintiff's Exhibit 1.

If they asked for Kellogg's Shredded Wheat we would give them Kellogg's product.

I happened to come here today as a witness because a representative of National Biscuit Company called to see me and asked if I would come here as a witness. We handle the cracker line of National Biscuit Company—we have dealt with that company for many years. We handle other lines, such as Sunshine and Ivins, Keebler and quite a number of them, Huntley and Palmer and foreign crackers.

HOWARD DUANE.

Direct Examination.

I am a member of the Bar of this Court and of the State Courts and have been such for a number of years. I know Shredded Wheat having been accustomed to eating a Shredded Wheat Biscuit from time to time. I would say that I have indulged in that practice for about 20 years.

Shredded Wheat means to me the product of what used to be the Niagara Falls Shredded Wheat Company, and has recently been taken over by the National Biscuit Company.

On April 25th I had breakfast at the Union News Stand in the Pennsylvania Station here in Wilmington, and I looked at the menu and on the menu was Shredded Wheat, and I asked for Shredded Wheat, and instead of giving me Shredded Wheat they gave me Kellogg's Wheat Biscuit. As I remember it, it was in a small carton with two biscuits in it. I had two biscuits for breakfast.

On another occasion, I remember, I would not say how many years ago, but it was probably two or three years ago, one box of Kellogg's biscuits got into the house, and we had always had the Shredded Wheat.

CROSS-EXAMINATION.

I saw immediately that the biscuit handed to me in this carton was not the biscuit I had been getting. I noticed the size was shorter than the Shredded Wheat Biscuit. I knew it was not the biscuit made by National Biscuit Company or the Shredded Wheat Company.

I had a conversation with the waitress about it. I asked her why, when I asked for Shredded Wheat, I was handed Kellogg's Wheat Biscuits. She did not say anything, but shrugged her shoulders and walked off. I have not had a meal there since. I ate there because I was on my way to New York on business and was waiting for the 8:25 train.

I eat Shredded Wheat about once or twice a week.

The product that I consumed at the station was not Shredded Wheat. I knew it was not Shredded Wheat. It was wheat that was shredded, but I knew it was not the product of the Shredded Wheat Company. I knew it was not Shredded Wheat made by National Biscuit Company but Shredded Wheat made by the Kellogg Company.

RE-DIRECT EXAMINATION.

THE WITNESS: It is not true that I had been asked to come to this place and ask for Shredded Wheat.

I told Mr. Culbertson, an associate of Mr. Morris, that I got Kellogg's Biscuit when I called for Shredded Wheat and that is the reason I am here.

RE-CROSS-EXAMINATION

THE WITNESS: I was up here to the clerk of the Federal Court office about two weeks ago and I heard

a discussion about Shredded Wheat Biscuits and Kellogg's Wheat Biscuits and this case that was coming on for trial, and I was here on another matter, and I just remarked that I thought I could be a witness for somebody and related this story. That is the way Judge Morris's office got it.

Shredded Wheat to me means the product that has been made for years at Niagara Falls, New York, and formerly of the Shredded Wheat Company, and now as I understand it, although I do not know, controlled by the National Biscuit Company. That information is written on the package. All the packages that I have ever seen said that this was the product of the Shredded Wheat Company of Niagara Falls, New York, and recently it has had something about National Biscuit Company as successor. I saw that many times on the packages.

MR. VILAS: If the Court please, we have agreed for informality of the proof that I may introduce a sheet drawn from the *Tampa Morning Tribune* of Saturday, July 9, 1932, containing an advertisement of Kellogg's Wheat, which I now offer in evidence.

THE COURT: Any objection?

MR. CLARKE: No objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 247.")

MR. VILAS: I offer as plaintiff's exhibit a sheet drawn from the *Tampa Daily Times* of Friday, July 8, 1932, which contains an advertisement of Shredded Wheat, with the word "Kellogg's" in smaller type and a cut of the plaintiff's carton.

(Received in evidence and marked "Plaintiff's Exhibit No. 248.")

MR. VILAS: I also offer in evidence a sheet, page 5 of the *St. Paul Pioneer Press* of Wednesday, April 26, 1933, containing among other things an advertisement of one Schoch, a witness who testified on behalf of the defendant during the taking of the depositions.

(Received in evidence and marked "Plaintiff's Exhibit No. 249.")

MR. VILAS: The plaintiff now offers the depositions which have been taken in this case. I may state very briefly, your Honor, that the defendant has examined in round numbers—the plaintiff has examined 160 witnesses, and the defendant approximately 180 witnesses. The depositions have been recorded pursuant to stipulations between counsel.

MR. VILAS: The record now discloses that we have offered all depositions of record and certified to the Court, both on the part of the plaintiff and the defendant and the respective cross-examinations.

Let me at this point call attention to the fact that there is a stipulation which we will offer which was made in a suit brought by the Shredded Wheat Company against certain distributors of the Kellogg Company and against the Kellogg Company in the District Court of Connecticut.

That suit was pending when the Biscuit Company acquired the Shredded Wheat Company, but after about a year was dismissed without prejudice upon the stipulation which permits either counsel to use any depositions already taken in that case, in any future litigation involving the subject matter.

THE COURT: We are not using such depositions here.

MR. VILAS: Yes, I am asking leave to file a small volume of depositions which were taken by the Shredded Wheat Company and counsel for the Kellogg Company, pending the proposed trial of that case. I have that here.

THE COURT: The Court suspends any rulings as to the admissibility of depositions taken in another case.

MR. VILAS: We will produce the stipulation pursuant to which I now offer them, and I ask leave to refer at the moment to them in connection with some historical testimony.

MR. CLARK: If your Honor admits them then I will offer the cross-examination, but I am objecting to them as having no bearing on this case. This case has been fully tried and depositions showing the whole trade situation, and 317 or more witnesses were examined on both sides.

THE COURT: My objection is that you are launching into an unfortunate precedent. If the Third Circuit Court of Appeals has spoken, that is the end.

THE COURT: The Court initiates the objection on its own part.

MR. VILAS: Again I ask leave to read just the pertinent lines of the stipulation, because I think they have some bearing on the discussion.

MR. MORRIS: Should not the stipulation be offered in evidence?

MR. VILAS: I so offer it:

"The Court consenting thereto, it is hereby agreed and stipulated"——

THE COURT: What Court?

MR. VILAS: Connecticut District.

MR. CLARKE: The Federal District Court.

MR. VILAS: "The Court consenting thereto, it is hereby agreed and stipulated among the several parties hereto that this suit may be and hereby is ordered dismissed without prejudice, and with the condition that should plaintiff, or its successors, sue again upon the same cause of action, or bring any other litigation involving the same, or related subject matter against these defendants, or any of them, or their successors, representatives, agents, or privies, in this or in any other Court or before the Patent Office, then any party to such litigation may avail himself or itself of any part of or of all of the proceedings, orders, testimony and depositions heretofore had, entered or taken in this case, or for use herein, to the same extent and for the same purpose as though the same had been taken, had or done in such litigation."

That was signed by the plaintiff and by the Kellogg Company by its president, the Kellogg Sales Company by Will K. Kellogg, and also by Mr. Kellogg individually and also by the other defendants who are distributors.

MR. CLARKE: They were not parties defendant in this case.

MR. VILAS: But they signed a stipulation of dismissal.

THE COURT: Do you offer the stipulation as evidence?

MR. VILAS: I offer it.

THE COURT: Admitted.

MR. CLARKE: Exception.

THE COURT: Let an exception be entered.

(Received in evidence and marked "Plaintiff's Exhibit No. 251.")

THIRD DAY.

May 24, 1933.

MR. MORRIS: Yesterday afternoon my associate, Mr. Vilas, offered in evidence the depositions taken in the case between this plaintiff and one of the dealers of the defendant, in which suit this defendant was named a party, but not served, but in which a stipulation was filed, which was signed by this defendant, stipulating that the depositions taken in that case, should be admissible in any future case between the parties.

The case to which I referred was 263 Fed. 481, the opinion of Judge Woolley. The witnesses were dead. One of the cases relied upon by Judge Woolley was 137 Fed. 48, decided by the Circuit Court of Appeals for the Sixth Circuit. In view, however, of the fact that the defendant objects to the admission of these depositions, notwithstanding the stipulation, we withdraw the offer.

MR. CLARKE: If your Honor please, we are prepared to withdraw all objections to the tender of the depositions that they want. The depositions were not actually offered in the other case; but they all showed there was no confusion between the parties at that time, when the defendant's product was first put on the market. I withdraw the objection, if they want to offer those depositions.

MR. COOPER: There are a few matters, your Honor, by way of offer to close our case. First, I wanted to call attention to the defendant's answer which contains an affirmative defense in many paragraphs. Now, Rule 30, I think it is, for Courts in Equity, Supreme Court Rules says that the averments of an affirmative defense in an answer are deemed denied.

Some of these affirmative defenses which we explicitly admit in our reply to the answer, to the affirmative defenses of the answer, but being a little uncertain as to whether those affirmative defenses will be taken as admitted without further proof under the state of the pleading, I will offer two paragraphs from the affirmative defenses as an admission against interest of the defendant.

They relate simply to formal matters, and I think will avoid considerable documentary proof.

THE COURT: Whose admission?

MR. COOPER: The defendant's admission as contained in the averments of its affirmative defense.

In our complaint we aver our corporate capacity and the defendant's corporate capacity and the like and the answer first proceeds to deny all those averments, and then proceeds under the heading of affirmative defenses to aver certain of those facts, and it is that pleading which I am offering in evidence as an admission against interest. Section 1——

MR. COOPER: Section 1 of the affirmative defense, reads:

"1. That the defendant Kellogg Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, a citizen and an inhabitant of said State, and has a manufacturing plant at Battle Creek, County of Calhoun, and State of Michigan, and that plaintiff National Biscuit Company is a corporation organized and existing under the laws of the State of New Jersey with a regularly established manufacturing plant and place of business at New York City, in the Southern District of the State of New

York, and another factory at Niagara Falls in the State of New York."

I offer that in evidence as an admission against interest.

The next paragraph of the affirmative defense is No. 2:

"That on information and belief, Cereal Machine Company was duly incorporated under the laws of the State of Colorado on June 8, 1893; that it was engaged in the manufacture and sale of a Shredded Whole Wheat Biscuit, an edible product; that Henry D. Perky was the founder of the business of said Cereal Machine Company, and was President of said Cereal Machine Company; that or or about the 17th day of May, 1900, the name of said Cereal Machine Company was pursuant to the laws of the State of Colorado, duly changed to Shredded Wheat Company; that in the year 1900, the Natural Food Company, a corporation, was duly organized under the laws of the State of New York, and that in the year 1900 said Natural Food Company acquired, succeeded to and thereafter continued until in the year 1930 the said business thereafter conducted by said Colorado corporation under the successive names, Cereal Machine Company and Shredded Wheat Company; that on or about the 15th day of May, 1908, the name of the said Natural Food Company was pursuant to the laws of the State of New York, duly changed to the Shredded Wheat Company; that in the year 1898 plaintiff, National Biscuit Company, a corporation, was duly organized under the laws of the State of New Jersey, and since its incorporation said plaintiff has been and now is engaged in the manufacture and sale throughout the several States of edible products; that in the year 1930, plaintiff, the said National Biscuit Company, ac-

quired and succeeded to the whole of the going business, alleged trade-marks and property of the said Shredded Wheat Company, a New York corporation; that since said plaintiff acquired and succeeded to the said going business of said The Shredded Wheat Company, it has continued and is now continuing to conduct the same throughout the several States and with foreign nations."

THE COURT: Are these so-called admissions necessary jurisdictional facts that you are proceeding to prove by this form?

MR. COOPER: Not so much the jurisdictional facts as the derivation of title from the original Perky enterprise down to and including the National Biscuit Company.

THE COURT: Not so much, but are they jurisdictional facts essential to your case, that you are seeking to introduce in this form?

MR. COOPER: Yes, they would be so regarded.

THE COURT: Are you seeking to amend your bill in this way?

MR. COOPER: Not at all. We averred these facts in our bill. They first deny them, even their own corporate capacity, in their answer, and then to support their affirmative defense they make these averments that I have read to your Honor.

In our reply we admit the truth of the allegations that I have read to your Honor, so that there is no issue upon them at all, but simply because of a little puzzlement on our side as to whether under Rule 30 of the Rules of Equity, we might be considered to have denied these affirmative averments, I am offering them in evidence as an admission against interest.

I do not think it is necessary because under the state of the pleadings, there is no issue raised.

I am offering in evidence these two averments of the defendant.

THE COURT: If it be a document, by whom is it signed?

MR. COOPER: By Kellogg, or by the defendant herein. That is a formal answer. Those are formal averments of the defendant's answer.

THE COURT: I understand the answer. I thought you were tendering something in order that it might appear that these averments were not denied under Rule 30.

MR. COOPER: Yes, I am. Of course, I tendered my reply to that answer. I am tendering those averments from the answer in the first place, as admissions against interest.

THE COURT: Is that the old common law pleading orally in Court?

MR. COOPER: No, this is on the equity side. Like any other document proceeding from my adversary, I can offer it in evidence as an admission against interest.

THE COURT: What are you offering?

MR. COOPER: I am offering those two sections of the answer No. 1 and No. 2, under the heading of affirmative defense in the answer.

THE COURT: It being a pleading and part of the record in the case, you are offering them?

MR. COOPER: Yes, not being certain whether under the Equity Rules it stands as an admission or is itself considered to be denied.

THE COURT: As proof in contrast to pleading?

MR. COOPER: Yes.

THE COURT: Very well. Have you any objection to having your own pleading go in as proof?

MR. CLARKE: No, except, if your Honor please, if it is going to deprive us of the right to see these title documents, I would ask your Honor's permission to withdraw those allegations. I know nothing about them. I will let the pleadings stand in that way without objection, if they let me see the title document. I make demand on them now.

THE COURT: You are charged with knowledge of what you pleaded.

MR. CLARKE: Precisely. I simply asked, and I will not change the state of the pleadings in any way if they let me see the title documents from the Shredded Wheat Company to the National Biscuit Company, otherwise I ask to amend by withdrawing those allegations.

THE COURT: He desires that the documentary evidence to stay in that proof to be tendered.

MR. COOPER: We have not got it here.

MR. CLARKE: They said they can have it here by tomorrow.

MR. COOPER: We said we could have it here, but I did not hear anybody say by tomorrow. We will have it here merely as a matter of convenience to you.

MR. CLARKE: If there is any question about my proving anything as important as the title, I will ask to amend by withdrawing the allegations.

MR. COOPER: After your adversary has acted upon it?

MR. CLARKE: If they will not let me see the title documents, I will ask your Honor to let me amend by withdrawing the affirmative allegations.

THE COURT: As a practical matter, will the documents be available?

MR. COOPER: Yes, we are sending for them now, and as a practical matter, we will try to have them here before the trial is over, and I will assure you and counsel that if they are not here before the trial is over, we will show them to him anyhow, and if he is not satisfied with what he sees then, he may bring what he wishes before the Court at any time.

I would raise no question of it being untimely if he approached your Honor with a motion in the event that the papers do not get here before the trial is over. I will raise no question if after seeing them subsequently, they not being actually produced here on the trial, he should approach your Honor with some motion based on the fact of something appearing in the papers which he might have raised on the trial. I will not raise the question of it being untimely.

MR. CLARKE: May I except to that for the record?

THE COURT: Yes.

MR. COOPER: I will offer in evidence defendant's answers to all the interrogatories except No. 34. The exception I make is because I think that answer No. 34 is not responsive to the interrogatory. I make the explanation about the long delay in filing them as a reason why it was not taken up with the Court before.

If your Honor please, they are referred to both in the complaint herein, the bill of complaint, and in the defendant's answer, four certificates

of registration in the United States Patent Office. They are identified fully in both sets of pleadings, and I want to offer those four in evidence. They might, I think, as a matter of convenience, go in as a single exhibit. I will specify what they are. They are numbered——

THE COURT: You offer the interrogatories and the answers save one?

MR. COOPER: Yes.

MR. CLARKE: The defendant will offer the other answer.

MR. COOPER: What its effect will be, I don't know. I do not think he can offer affirmative proof of his own answer. It is a self-serving declaration and not strictly responsive that I omitted it.

I will cut this Gordian knot, that my brother is raising so frequently in his effort to get out of things that he has done formerly by offering the whole set of answers to interrogatories as well as the interrogatories themselves, and moving to strike out as perfectly improper the answer to the Interrogatory No. 34, and ask your Honor to rule on that with the other things in the case. I do not think it would be necessary to take it up at this moment.

Now, I will offer in evidence as a single exhibit the four United States registered trade-marks to which I was referring, a moment ago, they being No. 85,186, registered January 3, 1912, and that one being a trade-mark which shows a bowl with a wheat biscuit in it and some milk or the like, and the second one being——

The second one in the exhibit is trade-mark No. 216,593, registered August 17, 1926, and that shows a saucer with two wheat biscuits in it, the thing that has been so familiar from these exhibits as being depicted.

The third is registered trade-mark No. 178,725, registered under the act of March 19, 1920, on the words "Shredded Wheat," it having been registered on January 15, 1924.

The fourth is trade-mark No. 213,456, registered under the same act on May 25, 1926, on the same words, "Shredded Wheat."

The difference between the third and fourth of these trade-marks is that the fourth applies the words to a greater variety of substance than does the one immediately preceding.

THE COURT: For every appropriate purpose they are admitted.

MR. CLARKE: May I have an exception?

THE COURT: Certainly; let an exception be entered.

(Received in evidence and marked "Plaintiff's Exhibit No. 252.")

MR. COOPER: I now offer in evidence certificates of registration of the name "Shredded" as a trade-mark in the State of California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Louisiana, Texas, Maine, Maryland, Massachusetts, Michigan, Missouri, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia and Wisconsin.

With the admission of my brother on the other side to whom I have submitted them, I use photostatic copies in place of the originals, the originals all being here, and I can offer them all as one exhibit, on the front of which is a list of the various states and their identification mark.

(Received in evidence and marked "Plaintiff's Exhibit No. 253.")

MR. COOPER: That, if your Honor please, is the plaintiff's case.

PLAINTIFF'S WITNESSES.

EDWIN L. WALLACE.

Deposition taken in New York, August, 1932.

DIRECT EXAMINATION.

THE WITNESS: My name is Edwin L. Wallace and I am 56 years old. I have resided at Welwyn Garden City, Hertfordshire, England, since 1924, where I am employed by The Shredded Wheat Company, Limited. I have been connected with the business of shredded wheat since 1896, when I received my first employment at Worcester, Massachusetts, with The Cereal Machine Company. The principal person connected with that company was Mr. Henry D. Perky, whom I knew from 1897 on, until he severed his connections with The Shredded Wheat Company. Mr. Perky is dead. He died about 1903-1904.

I was first employed on a production table as a panning and peeling man, putting the shredded wheat from the boxes in which they were made on to the trays for baking. I was employed by The Cereal Machine Company until 1901, and I think the name of the company was changed to The Shredded Wheat Company and then to The Natural Food Company. My next employment was in the machine shop working on the construction of a new automatic shredder and panner machine.

When the company moved to Niagara Falls in 1901 they commenced business under the name of The Natural Food Company. The plant at Worcester continued to run for about a year afterwards, until it was closed, and all the production was transferred to Niagara Falls. I installed all of the production machinery on the second floor of the Niagara Falls plant, except what was installed on contract by other people.

We made our first shredded wheat at the new plant in August, 1901, and we had four complete machines running. This plant is still producing shredded wheat. After the Niagara Falls plant started I carried on there as production foreman until the end of 1904, when I was given charge of assembling a plant which was to be started in Ontario, Canada. We started operations at the Canadian plant in January, 1905. I continued on there as factory superintendent until I was sent to England in 1924, where I had charge of the building of the plant, installing the machinery, organizing the force and getting the plant in running order. We made our first shredded wheat in England in 1925 and I have been with that factory ever since in the capacity of managing director, which puts me in charge of all departments, including sales and production. I assisted in a general way in the construction of other plants at Oakland, California, and Erie Avenue plant at Buffalo. Thus, I have been continuously connected with The Shredded Wheat Company and its predecessors since 1897 and engaged in actual and practical operation in the capacities stated. During that period of years I have become thoroughly familiar with all the processing and manufacture of the shredded wheat product.

Operations of the plants have been continuous since I have been connected with the company except for periods when they were overstocked. I was personally connected with the development of machinery that is used today in the manufacture of shredded wheat.

When I first went with The Cereal Machine Company the product of the company was called "Shredded Wheat."

The shredded wheat biscuit that is manufactured now is practically the same in appearance and constituency as the biscuit that was manufactured in 1898.

MR. VILAS:

Q. 96. P I, page 14. Is it true to say that that product, as produced today by the shredded wheat factories of the plaintiff is, in all respects, substantially the same as that produced in 1898?

A. It is.

Q. 97. That is, in size, shape, appearance, and contents?

A. Yes, yes and in weight.

Q. 99. Has it always been put in the same sized package?

A. Yes, 12 biscuit in a package.

Q. 100. What is the shredded wheat biscuit composed of?

A. Fibres or filaments of whole wheat, I should say.

Q. 101. Does it contain anything else?

A. No.

Q. 102. Is anything added to or taken away from the whole wheat kernel or berry in the manufacture?

A. No, it is still the whole wheat in the finished product.

Q. 103. Has that always been true?

A. Yes.

Q. 104. From the beginning of your connection with the company?

A. Yes, it has always been the same.

THE WITNESS: If any changes have occurred in the process of manufacture they have been in the nature of improvements in the machinery to produce the biscuit.

The general process of the manufacture of shredded wheat as it was carried on in 1898 is as follows:

The wheat was received in bags and stored until use, when it was subjected to about five or six different

processes of cleaning. It was then cooked by boiling it in a tumbler or drum immersed in boiling water for about ten minutes; then drained and lifted into wire bottom trays, which were covered with a cotton sheet. It was next turned by hand or with paddles about twenty-four hours until it was cured or in a condition for shredding. It was then shredded with rolls practically the same as those in use at the present day.

In the process of shredding the whole wheat kernels which had been previously cooked and cured were drawn between these rolls, one of which was full and the other grooved. The rolls were subjected to a considerable pressure, which drew this wheat out into filaments or fibres, which have always been known as shreds, although, in reality, technically, I suppose they are not shreds; but shreds and shredded wheat are names that have been connected with it ever since I can remember. (Page 18.)

The wheat is more pressed than cut, although the grooves are sharp. The pressure seems to string them out into shreds, and the berries or kernels of wheat blend into each other, so that there is more or less a continuous thread in the groove. We have often taken a thread two or three feet long, composed of one kernel of wheat, blended into another and so on.

The finished product shows the bran broken up on the shred. If you look at one of those biscuit you could distinguish particles of bran and a little grain of starch on the outside of the shred. Although I cannot give a chemical analysis offhand, the wheat berry is composed of starch fibre, bran and what is known as the middlings, which is taken off in flour. All these are pressed out by what we call the shredders.

There were 36 pairs of rolls in the complete shredding machine at that time (1898) and about 32 sets were in use. The depth of the groove ran from fourteen to eighteen thousands of an inch. Each pair of

rolls deposited its quota of shreds in a series of boxes that passed under the rolls and then the biscuit were in turn cut by an automatic knife; the boxes were then drawn out on to what they call the peeling bench.

These 32 sets of rolls were disposed in a line and each one deposited its filaments or shreds in the boxes that rode on a leather belt, so that after a box has passed underneath the 32 shredders it contained about 32 layers of filaments.

Thus the nature of the process was to pile up a longitudinal pile of layers or shreds and when it got on the table it was drawn into a pressing or cutting machine that shaped the biscuits and cut them apart in the box. They were then peeled with wooden peels from these boxes and laid on the pan.

A peel is a little instrument probably 8 inches long, about 4 inches wide, made of wood, with a little handle at one end. It is a kind of shovel which is shoved under the shredded wheat biscuits whereby they were picked up from the table and deposited on the pans.

The constituency of the biscuits at the time they were put on the pans ready for the oven contained approximately 46 per cent. moisture.

The pans were put on racks and the racks were taken to the oven room. After baking they were again put on racks and the racks were run through evaporators or drying chambers, which removed any moisture which might remain after baking. In the evaporator the moisture was reduced to about three or four per cent. In 1898 it used to take about 35 minutes to bake the biscuits in an oven of about three to four hundred degrees. They were in the evaporator about an hour and as soon as the biscuit were cooled they were ready for packing.

Between this time and the present day there have been improvements and refinements in the mechanical

process of making the biscuit. In 1898 an automatic shredding, cutting and panning unit was built but that machine was discontinued after several months because of the high amount of waste connected with it and a new machine of the same type was developed, which is substantially the same as is in use in the factories today.

In the Erie Avenue Plant at Buffalo, New York, and in the Canadian plant there is now an automatic machine which has been developed after about 18 years of experimental work and study. This machine automatically shreds, cuts, pans, bakes, evaporates and then delivers to the packing table; thus this new machine eliminates a great deal of the old hand labor and it is no longer necessary to use peels. All of the factories are still using some of the old system but this automatic machine is used in addition to the old units.

As for the treatment of wheat today—the wheat instead of coming in bags is received in cars in bulk, approximately 1800 or 2000 bushels in a car, which is handled by a car shovel and unloaded very quickly.

The cooking process is very different from the old slow tumbler and kettle. It is now cooked in a steel drum with a perforated metal tumbler or inner compartment, and it is cooked under steam pressure. The old style of doing it was simply to boil wheat by immersing a tumbler full of raw wheat in boiling water.

Before the wheat is cooked it goes through nine processes of cleaning so that by the time it is ready for cooking, foreign matters such as straw butts, unthrashed wheat, cockle, mustard seed, black or wild oats, barley, peas, beans, corn, lumps of dirt and stones have all been removed.

As for the shredding apparatus, there has been substantially no change and all the shredders work exactly as they did in the original process.

They are now baking the biscuit at 500 to 550 degrees F. in a period of 15 to 20 minutes. The evaporation process takes about fifty to sixty minutes.

The rolls used today have coarser grooves, which run from twenty to twenty-four thousands of an inch deep, and the number of sets has been reduced to 29 for the reason that the deeper groove produces a lighter and more porous product and enables us to shorten up the machine from 36 to 29 sets of rolls. There are twenty grooves on a roll, which is the same today as it was in 1898.

In the first cleaning process there is a combination of perforated screens and air suctions which removes the straw butts and raw offal. The wheat then goes through a milling separator with about six different types of screens which further separate foreign substances. If next goes through a scouring process whereby brushes brush the dirt from the outside of the berry. Next the cockle cylinders, a disk machine, remove the cockle and broken kernels of wheat. Then there is a set of stoning or gravity machines which remove stones by a shaking motion which cause the heavier material, such as stones, to climb to the high side and drop off and the wheat to drop off the low side.

Pure white wheat is the best for shredded wheat. It is difficult to get a pure white wheat in Canada or in the United States—it is more or less red or amber. We used to get the bulk of the wheat from the Genesee Valley, some from Michigan and some from other parts of the United States. In Canada it was nearly all Ontario wheat.

In summing up, I would say that the essential product and the essential steps of the actual manufacture of the product are the same today as they were in 1897, with the exception of the improved methods.

Shredded Wheat could be made in many different designs and produced in commercial quantities.

Each year the amount of shredded wheat produced has increased.

I believe that the average individual, when shredded wheat is mentioned, immediately thinks of the shredded wheat product that is produced by The Shredded Wheat Company.

The question was objected to as incompetent, irrelevant and immaterial.

(The witness was now shown several volumes containing carton samples that had been used in the past and was asked to identify him.)

THE WITNESS: I recall the use of the representation of the dish on page 19-A of Volume 1 of Plaintiff's Exhibit 2, which has been used for a great many years and as early as 1908. I also remember the picture on the cartons of a dish containing two shredded wheat biscuit. This picture of the biscuit in a dish has been used for considerable time in our American, Canadian and English plants. As a matter of fact we have a gift scheme in England where we give premiums to customers who return a certain number of these dish pictures from the cartons.

Shredded Wheat will keep almost indefinitely if it is kept dry.

CROSS-EXAMINATION.

THE WITNESS: The rolls which make the shreds coarser are used both in England and the United States at the present time. There has not been any lessening or refinement of the shreds in the United States in recent years, although the shreds that are laid on the bottom and on the top may be finer in order to make a better appearance. Also, the rolls with the deeper grooves do not wear out as quickly as those with the

shallow grooves. We have conducted experiments with these cases in mind—wearing qualities of the roll, improvement of the roll, improvement of the biscuit and regulation of the weight of the biscuit.

Shredded wheat is registered as a trade-mark in England.

In our new automatic ovens biscuits are browner on the bottom because they are baked on perforated, heavy metal pans rather than wire pans. The metal pan holds the heat and browns the bottom. Thus, some of our biscuit which are on the market may have darker bottoms than others, which are baked on the wire pans. The biscuit may also vary a little in shape, depending on the weather and the quality of the wheat, that is, some may have round bottoms while some may have flat bottoms. This is an accidental variation.

In the past we have had small demonstrating machines set up in store windows which made small Shredded Wheat biscuit. These, of course, were for demonstrating purposes only and most of the resulting biscuit was given away.

I have been familiar with the Kellogg biscuit since around 1920, when they were manufactured with ribbons rather than shreds and were made from dough. As for the present day Kellogg biscuit, I have not noticed it to any great extent, except that it is shorter in length, and I did not pay any attention to them because they have not entered our territory.

Our advertising department has requested us to use the picture of two biscuit in a dish rather than the one biscuit as they feel that will induce people to eat two biscuit instead of one.

I would say, as I have before, that our biscuit has been substantially the same as it has always been, except for changes in the size of the shreds which the consumer would not notice.

EDWARD EVERED SWEET.

Deposition taken in Providence, Rhode Island, September 7, 1932.

Direct Examination.

Witness: I reside in Cranston, Rhode Island, and am 46 years old. I have never lived in Wilmington, Delaware, nor within 100 miles thereof except that I at one time lived in Philadelphia.

The article which counsel takes from Plaintiff's Exhibit 1 I recognize as a biscuit called shredded wheat. I have been familiar with that, if my memory serves me right, since 1915. Since that time I can not remember any changes in the form of the biscuit. It is the same now as I have always remembered it in form and appearance because I have been eating it as long as I knew it. I can not remember any change in taste either.

The first experience in ordering shredded wheat in restaurants that established itself in my mind because of any unusual circumstances was on St. Patrick's Day, 1932, at breakfast at the Biltmore Hotel, Providence. I ordered a shredded wheat from the menu in the Providence Biltmore Hotel in their lunch room.

Yes, at the Providence Biltmore Hotel, in their lunch room; and a small package, such as might indicate that it was an individual package—or at least two biscuits were exposed during delivery of the food; and, because I was dividing my attention between the package and a newspaper, I just automatically removed one of the biscuits, as I always do when I receive an individual package, and started to eat it. Eating two or three portions convinced me that there was some sort of change in the biscuit, so I paused in my reading long enough to examine the package more closely; and I discovered that it was not shredded wheat, but that

it was a product known as Kellogg's Whole Wheat Biscuit. That, of course, indicated to me why it might be different from the shredded wheat that I had been eating.

The suggestion that I got was that it was hard to chew. My first impression was that I must have a very old shredded wheat biscuit That is what caused me to look at it and examine the package, and then on more close examination it semed like a shorter biscuit.

I called the waitress and, if my memory serves me right, I said to her: "This is not shredded wheat."

And she said: "What is it?"

And I said,—if I remember correctly, "This is Kellogg's Whole Wheat Biscuit."

"Well," she said, "they have sold out to the National Biscuit Company."

I had asked the waitress for shredded wheat, and no more. I had a similar experience at the same place on August 11, 1932, when I again ordered shredded wheat in the lunch room from waitress No. 172, and I wanted particularly to see what was delivered to me. On that occasion she delivered to me an individual package of Kellogg's Whole Wheat Biscuit. I identified the package by a mark I put on it and I asked her specifically not to open it because I wanted to take it out. On the previous occasion the package had been opened at the top, exposing two biscuits.

(The package referred to was received in evidence and marked "Plaintiff's Exhibit 5.")

WITNESS: In the March 17th experience I can not say what side of the package was toward me. I did say that the top of the package was open to expose the ends of the biscuit. In other words, I presume it was served that way for convenience in removing the biscuits. I did not have to open the package. It was open so that the ends of the biscuits were visible from the opening.

On August 11th I again asked the waitress for shredded wheat, and after the package was delivered I asked her if that was the only kind of shredded wheat they served at the Biltmore Hotel and she said yes. I then reminded her that that was not shredded wheat and I distinctly called her attention to the fact by referring to the package and that it was Kellogg's Whole Wheat Biscuit. She then said that that was the only kind of shredded wheat they carried. In that instance my order was written in full and I signed my name on the back of the card and left it with the cashier.

On September 2d, 1932, in the afternoon, I again ordered shredded wheat from waitress No. 177. She delivered and opened a package of Kellogg's Whole Wheat Biscuit. I ate the biscuit and then told the waitress that I would like a copy of the receipt. She arranged for a copy on a blank sheet of paper. I wrote the number of the check from which it was copied in the lower right-hand corned and signed it.

(Slip received in evidence and marked "Plaintiff's Exhibit 6.")

WITNESS: I produce the package delivered that day with my initials "E. E. Sweet, 9/2/32" written in pencil on the end of the package.

(Package received in evidence and marked "Plaintiff's Exhibit 7.")

WITNESS: On September 2d I ordered from the menu and retained the card, which I produce, with a circle around the words "Shredded Wheat Biscuits". I had seen the same item on the same menu several times before.

(Menu received in evidence and marked "Plaintiff's Exhibit 8.")

WITNESS: I recall having lunch with counsel at the Biltmore on September 1st, 1932, when counsel ordered shredded wheat. Counsel called my attention to the fact that the waitress wrote the words "Shredded Wheat" and I remember that I received Kellogg's Whole Wheat Biscuit in an individual package containing two biscuits, served with the top opened and counsel called the attention of the waitress, No. 172, to the fact that that was not shredded wheat.

At that time, she was rather surprised to think that it was not and asked you (counsel) to look on the package and see if it was not manufactured by the National Biscuit Company, following which she inserted a fork in the package and removed one of the biscuits to show counsel that it was shredded wheat in appearance.

I remember, further, that counsel again called her attention to the fact that it did not say anything about Niagara Falls or shredded wheat on the package and again called her attention to the fact that that particular product that she was showing him was made by Kellogg at Battle Creek, Michigan.

(Carton received in evidence and marked "Plaintiff's Exhibit 9.")

WITNESS: Since 1915 I have been employed professionally with sales and sales management of cereals, dairy products, canned goods and soaps. In 1915 I was employed by W. K. Kellogg Company at Battle Creek, Michigan, and severed my connection with them in 1919. In 1915 I was engaged at Chicago to peddle samples for them from house to house. In 1916 I had charge of their sample operations at Chicago. They later sent me to represent them at Peoria, Illinois, for the Peoria district as a salesman. I served them in that capacity until the conclusion of my services. During that period the Kellogg Company had a product that they called Kellogg's Wheat Biscuit. I did not

then, nor do I still, consider that biscuit in any way in conflict with shredded wheat. It was flat and rather hard. It was packed side by side in a long package. I do not recall how many in a package but it was smaller than the biscuit they now make. It was made of whole wheat but I have never seen the formula. It was sold as and for a whole wheat biscuit.

In the course of my work with Kellogg Company, I visited the trade, both wholesale and retail customers, particularly after I was appointed to the Peoria district. Before that I was concerned mostly with sampling but during the period between my original engagement and the final assignment to a permanent territory, they used me on the Chicago trade. In the Chicago trade the company was more particularly concerned with cornflakes exclusively. My first memory of the biscuit is concerned with the first convention I ever attended in 1917 or 1918 at Battle Creek, composed of salesmen that had not previously been to Battle Creek, some district managers and the heads of the sales organization. At that time I knew shredded wheat biscuit very well. I had seen them on the trade and I had eaten them.

I recall that a portion of that convention was devoted to the sales opportunity for Kellogg's products; and in that particular discussion, the men in charge of the subject specifically related to the opportunity for the Kellogg biscuit by indicating the tremendous volume that was enjoyed at that time by shredded wheat. Shredded wheat certainly enjoyed a splendid territory and splendid distribution—I should say nearly complete distribution so far as the retail trade was concerned. In selling the Kellogg Whole Wheat Biscuit after that convention it was necessary to expose it to the trade at the time that we tried to sell it to them. We had to do that to indicate its character. We had to tell them about the profit. We made comparisons between

the profit that was present in our biscuit and profit margin which we believed was present on shredded wheat. We went through the usual motions of demonstrating it by allowing them to taste of it.

Very often when we were presenting this product for the consideration of our retailers they would make the comparison that it was similar to shredded wheat. I was always very careful not to create the position that we wanted to make that kind of a comparison at all.

We did, however, guarantee the sale of the biscuit. We definitely told our trade that, if they could not sell them, as soon as we had satisfied ourselves and them that there was no place in their particular trade for it, we would refund the money that it had cost them so that it would be no loss to them.

I personally removed a good deal of the distribution that I obtained later by actually buying back the products from the retailer at the price they had paid the wholesaler for it. It was quite natural that, in our contact with the retailer, we made every effort to obtain their good will and interest for the product; but we naturally solicited their patronage of the product, and, by every ethical method, we endeavored to get their support for the product in the trade and make it move.

I would not say that the product actually competed with shredded wheat distribution. It was not successful in distribution in my territory.

I made daily reports to the company of sales and market conditions comprising the towns that we had covered during the day. They comprised the record of the distribution that was present in the retail stores concerning the products that we had to sell; and they also comprised a record of competitive products and also comprised our estimate of the division of sales of the different products. These reports were all on stan-

dard printed forms with places to report the sales of various Kellogg products by name and blank spaces for inserting matter referring to competitive products. I very definitely referred to shredded wheat in comparison with Kellogg biscuit sales. In some parts of the territory where we had no biscuit sales we used Krumbles for comparison in making shredded wheat sales.

After I left the Kellogg Company, I went to the Armour Grain Company as salesman at Milwaukee and later was assistant manager of bulk cereal division at Chicago. Later they sent me to Philadelphia to assist their district manager. That was for approximately 2 years and then I was appointed general manager of the Canadian Rit Dye Soap Company, at Toronto, Canada, in 1921. That was a job of reorganization which required only approximately 6 or 7 months. Following that I joined the Post organization, that is, the Post Products Company at their New York office and in that capacity I was employed in general observation of their entire field of sales procedure. My opinion was solicited concerning field campaigns, advertising, the general condition of their sales organizations. That was entirely cereals. I remained there until 1924 when they went into General Foods and I was sent into the field for observation and sales direction.

Finally, in 1925, I was placed in charge of the brokerage end of the L. W. Pennington business at Portland, Oregon, in charge particularly of the General Foods contacts which were handled out of that office. I continued in that capacity until February, 1927, at which time I became merchandising manager of the Western Dairy Products Company at Seattle, Washington. I had sales direction also of the California dairies at Los Angeles and in 1928 became president of their subsidiary, the Dutch Chain Stores, at Los Angeles, concluding that connection August 1st, 1929.

On August 3d, 1930, I joined the H. J. Heinz Company of Pittsburgh, in connection with their chain store operations, requiring coverage of all national contacts such as their own branches, concerning my contact entirely with the grocery end of the business, and that position was later changed to an attempted development of their cellulose program. That concluded February 2d of this year. Since then I have been in the care of doctors at Providence and Pittsburgh.

I feel that since 1915 I have been more competent regarding cereal products and distribution because of my experience which has been largely with cereals. It included all the cereals manufactured by Kellogg during the period I was with them; all the cereals manufactured by the Armour Grain Company during the period I was with them; and all the cereals manufactured by Post Products and later General Foods while I was with them; and the cereals and distribution and under development by H. J. Heinz in Pittsburgh.

I certainly have had an education in cereals that would probably permit me to be more critical than the ordinary consumer. For that reason, I am probably very critical of the cereals and the comparisons that I make when I select them and eat them. When I find a biscuit like that in Plaintiff's Exhibit 1 I can not think of anything but Shredded Wheat. When I think of Shredded Wheat the thought I get is concerned entirely with the product manufactured by the National Biscuit Company at Niagara Falls.

Prior to March 17, 1932 I had not seen this particular Kellogg product and did not know of its existence. During my experience in the cereal business, we kept ourselves constantly informed of products of a cereal nature regardless of whom they were manufactured by in order that we might make comparisons, but in those years I had never seen the Kellogg's

new biscuit until my contact with it at the Biltmore Hotel.

As to the effect upon the ordinary consumer who orders shredded wheat at a restaurant or at a grocery store and receives Kellogg Whole Wheat Biscuit, I think that would depend a good deal upon the consumer. The consumer today, I think, is pretty well advised of the structure of the products that they order from a grocer. I think that is primarily the reason they order these products: They know what they want, and they know what they are going to get.

Assuming that Kellogg's Whole Wheat Biscuit is served out of the package in a restaurant without accompanying identification of the package, I think it would pass very acceptably as shredded wheat. When a customer or member of the general public asks for shredded wheat, my understanding is he expects to receive Plaintiff's Exhibit No. 1. The term shredded wheat is connected very much in the public mind with the Niagara Falls product and I think that situation has been built up through the medium of their advertising. I think that Niagara Falls and Shredded Wheat and the Shredded Wheat Company are particular factors in the identification of the shredded wheat product in the minds of the public, and in the minds of the distributors.

I have had experience in dealing with retail store keepers throughout the country and I know their reactions and the methods of sales dealing with them. I think it would be very hard work for a salesman to properly demonstrate the taste, appearance, method of packing Kellogg's Whole Wheat Biscuit and properly compare it with any other product that might exist in a similar field, if I were a retail dealer, without making me conscious of my investment in shredded wheat. I do not think he could do it without making me conscious of the fact that if I purchased it I would necessarily expect to split the volume of that char-

acter of cereal between the two products. In my opinion, the retail trade has, for the period of time covered by my experience, been familiar with the shredded wheat as a sort of yardstick of that sort of cereal.

CROSS-EXAMINATION.

WITNESS: At the time this individual package of Kellogg's Shredded Whole Wheat was put before me, if I had not been reading the paper and I had looked at the package in the beginning, I certainly would not have had this confusion of it if I had examined it. I do not say there was similarity between the packages but that it is that characteristic that I had become accustomed to: the similarity of the two biscuits. There is no comparison between the containers. I am talking about the identification on the side of it. So, if I had not been reading the paper, I would have seen instantly that the Biltmore Hotel was serving me another kind than that which I had been accustomed to get.

As I recall now, it was on my second visit that the waitress told me that they only handled the Kellogg product. I naturally asked for shredded wheat because that was my preference. I made no complaint about it. I think they were very truthful to say they handled only the Kellogg product. I have proved it. When I saw shredded wheat on the menu, I certainly thought that they might handle it. What I saw on the menu was Shredded Whole Wheat Biscuits.

This is the first statement under oath that I have made about this but I sent a letter to Mr. Lowry and all correspondence since has been with Mr. Vilas. The occasion of sending the statement to Mr. Lowry was nothing more than amusement. I am always amused by any confusion, especially in the cereal line, because I have been concerned with cereals; and almost everybody who has been concerned with cereals during my

history is an acquaintance of mine, some of them very close acquaintances.

My confusion was not from looking at the packages but it was the possibility to me that it was not shredded wheat and the difference was first made conscious to me by the taste, or rather the difference in the chewiness of it. It seemed hard to me. It seemed different for that reason. I did not examine the biscuit as to baking on top and bottom for the reason that I have no history that tells me that that is characteristic of either biscuit.

As I detected this difference, I looked at the carton and as a cereal man, or in my capacity as an ordinary consumer, I knew that I was getting a product of a different carton. I would like to add also that in writing Mr. Lowry originally, I did so without intending any unkind notion. In writing Mr. Lowry, I was merely commenting on a situation that existed that was comparable to the many such situations that I had to handle and guard against when I was with Kellogg, from the start. One thing that we fought desperately against when I was with Kellogg was substitution. That has always been a vital consideration with our organization, with every organization that I was with, to avoid substitution. Consequently, I have performed that same service in defense of my own position and in defense of the Kellogg Company when I was connected with it; and, in making that motion to Mr. Lowry, I had not in any way anticipated that it was in any way possible that it would be used as testimony. I think that my own letter would indicate that it was done on the basis of amusement.

The basis of my amusement was that Mr. Kellogg's product was in the position of being substituted for that of somebody else. I did not hear from Mr. Lowry but subsequently heard from Mr. Vilas asking me if I would care to give testimony.

I constantly asked for shredded wheat at the Biltmore because it is a cereal that I am eating for a specific reason right now. I have never gone into the Biltmore Hotel or any other hotel for some time past without, if I was concerned with eating it for that particular meal; asking for shredded wheat. So that is a constant practice of mine. I think the Kellogg product which I received at the Biltmore Hotel is a distinctly shredded product and I do not mean to imply that it is not a wheat product. That is claimed for it on the outside of the package. I know that the Kellogg organization would not sell anything that they did not cover on the outside of their package. I distinctly told the waitress that it was not shredded wheat; and the connection between that and her observation is a connection that I think is quite vital to you and to the National Biscuit Company. It has been a practice ever since I have been a cereal man to ask for shredded wheat meaning the food that is in that exhibit (Plaintiff's Exhibit 1). When I said to the waitress that it was not shredded wheat, I meant that it was not Shredded Wheat made by the Niagara Falls Company. I did not have any thought about the Kellogg Company or National Biscuit Company or its product when I talked with her except that I wanted to make the comparison that the product that had been manufactured by Kellogg at Battle Creek, that was the Kellogg's Whole Wheat Biscuit, was not Shredded Wheat, meaning the one manufactured at Niagara Falls; not when I was identifying it by its distinctive name; but if that was served to me, not being this product, that was served for this product, being another product. I merely took it upon myself to tell the waitress that it was not the Niagara Falls shredded wheat, but I did not mean to say that it was not what it said on the package. It contained what it said on the package. It says

"Kellogg's Whole Wheat Biscuit" I showed her the package.

If I asked for corn flakes I would expect to receive Kellogg's Corn Flakes. There have been many other brands of corn flakes. If I had asked for Kellogg's Corn Flakes and received some other brand of corn flakes, I certainly would have complained that they were not the corn flakes that I hoped to get. I very likely would have told the Biltmore that those were not Kellogg's Corn Flakes. If I were eating constantly at the Biltmore, I would tell them, and I have done that to many hotels and restaurants in the United States when I wanted corn flakes, that I wanted the best corn flakes, meaning Kellogg's.

I did not join Kellogg's until 1915 but I had been a consumer of corn flakes for five or six years previously. I had never seen the Kellogg biscuit until my contact with it here in Providence. Yesterday I got it at the Providence Biltmore. Whatever I have had to say to them has not had the effect apparently of their purchasing the other, or rather serving the other, to me. All I am interested in is getting Shredded Wheat when I ask for it. I do not think what I did injured the Kellogg Company.

As a salesman, I do not see any reason why, in selling Shredded Wheat, or in selling Kellogg's Whole Wheat Biscuit, why their salesmen, for either product, has completed his job if he does not make it clear to the man that he sells it to that, if he wants to get the utmost from either product, he should distinguish those two products on his menus.

Further, I do not think that any salesman is doing his job, on either product, when he sells it to a hotel or a retail dealer, unless he also sells the idea with the product that the buyer is not going to get at all a view of the difference between those two products, unless he distinguishes between those two prod-

ucts and ties it into the advertising of both the organizations.

And, if that had been properly done by the salesmen, so far as the Biltmore was concerned, if that job had been carried out properly, both items would show in exact relation to the package identification, on the menu, and there would be no confusion between the Kellogg biscuit and the shredded wheat on the menu, if both items were written as they are identified on the package and their appearance on the menu, so that when the consumer looked at that menu, he would know that there were two products available and he could make his choice between them.

There is nobody—and particularly, I am not concerned with how much Kellogg's Shredded Whole Wheat Biscuit the Biltmore may sell, nor do I care how much Shredded Wheat the Biltmore may sell. The only question is that, if you ask for shredded wheat and you do not get it, you certainly have a right to say that you are not getting what you asked for. That is my interpretation of the sales position of the two products; and the Biltmore Hotel—so far as any motion that I have made or any motion that I have seen anybody else make, it is certainly not intended to disturb the sale of your product.

The motion has been made to secure proper identification and proper delivery of the products, as they may be ordered in that hotel.

I think a hotel like the Biltmore should put on their menus that they carry only one brand of corn flakes, or that if they do carry several brands, they should mention them all. It would be to their advantage to do it. That is, from the standpoint of identification to the customer. When they order it, they know exactly what they are buying. The customer might not like Jersey Corn Flakes and he might take your Whole Wheat Biscuit in preference; whereas, if

they had your corn flakes and Shredded Wheat Biscuit, they might, conceivably, prefer your corn flakes. What I was concerned with in connection with the Biltmore Hotel was that when I ordered Shredded Wheat Biscuit I did not want Kellogg's Whole Wheat Biscuit. I do not claim that as a consumer I was particularly acquainted with the shredded wheat situation when I saw this first package of Kellogg's Whole Wheat Biscuit, but I absolutely claim that it was the first time I had any contact with it or ever heard of it.

I could be quite familiar with shredded wheat, as I think of shredded wheat made by the Niagara Falls Company; but it is very possible that Kellogg could have his new biscuit in different parts of the United States and still not have it in distribution in any stores where I might come in contact with it or where my wife might come in contact with it or buy it so that I may become acquainted with it.

So the basis of my feeling that I knew something about the shredded wheat situation would be my own personal contact with Shredded Wheat or what I might have heard and what I might have come in contact with, and with advertising.

I was not closely enough connected with the Kellogg organization to know that they put out a shredded wheat biscuit or advertised it as such for some years before I heard of it.

Whenever you say Shredded Wheat to me, I can not think in terms of anything but the product made by the Niagara Falls organization. I think it would be possible that I could overlook entirely the fact that the Kellogg Company had put out on a national scale shredded wheat biscuit. I never saw any advertisements of Kellogg's shredded wheat until I encountered the product, then I saw advertisements in a window in Providence. I can not recall any advertising that I had previously seen put out on Kellogg's bis-

cuit; but my interest was stimulated after getting the product by seeing advertised in a grocery store a day or two after I had eaten the biscuit that product, and that led me to believe that Kellogg was instituting a definite advertising program on this biscuit. It occurred to me that it must be.

I was particularly convinced by the window display that they were putting out a biscuit, a shredded wheat biscuit. I did not investigate as to what its contents were; but I was convinced, after seeing the window display, that they were putting out a biscuit, and that they were different than anything I had seen before, other than the contact in the restaurant.

I would say that they were giving their biscuit very definite and wide publicity.

It has been my purpose, whenever I asked for shredded wheat, to try to get the product made by the organization at Niagara Falls and if the time comes when I want Kellogg's Whole Wheat Biscuit, I will specify it as Kellogg's Whole Wheat Biscuit.

(Letters produced by the witness received in evidence and marked "Plaintiff's Exhibits 1, 2, 3A and 3B.")

WITNESS: I think if the procedure I suggest were followed in every place where Kellogg's product is distributed, it would help the sales of the Kellogg product, if the distinction on the packages were carried on to the menu; and I am quite certain that is just what the Kellogg organization wants the salesmen to get for them.

I have not had any instructions from Mr. Vila. Everything that I have done since the day of my first letter to Mr. Lowry, in connection with the National Biscuit Company, has been done in accordance with the teachings that I received when I was with the Kellogg organization. If I have done anything for the

National Biscuit Company that is valuable to them—I mean by that that is valuable to their local sales force—if I have given them any thought that puts their local sales force in a situation that they are able to help on their sales, then I have voluntarily contributed something that has been developed for that reason and for that reason alone; and I have done it many times for your organization, and that is where I learned to do it.

Well, I certainly am a free lance; and I certainly have not expected that the National Biscuit Company was under any obligation to me, when I made it possible for them to supply a product or at least take steps to supply a product that they manufactured, that I was trying to buy at some place in Providence.

If they can put the National Biscuit product, Shredded Wheat, where I can get it when I ask for it, that is all the compensation that I expect, and it is all the compensation that thousands of people expect when they write to your own organization or to any other cereal organization in the United States under similar circumstances.

I have seen thousands of letters from consumers who have tried to buy products manufactured by the different organizations for which I have worked, asking us where they can buy it or if they will please provide it through certain dealers, so that they can get it there.

I do not think my action would be effective to try to force a hotel to throw out the Kellogg biscuit and put in the Shredded Wheat. I was not in touch with the manager of the hotel in any way.

I am not now employed and I left the Kellogg Company because I had a better opportunity with the Armour Grain Company. They paid me more salary to go to Milwaukee for them and increased my salary to come to Chicago for them. I solicited the position while I was still employed by the Kellogg Company.

Every night before I go to bed the last thing I eat is a bowl of shredded wheat, meaning this Shredded Wheat. (Plaintiff's Exhibit 1.)

Before February 2d, 1932, I was not a constant consumer of shredded wheat, but I have been a cereal consumer for a great many years. Shredded wheat and half and half is the dish of my preference because I like the taste and find it agrees with me. I have been eating the Kellogg product at the Biltmore right along. In this instance I bought the package, not intending to eat it there, and I told them so when I bought it, referring to Exhibit 5. I consumed the Kellogg product but it was not the product that I asked for when I got it; there is certainly nothing the matter with any of the Kellogg products that anybody should find disagreeable. My relations during the period of my employment by Kellogg were very cordial. I have always continued with a very high admiration of their products.

I would not say that there is some one leading brand of cereal which should have the right to exclude the service of any other products when they are called for by that name; but I certainly think hotels are doing themselves an injustice if they do not identify the brands of cereal they serve. I would say that if I ran the smallest hotel in the world, if I put a menu before my trade, I would brag about the lines that I carried. If I carried five brands of corn flakes, I would certainly put them all on the menu and I think the Biltmore is really missing an opportunity when it does not do that.

I think if they say "Kellogg's Corn Flakes"—that is my opinion, now—I think if they say "Kellogg's Corn Flakes" on the menu, they are indicating that they are carrying what is accepted as the standard quality of corn flakes available. I think that applies to anything else, whether it is ketchup or what it is.

If they carry something else, there must be a reason for buying it, and the best opportunity to sell it is to let the public know that they have got it; but I think that, when they say "corn flakes" and have three or four kinds of corn flakes—in fact, I know from experience that it is the most injurious thing to profit that they can do. There must be a reason for buying it, indicated by the reason that there is a demand for it; and, if there is a demand for it, they certainly ought to identify the fact that they have got it to those who want it. And the only place they can put it to do that is on the menu. And there will be no confusion if they will do that. I do not think there is a merchandising expert in the United States who will not agree with that.

I do not think it unethical for a hotel to say merely "corn flakes" on its menu, but I think it is unwise from the standpoint of the hotel. I did not, in any way, in conversation with the waitresses or the cashier at the Biltmore, say that they had no lawful right to carry the Kellogg product, and I did not even say there was no lawful right why they should not substitute it. I made no comments on it. I have not told them a thing about any litigation and no one connected with the hotel knows anything about this correspondence. The letter of August 11th, 1932, to Mr. Lowry was my first letter concerning the Kellogg product and was written after I had seen a reference in the press to a litigation between National Biscuit Company and Kellogg Company. I hoped it would not involve me as a witness in the case.

RE-DIRECT EXAMINATION.

RDQ. 301. If you asked for shredded wheat, Mr. Sweet, what would you expect to get?

A. Exhibit No. 1, or a product of that character.

RE-CROSS-EXAMINATION.

WITNESS: I would take cognizance of the fact that we now know there are two shredded wheat products on the market. I have not been concerned with that at all. I have been concerned with getting shredded wheat of the character of that contained in Exhibit No. 1 when I specified shredded wheat instead of Kellogg's Whole Wheat Biscuit, which was not what I ordered. I shall continue to ask for shredded wheat if I want the Niagara Falls product; and I will ask for Kellogg's Whole Wheat Biscuit if I want that product. I would not ask for Kellogg's shredded wheat biscuit.

If I asked for Kellogg's shredded wheat and they had Kellogg's Whole Wheat Biscuit in stock, I think I would be very likely to get Kellogg's Whole Wheat Biscuit; but if I asked for Kellogg's shredded wheat and they did not have Kellogg's Whole Wheat Biscuit in stock, and did have shredded wheat like Exhibit No. 1, or the same character as Exhibit No. 1, I think that they would be very likely to offer it to me. I would regard it as a particular case of confusion either way. If they gave me something else, I certainly would regard it as a substitution. If I specified the Kellogg product, I would not expect to get anything else because, if I specified the Kellogg product, I would do so because it has made some special appeal to me to make it popular enough to me to ask for it and designate it by name.

RE-CROSS-EXAMINATION.

WITNESS: Now that I have been fully apprised of the facts since April of this year, that there are two products of shredded wheat on the market, I would expect to specify which one I wanted. Because of my interest in cereals, because of my regard for cereal advertising; and because of my regard for the ethics which have pretty generally existed in cereal industry.

any time that I order cereals I will order them by their trade names, and in the future I would specify whether I wanted the Niagara Falls or the Kellogg product. If the restaurant said, "We are only handling Kellogg's shredded wheat product," I would accept that statement.

Such advertising as I have seen would indicate to me that Kellogg has another shredded wheat biscuit in distribution. That is based on what I have seen as a display. I do not think it would be good business for Mr. Kellogg to try to conceal anything under false colors.

RXQ. 298. Yes, and by that display, you do not think that he is trying to do it?

A. I think that he is very definitely indicating that he is making a biscuit—and I know definitely now that he has a whole wheat biscuit and that it is shredded.

In every case where it has come to me in restaurants as a consumer it has come to me in the whole wheat package of Kellogg's.

I certainly would not want to give testimony against the Kellogg Company. My relations with Kellogg have been very cordial. I do not have any reason to want to hurt the Kellogg organization. I have no particular reason for testifying now, except that I have been asked to relate the experience that I referred to. The sole motive that I had in writing Mr. Lowry was that I thought he would want to pass it along to his local branch manager giving the history that I wrote him, and possibly have him go over to the Biltmore and see that I could secure shredded wheat when I asked for it. In other words, here is a customer who wants shredded wheat. See if you can not supply it to him when he asks for it. That is the sole thought that I had in mind.

It is fair to assume that when I wrote Mr. Lowry I had the thought in mind that I could get the product

when I asked for it. That is the sole thought I had in mind.

RE-DIRECT EXAMINATION.

WITNESS: In speaking of the Kellogg slogan on cross-examination, our own slogan when I was employed with the company w : If the customer says corn flakes, they mean Kellogg's; and, if they say Kellogg's—speaking to the retailer—they mean corn flakes; but I was anxious to use that as a basis because it is in exactly the same position today when I say shredded wheat. I mean such as is contained in Exhibit No. 1.

JAMES GALLAHUE.

Deposition taken in Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a grocery and provision dealer, 351 Tremont Street, Boston, having been ten years there, and twenty-five years in an office on Widener Street, Porter Building.

I recognize article from Plaintiff's Exhibit 1 as Shredded Wheat, also recognize the package; first knew of the article at food fair in Boston, thirty-five or forty years ago. George H. Barnes, my employer then, was manager of the fair. They had machinery and made shredded wheat, which is first time I saw it. It looked then like biscuit just taken from Exhibit 1.

I have been familiar with it since. We always carried it. Always had same general shape, size, appearance this biscuit. If they ask for package of Shredded Wheat today, we give them like Plaintiff's Exhibit 1; would not give customer anything else. If he asks for Shredded Wheat, I know immediately what

he desires. When a customer asks for Shredded Wheat, I give him that package with Niagara Falls on it.

I recall having seen on package of Shredded Wheat similar to Exhibit 1, picture of saucer with shredded wheat biscuit in. Cannot say how long; knew it was there, and thought it was on every package. If it was left off, I might not have noticed.

When our customers ask for it, they usually ask for a package of Shredded Wheat. That has been so always since we handled it, thirty-five years or more, and before that when I handled it for Barnes. Until lately, never had any other kind of shredded wheat. Never handled anything but that. I have been asked to handle Kellogg's; thought not enough difference in price to make it an object.

First heard of Kellogg's Shredded Wheat about two years ago. I think the purchasing public, my customers, mean that package, like Plaintiff's Exhibit 1, by shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: I never carried Kellogg's Shredded Wheat. I know what the Kellogg package is and have seen it. It has been opened. The Kellogg package and Niagara Falls package pretty much same, except it has "Kellogg" printed on. If I were stocked with Kellogg's Shredded Wheat and a customer asked for it, I would give them Kellogg's Shredded Wheat.

The package shown me by Mr. Vilas is made at Niagara Falls. I have been familiar with the fact it is made there, for many years; had invitations to go there and heard people speak of the wonderful factory there. Never been to Battle Creek. I have seen the Kellogg's shredded wheat biscuit. Think it is little longer package, more in it. I have seen Kellogg's biscuit, a smaller biscuit than Niagara Falls Shredded

Wheat. Package did not look any larger and had 15 cakes in, against 12 in this.

I have seen Niagara Falls individual package, but not Kellogg's; in restaurants. Never handled it. I would not say it is common to illustrate food products with saucer containing some of product. Have seen peas that way; have not noticed it particularly.

Do not remember on early Shredded Wheat package picture of woman holding torch. Do not think Kellogg's biscuit introduced generally into Boston market. First saw it at Boston Wholesale Grocery Company, girl salesmen showed it to me. I figured price so little different, most people would want old article. Price of this is about $1.09 a dozen. Kellogg's, about $1, two for $1.98; $3.87 with discount. This cost $4.05, and discount about 17 per cent. Price has held steady until reduced lately. Sold it 12 cents for years; now everybody selling at 10 cents. Prices to public and grocers came down, perhaps two years ago.

RE-DIRECT EXAMINATION.

THE WITNESS: Have heard people speak of Niagara Falls factory, perhaps five or six years; two or three different occasions, that they were there and it was a wonderful factory. Other dealers and customers have been there. Customers never ask me for Kellogg's Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: I have heard Kellogg located at Battle Creek. We have always carried Kellogg line since they came out. Originally carried Kellogg's Corn Flakes, and the other products all time mills carried them. Kellogg Company has good reputation in the trade. Have not heard it charged with unfair dealing. We have tried other corn flakes but people do not seem

to want them; so we carry Kellogg's almost exclusively. Package of Kellogg's looked like a Kellogg package to me; just looked at it once or twice; did not look at it specially, but saw it was Kellogg package, because of printed signature.

FRED A. SYKES.

Deposition taken at Boston, Massachusetts, November 29, 1932.

Direct Examination.

The Witness: I am a retail grocer and provisions, at 63 Winthrop Street, Medford, Massachusetts. In retail grocery business since 13 years old; now 50. Owned present store eight years, worked there thirty years. Handled various cereals during that period, and similar grocery products.

I recognize article from Plaintiff's Exhibit 1; have sold it as shredded wheat, nearly from time it started; cannot remember year; but demonstrations of it at various food fairs in Mechanics Building; from then on, we sold it. The expression shredded wheat means the package, Plaintiff's Exhibit 1. I am familiar with it, have handled it for many years.

If customer comes to my store and asks for shredded wheat, as a rule I give him this; at times, on sales, have pushed Kellogg's shredded wheat. There has been a time when a customer has asked for Shredded Wheat and I have given him Kellogg's. At sales, with a lot of other new articles, we try to push the one there is a dollar in. Cannot tell you how often. We had the product in five-case lots, and they ran premiums, dishes, etc. We have made quite a sale of it.

Up to short time ago, trade knew only this Shredded Wheat. When they say shredded wheat, if

they do not find fault with it, we put out the other. Some found fault with it, of course; then we gave them the Shredded Wheat they wanted.

Since I have known Shredded Wheat Biscuit, it has not been in any different shape or form than as put out by the Shredded Wheat Company, that I know of. I do not use it. We sell it in cases or packages. I am not familiar with the biscuit as people who use it every day. I like other cereals, like old-fashioned oat meal.

I think at one time different label on Shredded Wheat than now, with saucer or something; do not know how long ago; but I know there was different label from now. Cannot say I ever had posters or cards in my store displaying Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: Shredded Wheat salesman asked me to come here today, said they were having discussion here regarding Shredded Wheat; all the conversation I had.

I carry Kellogg's Shredded Wheat. First time I saw the package, recognized it as Kellogg package; did not confuse it in any way with Niagara Falls package. The packages are different. I have carried Kellogg's line from time they started with Force people, and then their corn flakes right after. Always found the Kellogg people to deal fairly with me. They have good reputation in trade.

When I first had Kellogg's shredded wheat, a customer sold it to me. I featured it then at a considerable cut below this shredded wheat; made quite a display of Kellogg's biscuit. People who came into the store could see what the packages were. We sometimes put package of Kellogg's in basket on route.

When customers ordered Shredded Wheat over telephone as in past, we gave it to them. Sometimes on

sales, we put in Kellogg's. Some wanted it changed; but lot of them kept it. We sell today a lot of both kinds.

Believe I was told the Kellogg packages are a little smaller. I do not use Shredded Wheat personally; have not opened any packages. In my store, a few recognize there are two shredded wheats made by different manufacturers. I continue to carry Kellogg's biscuit. At the time I first had it, they were giving green dishes with each package, a plate or saucer, or cup; which is often practice today in introducing a new article. We have several articles they give a dish or cup with. We gave it with every package of Kellogg's biscuit, just as we advertised it, placards in the window display, prominently.

I have not noticed advertisements of Kellogg's Shredded Wheat, except window displays.

RE-DIRECT EXAMINATION.

THE WITNESS: I now stock both products; cannot swear what Kellogg's product is now called on package. All I know it by is just shredded wheat. That is what it is called when we had the demonstration. Sixty per cent. of our business is telephone. Since we ran those sales, quite a few wanted the other, and when a customer asks for Shredded Wheat, we usually give him a package like Plaintiff's Exhibit 1. Very few customers today ask for Kellogg's Shredded Wheat. We have it for those who want it.

RE-CROSS-EXAMINATION.

THE WITNESS: I always took this for Niagara Shredded Wheat. The other is Kellogg's Shredded Wheat. I take it they are both the same thing, shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I have seen no packages by Kellogg with a cellophane window showing what i nside.

JESSE A. LEONARD.

Deposition taken at Boston, Massachusetts, November 29, 1932.

Direct Examination.

The Witness: I am fifty-nine, a grocer, retail, in Auburndale, Mass.; having been in grocery business twenty-six years, always in same place, my own store and business. I carry usual line of retail groceries, including cereals.

I recognize article taken from Plaintiff's Exhibit 1; it is a shredded wheat biscuit, which I have known ever since I have been in business, and four years previous, while working for other grocers, total of thirty years. Shredded wheat biscuit is a biscuit that comes out in shreds and is baked into that form. I have been through a factory and seen the process, at Niagara Falls. The only theory of that name I have is that it was given to it by its originators.

When our customers ask for shredded wheat, we give them just shredded wheat. I do not know any other. That is the only one I have ever seen or handled. I can only send a customer what we have in shredded wheat. Plaintiff's Exhibit 1, a package like that is the only one I have ever seen. Shredded Wheat has had a very large sale with me. I do not recall having seen advertisements in the form of the representation of a saucer with biscuit in it.

Cross-Examination.

The Witness: I have heard of but never have seen a package known as Kellogg's Whole Wheat Biscuit or Kellogg's Shredded Wheat. I think a grocer in town said they had it in.

ROBERT H. HAMILTON.

Deposition taken at Boston, Massachusetts, November 29, 1932.

Direct Examination.

The Witness: I have been in the retail grocery business forty years, since I was eighteen, my entire business life; at my present address, 4202 Washington Street, Dedham, Mass., five years, last June, prior to that on High Street, in Dedham. My store is Robert Hamilton & Sons. We carry the usual line of retail groceries, including cereals.

I recognize the item taken from Plaintiff's Exhibit 1 as shredded wheat, which I have known since January 6, 1895. When this discussion came up, I was interested to know how long shredded wheat was on the market and I had known it. A few days ago I looked through an old chest in the cellar, picked up old account book and saw we bought first shredded wheat biscuit January 6, 1895. I was asked about it by a representative of the National Biscuit Company and was curious to know something about it.

We have carried Shredded Wheat ever since that time. I do not recall any change in general form, appearance, or shape of the biscuit. I recognize the package, Plaintiff's Exhibit 1; do not recall any material change in it. They may have changed some of the printing. I notice a picture of Niagara Falls on the package, which has been there as far back as I recall particularly.

When a customer says shredded wheat, it means a package like Plaintiff's Exhibit 1. When a customer orders it, that is the package I supply her. Many of my customers order by telephone. They order this product as Shredded Wheat. When we get such an order, we supply this shredded wheat; have never supplied any other.

I think, some years ago, they used to have advertising of shredded wheat with a sort of saucer and two shredded wheat in it. I recognize Plaintiff's Exhibit 1C for identification as one of the old style packages. I would say we have handled shredded wheat in a package like that quite a while ago. I see at the bottom of the panel in which a building is shown, a copyright designation, but that does not refresh my recollection when we handled it. I recognize the representation of the saucer with shredded wheat, to which I previously referred. I do not know how long ago they used that package, but it is quite familiar to me.

I have a general idea in my mind of what Shredded Wheat is. When a customer asks for it, I always have taken for granted that she means a package of shredded wheat, packed as Plaintiff's Exhibit 1. As I understood, that is what this package is known as by everybody I have come in contact with, as shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: I regard the term shredded wheat as describing the form and nature of the biscuit in the package, too; because I think the name applies as the biscuit, not as a shredded wheat in any other form. When I say shredded wheat, I mean a biscuit made of wheat, shredded, in this biscuit form. I mean this biscuit form. That is what they want, what they mean.

I do not, at the present time, know of any other shredded wheat biscuit on the market besides this Niagara Falls Shredded Wheat. Some time ago, there was another shredded wheat on the market, the Kellogg product, and I saw a package of it. At that time, it was called shredded wheat. I saw the biscuit, itself. I knew it was a biscuit similar to this one. It might have been a trifle different in size; I am not positive. I just saw it one time, when the salesman brought it

to me and tried to sell me some. I did not stock any of it. We carry other Kellogg products, sell a great many of them.

The salesman said, in effect, they were out with a new shredded wheat biscuit and wanted us to put it in, used the usual sales talk.

We average four to five dozen packages shredded wheat a week, which is more in packages than any other cereal, except Kellogg's Corn Flakes. I have never at any time stocked Kellogg's Whole Wheat Biscuit. The salesman only offered it to me once.

RE-DIRECT EXAMINATION.

THE WITNESS: My principal reason for not stocking the Kellogg biscuit was they were coming out and stealing the product of another firm. I told the salesman so and gave him a good, sound talking to about it. I said, "To my mind, you are simply going out and trying to steal their business and putting out a shredded wheat, which they have had on the market for years and years. I do not approve of it, do not sanction it, and will not buy it at all." I remember that particularly.

RE-CROSS-EXAMINATION.

THE WITNESS: I have always felt that nobody except the Niagara Falls company should make a shredded wheat. If I were in their place, I should think any other concern coming out with that would be an infringement on the product. I had that feeling when Kellogg first put out corn flakes and then other people did, to some extent. I feel the first one putting out corn flakes, or wheat or rice flakes, should have a preference, at least. I cannot say I feel no one else should make that same product; but I do not think he should come out and sell it as the same thing. He can make the same product.

As I recall, the name on the Kellogg package shown to me by the salesman was shredded wheat, and, of course, the usual advertising and the Kellogg's name. I have heard of Kellogg's Shredded Wheat since then. I do not think they have any right to put out a package marked shredded wheat.

I saw one of the Kellogg biscuit packages just once. I did not think it was an original package of shredded wheat, because I was familiar with the size of this package. I knew it was not. I am not a believer in someone else stealing any other man's product. I think that the shredded wheat product, as shredded wheat, under that name, and the right to make that product belongs perpetually to the Niagara Falls concern. If I discovered it was a patented product, on which the patent had expired many years ago, I would still feel the same way.

After the patent runs out on Gillette Safety Razor, for instance, I think others could make a safety razor; but I do not think they should call it the Gillette safety razor. I do not know it would be considered a Gillette type, but it would be a safety razor.

I carry two brands of corn flakes: Kellogg's and Post's. If a customer simply asks for corn flakes, we give them Kellogg's. I have no doubt Post's Corn Flakes are corn flakes. I have every reason to believe they are. I simply regard them as corn flakes not made by Kellogg.

I have never been to Niagara Falls. I knew they were somewhere before they went to Niagara Falls, but did not recall where. I was never interested in the Shredded Wheat Company in any way, except to make what money I could by selling the product. I use the product myself one or two mornings a week.

I do not believe there should be any competition in the manufacture of the product known as shredded wheat, under the name of shredded wheat. I would not think it would be wrong for me to stock Kellogg's

Whole Wheat Biscuit in a carton such as you show me, if I wanted to (Defendant's 4 for identification). I would not feel that I would be doing any wrong.

I did not stock Kellogg's because I did not think it was right for them to come on to the market with a package calling it shredded wheat. I would not say Defendant's Exhibit 4 is a wrong package for Kellogg to put out, if they are going to put out a package of whole wheat biscuit and call it shredded wheat. I, personally, would distinguish that from the Niagara Falls package, like Plaintiff's Exhibit 1, very readily. I would regard that, in color and makeup on the line of the Kellogg package. (Second carton marked Defendant's Exhibit 5 for identification.)

RE-DIRECT EXAMINATION.

THE WITNESS: Customers do not usually examine carefully the ordinary packages they receive. In some lines, like fancy goods, they examine them very carefully. I think the ordinary housewife, if we sent her Defendant's Exhibit 5 for identification, would recognize the difference between that and the Niagara Falls package.

I do not think the average person would be very much confused by the representation of a dish with shredded wheat in, as appearing on Plaintiff's Exhibit 10 and Defendant's Exhibit 4. I think some housekeepers, some housewives, would notice the difference.

Looking upon it from the point of view that it was a copy of someone else's package, I would not consider it right of the Kellogg Company to place upon either Defendant's Exhibit 4 or 5 for identification, a picture of a dish with biscuit in it.

When I talked to the Kellogg salesman, I referred to the use of the whole thing, as a whole, the package of Shredded Wheat itself, coming out, putting out on

the market of the shredded wheat itself; trying to get me to put that in and sell it or put it out in preference to a product we had been selling for years. I think the salesman had his package open. The biscuit I then saw was very similar to the biscuit in Plaintiff's Exhibit 1.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not think I testified it was a smaller biscuit; it might have been a trifle smaller. I was not sure. The name on the package was Shredded Wheat. There was nothing more that I recall specifically, except on those packages the usual advertisement of the Kellogg Company. That was several years ago. The first I knew of any litigation or any prospect of it was about a week ago, when I was asked if I would come into the hearing. I was told there was a suit on between the two companies. They did not say what it involved. I looked for some information in regard to it.

It is a common practice, done quite often, to illustrate on the container of a food product the representation of a dish containing a quantity of the contents, an ordinary advertising device.

MRS. GRATIA C. SANBORN.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a demonstrator, now employed by Swift & Company, promoting sales of different products. I have been employed by the National Biscuit Company to promote sales of Wheatsworth cereal and flour, and other cereals, for just five

weeks, beginning about the thirteenth of October, 1932. I never had any other connection with them.

I recognize the article taken from Plaintiff's Exhibit 1, shredded wheat, which I have used in my own home for twenty years, always, as a breakfast cereal. The only way I would ever apply the term shredded wheat is to one of those biscuits. The only thing I know about shredded wheat is there. We always connected shredded wheat with Niagara Falls, a great many years before I knew who manufactured it. I always purchased it in packages.

The packages, as I have known them, during the time I have used it, have been similar in appearance to Plaintiff's Exhibit 1. I have bought shredded wheat in packages like Plaintiff's Exhibit 10, with a dish on the end, which I recognize. I have known that in connection with shredded wheat a number of years. If I saw a dish like that, I would naturally think of shredded wheat, the cereal breakfast biscuit, shredded wheat.

I went into a store, asked for a package of shredded wheat, and was given a package. As it was taken from the shelf, I saw it was not shredded wheat, as I know the product, not the same shaped box. This was October, 1932, in Hamilton Cash Market, Hamilton, Mass. I said to the lady serving me: "Is that shredded wheat?" She said, "Yes, shall I do it up for you?" I first said no and then yes, and it was given me. Plaintiff's Exhibit 11 is the package she sold me; my signature and the conversation that took place are on a piece of paper pasted to it, which identifies the package to me as the package I received then. I had no further conversation with the sales person at that time.

Another time, I ordered a package of shredded wheat over the telephone, from a local dealer near my home, where I am living now. A package was delivered to me similar to Plaintiff's Exhibit 11. I used it. No

package like Plaintiff's Exhibit 1 was delivered in tha order.

CROSS-EXAMINATION.

THE WITNESS: I went with the salesman of th National Biscuit Company, Kenney, to make the pur chase. He asked me to buy a package of shredde wheat. I was working for him at the time. It wa while I was working for the company then, and h repaid me.

I have only used Kellogg's Whole Wheat Biscui once, the time it was brought into my home. I do no eat cereals at all. I noticed it was the same type o biscuit, but not shredded wheat as I have always notice the shredded wheat biscuit. The size was different no particular difference in taste. I did not notice th biscuit toasted on bottom as well as top. I do not ea shredded wheat biscuit myself. I noticed the differ ence in the package as soon as the girl reached for it

I have seen food packages from time to time wit an illustration of a plate with some of the food in it That is the only type of package or food of that par ticular type that I have seen this illustration of a plat with two biscuit on. I have seen manufacturers doin that same thing on beans.

MISS ELIZABETH C. BARRETT.

Deposition taken at Boston, Massachusetts, No vember 20, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a stenographer for Colin Cole not employed by or connected with the National Bis cuit Company.

I recognize the article taken from Plaintiff's Ex hibit 1 as shredded wheat. I have been familiar with

it all my life, pretty nearly, thirty years, more or less. I have been a user of shredded wheat during that period. I purchase it at retail stores and at restaurants. It is served in restaurants, both in and out of the package. I have had it both ways.

Shredded wheat or shredded wheat biscuit conveys to my mind a sort of stringy substance, and I know it is more or less porous. It is shredded wheat. Shredded wheat is the original shredded wheat; Shredded Wheat Biscuit from Niagara Falls, not from any other place, always from Niagara Falls.

At the Hawthorne Hotel in Salem, Massachusetts, about three weeks ago, I asked for shredded wheat, and they brought me some biscuit that looked similar to a shredded wheat biscuit, not as large, came in a package marked Kellogg's Wheat Biscuit or something like that. I called the waitress and asked if it was shredded wheat. She said yes. There was a package with two biscuit, and I said, "This is not shredded wheat." She said, "Yes, it is." I said, "Does it say so on the package?" She said, "No. Well, it is, just the same." She did not take the package back. I finally accepted it. I kept the box they were in. I recognize Plaintiff's Exhibit 12 as the carton delivered to me then.

I also brought with me a menu card, which is Plaintiff's Exhibit 13. I do not know who put the pencil mark around the words shredded wheat. I did not do it.

I have noticed and been familiar for a long time with the picture of a dish with biscuit in, such as is on the end panel of Plaintiff's Exhibit 10, in connection with shredded wheat advertising. I have purchased packages of shredded wheat with that picture on them. For fifteen years, this has meant shredded wheat. If I saw that picture of a dish on another package, it would mean shredded wheat to me.

I have seen packages like Defendant's Exhibit 4. The panel of that package with a dish with two biscuit in it means to me shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: I came to testify today through Mr. Sullivan, brother of a friend of mine. I imagine he is connected with the National Biscuit Company. He was talking about his company and more or less joking. He said, "If you go to lunch, order some shredded wheat." This was at the Hawthorne Hotel. That was the only time I had any conversation with him about the case. I made a written statement of the incident then and signed it.

I have seen packages like Defendant's Exhibit 4 in stores, up on the shelves. I have used other Kellogg products.

I have eaten Kellogg's Whole Wheat Biscuit on other occasions besides this incident at the Hawthorne Hotel.

I think I have seen within a couple of years a package of Niagara Shredded Wheat with the illustration of the dish. I have seen other food products in packages with illustration of a dish containing some of the product in the container. I do not think it is necessarily a method used in a great many food packages. I would not be surprised if you told me you could show me dozens of packages in a grocery store, each illustrating a dish with some food in. I have only noticed it on this package. This means shredded wheat to me.

I have noticed a dish on the outside of the Kellogg package, too. Those two instances are the only ones I recall.

MISS MARIE CREEDON.

Deposition taken at Boston, Massachusetts, November 29, 1932.

Direct Examination.

The Witness: I work for the John F. Cabeen Company, plumbing and heating; not connected with National Biscuit Company in any way whatever.

I recognize the item taken from Plaintiff's Exhibit 1. It looks very much like shredded wheat, but a little smaller than the biscuits I have seen. I have known shredded wheat all my life, all of twenty years or more. I have used shredded wheat more or less during all my life and have bought it at stores. I have ordered it by telephone. I have been familiar with it in a package like Plaintiff's Exhibit 1, and I have seen it in a package like Plaintiff's Exhibit 10. I have often noticed a picture such as is on the end of Plaintiff's Exhibit 10 in ads in magazines.

Shredded wheat to me means a wheat biscuit made in Niagara Falls, a product of the Shredded Wheat Company (reading from the package in front of witness). It does not mean the product of any other concern or company. I never connected it with anybody but the Shredded Wheat Company.

Recently, I went to a store in Salem, Massachusetts, asked for shredded wheat, and was given Kellogg's Whole Wheat Biscuit. It was a National or Hurder's, or one of those grocery stores, on North Street. The fellow took down this Kellogg's package. I said, "That is not shredded wheat." He said, "Oh, yes, it is; it is just the same thing; only you are getting fifteen in a package instead of twelve. You are getting more in a package." I said, "Is that exactly the same thing?" and he said, "Yes." I took the package, which

is Plaintiff's Exhibit 14. The piece of paper pasted thereon is my statement, signed by me.

CROSS-EXAMINATION.

THE WITNESS: I had never made any other purchases at this store of G. B. Hurder. Mr. Sullivan of the National Biscuit Company asked me to go there to buy shredded wheat. I have known him maybe a couple of years. He refunded what I had paid. He just asked me to ask for shredded wheat and observe what was said. I said, "It is not shredded wheat." He did not tell me to say that. He told me to ask for it and see what they gave me. He did not ask me to go to any other store, just picked out that one for me. There are quite a number of National stores in Salem besides that. I usually do my buying over on my street, that I prefer. He did not say anything about going to my own grocer.

CHAUNCEY A. STIMETS.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, at 1286 Washington Street, West Newton, Massachusetts, in business for myself for seventeen years; worked in it thirty-four years, in West Newton.

I recognize the article taken from Plaintiff's Exhibit 1 as Shredded Wheat from Niagara Falls. I have sold it, I guess, thirty-three or thirty-four years. I cannot say it has changed during that period in general appearance, size, or shape of the biscuit. I should say it has been substantially the same. The package is practically the same. The lettering has been prac-

tically the same. I could not say just what has been changed in that. I recognize and should say I have handled the product in packages like Plaintiff's Exhibit 10. I do not recall if the dish with biscuit in on the end panel of that package has been on all the time or not. I do not recall seeing that dish with the biscuit in it, in connection with shredded wheat.

Shredded wheat, to me, means this: They use it in the business. They fill orders from that Niagara Falls Shredded Wheat. Anybody that asks for shredded wheat, that has always been our way; filling orders with Shredded Wheat of Niagara Falls. If a customer asks me for shredded wheat, I fill it with this Niagara Falls Shredded Wheat. When a customer orders shredded wheat, she expects to receive Niagara Falls Shredded Wheat. That has been true ever since I handled it.

CROSS-EXAMINATION.

THE WITNESS: I am not familiar with any other shredded wheat on the market besides Niagara Falls Shredded Wheat. I have heard of Kellogg's Whole Wheat Biscuit; have it in the store now. I would never fill an order for shredded wheat with that. I would supply it in answer to calls for whole wheat biscuit. I have had people call for Kellogg's Whole Wheat Biscuit and gave them that product. I think I tried some when it first came on the market, last three or four years, something like that. It is an advertised product.

RE-DIRECT EXAMINATION.

THE WITNESS: Once in a while we have a call for Kellogg's Whole Wheat Biscuit. The sale is very small.

MRS. FLORIDA P. McCABE.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: My husband is an agent of the National Biscuit Company.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat, with which I have been familiar since I was a little girl. I have been a user of it. I eat it every other day, and have been a purchaser of it for eleven years.

Shredded means to me something taken apart, shredded to pieces. The minute I see shredded wheat, I always think of shredded wheat coming from Niagara Falls. I positively never think of shredded wheat coming from any other place; I never have any such idea.

The biscuit I have known as shredded wheat has always been the same to me, throughout the years. I have been familiar with the package in which I purchased it. It has changed a little bit. It used to have a saucer with biscuit in, like the picture of a dish with two biscuit in on the end panel of Plaintiff's Exhibit 10. I have known that for a long, long time. It is associated in my mind with shredded wheat. I have never seen it used to advertise any other product until the day when I was given a different package. I needed shredded wheat and I went into the store of Fontaine, at Castle Hill, Salem, Massachusetts, about a month ago. I asked the clerk for a package of cigarettes, and he gave them to me. Then I asked for a package of shredded wheat. He handed me this package, Plaintiff's Exhibit 15, which did not look like shredded wheat to me that I have been using. I asked him if it was shredded wheat, and he said yes. I said, "It does not look like the shredded wheat I have been using." He

said, "It is positively the same thing, except it is a smaller biscuit." I said, "I want to make sure that, when I call for anything, I find what I want." He said, "That will be the same."

I took the package. The piece of paper attached to it is my report, signed by me. That is my signature on that exhibit. Having refreshed my recollection by looking at the exhibit, the store was 327 Jefferson Avenue, and the date, November 2, 1932.

CROSS-EXAMINATION.

THE WITNESS: My husband positively did not ask me to make this purchase. I wanted shredded wheat. After I told Mr. McCabe I wanted shredded wheat, he said, "Why do you not go to buy it in that store?" So I went. I have no regular store to trade in; go everywhere. I live at 49 Hawthorne Street, Salem, about five minutes from 327 Jefferson Avenue. I had not made purchases in that store before; that is the only one I made there.

My husband did not tell me to get it there. He asked me if I wanted to go. It was convenient for me because I was going up that way. I have bought shredded wheat since that time in another store. That time I went to the store across the street. They did not have it and sent me to this store, which my husband had suggested. I needed shredded wheat. The typed notice was put on the package at the National Biscuit Company, Jefferson Avenue. When I got the package, I turned it over to my husband, who took it away. Some time later he brought it back to me to sign, and I signed it, the same day. Mr. Kenney brought it back to me the same afternoon to sign. I had turned it over to Mr. Kenney, not my husband. He is connected with the National Biscuit Company, I believe. I was with Mr. Kenney that morning. He

stayed outside while I made the purchase. He was not outside the first store I went to. I had been the day before to that store and knew they were out of it. Nobody suggested to me the day before to go to the store which was out of it. That store was on the way to the beach. I would stop if I needed little things in the summer once in a while.

The package I needed the day before, I needed shredded wheat. If they wanted to buy it for evidence —that was a package I was buying for them, if they had had shredded wheat. Mr. Kenney did not tell me to go to that store, also. Mr. Kenney came to me the next day and suggested I buy it at the Fontaine store, and he joined me and took me to the Fontaine store and stayed outside. I did not go to any other stores that day with Mr. Kenney.

HAROLD M. ROBBINS.

Deposition taken at Boston, Massachusetts, November 29, 1932.

Direct Examination.

The Witness: I am buyer and store manager of the Star Market Company, just one store, at Watertown, Massachusetts, meats, groceries and provisions. I have been in the retail grocery business fourteen or fifteen years, with Star Market six years. We deal in a full line of groceries, including cereals.

I recognize the article taken from Plaintiff's Exhibit 1 as a shredded wheat biscuit. I have known it since I have been in the grocery business and before, as a consumer. The Star Market carries it. During the time I have known it, I could not say whether it has changed in appearance, shape, size, color, etc.

If you came in my store and asked for a package of shredded wheat, and I was on the counter, I would

pass you shredded wheat biscuit, the same as in Plaintiff's Exhibit 1, with the Niagara Falls picture on the end. Shredded wheat means to me a product that comes from Niagara Falls, on account of the picture of the Falls on the end of the package. It is the only product I would call shredded wheat. If a customer would come in and ask for shredded wheat, that is what they would get.

To my customers and the purchasing public generally, shredded wheat means the same as it does to me: that the package of the Niagara Falls company is Shredded Wheat.

I have seen in the ads of the Shredded Wheat Company or the National Biscuit Company an illustration representing a dish containing the biscuit. As I remember, that was on the end panel, as in Plaintiff's Exhibit 10. I do not remember just when or how long. I have noticed it mostly in the ads, not so much on the package. I refer to magazine ads.

Kellogg salesmen have been in to me to buy their biscuit, but I did not stock it. I stock everything in Kellogg's, but not the biscuit, because shredded wheat has the demand and the call; and it would mean we would have to push and explain to people that Kellogg's biscuit was something similar. Perhaps the customers would take it; perhaps not.

SAMUEL ABRAMSON.

Deposition taken at Boston, Massachusetts, November 29, 1932.

Direct Examination.

The Witness: I am a retail grocer in business for myself, at 331 Eastern Avenue, Malden, Massachusetts. I have been in the business thirty-one years, for my-

self, in Charlestown a short while, and twenty-eight years in Malden. I carry a full line, including cereals.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat, which I have known more than twenty years. The label has changed, maybe once, to my knowledge. The biscuit has remained the same thing. I carry this line of shredded wheat biscuit and have carried it about twenty years. The public has always asked for shredded wheat. When a customer asks for it, I give him shredded wheat, positively. If they ask for shredded wheat, we give them shredded wheat. A customer never asks for anything but shredded wheat. We forget the company or where it is coming from or what it is, when they ask for shredded wheat.

I happened to be at Niagara Falls once. That is the reason I know where it comes from. The chances are I might not think of it, or maybe I would. I saw the factory.

I saw a representation of a dish with two biscuit in it, a few years ago, in connection with shredded wheat. That was like the dish on Plaintiff's Exhibit 10, which I recognize. It must have been five, or eight, or ten years ago. A representation of the dish with biscuit does not mean anything to me, because we are in the habit of calling it shredded wheat.

We tried the biscuit of shredded wheat put out by the Kellogg Company, and it did not go very fast. We had that shredded wheat, but it did not go very fast, and we cut it out. That was a couple of years ago or so. The customers used to call it shredded wheat biscuit and shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: In the last six months, we have been connected with a voluntary chain of 155 members.

I have no idea if any member carries Kellogg's biscuit. Nobody was interested in it. We carry it once in a while; but it is a kind of merchandise that does not run fast, and we try to cut it out.

One of the salesmen asked me if I would come here. I told him I had no objection. He did not tell me why; just asked me if I was going to Boston Tuesday. I told them I was going to see the doctor. I do not know if any other members of our chain are here today. I have not go my list.

If a customer asks us for Kellogg's Whole Wheat Biscuit, we are just around the corner from Northern Products, and we go there and get it, maybe a dozen at a time. We always get a lot of shredded wheat, because there is a big demand for it.

It is very common to put an illustration of a dish with the food on packages of canned food, such as baked beans, or peas. I remember Peter Pan peas used to have it with a dish, but that has been taken off. I have not noticed that practically every food product in packages has some such representation.

RICHARD CLARKE.

Deposition taken at Boston, Massachusetts, November 29, 1932.

Direct Examination.

The Witness: I am a grocer, retail, under name of L. E. Smith Company, in Lexington, Massachusetts, forty-five years altogether, thirty-two in Lexington; at present time in partnership with two others. We carry a full line of meats, groceries and fish; and we have cereals.

I recognize the article taken from Plaintiff's Exhibit 1, as shredded wheat, which I have known since I

was in Lawrence; I should say about thirty-five years ago. I should say the appearance, shape, size, color, etc., of the biscuit have remained pactically the same throughout those years. It looks a little browner on top. It has not been altered in any other respect that I have ever seen. The package has been changed, just simply on one end, I should say. One end used to have, I think, a dish with a biscuit in or alongside of it. The other end had Niagara Falls. Plaintiff's Exhibit 1 has Niagara Falls on both ends.

I know there was a change in the package while I have been in Lexington. Plaintiff's Exhibit 10 is the one I have in mind. That was used by the Shredded Wheat Company I think up to a very few years ago.

If anybody should order shredded wheat, we would give them the one with the Niagara Falls on, which is the only one we ever had until the last few years.

The term shredded wheat has a connection in my mind with the origin or source of the product. I took it that it meant that they were the originators of the shredded wheat, when this first package came out. We never ordered anything but shredded wheat, never signified anything but the one kind; and we always got the one kind.

From my experience over the years as a retail grocer, the consuming public has in mind that this is the package they would want, the Niagara Falls package. I recall that, because that is the only way I know of it.

A short while ago, we were out of shredded wheat and had Kellogg's biscuit. A lady came in and asked for shredded wheat. The clerk came to me and said, "What will we give her?" I said, "Give her that. Is that not shredded wheat?" He gave it to her and she refused it. That is the only such incident in my experience, about a year ago. She wanted the kind she had always had, she said.

I do not think the representation of a dish with two biscuit on it on a package of cereal conveys to my mind any indication of its source or origin. We carry Kellogg's Wheat Biscuit, and we carry Muffets, which is something on the same principle, but a round package, made practically like a shred, something like shredded wheat. I think it resembles in appearance, but not in shape, shredded wheat. A Muffet can readily be distinguished from a shredded wheat biscuit. Customers usually ask for these products by name.

When they ask for the Niagara Falls product, shredded wheat is all they ask for. I have never had anybody ask for anythng else, except that one instance, where she asked for shredded wheat and we gave her the other. Our customers sometimes ask for Kellogg's Whole Wheat. I do not think I ever had any ask for Kellogg's Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: Mr. Murphy, the man from the National Biscuit Company, asked me if I would come in and testify how long I had been in business and what I know about shredded wheat. I told him what I have told you. Seven years I was painting, but most of the time, I have been in the grocery business. Our firm belongs to the Pioneer organization. I have not seen any members of it here today.

BENJAMIN FEINBERG.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the department food market business, the North Shore Market. We carry every

kind of food, including groceries, fish, meats, cereals. I have been in that business about 18 years, during which I have conducted this food store. Previously, I was in the wholesale grocery, salesman for five years.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat, with which I have been familiar ever since I have been in the grocery business. The biscuit looks the same to me as it has always. I recognize the package. I remember the picture, as far back as I can remember. I cannot say I have looked it over thoroughly to notice any changes. I remember the picture of Niagara Falls on the end and the buildings on the side panel.

I recall seeing a carton like Plaintiff's Exhibit 10. I never studied the back of an outside container, but I remember the container, the biscuits, and buildings. I do not remember the time, the two biscuits and plate were used. I would say the package looks just like this now, because it is one of thousands of things we sell. Naturally, I do not get down to examine the package, as long as the contents are the same. When a customer asks for shredded wheat biscuit, we give him shredded wheat. It is the only thing I have, except sometime ago, when Muffets came in.

We were a little indisposed against shredded wheat then, because Muffets were good priced when first introduced; and we tried to substitute that way. At one time, the chain store cut the price and there was no profit for us in shredded wheat. But nobody would accept Muffets, because they asked for shredded wheat. The only reason we brought up the Muffet question was that the salesman sold me the idea of substituting Muffets for shredded wheat, and we were not successful in doing that.

We just know the shredded wheat as the biscuits there; that is all we know of. I do not know of any article of that sort, any different thing but shredded

wheat. I have dealt with the public direct in selling them cereals. The only thing I know as shredded wheat is this shredded wheat that comes in that package, Plaintiff's Exhibit 1, just that sort and nothing else. The buying public mean by shredded wheat just that package and absolutely nothing more, as far as my experience is concerned. That has been true ever since I have been in business.

The expression good-will means to me the fact that, if something becomes established, it ought to have a certain amount of protection, after you have worked hard to build it up. As a merchant, I would say I think there is good-will, as I understand it, attaching to shredded wheat, on account of the advertising of it and the good-will that it has built up of itself, so that, whereas, when we tried to substitute, it did not work out. I know from observation that the Shredded Wheat Company has advertised its product.

CROSS-EXAMINATION.

THE WITNESS: I was asked if I would care to come down to the Parker House, visit representatives of the shredded wheat people, and answer some questions about shredded wheat. The salesman talked to my head bookkeeper, who got me when I was very busy. I had to go to the hospital every morning anyway, and dropped in here on my way back. My bookkeeper told me it was practically the same thing I just repeated, about shredded wheat, and if I knew anything about the Kellogg's Wheat Biscuit. To be frank with you, I did not know there was any such thing. It was never offered to me personally. I am a busy man, except the last few quieter months, and I could not give my attention to all departments. I was doing the buying. Outside of that, I do not seem to have been approached about it.

I belong to the Thrift, a voluntary chain, in order to get special discounts. I do not know if any members handle any Kellogg's biscuit. If I had known, I would have known about Kellogg's Whole Wheat Biscuit. I heard of Triscuit, but never of Whole Wheat Biscuit. This is the first I heard of it, because of what the salesman asked my bookkeeper.

I had some trouble with shredded wheat, because I found I could not get it cheap enough to get a competitive price. We put in Muffets, thinking it was a good way to resist chain store competition. They were a Quaker product. It looked like a shredded wheat. We thought it would take its place. I do not know how long Muffets have been on the market. We sell very few. We carry it and have a few calls. It is circular. I would not call it cup shape.

I have never seen any package like Plaintiff's Exhibit 14, never handled it in my store or had anything to do with it and do not know what kind of product is inside the package; do not know anything about it.

ARTHUR R. ELLIS.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, at 62 Bacon Street, Waltham, Massachusetts, in my twentieth year in business in Waltham.

I recognize the item taken from Plaintiff's Exhibit 1 as shredded wheat, and have known it at least twenty-five years. I remember seeing it first in England when I was an errand boy, twenty-five years ago. I am just over twenty-one years here. During that time, I have carried shredded wheat among cereals. As far as I can

see, the form, appearance, shape, and size of the shredded wheat biscuit is practically the same as when it first came out, or when I first remember it. I cannot see anything different in the package from what I have always known. Plaintiff's Exhibit 1 certainly looks familiar to me. I have sold quite a lot of it, the second largest cereal seller we have in the shop. I recognize the picture of Niagara Falls on the end panels, which has been on the package since I have known it.

I can remember a package with a picture on the end with a dish with two biscuit. I do not have to look at Plaintiff's Exhibit 10 to recognize the dish. That is what I have reference to. I cannot recall any time that was not there. I see it is not on Plaintiff's Exhibit 1, so I am wrong there. Plaintiff's Exhibit 10 is the old package we had. I should say it was up to within three or four years ago, prior to that for at least ten years.

For shredded wheat, I never knew anything else but just shredded wheat. To me it has always signified the picture of the factory at Niagara Falls, and this biscuit inside, such as I see in Plaintiff's Exhibit 1. Shredded wheat has never meant any other product to me. If a customer comes in my place and asks for shredded wheat, that is the only thing I know to sell them, Plaintiff's Exhibit 1, the Niagara Falls product.

I have never sold Kellogg's Shredded Wheat Biscuit; but I have sold the Triscuit, which is, I suppose, made of somewhat similar ingredients, but it is not the same type of biscuit. I guess the National Biscuit Company makes Triscuit at this time; made by the Shredded Wheat Company, I guess, before National took it over. I have carried Kellogg's Corn Flakes, and Kellogg's Bran, and things like that; but I do not carry their shredded wheat biscuit or whole wheat biscuit.

CROSS-EXAMINATION.

THE WITNESS: Mr. Murphy of the National Biscuit Company asked me to come down today. He told me Kellogg was putting out shredded wheat biscuit, and the National people were up in arms about it; that they did not like it, and they were going to fight it. He asked if I would come down to testify. I had sold shredded wheat; did not ask me whether I had carried any of Kellogg's Shredded Wheat.

I am an independent, just for myself, do not belong to any buyers' chain. I have never had any experience with Kellogg's Biscuit, like Plaintiff's Exhibit 14; but I have seen a package like that before. A man came in the store and tried to sell it to me. I did not buy it. I usually buy through wholesalers; generally through Washington Street office there. We get our shredded wheat now direct from National. Kellogg sells its products to wholesalers.

Kellogg's Corn Flakes is the largest cereal seller we have. I have known of Kellogg for many years and always found them always fair in their dealings. I have handled other Kellogg products besides Corn Flakes.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not stock Kellogg's biscuit because I guess I am kind of funny. I do not believe, after a man has established a business, anybody should come up behind him and take his business away; nor that, after Shredded Wheat has been on the market so long and got such a fine reputation, somebody else should come and take it away.

When I said I found Kellog's fair in their dealings, I meant they have always treated me all right in my dealings with them. In that particular thing, I do not think they are doing the right thing.

RE-CROSS-EXAMINATION.

THE WITNESS: I think this package is an unfair package as compared with theirs. I think absolutely it would be confused with their package. I think surely this package, Plaintiff's Exhibit 14, is comparable to Plaintiff's Exhibit 1. Taking Plaintiff's Exhibit 10 and Plaintiff's Exhibit 14, I do not think that is right. I do not believe in the whole thing, the product itself. The Shredded Wheat people have built up a business. Kellogg has a darned good business, Kellogg's Corn Flakes. Why should they come and meddle with this one?

I handle Kellogg's Corn Flakes and Post Toasties. I did not sell one of Post's to a case of Kellogg's Corn Flakes. We have not the demand. I did not give it a thought when Kellogg's brought out Corn Flakes and then Post Toasties came out. I do not like the Post Company introducing competition in the corn flakes. I do not think that is just. I feel Kellogg should have had a complete monopoly in their brand of corn flakes, because they brought it out. I do not know as to the National Biscuit Company. I will go back farther than that and say that the Shredded Wheat Company should have a monopoly, for all time, absolutely.

RE-DIRECT EXAMINATION.

THE WITNESS: Eliminating for the moment the words "Kellogg" and "biscuit," the picture of two biscuit on a dish represents shredded wheat to my mind. It is one of these, and it is in a dish. Taking a biscuit from Plaintiff's Exhibit 1, taking the two together, it is just a small picture of the shredded wheat. I think it is unfair.

RE-CROSS-EXAMINATION.

THE WITNESS: If the Kellogg package were made so that, in my idea, it was not a scale copy of the

Shredded Wheat Company package, I think it would still be wrong. It is not necessary. There is no need for them to put it on the market, no call for it. That is not the reason I did not put it in. I surely want to testify that I turned down a product I thought there was a demand for. I have done it in several cases. I know there is not a demand for Kellogg's, in my lifetime, anyway. I turned it down on the ethical ground I thought it was not fair to the National Biscuit Company, through my lifetime, anyway, if not perpetually.

I cannot say that I did have any feeling about stocking competitive Corn Flakes against the Kellogg Company. To be honest, I think Kellogg's Corn Flakes and Post Toasties are two different products. One is a lot thicker, the Post Toasties. In my opinion, they do not taste half as good. There is really no comparison between the two. If they made the same kind of thin corn flake which could not be distinguished from the other, I would refuse to stock them. On that ground, I think Kellogg should have a monopoly on them for all time. If they bring it out, put it on the market, and everybody is satisfied, I do not think they should come across and take advantage of their advertising. All the stock of corn flakes I have tried in the store are Kellogg's and Post Toasties. I have been offered many others.

I just like to have one brand and one kind of product, if it is a good one. That is a more convenient way for me in carrying on the grocery business. It prevents me from getting stocked up with a lot of different brands.

LUCIEN N. ROBINS.

Deposition taken at Boston, Massachusetts. November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the retail grocery and provision business and have been at my present place about 20 years. I was in Charlestown, running a store there for about nine years, and was over there eighteen or nineteen years. During that period, I dealt in general lines of groceries, buying and selling, cereals among others.

I recognize the article taken from Plaintiff's Exhibit 1 as a shredded wheat biscuit, with which I have been familiar as long as I can remember. We sold it years ago in Charlestown; I should think, as long as I have been in the business. I should think, all the time I have known it, the biscuit has been about the same. It is about the same as I have always known it.

Shredded wheat means to me a breakfast food, a cereal. If a lady comes to my store or telephones and asks for a package of shredded wheat, we give her a package like Plaintiff's Exhibit 1. There is no other product I know of I use to fill an order for such an article. I know my customers, when they say shredded wheat, have in mind that package.

I have had occasion to know, over the period of years I have been handling it, that this product has been advertised, and it has always been one of our best sellers. We never have had any trouble with it in any way. I think there is a large demand for shredded wheat. I do not know exactly what would cause that demand, any more than what they like and want.

I have seen advertising of shredded wheat, consisting of a picture or representation of a dish with biscuit in it. I do not know if it was carried on a package. I recognize Plaintiff's Exhibit 10, as a package

that has been used by the Shredded Wheat Company, and I remember the picture of biscuit in a dish now. I do not know how long it has been used. It seems to me that is the package, as long as I have known it.

CROSS-EXAMINATION.

THE WITNESS: A National Biscuit salesman asked me to come to testify; wanted to know if I would come down to some kind of meeting; said there was some sort of meeting between Kellogg and National. He did not seem to know anything about what he wanted me to testify to.

I buy shredded wheat through the Boston Wholesale Grocery Company; that is, I did, but not now. We bought it until after National took the distribution over from the wholesale grocers, as a National Biscuit Company product. I cannot say how long ago it was added to the National Biscuit line. I have chain competition near me. They handle National Biscuit Shredded Wheat. I do not know how they buy it. I do not know their prices and discounts, any more than hearsay. I always supposed they bought the same.

I know nothing about Kellogg's biscuit, never have carried it in my store; do not think it was offered to me; will not say it has never been. I do not know much about the product; do not know that I have ever seen any. I handle Kellogg's Corn Flakes, which I think is a bigger seller than shredded wheat.

JAMES KERSHAW.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I have a retail grocery and provision store, at 361 Broadway, Revere, Massachusetts.

where I have been about twenty years. I have been in retail grocery business twenty-five years.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat, which I have known since I was a baby, old enough to eat it. I am a consumer of it as well as a dealer. I have to eat it. I used to like it but do not care much about it now. When I was a hungry boy, I liked it. During the time I have known it, its appearance has been about the same. I do not see any change. I remember the package. They always look alike to me. I never see any change in it at all.

When a customer asks for a package of shredded wheat in my store, that is all she gets, because that is all I ever handled. All I know of shredded wheat is that package. I have known it as shredded wheat ever since I can remember knowing anything. When I hear the expression shredded wheat, I go for that package. That is it. I never had anything but this shredded wheat in my store. When a customer comes in and says she wants shredded wheat, she always gets that. I had no other to see whether there was any special one or not; only they must like it. I sell a great deal of it. They do not bring it back and say they do not want it.

I do not know about the representation of a dish with biscuit in it. I recognize it by knowing the front with the building and so on. I do not recognize and have no recollection of Plaintiff's Exhibit 10.

CROSS-EXAMINATION.

THE WITNESS: I never heard of Kellogg's biscuit until I happened to see it today. I just saw it here. I might have had it offered to me. I turned down lots of salesmen, had a lot of trouble with them.

In Corn Flakes, we just have Kellogg's. My reason for having one brand is to keep it fresh. I have

much competition, but I meet it by keeping it fresh. I have my cake down to one brand and keep it fresh. It is desirable from our standpoint to keep one brand and keep it moving along. If I were offered another brand of shredded wheat, the chances are I would turn it down, for that reason. Generally speaking, I like price competition between different manufacturers.

I buy what I want through New England Stores Supply. If I cannot get it there, I buy it outside for cash. I buy shredded wheat directly from National Biscuit Company, not through any wholesaler or chain: because I can buy it from them with profit and sell it the same as they. I handle other products of the National line, cookies, which are delivered to me along with other products when I order them from the National.

I have been buying shredded wheat direct from National ever since they took it over. I have tried other brands of Corn Flakes, but they want Kellogg's.

HARRY ADRIAN.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the retail grocery and provision business, at 102 Main Street, Malden, Massachusetts; having been there ten years, my entire grocery experience.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat, which I have known for about twenty years. I was a consumer of it before I was in the business and still use it. It is a favorite cereal in my home. I am familiar with the package and have known it for the same time.

If a customer asks for shredded wheat, we give her shredded wheat, for we have no other in the store. It means whole wheat biscuit, with a picture of Niagara Falls, with the factory. The name shredded wheat carries with it an indication of the fact that it is made in Niagara Falls.

We had a peculiar experience once, passing some shredded wheat which was not that product or in that box to a customer, and she said she wanted the one with the Falls on it, refusing it until I produced the other. What we tried to give her was Kellogg's Whole Wheat Biscuit. I had one case in the store and it lasted so long I would not reorder it. I had to discontinue the sale of the whole wheat biscuit because we do not like that long a turnover in the store. We ought to have cereals once a month.

I opened up a package of Kellogg's biscuit, took them home, and liked them very much. They are precisely the same, only it is probably smaller. In my experience, it was a trifle crisper when milk was poured over it; a very nice flavored biscuit.

If I had a Kellogg's biscuit on the table outside the package, I would think it was a Shredded Wheat Biscuit. It would be hard to differentiate them without the box.

I think the shredded wheat biscuit like those in Plaintiff's Exhibit 1 have a great reputation with the consuming public, because it has been before the public eye so long a time that one does not conceive of shredded wheat, unless it is in that style package.

The dish on the package of the shredded wheat is one of the outstanding features of shredded wheat, as long as I can remember. Even in my younger days at home, it had a dish with two biscuit.

I have seen a package like Plaintiff's Exhibit 14; only the one we had before had cellophane, and I do not believe there was a dish. Shredded wheat showed

through the cellophane, the window, which showed the ends of the biscuit inside the package. A person seeing that package in a pile, without reference to the reading matter on it, but seeing the saucer and the two biscuit, would get the impression it is shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: I have no doubt it is shredded wheat. I was asked to come to testify today, by a representative of the National Biscuit Company. I also handle their other products. I used to buy shredded wheat through the wholesaler. Since National took it over, I buy it both ways, direct and sometimes through the wholesaler when he gives us a better trade than the National. I cannot conceive how they do it. A jobber will come in and say he will give us a good trade for shredded wheat, and we take a case. Maybe he is trying to get some money he needs or trying to get into the store to sell us other merchandise.

I do not know whether the National distributes its merchandise through wholesalers or not. Most of it is distributed by themselves. I handle several products in competition with National. We have Sunshine, Feldman Biscuit, Weston Biscuit. We have a special trade that asks for those. We have just Kellogg's Corn Flakes and Post Corn Flakes.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not think one glancing at Exhibit 14 be led to believe it was the Niagara Falls Shredded Wheat; because, if they did not have Niagara Falls on, they would know it was not the shredded wheat they had always been buying. Maybe they would know it was a biscuit of the same kind. I had the occasion I spoke of, where a customer asked for shredded wheat, and I offered her Kellogg's. She looked the

package all over and said it was not the biscuit she wanted: "I want it with the factory on."

RE-CROSS-EXAMINATION.

THE WITNESS: That one instance is the only one I recall. I did not have shredded wheat, and I did not want to lose the sale. We had just one case of Kellogg's biscuit. It was a slow seller, so I did not want it in the store.

W. A. DOYLE.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am now demonstrator on shredded wheat and cereal for National Biscuit Company, with whom I have been about three months. Before, I was with Arbuckle Coffee Company in New York City. We have just been going from store to store here, where they designate.

I am familiar with shredded wheat, having known it ever since I have been able to talk and see things; all my life. I recognize Plaintiff's Exhibit 1 and contents as shredded wheat, that I said I have known all my life. It is just exactly the same form and appearance of biscuit as I knew when I was young.

I know shredded wheat has a reputation with the public, from my experience in purchasing it; it is the only shredded wheat I ever knew, the only box I would ever accept as shredded wheat. The same applies to the public at large. The good will of the public is in Shredded Wheat; and there is nothing else you could call shredded wheat.

I had breakfast at the Biltmore Hotel at Providence, Rhode Island, November 7, 1932, and ordered a

serving of shredded wheat. They brought me a package of Kellogg's biscuit in the original package. I told the girl that was n[illegible]e shredded wheat I wanted. She said, "That is [illegible] shredded wheat we serve." I did not eat it; bu[illegible]the package and the menu they listed it on alo[illegible]e. Plaintiff's Exhibit 16 is the package and Pl[illegible]'s Exhibit 17 the menu I took at that time.

I had a similar experience last summer, while I was connected with Arbuckle Coffee in New York. Mr. Kenney and I were at breakfast in Doukas Cafe, Keene, New Hampshire. We ordered shredded wheat. A gentleman who I think was the proprietor brought a serving of Kellogg's biscuit. We objected to it and said it was not shredded wheat. It was in the package. He insisted it was shredded wheat. We went into lengthy detail about it. He also stated Kellogg had bought out Shredded Wheat Company and that that was the shredded wheat.

We did not succeed in getting anything else. He did not even state it was owned by National. His honest statement was that the Kellogg Company had bought it out. I knew that was not so. I did not keep the package.

I recall the picture of a dish with two biscuit, on shredded wheat packages, similar to Plaintiff's Exhibit 10. That was there for maybe fifteen years. I think I remember it up to a couple of years ago. Then it was not on. Recently, it has come back. There was always that association of the dish with two biscuit, on the package.

I observe the dish with biscuit on Plaintiff's Exhibit 14. I have seen the Kellogg package before. As a cereal man, I would say there was great possibility of the public being deceived thereby. The dish with two biscuit certainly looks as if it must have been taken from the old shredded wheat package. That would be

my belief. In fact, I have heard a few comments about that.

CROSS-EXAMINATION.

THE WITNESS: I know Mr. James F. O'Brien; knew him while he was with Arbuckle Brothers. I did not go with the National when he did. He was with them quite some time. I only came here recently, two and a half or three months ago.

The only practice I would have is, if I were to order shredded wheat, I would want shredded wheat. If they served me Kellogg's I would not take it.

When I told the man at Keene it was not shredded wheat, I meant it was not the shredded wheat made by the Niagara Falls concern. He said nothing about it being made at Battle Creek. He said it was shredded wheat. I doubted that it was shredded wheat, because I was always able to tell shredded wheat. I knew the exact biscuit, could pick it out of any biscuit.

I have eaten the Kellogg product, which is a whole wheat biscuit. It is not shredded wheat. I could not say if it is a shredded whole wheat biscuit. I call the product in Plaintiff's Exhibit 1 shredded wheat biscuit. Not being really familiar with the Kellogg biscuit, I could not tell you what it is, not being posted about the making of it.

In Plaintiff's Exhibit 1 is shredded wheat. I do not know anything about the manufacturing process. If I asked for shredded wheat, I would want it served to me.

I have only been with National two and a half months. Did not come with them through O'Brien, only as demonstrator, not really being paid by the company. From my own experience, I cannot say if the shredded wheat biscuit is made by shredding wheat and forming it into a biscuit and baking it. All I can say is from eating shredded wheat.

THOMAS ROGER KENNEY.

Deposition taken at Boston, Massachusetts, November 29, 1932.

Direct Examination.

The Witness: I am in the employ of cereal division, National Biscuit Company, and have been for six months; in cereal business for twenty years. Was with Kellogg Company about fifteen years; then with Arbuckle Brothers, previous to National.

I have been familiar with shredded wheat all my life. Shredded wheat means to me the shredded wheat biscuit. The only association I would have with the term shredded wheat would be the Shredded Wheat Biscuit put out by the National Biscuit Company.

In August of this year I was in Doukas Cafe, Keene, New Hampshire, asked for shredded wheat, and was served Kellogg's biscuit. I told the waiter that was not shredded wheat, was not what I wanted. He insisted it was shredded wheat, the only shredded wheat he had. To convince me it was, he told me the Kellogg Company had bought out the Shredded Wheat Company and was now putting the biscuit out in this package and in this form. I explained who I was and my connection with the National, and told him he was wrong, that shredded wheat was still being put out, as it always was, and the package he had served me was not shredded wheat.

Cross-Examination.

The Witness: I meant that it was not shredded wheat, by the term that shredded wheat implied. There was never any qualification as to shredded wheat. It was shredded wheat, always, just a regular shredded wheat biscuit.

I would describe the Kellogg product I was served as a whole wheat biscuit, not known as shredded wheat

biscuit. It was a solid biscuit, not what you might call a raised biscuit. I knew it had entirely different physical properties from the biscuit the Shredded Wheat Company made, because he served it to me in a Kellogg package. I did not see the biscuit inside; I refused the package. Mr. Doyle was with me then. We ate breakfast together. I did not eat any shredded wheat in that restaurant that day. I went somewhere else and got shredded wheat.

We sold this man at Keene shredded wheat. He still had Kellogg's biscuit there, but we sold him shredded wheat made in Niagara Falls and sold it in two or three other places. It is not my position or work to and I am not going around the country for the National Biscuit Country telling people that Kellogg's product is not a shredded whole wheat biscuit.

I have seen the Kellogg biscuit outside the package; but I say that, physically, there is no resemblance at all between the Kellogg product and the Niagara Falls product. I know how shredded wheat is made. I believe the two products are made differently. I do not know exactly the difference. I never associated the two together.

The time Doukas, at Keene, tried to tell me Kellogg's biscuit was a shredded wheat biscuit is the first I had heard of any association between that biscuit and the Niagara Falls biscuit. He told me he had been informed Kellogg had taken over the Shredded Wheat line. I was with National at the time; before that, with Arbuckle Brothers, and James F. O'Brien was with them then, and I knew him. I came into National through him.

I was with the Kellogg Company from 1914 to 1929. I have sold some Kellogg whole wheat biscuit, when it was a flat biscuit, when it was on the market, not as late as 1929. O'Brien was not with Kellogg in 1929. I think he left them in December, 1928. When I was with

Kellogg, I knew we had a Whole Wheat Biscuit, but we never called it a shredded wheat biscuit.

I have seen a package like Defendant's Exhibit 5. That was only on the market a short time when they changed it. I knew of the package, but we were instructed to discontinue to refer to the biscuit that way. I am positive I never, in any way, thought of the Kellogg product as being physically a shredded wheat product. We always associated it more with Triscuit than with Shredded Wheat Biscuit. I refer now to the product marketed in cartons like Defendant's Exhibit 5.

Stipulated that each of the following witnesses:

I. Loss, 124 North Street, Salem;
Alexander Lager, 79 Leach Street, Salem;
Charles Goldberg, 107 School Street, Salem;
George Quint, 47 Margin Street, Peabody;
A. J. Ayotte, 247 Jefferson Avenue, Salem;
R. C. Smiley, 86 North Street, Salem;
Samuel Wallace, 123 Hale Street, Beverly;
A. Nelson, 944 Broadway, Everett;
Donald Black, 681 Main Street, Melrose;
Peter Tolan, 213 Franklin Street, Wollaston;
G. O'Brien, 1911 Dorchester Ave., Dorchester; and
Thomas Cafferalla, 77 Newbury Avenue, Atlantic;

would testify, if called, that he is a retail grocer in or about Boston, handles Shredded Wheat of the National Biscuit Company, formerly made by Shredded Wheat Company; has known it for several years, and, when customers ask for shredded wheat, the order is always filled with the product of the plaintiff.

MRS. GRACE DARLING.

Deposition taken at Boston, Massachusetts, November 29, 1932.

Direct Examination.

The Witness: I am a housekeeper in Wollaston, Mass., and have a son, sixteen years old. I am familiar with shredded wheat, having used it since my son was four months old.

I recognize Plaintiff's Exhibit 1, having bought a good many of them; it is the package in which I have been accustomed to purchase shredded wheat.

In October of this year, I went to the Quincy Market, as I do Saturdays. As I went up the aisle, a clerk held a package out. I did not see the name but what I supposed was shedded wheat. I was out of shedded wheat, and I wanted some, because I am never, never without it. I gave him my traveler and said, "Send it up," and thought no more about it.

Q. 13. Let me ask you this: When you say you saw what you thought was shredded wheat, do you mean that the words *shredded wheat* were on it?

A. No. I saw this picture there, and I supposed it was shedded wheat. I did not see the name.

Q. 14. You saw the picture, but you did not see the name?

A. No.

Q. 15. Was that the box, Plaintiff's Exhibit No. 1?

A. Yes, that was it.

Q. 16. But you did not read it?

A. I did not read it as carefully as now.

Q. 17. What happened then?

A. I went away that night, and I did not come back home until the next day, and he always comes up to see me; and he started to make a dreadful fuss about the

shedded wheat, and how he wondered where I got it, and what is the matter with it, and why I did not get shedded wheat; and I said, "It is shedded wheat." And he said, "It is not shedded wheat; it is straw." And I said, "No? Oh, well, if is all right." And he kept on fussing and fussing about it; and he asked me that I would not get him any more. I kind of forgot it and went out to the store and ordered some more shedded wheat, and the box of shedded wheat disappeared. I do not know where it went to. I am sure I do not know, and that was——

Q. 18. Was that the first time you had received anything different from that which you had been accustomed to receive?

A. I had never seen a substitute in all the years that I had bought shedded wheat. That is the first time I had seen a substitute for shedded wheat. That is, I presume, the reason why I did not stop to look at it and read it.

Q. 19. So you had purchased shredded wheat for a number of years?

A. Since he was four months old. That is all I had, nothing else for him.

Q. 20. And he has used it constantly all during that time?

A. Yes, we had it all the time.

CROSS-EXAMINATION.

XQ. 47. It is perfectly obvious to me that your son did not think he was getting the product he had been getting.

A. No, he said it was straw and he did not want any more of it. Well, I said, "You do not need to have any more of it." I did not even look at the name. I just saw the picture there while I was going up the aisle. I did not want to have to go all the way back to the other corner where I would have to go to get it, and I just passed the slip in, as I went by.

XQ. 48. And at that time, you think it was this same package?

A. Yes, this same package.

XQ. 49. Referring to Plaintiff's Exhibit No. 14?

A. Yes.

MR. CLARKE: That is all.

RE-DIRECT EXAMINATION.

RDQ. 53. You saw the package?

A. I saw the shedded wheat, you see. I had to have it Saturday night. Saturday afternoon, I had to have the shedded wheat. That is all I did see.

RDQ. 54. Do you mean you saw the name?

A. No, I saw the picture of shedded wheat. I did not look at the name, you know, because, in all the years I have bought shedded wheat, I have never seen a substitute for it; and I suppose that is why I did it.

RE-CROSS-EXAMINATION.

RXQ. 55. Have you a husband?

A. I just buried my husband.

THE WITNESS: He was a minister. I do not approve of the manufacture of shredded wheat by more than one concern for my home. I am not speaking generally, but I would not use it in my home.

PRESTON DARLING.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am sixteen. My mother just testified. I have eaten it ever since I can remember. I recognize the package, Plaintiff's Exhibit 1, it is

shredded wheat. I recognize the biscuit in it as the biscuit I always have.

Plaintiff's Exhibit 14 is the package sent home that day. I recognize it. We usually eat shredded wheat biscuit for breakfast with milk and sugar; sometimes eat it dry with butter on.

I ate the Kellogg biscuit both ways; first with butter. I did not like it. It cut my tongue. I tried it for breakfast with milk, I think. I only ate two out of the package.

CROSS-EXAMINATION.

THE WITNESS: I do not know what became of the rest; but I think my sister's dog likes it and I think that is where it went. I do not know if she tried any. My sister does not live with us. I do not know how she got it. They take the dog to our house quite often. That must have been when the dog got it.

Then I wrote this message to National, that I had been eating shedded wheat, my mother said, ever since I was four months old; that she brought home a new kind, which looked as if it would pass for shedded wheat, but it did not taste like it. We got an answer from somebody who said they were glad to hear from satisfied customers. I do not know what else they said. Some fellow came to see me, and then Mr. Savage saw me. Sometimes, when shredded wheat is gone, I have to eat some other cereal.

The Kellogg biscuit cut my tongue just enough to make you know it was not good, that it was not showing up very good. I do not know if I ever had shredded wheat hurt my tongue in any other way. It breaks up. This stuff is just like wire. I knew right away I was getting another product.

HAROLD A. DAGGETT.

Deposition taken at Burlington, Vermont, December 7, 1932.

Direct Examination.

The Witness: My family live on Cape Cod. I sleep around here, where I happen to be. I am a salesman of the National Biscuit Company, my duties requiring me to travel, on the road all the time. In the course of my work, I have found demonstrations of Kellogg's products.

In October, I was at Colodney's Market, in Burlington, conducting a sale of Wheatsworth. Next to me was the Kellogg demonstrator, a woman, selling a package of Wheat Flakes, a package of Rice Crispies, and a package of Pep, the three for 29 cents, and she stated she was giving a package of shredded wheat free with each purchase. I saw what she was giving as shredded wheat. It was Kellogg's Whole Wheat Biscuit. I saw her hand that out several times, in my presence.

Cross-Examination.

The Witness: I think her name was Brownell. She demonstrates for them here, has been with Kellogg for some time. I have seen her here for them before. She told me she worked for them; does practically all their demonstrating here. She is a short woman. I am not positive of the name.

XQ. 18. What language did she use in demonstration? How did she talk?

A. She would say, "We have a value here today. A package of Wheat Flakes and a package of Crispies, and a package of Pep, all for twenty-nine cents; and we are giving you a package of shredded wheat free."

XQ. 19. You are quite sure that that was the language she used? Are you sure she did not say Kellogg's Shredded Wheat?

A. No, she said, "We are giving you a package of shredded wheat."

XQ. 20. How many times did you hear her say that?

A. Well, quite a few times; because, naturally, I pricked up my ears when I heard her say shredded wheat.

XQ. 22. What kind of package was it that she gave out? A Kellogg package or——

A. A Kellogg's Whole Wheat Biscuit, you know, the regular package that they have.

XQ. 23. And you say that that was the package that she was giving out?

A. Oh, yes, I would say that that was the package that she was giving out.

XQ. 24. And that package was unwrapped, was it?

A. What do you mean?

XQ. 25. It must have been unwrapped, because you saw it.

A. Well, she had one of the little isinglass packages, you know. There is one little package that has isinglass in the center of it. She had that right there, you see.

XQ. 26. Was it a package of the whole wheat biscuit?

A. Yes, it was that. She would take it from her stock there.

XQ. 27. So she had a stock piled up there?

A. Well, you see, she said that they sold some four hundred packages.

XQ. 28. How was that stand arranged?

A. Well, there was a package of biscuit here, and the packages—one of those little display stands, with a pile of each of them there.

XQ. 29. They were prominently displayed?

A. Oh, yes, prominently displayed.

THE WITNESS: I kind of joked with her, told her that was not Shredded Wheat. One of the customers turned it back and said, "That is not shredded wheat. I do not like it." The woman had tried it, and I heard her say that. The woman would not buy it. A lot of them took it and did not know the difference. They had had it, but, like a lot of other things, I do not know where it is carelessness or not. When I say it was not shredded wheat she was selling, I mean it was not Niagara Falls Shredded Wheat. I mean to say the shredded wheat I know is the shredded wheat I have had since I was a kid, made at Niagara Falls.

I am not a production man, and I do not pretend to know whether it is possible to have shredded wheat made anywhere except at Niagara Falls. I have eaten Kellogg's biscuit, and I cannot say it was not shredded wheat. As a matter of fact, I know nothing about it. When I am talking about shredded wheat, I am talking about the shredded wheat I have known. I did not talk to the woman who handed it back, at all. I never spread around that Kellogg's biscuit is not shredded wheat. I never knock anybody. There has never been a National man even mentioned Kellogg's. We are too busy selling our own products.

BENJAMIN HARRISON SHARPLEY.

Deposition taken at Burlington, Vermont, December 7, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a restaurant proprietor, having been such two months. I lived in Burlington all my life, have been chef, and steward in hotels. I recently purchased a restaurant at 150 Church Street, Burlington, and ordered some supplies. I am familiar with shredded wheat, and have been for twenty-five to

twenty-eight years. All I know about it is that it is a very healthful, delicious breakfast. I know the Niagara Falls Shredded Wheat Company really puts out the finest cereal in domestic commerce. I have known that ever since I have kept a hotel.

I ordered shredded wheat for my new restaurant, at the Burlington Grocery, wholesale. I received Kellogg's wheat biscuit substitute. I ordered the real Shredded Wheat Biscuit, Niagara Falls, emphasized that in my order. I got the carton, photograph of which is marked Plaintiff's Exhibit 18, being case No. 3221-24.

I obtained from National some menu cards for my restaurant, like the one you show me, carrying printed on the bottom the words *shredded wheat.*

We still have the shipment of Kellogg's Whole Wheat Biscuit on hand, having served only an order or two since we got it. The help have eaten some of the rest, to get it out of the way. When a customer calls for shredded wheat, I give him the whole wheat biscuit. One occasion, a customer said, "No, have you got the real shredded wheat?" I said, "That is real shredded wheat." And he said, "No, that is a whole wheat biscuit. I want shredded wheat. If that is what you call shredded wheat, that is too tough."

CROSS-EXAMINATION.

THE WITNESS: I think we served an order or two of Kellogg's biscuit in our restaurant. I still have some on hand. It is on exhibition there. If our trade want it, all right, it is there.

I have Niagara Falls Shredded Wheat now and did have it. I am serving two kinds of shredded wheat now, whole wheat and shredded wheat.

I do not believe I have specially noticed the picture of Niagara Falls on the shredded wheat package. I

know the Niagara Falls Shredded Wheat Company puts out the finest cereal. I spoke of it as that, because it stated Niagara Falls on there. In saying that, I associated the picture of Niagara Falls with a picture of shredded wheat on that first product. I remember seeing the picture of the Shredded Wheat factory at Niagara Falls, I guess, away back.

I did not see that the Kellogg biscuit was not the Niagara Falls Shredded Wheat until it was up on the shelf. Then a customer gave the girl an argument. I thought the Kellogg Whole Wheat package was a Niagara Falls package. I saw the difference, noticed that right away. This customer started the argument my first week in the restaurant, say between the 17th and the 23rd. The girl put the whole wheat biscuit down, and he said, "I want some shredded wheat." The girl insisted that he got it, but he said, "No, that is Whole Wheat. Don't you know what shredded wheat is?" Then I snapped into it. That roused me. I overheard it. I said, "No, that is not real Niagara Falls, but a different kind of shredded wheat biscuit." He said, "I want Niagara Falls. It is made in Niagara Falls. That tastes more like baled hay."

When he said it was whole wheat biscuit, he had the carton in front of him. The girl simply opens it up and hands it to him. He handles it himself. The girls are not allowed to touch that. It is a little individual carton, holding two whole wheat biscuit. The girls were serving it in those cartons, marked Kellogg's Whole Wheat Biscuit. A customer said it was not Niagara Falls Shredded Wheat. I explained it was a different kind of Shredded Wheat, made at Battle Creek, that I had ordered Shredded Wheat and had not yet received it; that was all I had that morning, and I would see I had it in stock. He said it tasted like baled hay. I was very busy, so I do not remember all that took place.

I had no complaints from my help about eating Whole Wheat Biscuit. You would not get it from them, anyway. I have tried it myself. There is as much difference as day and night between the two. I could tell the difference blindfolded, between the Kellogg product and the Niagara Falls product.

ALEXANDER VERRET.

Deposition taken at Burlington, Vermont, December 7, 1932.

Direct Examination.

The Witness: I am a retail grocer at 112 Church Street, Burlington, in business for myself for thirteen years, worked in grocery store in Burlington twenty-nine years. I carry a full line of groceries, including cereals.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat biscuit, which I have known for twenty-nine years. During that period, the general appearance, form and size of the biscuit has been the same. My customers ask for shredded wheat biscuit and I give them a biscuit like that in Plaintiff's Exhibit 1. I recognize the package, with the picture of Niagara Falls. I have been familiar with it about twenty-nine years, and it has been substantially the same in form during that time.

I have seen in shredded wheat advertising a dish with two biscuit in it, as on Plaintiff's Exhibit 10. I remember seeing that for a long while. Shredded wheat and the name shredded wheat have a reputation among the purchasing public. When a customer asks for shredded wheat, I believe she means Niagara Shredded Wheat. It is the one that has been identified with the package with Niagara Falls on it.

CROSS-EXAMINATION.

THE WITNESS: I have handled Kellogg's biscuit. We carry it in cartons like Plaintiff's Exhibit 18. We do not supply the small two-biscuit cartons to the restaurant trade. I still carry Kellogg's biscuit and deliver it to customers who ask for Kellogg's whole wheat. Some do ask for Kellogg's Whole Wheat. If a customer asked me for Kellogg's Shredded Wheat, I would give them Kellogg's Shredded Wheat. I have no doubt about the Kellogg product being a shredded wheat product made by Kellogg. I have been handling the Kellogg product two or three years, and I buy it through wholesalers.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not sell many Kellogg's Whole Wheat Biscuit.

FREDERICK E. BLAIS.

Deposition taken at Burlington, Vermont, December 7, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, purchasing my supplies from Burlington wholesalers, Vermont Food and Burlington Grocery. I ordered shredded wheat from Burlington Grocery Company two or three weeks ago and got Kellogg's Whole Wheat, the package, Plaintiff's Exhibit 18. I wrote my name on top to identify it down to the agency. That is my signature. I went there and told him I wanted a case of shredded wheat and ordered some other stuff, too. There were no ifs and ands. When I got to the stock room, I got a case of this. I had a wagon there to take it away. My order for shredded wheat was filled with Plaintiff's Exhibit 18.

CROSS-EXAMINATION.

THE WITNESS: I did not know whether they had any Niagara Falls Shredded Wheat in stock and could not tell you if they had been cut off from supplies of Niagara Shredded Wheat. When I saw the Kellogg carton, I knew it was a Kellogg product and not Niagara Falls Shredded Wheat. I have been in business about six years and dealing in Kellogg products all that time.

After getting the case of whole wheat biscuit, I had to go by the National Biscuit agency where my brother is shipping clerk. I told him I had ordered a case of shredded wheat and gotten this from the Burlington Grocery. He told me to drop it there, which I did. Some man from the National paid me for the case. It was not my brother asked me to buy this case; but the other fellow told me to buy a case of shredded wheat and, no matter what kind of case I got, to bring it to him. He said to ask for a case of shredded wheat, and, if I got a case of Kellogg's, to bring it to him. He asked me first where I usually buy my groceries. I told him I got some from Burlington Grocery and some from Vermont Food. So I went to Burlington Grocery. I knew nothing about whether they had cut off the Burlington Grocery as a wholesale dealer, and he did not tell me.

I handle both kinds of shredded wheat, Plaintiff's Exhibit 14 and Plaintiff's Exhibit 18 in my store. I have handled this one, like Plaintiff's Exhibit 18, only in the last two or three months. I do not sell a great lot of it; because, when they ask me for shredded wheat, I always push the Niagara Falls one. I do not care about selling the other. They had a kind of sale. A certain percentage of sales was going for the benefit of Veterans of Foreign Wars; and they asked us, to oblige them, to get a full line in. That is the first time

I had it. The Kellogg salesman asked me to take the whole line, because I did not handle Whole Wheat or Kaffee Hag. We got them from them then.

I now buy my Niagara Falls shredded wheat from the National Biscuit Company and buy and handle their whole line, one hundred per cent. I handle no cookies or crackers except the National. I get no special discounts except the regular 10 per cent. I handle the National line because I think it better; just on the quality of the goods. The only competitor to the National line in my store is Kellogg's Whole Wheat Biscuit; otherwise, I have a hundred per cent. National products. The other products I buy from wholesale grocers. I buy the Niagara Falls Shredded Wheat from the National Biscuit Company, and they deliver it to me.

I am not a member of any chain store organization. The Reed Murdock salesman has not come over yet, but National has promised that, through him, it will get in touch with me and give me a special extra seven and a half per cent. discount.

I was not involved in the old discount fight between grocers and the National some years ago. I did know, however, they gave preferential treatment to chain stores.

RALPH THAYER.

Deposition taken at Burlington, Vermont, December 7, 1932.

Direct Examination.

The Witness: I am a contractor and builder. Sometime last month, November, 1932, I went in a restaurant on Church Street, the Vermont Lunch, and called for a serving of shredded wheat biscuit. She took down a small box of Kellogg's biscuit, opened it and brought it to me. I said, "This is not shredded wheat, is it?" She said, "No, it is not; it is Whole

Wheat, but it is the same thing, made just the same way and of the same stuff, just as good, if not better." I said, "I want shredded wheat." She said, I have not got it; this is the same thing." I asked to see the box, and she took another box and set it up. I said, "I want the box this came out of," and she got it. Then she wanted to know if I did not call it just as good, just the same as the other.

I ate the Kellogg biscuit. I did not see any menu on the counter. The box that was served me, which contained two small biscuit, is Plaintiff's Exhibit 19.

CROSS-EXAMINATION.

THE WITNESS: I ate the Kellogg biscuit served in the little Kellogg package. The girl asked if I liked it. I told her I could not see any difference, but I always used the other and insisted on it. I have not used Kellogg's since; that is the only time I had it. I have not been in that restaurant since. If I go to a place, ask for something, and they refuse it, if that is all they serve, I do not care to go there again.

I did not notice any difference by eating it. I have no relatives here connected with shredded wheat. I have been working there in that lunch room. No shredded wheat person was with me when I bought it. I have known Mr. Bradbury, of the National, and he spoke to me about going in there at first. Then, I told him I knew them in there and I would go in. He suggested that I go into the Vermont lunch. I think he did tell me to tell them the Kellogg product was not shredded wheat. I told them it was not; and they said it was not shredded wheat, but it was just the same thing, made by the same process and of the same material. I do not think we ever used any by Kellogg's before. It was at Mr. Bradbury's suggestion I brought away the carton that was served me. I had never seen the Kellogg's Whole Wheat carton before this inci-

dent in the Vermont lunch. I was served with two biscuit. I knew before that Kellogg's had a shredded wheat biscuit on the market, but supposed it was one biscuit.

I know Mr. Bradbury is the National representative in this vicinity. He had spoken to me about this controversy before this incident in the Vermont lunch. I never worked for the National, but I had worked in the Vermont lunch, making switches, and so on. I had known Mr. Bradbury before then, went down one night and put up an elevator, did work around there. Through him I knew about the Shredded Wheat-Kellogg controversy, but not very much until I had been in there. Then he asked me what was said and told me what was going on.

RE-DIRECT EXAMINATION.

THE WITNESS: I have been familiar with shredded wheat biscuit ever since I came to Burlington, four or five years. The first place I boarded that is about all we had for breakfast for a year and a half. When I went back up country, they had shredded wheat for breakfast.

ERNEST BRADBURY.

Deposition taken at Burlington, Vermont, December 7, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am National Biscuit Company sales manager in Burlington and have been with them sixteen or seventeen years. At noon yesterday, I was in Burlington with Mr. Vilas, Mr. Smith and Mr. Atcheson. The four of us lunched at the Montpelier Tavern. Mr. Vilas ordered shredded wheat and was served Kellogg's Whole Wheat Biscuit in the Kellogg

package, individual size. Mr. Vilas mentioned the fact it was not shredded wheat; and the young lady said, "It is." Mr. Vilas said, "I am sorry; but that is not shredded wheat." The young lady replied: "Oh, you want the other biscuit," and she grabbed up the Kellogg biscuit, took it back, and served Niagara Falls Shredded Wheat to Mr. Vilas, in a dish out of a package, one biscuit. There was a menu card on the table. Plaintiff's Exhibit 20 was that menu.

This morning, I stopped with Mr. Vilas to take him to breakfast, at Dorn's Cafe, in the New Sherwood Hotel. He ordered shredded wheat and was served Kellogg's biscuit out of the package, two biscuits in a dish out of the package. Mr. Vilas examined them and said to the girl: "Why, that is not shredded wheat!" The young lady stated, as was the case in Montpelier Tavern, "Yes, that is shredded wheat." Mr. Vilas said, "I am sorry, but it is not." Then she said, "Just a minute. You want the other biscuit." She reached down and said, "This is what you want," and pulled out a package of Niagara Falls Shredded Wheat, individual size, opened it up, and served the two Niagara Falls biscuit in a dish without the package. I happened to notice, when she took the two first biscuit out, which were Kellogg's biscuit, when she went back to change them, she took the two biscuit out of the dish, and laid them on the counter. She then took the two Niagara Falls biscuit out of the individual package and put them in the dish, leaving the Niagara Falls package lying beside these other biscuit.

Then, she served the Niagara Falls biscuit to Mr. Vilas. I sat there waiting for Mr. Vilas to get through. I happened to notice she picked up the two Kellogg's biscuit and put them in the Niagara Falls package, brought the package over, and put it down where she keeps her shredded wheat cereal. We obtained that

package just as she put it down. It is Plaintiff's Exhibit 21, which is exactly in the condition in which it was placed by the waitress in the stock, on the shelf. It has not been touched. The two biscuit now in it are the biscuit first served to Mr. Vilas in the dish. I saw them put in there. They were served to Mr. Vilas from outside the package.

I am familiar with the Vermont lunch, Mr. Sharpley's restaurant. They have a supply of menu cards furnished by the National Biscuit Company, of which Plaintiff's Exhibit 22 is one, which I identify as having been taken by me from Mr. Sharpley's restaurant.

Three or four weeks ago, I stopped in at Dorn's Cafe to have a light lunch. I like shredded wheat very much, and I ordered it. I knew they had both shredded wheat and Kellogg's biscuit, and I ordered shredded wheat. The girl picked up Kellogg's biscuit and served it to me out of the individual package, two biscuit in a bowl. I told her right away that it was not shredded wheat, and, as we have stated before, she said, "That is shredded wheat." I told her she was mistaken, it was not and she was doing a very wrong thing by substituting another item when shredded wheat was called for.

Then, a lady who is cashier or something at the door seemed to take quite a little interest in it. She spoke up, asked me what the trouble was. I told her I called for shredded wheat and, though they had shredded wheat on the shelf, the girl had picked up Kellogg's biscuit. In the conversation the remark was made that Kellogg's salesmen were after the girls all the time to push their biscuit out when shredded wheat was called for. This young lady acting as cashier said, "Thank you very much for calling my attention to it. We will have it corrected."

In the instance I just described, I saw the waitress take a package of Kellogg's from the shelf. I saw

her this morning take it, also. In both instances, the biscuit were taken from the package and served in a dish.

CROSS-EXAMINATION.

THE WITNESS: Mr. Vilas is staying at the Vermont Hotel on the trip to Burlington. I drove around and got him this morning. I suggested we go out to breakfast elsewhere and drove to the Dorn's Cafe, where the incident I have related occurred. This was the same cafe where I dined under similar circumstances two or three weeks ago. We sell Niagara Falls Shredded Wheat to them.

Before I went in there then, I believed they were handling Kellogg's product, because, along in September, they had not been purchasing Shredded Wheat, and I figured they would either have some Kellogg's biscuit left or would still be handling it. After September I sold them Shredded Wheat. I think we had sold them a little something before September, but not so much.

They were handling Kellogg's biscuit in that restaurant before I sold them Shredded Wheat. I stated, when Kellogg's was first handed to me in Dorn's, I told her at once it was not shredded wheat. I had ordered shredded wheat and saw her go directly over to the cereal section under the counter. Niagara Falls biscuit and Kellogg's biscuit were there. I saw her deliberately pick up Kellogg's biscuit. When I order shredded wheat, I want shredded wheat and not Whole Wheat Biscuit. The girl said: "That is shredded wheat, made by someone else." That is not literally true, to my idea. When I told her it was not shredded wheat, I meant it was not the Shredded Wheat I have known for years.

I do not tell people it is not Shredded Wheat of anyone's. The way I feel about it, it is not the

shredded wheat I have known. I do not know whether it is wheat. I do not question that it is. I do not say it is not shredded. I am not saying it is not in biscuit form. I say it is not shredded wheat biscuit. The only shredded wheat biscuit I have ever known is Niagara Falls Shredded Wheat.

As general manager of sales in this district, I make the statement that, if it is not Niagara Falls biscuit, it is not shredded wheat. That is true. When I order shredded wheat, I mean Niagara Falls Shredded Wheat.

Wherever I order shredded wheat, if it is not shredded wheat, I tell them so. I did nothing with this Kellogg product that was served me two or three weeks ago. I just let her take it back, and she brought me Niagara Falls Shredded Wheat. That was the same cafe to which I took Mr. Vilas this morning. I do not know the name of either the waitress or the cashier there.

Wherever restaurants want Shredded Wheat menus, we supply them, and we give them cards. We sell shredded wheat direct to the Dorn Cafe now, and we make deliveries direct. That is our general method of supplying the trade in this district.

I drove over with Mr. Vilas to Montpelier yesterday. I had had lunch at the Montpelier Tavern before. The other gentlemen drove over with us, and we had lunch together.

The National Biscuit Company, no longer, as far as I know, markets cartons with picture of a dish with two shredded wheat, as in Plaintiff's Exhibit 10. I have not seen one in a long time that way. All the cartons marketed by the plaintiff company, as far as I know, contain a picture of the Niagara Falls factory and on the end a picture of Niagara Falls, with the words: The Home of Shredded Wheat. The plaintiff distributes its product in two sizes of package, a large

carton with twelve biscuit, and individual cartons, containing two biscuit each.

So far as I know, the policy of the plaintiff company is to encourage the sale of individual cartons so far as restaurant or hotel trade is concerned.

I have been connected with the National Biscuit Company between sixteen and seventeen years. I was not in any way connected with the Shredded Wheat Company before the National Biscuit Company took over the Shredded Wheat Company a few years back.

HARRY J. SOOST.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the retail grocery and meat business in Pittsburgh. I have been in this business all my life having been brought right up with it, ever since I was about six years old and have never done anything else. I carry a full line of groceries, including cereals and the like.

I recognize the article taken from Plaintiff's Exhibit No. 1 as being shredded wheat which I have known ever since it has been on the market about thirty-five or forty years. I know this article comes from Niagara Falls, New York, as I have seen it made, having visited the factory twice. The shredded wheat biscuit looks exactly like it always has and the carton in which it is packed is the same as it has been, as far back as I can remember, about twenty or twenty-five years.

Yes, I recognize Plaintiff's Exhibit No. 10 with a picture of a dish on it and some biscuit in the dish.

This panel on the cartons with the dish and the biscuit in it has been used for about ten or fifteen years. A long time ago we gave dishes—similar to the one on the package—away with shredded wheat. When our customers ask for Shredded Wheat we give them the Shredded Wheat made at Niagara Falls as we have never had anything else to give them and that particular shredded wheat is what our customers expect to receive.

The reputation of shredded wheat biscuit is very good and as long as I have dealt with the company they have occasionally sent a man around to see that the stock was all right and no complaints and I have had less trouble with Shredded Wheat than with any other breakfast food we ever handled.

Shredded Wheat has been well advertised and when anyone went to Niagara Falls the main thing to see was the Shredded Wheat factory.

CROSS-EXAMINATION.

THE WITNESS: I was at the Shredded Wheat factory twice and saw the biscuits made but I really do not remember what they were made of. Some people called them bales of straw or they would ask for the little bales of wheat.

There is no other name for biscuit put up with shredded wheat. I had never heard of Kellogg's shredded wheat and knew nothing about them until the last week or two. I have known the All Bran and have handled Kellogg's Corn Flakes and when a customer asks for Corn Flakes I give her Kellogg's but I have never seen Kellogg's Whole Wheat Biscuit. I have an idea that Kellogg's products are made up in New York State some place. I was one of the first grocers in Pittsburgh to handle their products and have done so ever since they have been on the market

but I have never seen any of Kellogg's Whole Wheat Biscuit and only heard of it recently when my brother-in-law told me that they were putting out a whole wheat biscuit. I had never seen one until just now looking at that package is the first time and they do look the same to me as shredded wheat.

MR. VILAS: Has that an exhibit number?

MR. CLARKE: The reference is to Defendant's Exhibit No. 4 for identification.

I recognize Defendant's Exhibit No. 4 as a Kellogg package by the Kellogg name on it and the color and arrangement suggests a Kellogg's Corn Flakes package.

I remember well seeing the picture of Niagara Falls on the Niagara Falls product and of the representation of the Falls on the end of the carton. They have always emphasized the fact that this biscuit was made at Niagara Falls and this fact is very generally known in the grocery trade.

For the last thirty-five or forty years I have purchased the biggest part of my Shredded Wheat supply from Weisbrod Wholesale Grocery, in Pittsburgh, from whom I can get about the best price. There was no change in the distribution of Niagara Shredded Wheat after the National Biscuit Company took it over, everything went along just about the same.

In addition to National Biscuit Company goods I handle some Beech Nut crackers. I have handled Loose-Wiles goods but not for the past five or six years.

RE-DIRECT EXAMINATION.

If I had a package like Defendant's Exhibit No. 4 for identification and a package like Plaintiff's Exhibit No. 1, side by side, I would have no doubt

in my mind as to which was which. My customers always study the package they are buying and would know the difference all right because we have handled this other package so long.

ALFRED F. BRAUN.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

Direct Examination.

The Witness: I am a retail grocer, in business about thirty years at the same place in Pittsburgh. Up to five years ago it was Stilpe & Brown and now I am in business for myself. I carry a regular grocery line including cereals. Yes, I recognize Plaintiff's Exhibit No. 1 as being shredded wheat, having eaten it at home quite often and I also carry it in the store and have carried it ever since we opened up about thirty years ago. When a customer asks for shredded wheat I give them shredded wheat in a package like Plaintiff's Exhibit No. 1. Plaintiff's Exhibit No. 10 is an old timer that was used ten or fifteen years back.

I recognize Defendant's Exhibit No. 4 as Kellogg's Whole Wheat Biscuit which we have carried for about a year.

I cannot say whether my customers would be familiar with the picture of the dish—probably some of the old-timers would recognize it.

Cross-Examination.

I understand "shredded wheat" to be a wheat product made into biscuit form and shredded. I recognized that Kellogg's Whole Wheat biscuit was a shredded biscuit the first time I saw it. I know of no other way of describing this product and have never heard any other name applied to it.

I would not say that Shredded Wheat and Corn Flakes were both descriptive names. Shredded Wheat sounds different than Whole Wheat Biscuit, there might be a little confusion with some people. Corn Flakes would not be a special name because there are a great many corn flakes on the market. If a customer asks for corn flakes I would give them Kellogg's, it might happen that we would give them Post Toasties but that would be very seldom unless they specified Post Toasties.

I remember the picture of Niagara Falls on the Shredded Wheat package during all the time I have been familiar with it but I am not sure about the picture of the plant with the windows in it on the front face of the cartons. Plaintiff's Exhibit No. 10 seems a little strange, it does not seem to me that the picture of Niagara Falls has been on there long. The factory picture has always been on. I buy direct from National Biscuit Company and handle the rest of their line. I handle some Loose-Wiles goods, not quite as much as National.

I have handled Kellogg's corn flakes, bran products, Pep and whole wheat biscuits ever since we opened business.

RE-DIRECT EXAMINATION.

Yes, "Whole Wheat Biscuit" is another way of describing wheat in the form of a biscuit made of shreds.

RE-CROSS-EXAMINATION.

I would now know what was in a package with the name "Whole Wheat Biscuit" if I did not see the picture of Shredded Wheat on the package but previously if I had simply seen it marked "Whole Wheat Biscuit" I would have known it was a wheat biscuit, possibly made of wheat flour of any character. The first time I saw the Kellogg package if it was re-

ferred to as Kellogg's Shredded Wheat I expected to see a shredded biscuit something like the biscuit in Plaintiff's Exhibit No. 10.

EDWARD P. LOUGHREY.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I have been a grocer for the past twenty-eight years, for the past eight years in business for myself during which time I have been selling a general line of groceries to consumers. During these eight years I have been buying groceries from wholesalers and jobbers and manufacturers including cereals such as corn flakes, bran flakes, shredded wheat, wheatettes, Post Toasties, etc.

Plaintiff's Exhibit No. 1 is the shredded wheat product which I have been selling for twenty-eight years.

I never paid much attention to the packages but I do recall that at certain times of the year I would see a picture of a dish with strawberries on the shredded wheat. That took my eye because it always looked so doggoned good.

The biscuit taken from Plaintiff's Exhibit No. 1 looks like the shredded wheat which I have always sold for shredded wheat. It is the Niagara Falls Shredded Wheat which has always looked the same. I do not remember ever seeing Kellogg's shredded wheat. When I order shredded wheat I merely ask for a case of shredded wheat, meaning the National Shredded Wheat from Niagara Falls and this is what I always get. If a customer came in to my store and asked for shredded wheat I would give her the package like Plaintiff's Ex-

hibit 1, being the only package that I know as Shredded Wheat.

CROSS-EXAMINATION.

I knew the Kellogg Company were around selling a whole wheat biscuit but would not know just what that was, there being so many things whole wheat, but when you speak of Shredded Wheat Biscuit I would know it to be Niagara Falls Shredded Wheat.

The biscuit just taken from Kellogg's package I would sell for Whole Wheat Biscuit, that being what it is marked. I would not call them shredded wheat because I would not know them as that.

It may be possibl for more than one manufacturer to make Shredded Wheat. I only know Kellogg's Corn Flakes in the trade. There are other kinds such as Post Toasties. I have heard of Jersey Corn Flakes but have never handled them. Kellogg's is not the only one that makes corn flakes but when a customer asks for corn flakes I give them Kellogg's, although I handle Post Toasties and Wheaties.

I have handled the Kellogg products since I have been in business for myself and knew of them when working with others in the business. While I have seen the Kellogg Whole Wheat cartons before now I have never seen the whole wheat biscuit. I have had a dozen packages in my store on consignment but could not sell them so exchanged them for something else.

From the time that I went to school and heard them talking of Shredded Wheat I remember seeing the picture of Niagara Falls on the face and panel of the carton. Kellogg's products, I believe, are manufactured in Battle Creek, Michigan.

I handle some of the National Biscuit Company cakes and their shredded wheat and purchase these directly from them. Also carry some Colonial crackers. I am an independent grocer not belonging to any chain.

Seeing the two biscuits together I would recognize that there are two different brands of shredded wheat. If I had Kellogg's product in stock and a customer asked for Kellogg's Shredded Wheat, I would ask her if that is what she wanted.

RE-DIRECT EXAMINATION.

I buy Kellogg's products through a jobber and National Biscuit Company products are delivered by their own wagons.

LEROY SHAFFER.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: For about ten years in the one place in Pittsburgh I have been in the retail grocery, meat and vegetable business.

I recognize Plaintiff's Exhibit No. 1 as shredded wheat. The article taken out of the package is shredded wheat which I have eaten off and on for the last thirty years and the appearance of the biscuit has always been the same. I carry quite a line of cereals. We are right in a district there where people use cereals much more than do those in the cheaper neighborhoods. I handle shredded wheat which I purchase now from the National Biscuit Company. Before they distributed it I purchased it from wholesale grocers and ordered it as shredded wheat. In fact I had but one shredded wheat in mind. I did not always bring in the Niagara Shredded Wheat, I always just asked for shredded wheat and always got the shredded wheat that you have here. If a customer asked for shredded wheat we would give her the shredded wheat we have been

handling for years. Kellogg's have a Whole Wheat Biscuit which we would give out when someone asked for Kellogg's Whole Wheat Biscuit.

In 95 per cent. of the cases, customers asking for shredded wheat want the Niagara Shredded Wheat. Kellogg's Whole Wheat Biscuit are not as well known as their other products. The old carton with the plate or dish on was used for shredded wheat four or five years ago. I do not know exactly the number of years but probably until they changed to the new package marked Plaintiff's Exhibit No. 1.

CROSS-EXAMINATION.

In recent years the shredded wheat cartons have featured the Niagara Falls at both ends. I think I have known since I was a boy that this biscuit was made in Niagara Falls and some years ago I visited the factory myself.

I would not say that Niagara Falls has been emphasized and beaten into the trade but my idea is that that is the original Shredded Wheat. When Kellogg's came out I identified that as whole wheat biscuit. If a customer called up and asked for a package of Kellogg's Shredded Wheat we would ask her if she wanted Kellogg's Whole Wheat Biscuit, to be correct.

My definition of shredded wheat is that it is little shreds perhaps easier to digest.

Kellogg's is the chief brand of Corn Flakes and there are Post Toasties which do not conflict much with corn flakes. I have heard of the Jersey brand of corn flakes, they are made near here. It would indeed be news to me if I were told there were a hundred different kinds of corn flakes.

When a customer asks for corn flakes we give them Kellogg's Corn Flakes because that is what they expect to get. If a customer asked for Post Corn Flakes

I would ask her if she wanted Post Toasties. If she asked for Jersey Corn Flakes and I had them I would be glad to sell them. Kellogg's is a good line except the Whole Wheat Biscuit which is a poor seller compared to Shredded Wheat. I carry both brands to be fair to Kellogg's.

The National Biscuit Company man asked me if I cared to come down to testify. I have known for a long time that there was an infringement as to the name Shredded Wheat but it never concerned me a lot as we never had but the one shredded wheat.

I have never heard of Quaker Corn Flakes nor seen such a package. The Postum Company I have known since I have been in business and I guess it was a long time after I knew them as makers of cereals that they put out the toasted corn flakes. I did not go into the grocery end when I first started in business but the Post Toasties representative lived near me and he put in a line of Postum goods. I consider Post Toasties and corn flakes as two different cereals. If someone asked for Post's Corn Flakes I would ask if she wanted Post Toasties. Most people when they want corn flakes ask for Kellogg's Corn Flakes. If someone asked for Kellogg's Shredded Wheat I would tell them it was Kellogg's Whole Wheat Biscuit. I presume it would be possible to have a whole wheat biscuit in another form made of whole wheat flour or even whole wheat flakes.

I have seen the Kellogg Shredded Whole Wheat Biscuit package but I do not know whether I have ever had it in stock or not. I have never had a case of whole wheat biscuit in the store at one time as it is such a poor seller with us.

Since the National Biscuit Company took over the Shredded Wheat Company I buy direct from them as I can get quicker delivery and get the regular discount.

For the past year I belong to the Triangle Grocers Association.

When I first started in business I handled Loose-Wiles goods but no more unless Triangle has a special sale, in which case I may take a dozen with a guarantee for the sale. If they don't sell they go back.

JANE HESS WHITE (Mrs. Arthur White).

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife and have been acquainted with Shredded Wheat about twelve or fifteen years and have used it about six or eight years, but not so much recently although my father uses it every morning. I have seen it manufactured, having been at the Niagara Falls factory about nine years ago.

When I see the words Shredded Wheat it always conveys to me the fact that it is made at Niagara Falls.

I went to purchase a package of Shredded Wheat last week and was given something else. This was in Duritsky's store on Elma Avenue, Uniontown. I asked for two or three articles first and then for shredded wheat. They gave me another product which I said was not Shredded Wheat, but was assured by both the lady and man in the store that it was shredded wheat, a smaller biscuit and more in a box. I proceeded to get the balance of my things and they wrote out the slip marking it "S. Wheat." I asked them to write out the full name of all articles purchased. What I was given was a package of Kellogg's Whole Wheat Biscuit. The sales slip and carton which you have are my receipt for the articles that I bought and the Kellogg Whole Wheat Biscuit carton. The biscuits I gave to

Mr. Moser, who is the Uniontown sales manager of National Biscuit Company. It was at his request that I made this purchase in a store I had never been in before. The sales slip is signed by Mrs. Mary Duritsky, who owns the store.

MR. SAVAGE: I offer in evidence, as Plaintiff's Exhibit No. 23, the sales slip concerning which the witness has just testified, and as Plaintiff's Exhibit No. 24, the Kellogg carton to which the witness has just referred.

(The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 23"; and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 24.")

CROSS-EXAMINATION.

I have known Mr. Moser about fifteen years; he was sales manager when I first knew him and deposited in the bank where I was teller. I have no relatives connected with the National Biscuit Company and came into this case merely as a friend of Mr. Moser, who asked me to go to Duritsky's to make this purchase and I knew when they gave me Kellogg's Whole Wheat that it was not the product which Mr. Moser had told me to buy. This store is in my neighborhood and judging from the looks has a good reputation, but I never had any dealings with them. Mr. Moser asked me if I used shredded wheat and then asked that I buy a package at Duritsky's, which was the only store I went to. I recognized the package immediately as not being the Niagara Falls product and asked if that was Shredded Wheat and was told by both the lady and man that it was a smaller shredded wheat. The Niagara Falls Shredded Wheat is the only shredded wheat I had ever heard of and looking at the Kellogg's product I would not know now that it was shredded wheat be-

cause it is not marked on the box. I have not had much to do with shredded wheat the past few years, but previous to that my parents bought it and now I buy a box occasionally for my husband to eat. I am not familiar with any brands of corn flakes and I went to no other store but Duritsky's, where I had them write down the items I. purchased. I occasionally do this because I buy for relief organizations and must show a slip of the purchases. I have never done any demonstration work for either National Biscuit Company or Shredded Wheat Company.

MRS. EDITH MOSER.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am the wife of Mr. Moser, agent of the National Biscuit Company at Uniontown, and was with Mrs. White when she made her purchases at Duritsky's. She purchased beans, potatoes, corn, etc., and then asked for a package of shredded wheat. On being handed the package she said "Is that shredded wheat," and was told that it was, but a smaller biscuit, and you got more in the box. The package she received was like that of Plaintiff's Exhibit No. 24. She took the package, paid for it and had the boy put the purchases in the car.

CROSS-EXAMINATION.

The party waiting on us at Duritsky's pointed to the picture on the front of the package and said "it is shredded wheat," "it is a smaller biscuit but they are packed more in the box," but kept the package in his hand.

Q. Did you have any doubt that the biscuit in this package were any different from the biscuit illustrated on the carton? That is, did you think that he did not know what he was talking about or that he was lying to you?

A. Well, I did think that it was not shredded wheat. The boxes were not lettered "shredded wheat." I thought to myself, then, "Why do these people say it was shredded wheat, when I could not see any "shredded wheat" on there.

Q. Does it not say "Made of deliciously flavored whole wheat shreds, double toasted"?

A. Yes, it does say that.

Q. And on the side of the carton, does it not say this: "This certified analysis, made by the Medical Arts Laboratory of Philadelphia, indicates the splendid food value of Kellogg's Shredded Whole Wheat Biscuit"?

I could not read the side of the package, only being able to read what the boy was holding up. I thought if there were shredded wheat in the package it should be marked on the outside. Kellogg's name was not mentioned in connection therewith, although I saw Kellogg's name on the package. This package I gave to Mr. Moser.

When we were handed the package we naturally looked for the large biscuit in the corner and not seeing it knew it was not the Niagara Falls Shredded Wheat, and the name Kellogg's Whole Wheat Biscuit meant nothing.

I had never been in Mrs. Duritsky's store before and had never heard my husband speak of her and did not know until last week why he wanted me to go there to make this purchase.

EDWARD TRESER.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

Direct Examination.

The Witness: I have been in the meat and grocery business for the past 32 years. For the past ten years I have carried a line of groceries, previously meats only. I do a retail business and carry a line of cereals. Plaintiff's Exhibit No. 1 is a package of Shredded Wheat and the contents Shredded Wheat Biscuit which I have known to be the same in form, shape and appearance for the past thirty years or more. We carry Shredded Wheat in our store and sell a lot of it. When a customer asks for shredded wheat we give her a package like Plaintiff's Exhibit No. 1 and never anything else. This is an old established product.

Cross-Examination.

I came here at the request of Mr. Nasmith one of National Biscuit Company's salesmen from whom I buy crackers, etc. I have been dealing with the Biscuit Company about ten years. I handle Kellogg's Corn Flakes and Bran but have never handled their Whole Wheat Biscuit and have only heard of it within the past year, that is, I heard they were putting out a shredded wheat biscuit. I have always associated Shredded Wheat with Niagara Falls, their package has always looked the same to me.

I give my orders to the salesman and the goods are delivered by the National Biscuit Company's trucks. I buy some of their cookies, etc., and some of Loose-Wiles products. At one time I was tied up with the Royal Scarlet stores but no more.

This is the first time I have ever seen a Kellogg Shredded Wheat and I can see that it is not as large

it is smaller, shorter than the Niagara Falls Shredded Wheat. I am familiar with Kellogg's general type of carton for corn flakes, bran, etc., and would recognize the whole wheat biscuit carton as belonging to the Kellogg family as its red and green colors are very similar to their other packages.

MRS. IRMA COLLIFLOWER (Mrs. J. A. Colliflower)

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife and recognize Plaintiff's Exhibit No. 1 as a box of Shredded Wheat which I have known ever since I was a little girl. I buy it right along giving it to my children. When buying I ask for a box of Shredded Wheat and usually get the package similar to Plaintiff's Exhibit No. 1 with the exception of this one.

Q. Will you state the circumstances connected with this carton which you have just produced, stating where and when you got it and any other circumstances connected with it?

A. Well, I stopped at the L. H. Black Grocery at 601 Second Street, Juniata, Pennsylvania, and I asked for a box of Jell-O. And she did not have the Jell-O which I asked for. She said she had some gelatin. And I said, "All right." And she took time to explain about the Jell-O. Then I asked for a box of shredded wheat, and she gave me this. She said nothing about it, and I asked for a slip, and she handed us her name on the slip.

(The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 25.")

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 26.")

I took the package, paid for it and nothing more was said. The words Shredded Wheat mean Niagara Falls Shredded Wheat to me and means a biscuit when broken is very tasty and palatable and is the only shredded wheat I have known and have cared to use. Any other product by that name would seem to me to be a misrepresentation.

CROSS-EXAMINATION.

The biscuit contained in Defendant's Exhibit No. 6 look like a small sized shredded wheat biscuit and a little dryer.

The National Biscuit Company Altoona salesman asked me to go into this particular store to make any purchase I desired and to buy a package of shredded wheat and to take what was given me. I had seen Kellogg's product on the shelves in stores and knew immediately that I was not being given the original Shredded Wheat as the carton did not contain a picture of the Falls nor was it marked "Home of the Shredded Wheat." I understood right away that she was giving me a product made by Kellogg Company. I was asked to make purchases at two other stores; at the first store I was told they had two brands, National and Kellogg's, which did I want. I asked for National and received it, taking it home and using it. The other package was turned over to the National Biscuit Company salesman and I did not see it again until today.

I am very familiar with Kellogg's Corn Flakes as I like them very much. As to the shredded wheat package one could easily be misled, if in a hurry, into thinking that Kellogg's package was the Niagara Falls Shredded Wheat. Of course, if one is expecting that they may get a substitution you would be most careful to see what you were getting, whereas if you were in a hurry you might receive another package without noticing the difference until you arrived home.

The other store I was asked to go to was the Clover Farm Store in Altoona.

I am not connected with or related to anyone in the National Biscuit Company. The name of the salesman who asked me to make these purchases is J. L. Black of Altoona whom I have known for several years, he explained at the time that he wanted me to go to Pittsburgh to act as a witness. After making the purchase I met him accidentally on the street and gave him my purchase.

RE-DIRECT EXAMINATION.

In the first store I dropped in they had one package in each shelf with both prices of merchandise showing and this was the store where they explained the difference between the two packages. I had never been in this store before. In the next store I made the purchase.

RE-CROSS-EXAMINATION.

I rarely have the wrong merchandise sent to me—I specify plainly what I want and if I did not get it would send it back. If Kellogg's Shredded Wheat were sent me instead of Niagara Falls I would return it because the latter is what I like and what I would order. Occasionally I try a new product if it is explained to me and then if I don't like it I go back to the old.

MRS. CLARA GOODMAN (Mrs. J. E. Goodman).

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

I am a housewife and recognize Plaintiff's Exhibit No. 1 as Shredded Wheat which I have known ever since I can remember and which I use nearly all the

time. When I purchase it I ask for shredded wheat and until recently have received the same as Plaintiff's Exhibit No. 1. Last week in Huber's grocery store at Altoona I was offered a package of whole wheat biscuit and the package before me is what I received when I asked for Shredded Wheat. I also had them give me a sales slip for this purchase.

(The sales slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 27.")

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 28.")

CROSS-EXAMINATION.

This purchase was made at the request of Mr. J. L. Black, the National Biscuit Company salesman at Altoona. I frequently buy at Huber's and have always gotten what I asked for including Shredded Wheat with this one exception. I was also asked to go to Fritz's and here I was given the Shredded Wheat that I asked for. The package of whole wheat biscuit that I bought I put in the car and turned over to Mr. Black who lives across the street. I do not know what became of the biscuits that were in the package. I had never heard of the Kellogg shredded wheat until this package was handed to me and did not know there were two kinds. I knew then there were two kinds of shredded wheat on the market. There is a difference between the two biscuits you show me, the Shredded Wheat biscuit is larger. When Mrs. Huber gave me this package of "Kellogg's" shredded wheat, I knew right away it was not a Niagara Falls package I was getting. I recognized instantly that it was not a new shredded wheat package.

The conversation I had with Mr. Savage had to do with the difference in the boxes and there was nothing said about the Niagara Falls biscuit being the only shredded wheat. The Kellogg biscuit does not look like the Shredded Wheat I have been buying, it is a smaller biscuit and very brown and I would describe it as a whole wheat biscuit, to call it a shredded wheat biscuit would be a misrepresentation. If this biscuit is made of wheat, shredded and put in biscuit form, I would still say that it is not Shredded Wheat for it is not made by the Niagara Falls people. It is whatever you people have marked it.

Defendant's Exhibit No. 5 for identification is not Shredded Whole Wheat biscuit because if an article is marked you usually ask for what it is marked, if that is what y[illegible] mean but if I had the same biscuit in a carton, Defendant's Exhibit No. 5 for identification I would say that that is Whole Wheat Biscuit because that is what it is called. As to Exhibit No. 5 for identification, I have always bought Shredded Wheat biscuit and therefore I would say that is Whole Wheat Biscuit.

Referring now to Plaintiff's Exhibit No. 14, the articles in the plate on the end are Shredded Wheat Biscuit. They look different to me from the other package on account of the size and the picture. One I would call Shredded Wheat and the other Whole Wheat Biscuit. This is just my own idea, just sitting here talking to you not talking to anybody about it. If you get all of the cartons out of sight and just put two biscuit down on the table, one would be Shredded Wheat and one would be Whole Wheat. I have known that only since last week because I have not known your product until last week.

RE-DIRECT EXAMINATION.

Q. What would you think, if Kellogg's or any other manufacturer, other than the National Biscuit

Company, put a biscuit on the market like that, this whole wheat biscuit, and called it shredded wheat! What would you think?

A. Well, I think it would be misrepresenting the company that it is made by.

RE-CROSS-EXAMINATION.

Ten years ago I worked as a saleslady handling clothing and such things but I have never been a demonstrator nor done any work in the grocery line.

JOE H. MILLER.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

I am a salesman, 36 years old, unemployed at present. Plaintiff's Exhibit No. 1 is a Shredded Wheat carton, the biscuit taken therefrom is a Shreded Wheat Biscuit which I remember as far back as I can. I have been eating Shredded Wheat since childhood and occasionally purchase it in a grocery store where I ask for a box of shredded wheat. I have received Shredded Wheat and have also received Kellogg's Whole Wheat Biscuit, the latter several times and once very recently, the last time being Thursday when I made a purchase of a bottle of milk, a loaf of bread and a box of Shredded Wheat. I received the first two and a box of Kellogg's Whole Wheat Biscuit. I asked for Shredded Wheat, was given the Kellogg package which I accepted and paid for and received a sales slip for. The store was Witherow where I had made purchases

before and had always heretofore received Niagara Falls Shredded Wheat. I made this purchase at the request of the National Biscuit Company representative. I was asked to go to one other store but did not do so.

(The sales slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 29.")

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 30.")

CROSS-EXAMINATION.

Mr. Black of Altoona asked me to make this purchase. I have known him about 14 or 15 years. He said that I should ask for Shredded Wheat and see what I was given and that later I was to come here and testify. Mr. Black asked that I go to the Witherow store and one or two others but as I got the evidence he wanted in the first store I did not go to the others. I believe the other store I was to go to was L. K. Black, which is a Handy Service Store by which I mean they form themselves into a buying organization.

When employed I was a salesman for the General Outdoor Advertising Company. I have never worked in the grocery line. The first time I heard of Kellogg's Shredded Wheat Biscuit was six or seven months ago when there was a package at my home which my mother said the store had sent. We used up that package but have had no more since.

At the time I made the purchase the package was set on the counter together with the other items I purchased—I recognized it as a Kellogg package later but did not open it. I saw the biscuit in the package my mother had but could see no difference between that Biscuit and the Niagara Falls biscuit. The biscuit taken from Plaintiff's Exhibit No. 1, is a Shredded

Wheat biscuit which I recognize from seeing it and knowing the shape and design.

I have known Puffed Wheat and know that wheat is put up in various forms such as shreds and puffed and flakes, also bran, and made into flour and the flour into wheat bread.

From looking at the biscuit I could not tell where it was made but I would call it a shredded wheat biscuit. One is shorter than the other but they both look like shredded wheat, one made at Niagara Falls, the other at the Kellogg plant.

Q. You want to change your testimony now and say that this Kellogg product which I show you, taken out of Defendant's Exhibit No. 6 for identification, is not a shredded wheat biscuit?

A. Oh, no, that looks like a shredded wheat biscuit.

Q. To you?

A. Yes.

Q. Did you say you had been a salesman at one time?

A. A salesman, yes.

MR. CLARKE: That is all.

RE-DIRECT EXAMINATION.

By MR. SAVAGE:

Q. Just one more question: Will you state what impression it would make on you or what your opinion would be if a biscuit, such as is contained in Defendant's Exhibit No. 6 for identification, were sold or offered for sale in the stores as shredded wheat biscuit, instead of whole wheat biscuit?

A. I think it would be very unfair competition.

E. N. THOMPSON.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

Direct Examination.

I am in the food market business which deals in meats, green goods, poultry and bakery. We are right in the residential district, our P. O. being Homewood station. We have eighteen employees, run four delivery trucks and have six telephone lines. Our store is what we call a complete service store where people can call up and receive just what they want. I have always been in the grocery business and in this particular business for about fourteen years.

I certainly do recognize Plaintiff's Exhibit No. 1 as a package of Shredded Wheat and the contents as Shredded Wheat biscuit. I have been familiar with this biscuit for the past twenty years or more in which time I do not think the biscuit has changed any in form or appearance. The general public designates this particular package as Shredded Wheat and when they call up and ask for Shredded Wheat we give them the same as Plaintiff's Exhibit No. 1 and nothing else. I have never known any other shredded wheat. The expression Shredded Wheat has a very good reputation attached to it in the mind of the public and is a nationally known product and when people ask for Shredded Wheat there is but one product that they want.

Cross-Examination.

I am carrying Kellogg's Shredded Wheat at the present time and when a customer asks for Kellogg's Shredded Wheat that is what I give them. The Kellogg's biscuit was put in during my absence and a one-cent sale run. There is not enough difference in the two products to justify a grocer in carrying both—one is a good seller, the other is not.

I believe in competition in trade and that no one should have a monopoly on any certain thing but where two articles are so similar it does not warrant a grocer in stocking them. There is a difference in the size of the biscuit but other than that there is little difference. We still have some Kellogg's biscuits on hand which we are trying to dispose of. I realize Kellogg's are large advertisers but I have not seen any of their advertisements of shredded wheat, nothing but the package itself. Both of these products are shredded wheat, there is a difference in size, otherwise they are the same with the exception that one is made in Niagara Falls, the other in Battle Creek, Michigan.

I handle Post Toasties as well as Kellogg's Corn Flakes. When a customer asks for corn flakes we ask her whether she wants Kellogg's or Post Toasties. I have never heard of anyone asking for Post's Corn Flakes but if they did I should give them Post Toasties. I have never heard of Quaker Corn Flakes but of Quaker Crackles.

JAMES LEE BLACK.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

Direct Examination.

I am a special salesman for the National Biscuit Company. At my request Mrs. Goodman, Mrs. Colliflower and Mr. Miller made purchases of shredded wheat in certain stores in Altoona. After their purchases they delivered them to me and they are now Plaintiff's Exhibits 25 to 30, all of which I can identify.

Exhibit No. 25 is the sales slip from Black's store; I marked this slip with the grocer's and the purchaser's names on the back with blue pencil.

Exhibit No. 26 I can identify by the writing of "Black's grocery" in the red pencil. This sales slip and carton were delivered to me by Mrs. Colliflower after she had made her purchase at Black's store. I put same in my car and later took them to the office where I removed the contents and folded the carton and mailed same to Mr. Thoms of the National Biscuit Company at East Liberty.

Exhibit No. 27 is a sales slip issued by Mrs. Huber on the back of which I have marked in blue pencil the date, the name of the purchaser and the store and Exhibit No. 28 is the carton which was received.

Exhibit No. 29 is a sales slip issued by the Witherow Grocery in Altoona and the purchaser J. H. Miller and this sales slip and package were turned over to me by Mr. Miller.

Exhibit No. 30 is marked 13¢ on the outside of the box and the sales slip calls for 12¢. Mr. Miller brought me the sales slip and the package direct from the store. Exhibits 27 and 28 are the identical slip and package I received from Mrs. Goodman and Exhibits 25 and 26 are those received from Mrs. Colliflower.

CROSS-EXAMINATION.

I have been in the grocery specialty business about 13 years.

It was not necessary to put any heading in Plaintiffs' Exhibit No. 27 as it was already in there. Exhibit No. 29 had no heading on it so I marked in the name of the store, the street number and Altoona, Pennsylvania, just as a reminder. I was outside of the stores in each instance when the purchases were made and immediately after they were made they were turned over to me. Sometimes I was in my car, sometimes standing on the street corner. I added the name "Witherow" out on the street, the address I added

after I had gotten back in my car. The reason for these notations was for identification purposes by me to show where the purchase was made. I did not think it necessary to have that information supplied by the seller.

I had asked Mr. Miller to go to two stores but after his purchase at the Witherow store I told him it would not be necessary to go to the other. One of the other women went to two stores in one of them she got the shredded wheat she had asked for and I still have that package, not deeming it necessary to say anything about that. In the other instance the lady got Kellogg's Whole Wheat Biscuit instead of Shredded Wheat. I do not know whether it is shredded wheat or not because the outside of the carton calls for Kellogg's Whole Wheat Biscuit. If the Kellogg's biscuit were served to me in a bowl and not having tasted it I would say that it looked like shredded wheat. I have never tasted them and do not know whether there is any difference in the taste from Shredded Wheat. If a customer asked me whether the Kellogg product was a shredded wheat I would say it was a substitute.

I do not know just how Shredded Wheat is made but know that it is one of the biggest selling breakfast foods that there is. I know that it is made of wheat as the carton calls it Shredded Wheat and according to the laws of Pennsylvania things have to be what they are advertised.

I have been to Niagara Falls but never to the Shredded Wheat plant; the time I was there was July 4th when the plant was closed. My contact with Shredded Wheat has been only since the National Biscuit Company has taken it over. I know nothing about the biscuit being shredded, I only know what it is advertised as. In my contact with the stores I tell the merchants that Kellogg's product is a substitute for

that made at Niagara Falls. I ask them if they have been successful in selling Shredded Wheat and in nine times out of ten they say "yes" and then I ask them why they substituted. There are various reasons given for this question. I never talk about Kellogg products, if possible, and if a grocer asked whether there was any difference between the Shredded Wheat made by National and that of the Kellogg product I would tell him that was for him to decide.

On two occasions in the past I was served with Kellogg's individual package in two different restaurants and these were my first introduction to the Kellogg Whole Wheat Biscuit. Had they been served outside the carton I would have noticed a difference in the taste and would have realized that they were not Shredded Wheat. I also recognized the difference in size and after they were served to me I merely ate some of the milk and then pushed the biscuit aside, being loyal to National Biscuit Company products, and that was my first experience and introduction to Kellogg's Whole Wheat Biscuits.

RE-DIRECT EXAMINATION.

The first of these substitutions occurred in the Palace Restaurant in Johnstown and I think the other was at the Washington restaurant in Greensburg, Pennsylvania. The Greensburg incident happened three or four weeks ago and the Johnstown incident a week or two prior to that.

I realize that products are saleable in Pennsylvania under trade names and trade-marks and that those sold as Kellogg's Whole Wheat Biscuit or Kellogg's corn flakes need not necessarily be made by Mr. Kellogg.

In my opinion the name "shredded" means something pulled apart such as shredded wheat or shredded

cocoanut, but Shredded Wheat to me means a biscuit that I have known since childhood.

RE-CROSS-EXAMINATION.

In my second experience with the individual carton of Kellogg's biscuit I did exactly the same as in the first, I ate a little of the milk off and pushed it aside. I fully realized I was getting Kellogg's product as in each instance the biscuits were served to me in the individual carton. I realize that Kellogg's product is being sold in competition and being sold as a shredded wheat. It makes a good substitution and is being handed out to consumers for Shredded Wheat on requests for Shredded Wheat.

My favorite brand of Corn Flakes is Kellogg's, occasionally I eat another brand. If I asked for Kellogg's and was given another brand I would say it was a substitution. Since childhood Shredded Wheat has always meant the Niagara Falls product to me and Corn Flakes has always meant Kellogg's.

FRANK J. PIALET.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

For the past twenty years I have been a retail grocer in the suburbs of Pittsburgh. We carry a full line of groceries and employ three clerks. Our store is what is called a service grocery store, telephone orders, deliveries and credit. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and the contents as Shredded Wheat Biscuit which I have been familiar with for the past twenty years as a grocer and previously as a consumer about ten years. The Shredded Wheat Biscuit

in form, shape and appearance remains the same as I have always seen it. The term "shredded wheat" conveys to me a biscuit made of wheat in shredded form and manufactured at Niagara Falls and regarded by me as the only Shredded Wheat Biscuit. When our customers ask for Shredded Wheat we give them the original Shredded Wheat same as Plaintiff's Exhibit No. 1. Plaintiff's Exhibit No. 10 with the dish on the end of the package I recall being used up to three or four years ago, the length of time it was in use I should say was about twenty-five years.

About two weeks ago I went to the Grayboro for breakfast and called for Shredded Wheat biscuit. The young lady picked up an individual package of Kellogg's Whole Wheat Biscuit—I told her that was not Shredded Wheat and she said it was just the same. I finally took it because she had opened the package, but it was not the same as Shredded Wheat to me.

CROSS-EXAMINATION.

This was a biscuit made of shreds of wheat and baked, although the package did not read that way, but what I wanted was the old familiar Shredded Wheat made at Niagara Falls. I knew immediately that it was a different biscuit as it was not as crisp nor did it have the toasted flavor of Shredded Wheat. I did eat one of the biscuits but did not like them. I cannot say about this dislike being general, but I will say that Kellogg is practicing on someone else's trade-mark and selling under someone else's advertising. The package, to my way of thinking, misrepresents the contents. To my taste the Kellogg biscuit is not as crisp or as well toasted as the National Shredded Wheat, but other opinions may not be the same.

If I were asked for Kellogg's Corn Flakes I would not give a customer Post Toasties and tell them they

were the same. The girl evidently had no Shredded Wheat and gave me the nearest thing to it, but to my taste it was not Shredded Wheat. She said it was the same as the other shredded wheat biscuit, of course I had the carton before me and knew it was not the same as it was marked "Whole Wheat Biscuit" and the size and the taste were not the same.

I have been in the grocery business about twenty years but in the retail grocery for myself only about five months.

I came here to testify because I was asked whether I had ever asked for Shredded Wheat and had been given whole wheat biscuit. I did not know the gentleman who had asked me, but I told him that I had and where it was. This was several weeks ago and then another gentleman whose name I do not know asked me to testify here—I have three people running my store, so I was able to get away. If anyone asked for Shredded Wheat I would give them the Niagara Falls product; if they asked for Kellogg's Whole Wheat Biscuit I would give them that; if they asked for Kellogg's shredded wheat I would give them the Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

If I had a product on which I had spent millions of dollars and years of time to put it on the market I would consider it decidedly unfair if someone else came along and put out the same kind of an article. I know that the Shredded Wheat Company has done extensive advertising over a great period of years.

RE-CROSS-EXAMINATION.

We carry every product that Kellogg makes except their Whole Wheat Biscuit, for which there is no demand. If a customer asked for it I would tell her

we did not keep it as the turnover was so slow we could not keep it fresh. We tried it out but the customers wanted the old shredded wheat biscuit.

I handle Kellogg's Corn Flakes and their Rice Crispies, but I do not handle Post's Corn Flakes because my trade prefers Kellogg's. If a customer just asks for Corn Flakes I give her Kellogg's; none other come up to it. I certainly believe in the competitive system, but it does not seem fair for another concern to put something similar on the market and gain the advantage of the enormous amounts of money that have been spent in advertising. Wherever you would see Shredded Wheat you would see a picture of the Niagara Falls cataract, that being the home of Shredded Wheat.

WILLIAM H. McSHANE.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

I have been a retail grocer for the past eighteen years carrying a full line of groceries in the same town, eleven years for others and seven years for myself. Our store is both a service and cash and carry.

Plaintiff's Exhibit No. 1 is Shredded Wheat, the contents of which have looked the same ever since I have sold it, for the past eighteen years. If a customer asked for Shredded Wheat I would give her the package similar to Plaintiff's Exhibit No. 1. Shredded Wheat to me means a biscuit made at Niagara Falls and none other. To my customers it means a breakfast food and as they have always been accustomed to getting this particular biscuit, that is what I give them when they ask for Shredded Wheat. I carry the Kellogg Whole Wheat Biscuit. Some years ago there was

a similar biscuit on the market—I believe it was called Ross, but it did not sell.

CROSS-EXAMINATION.

I carry both products at the present time and recognize that they are both physically the same type of product and look alike except that the shredded wheat biscuit is larger. I have eaten the Kellogg product and have enjoyed it and in my mind there has never been any confusion between the two products.

I handle Kellogg's Corn Flakes and Jersey Corn Flakes as well as Post Toasties and give the customers whichever they ask for. The three are different makes of the same general type with the Post Toasties a little thicker than the Kellogg's Corn Flakes.

9.

MARGARET TRESCHER.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

I am a housewife, married, living in Pittsburgh.

Plaintiff's Exhibit No. 1 is a package of Shredded Wheat, the contents of which I have been familiar with for the past fifteen years. I associate the name of Shredded Wheat with Niagara Falls, that being the picture on all their packages. When I order Shredded Wheat that is what I usually get, but recently I went into Isaly's Dairy and asked for Shredded Wheat and was handed this package. They had just a small package and they gave me that. I have identified the package with my initials. No, I did not eat them on the premises. I was going to eat them on the premises, and it was rather late, so I asked the waitress to put them in a bag for me. She asked me if I wanted more

as long as I was taking them away. This is the bag they put them in and I just looked at the package, because really I had never seen them.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 31.")

CROSS-EXAMINATION.

After I initialed the carton I gave it to Mr. Crilly, whom I have known for a great many years and who works for the National Biscuit Company. He asked me if I had ever been given any other product when asking for Shredded Wheat. At the time I did not know there was another product. The next time I went to Isaly's, where I eat occasionally, I asked for Shredded Wheat and was given the Kellogg product. I knew right away it was a different shredded wheat that I was getting. I noticed right away that this was a Kellogg package they had handed me. I took it home and ate it, because the place was crowded at the time. Mr. Crilly asked me if I would go to Isaly's sometime and see what product they served, but he suggested no other places for me to go to. I had never known before that there was a similar biscuit on the market, but I realize now that there are although they taste somewhat different, one biscuit is harder and has less taste to it and it is toasted more. By that I would assume that it was a biscuit made out of wheat in shredded form.

RE-DIRECT EXAMINATION.

Up to the time I received the two Kellogg Whole Wheat Biscuit I had never had anything else that was like a shredded wheat biscuit. Defendant's Exhibit No. 6 looks like Shredded Wheat; if I saw that dish dissociated from the other printing matter I would think it was shredded wheat.

GEORGE JOHN BORNEMAN.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

Direct Examination.

I am in the trucking business for the Pittsburgh Wholesale Delicatessen and am familiar with Shredded Wheat for the length of time that I have sold it, about twenty-four years. The package before me marked "Plaintiff's Exhibit No. 1" is Shredded Wheat, the general appearance of the package and biscuit have not changed any during the time I have known it.

Recently I was in a restaurant with Mr. Crilly and he asked me to have something to eat. I had had my dinner so just ordered some shredded wheat and was handed a package of Kellogg's Whole Wheat Biscuit. I asked at the time if that was Shredded Wheat and was told that it was the same thing. I ate the biscuits and have with me here the carton.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 32.")

Cross-Examination.

Mr. Crilly, who is one of the National Biscuit men, came in the restaurant while I was there and joined me—he asked me to have something to eat—I had already eaten, but as I can always eat at any time I just ordered some Shredded Wheat. I immediately recognized a difference in the biscuit, first in the package and then in the size and taste of the biscuit. I was familiar with the fact that Kellogg's made a shredded wheat biscuit, having handled it when I was with the independent stores. While with the A. & P. stores I was familiar with Kellogg's Corn Flakes as well as two other brands which they carried, the Jersey and

a brand of their own called Sun filled corn flakes made by the Quaker people and sold in their stores exclusively. The A. & P. have from fourteen to sixteen thousand stores. I waited on the counter there and when anyone just came in and asked for corn flakes I would give them Sun filled corn flakes. Of course, if they asked for Kellogg's or Jersey we would give them the brand they asked for if we had it in stock.

I came here to testify at the request of Mr. Crilly inasmuch as I had had this experience while with him—I came of my own free will and do not expect to be paid.

RE-DIRECT EXAMINATION.

While with the A. & P. stores, when a customer asked for Shredded Wheat we gave her the package same as Plaintiff's Exhibit No. 1.

RE-CROSS-EXAMINATION.

It is six months since I left the A. & P. At that time they did not carry Kellogg's Whole Wheat Biscuit and I do not know what their policy would be now if they carried both products. I have never heard of shredded cocoanut or shredded codfish.

JOHN A. ORR.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

I am a retail grocer in Turtle Creek, a residential suburb of Pittsburgh. I have four stores, all in Turtle Creek. I am familiar with Plaintiff's Exhibit No. 1, having sold it about thirty years, first in Toronto, Canada, for the T. Eaton Company, and for the past twenty-eight years in the United States. I have been in business for myself since 1921. I recognize the

contents of package as Shredded Wheat, which has remained the same size and shape during the years that I have been familiar with it.

Shredded Wheat to me means a national product which we are selling to the public every day and it means but one article. The purchasing public come in and ask for it and we give them Shredded Wheat, which is what they want. It has a positively established reputation and a lot of good will attached to it. Shredded Wheat has been so extensively advertised that it practically sells itself. Three or four years ago I carried Kellogg's Shredded Wheat, but it could not compete with Shredded Wheat Biscuit—there would be no repeat orders and we finally had to send some back.

I do recall when the Kellogg people changed the name of their biscuit to Whole Wheat, but I do not know the reason for it and I have carried none of the biscuit since the name has been changed. At the present time I have one of their packages with the glassine window in. Kellogg's salesman was in my store the other day and gave it to me and told me if I told the people it was like shredded wheat we would sell it. Looking through the glassine window the biscuit does look like shredded wheat, but there is a difference in the taste. I have tasted them and the Kellogg's biscuit, when it becomes moist, is tough, whereas Shredded Wheat remains crispish.

I do think the glassine window in the package will affect the sale of Whole Wheat Biscuit, as people will see that the biscuit looks like Shredded Wheat and will buy it on the strength of Shredded Wheat quality.

Cross-Examination.

I believe in competitive sources of manufacture of different products and have no fight with the Kellogg

people; we try all of their products but their shredded wheat will not sell in our store and I have no room for goods that are not movers.

The goods in Defendant's Exhibit No. 6 is an imitation Shredded Wheat, there being a difference in the size, the Niagara Falls product being about an inch longer. I handle Kellogg's Corn Flakes, in fact five brands of their cereals. I also handle the Jersey corn flakes which are in a sense an imitation of the Kellogg Corn Flake except for the difference in the quality, the Kellogg's Corn Flakes being superior in my mind and in the minds of most people.

I do not think a grocer should fraudulently sell the Kellogg product for the Niagara Falls products—they are both shredded wheat biscuits and of course the Kellogg product is as good as they know how to make it. The Kellogg package is advertised as Whole Wheat biscuit and if a customer comes into my store and asks for a package of Shredded Wheat and if I give her the Whole Wheat Biscuit she would say "that is not what I want". Then I would have to tell the lady "it is the very same as Shredded Wheat but put up differently" as she would not know by the name Whole Wheat that it was shredded wheat. It is made of wheat, on the same order as Shredded Wheat but there is a difference in the make-up. Some of the customers will repeat but many will not. I know I did not get rid of mine. No, I would not be surprised to be told that Kellogg's had a very large business on Whole Wheat Biscuit and I agree that if it were not for the plate with the two biscuit on it no one would know what was in the package as it could be any one of six or eight different things and still be called Whole Wheat Biscuit. I could not sell this article as a Whole Wheat Biscuit and it was necessary to tell people that it was a biscuit made by Kellogg's. This was not un-

fair on our part as it was our only avenue to dispose of the goods and had customers come back and asked for more of it I would have been perfectly satisfied.

RE-DIRECT EXAMINATION.

Q. Now let us get down to brass tacks. Is it fair or unfair for the Kellogg Company to get out an imitation, as you call it, of shredded wheat biscuit?

A. No, it is not fair to the people who put out Shredded Wheat. It is not fair to them, to come in and put out this other product, because they cannot sell this without telling them it is Shredded Wheat and telling them it is identically the same as Shredded Wheat.

When I had the package with the window in it all I had to do is to put it on the counter and let them see for themselves.

RE-CROSS-EXAMINATION.

If I were trying to sell a corn flake put out under a different name and also carried Kellogg's Corn Flakes and a customer came to buy corn flakes I would have to tell her that the contents of the first package was an imitation of Kellogg's Corn Flakes in order to sell it and in order that she may know what is in the package. If Kellogg was the only concern allowed to use the word "Corn Flakes" and others were making a similar cereal put out under a different name I would have to explain to them that it was like Kellogg's Corn Flakes.

There were other articles sold blind like that necessitating explanations, one being a Whole Wheat product put out by the Jersey Corn Flakes people which looked like Rolled Oats but was a Rolled Wheat and it was necessary to mention each time you sold a package that it was like Rolled Oats.

In the case of the Jersey Corn Flakes the name is on the outside of the package and the customer

knows exactly what it is. The sale of Kellogg's Whole Wheat Biscuit was handicapped by the necessity of having to tell customers what was in the package. Had the package been marketed as Kellogg's Shredded Wheat it would have explained itself. If the dish were removed from the face of the package and reference to shredded wheat removed the package would have to be opened to find out what it contained. It requires a real salesman to put across the sale of a blind package.

Yes, I recall when Kellogg's Corn Flakes were known as toasted corn flakes and so many brands of corn flakes came on the market that Kellogg had to call theirs Kellogg's Toasted Corn Flakes.

I understand that both of these companies are friendly to us and I am not fighting one more than the other. They are all my friends.

ORVILLE KEEDER.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

Empire, Ohio, is a town of about 700 about twelve miles up the river from Steubenville.

Recently at Isaly's in Steubenville, a confectionery store which sells milk and butter and puts up lunches, I asked for shredded wheat and was handed this box of Kellogg's Whole Wheat. I said "Now, this is Shredded Wheat, is it?" and she said "Yes, sir." I knew that it was not from the box but I at it and brought the box away. The piece of paper attached to the box was signed by me and attached to the box by Mr. Herron about an hour after I received it.

(The box referred to was received in evidence and was marked "Plaintiff's Exhibit No. 33.")

CROSS-EXAMINATION.

Isaly's Restaurant is in Steubenville. I had never been in there before but went this time at the request of Mr. Herron who came in after me. Charles Stewart, a young man who works in the National Biscuit Company offices in Steubenville introduced me to Mr. Herron and I was then asked to go to this restaurant and to buy shredded wheat. I ate one of the Kellogg biscuits and did not like it. I do not care for shredded wheat so it made no difference to my personal taste which package I received.

THEODORE KEENAN.

Deposition taken in Pittsburgh, Pennsylvania, December 1932.

DIRECT EXAMINATION.

I am familiar with Shredded Wheat and recently I went to Kresge's five-and-ten-cent store in Steubenville and asked for shredded wheat. I was handed the biscuits and the girl threw the package under the counter. Later another girl came along and I asked her to give me the package which was thrown under the counter. I have that box with me here gotten at the request of Mr. Herron of the National Biscuit Company. The paper attached to it was signed by me and attached by Mr. Herron in my presence.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 34.")

I had never seen the Kellogg small package but had seen the Niagara Falls package and knew instantly that I was not getting the Niagara Falls product when the girl at Kresge's handed me the package.

MR. CLARKE: I am willing to stipulate that each of the following witnesses: F. H. Fitzgerald, 7301 Kelly Street, Homewood; P. E. Gibson, 5847 Ellsworth Avenue, East Liberty; George E. Straw, 1111 Maple Avenue, Turtle Creek; Frederick Gross, 317 Atlanta Avenue, McKeesport; O. Dornbush, Adams Street, Steubenville, Ohio, if called would testify that he is a retail grocer in or about Pittsburgh, that he handles the Shredded Wheat of the National Biscuit Company, formerly made by The Shredded Wheat Company; that he has known it for several years, and that, when customers ask for shredded wheat, the order is always filled with the product of the plaintiff.

And it is further stipulated that said witnesses also would testify that customers who ask for corn flakes mean Kellogg's Corn Flakes, in practically every instance, and that where a customer asks for corn flakes the grocer gives them Kellogg's.

WILLIAM FRANKLIN NUBERMEYER.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I have been in the grocery business about twenty-five years carrying a full line of groceries, including cereals. My business is in the residential suburb of Cleveland and we do a credit service delivery business, receiving a great many orders over the telephone.

I recognize Plaintiff's Exhibit No. 1 as a package of Shredded Wheat and the contents of the package as shredded wheat biscuit. I have been familiar with shredded wheat for the past twenty-five years and have always carried that item. During this time I have

noticed no perceptible change in its appearance. The term "shredded wheat" conveys the fact that it is shredded at some time or other and is made by The Shredded Wheat Company of Niagara Falls, and is a breakfast food.

When a customer either in the store or over the telephone asks for shredded wheat we give her the same as Plaintiff's Exhibit No. 1 which we have always known. Plaintiff's Exhibit No. 10, particularly the end of the carton was changed about a year and a half ago. I remember seeing that dish as long as I can remember shredded wheat. The strip of paper, I have seen in store windows within the last year.

(The strip display sign referred to was received in evidence and was marked "Plaintiff's Exhibit No. 35.")

MR. VILAS: I have a glass bowl here, with biscuit in it, which I would like to have marked for identification.

MR. CLARKE: You may have it marked in evidence now, if you wish.

MR. VILAS: Very well. I offer it.

(The glass bowl referred to was received in evidence and was marked "Plaintiff's Exhibit No. 36.")

The glass bowl, Plaintiff's Exhibit No. 36 I have seen some ten or twelve years ago in restaurants, cafeterias, etc., usually filled with shredded wheat biscuit.

A. It seems as if every restaurant had them—that is, the cheaper type of restaurant, cafeteria, and the little restaurant, on the outskirts, as I remember it.

CROSS-EXAMINATION.

I know of Kellogg's Shredded Wheat which we handle and which we introduced in the store about three years ago.

HARRY EDWIN PENDER.

Deposition taken in Cleveland, Ohio, December, 1932.

Direct Examination.

I am in the retail grocery business for the past twenty-two years working for the Southworth Company in capacities from driver to superintendent and at the present time store manager. We are members of a voluntary chain of which there are between one hundred and fifty and two hundred stores. In the store which I manage we carry a complete line of groceries and meats. Our store is a service store in the downtown section run chiefly on a cash basis to accommodate the people working in the downtown section and who wish to pick up things to take home with them. The orders taken downtown are transferred to outlying stores for delivery service.

Plaintiff's Exhibit No. 1 which you have in your hand is Shredded Wheat and the contents are Shredded Wheat which I have known for about twenty-two years and which has remained the same in appearance. The package in which the biscuits were packed has also remained practically the same during all those years. Plaintiff's Exhibit No. 10 with the dish on the end of it I can remember up until recently, the dish on one end and the Falls on the other, I should say this was on for approximately twelve or fifteen years.

If a customer asked for shredded wheat I would give her the Niagara Falls Shredded Wheat and I would say that it is the package they would expect to receive. Shredded Wheat has a reputation or goodwill attached to it and they have advertised very extensively. We have had their advertising in the store at different times.

I do not recognize the strip, Plaintiff's Exhibit No. 35 but I do recognize the glass bowl, I have not seen.

that for perhaps fifteen years, when I did it was always in front of you in a restaurant.

We handle a full line of Kellogg's products including Kellogg's Whole Wheat Biscuit in packages like Defendant's Exhibit No. 6.

CROSS-EXAMINATION.

If a customer asked for Kellogg's Shredded Wheat I would ask them if they meant Kellogg's Whole Wheat Biscuit or Shredded Wheat.

There is a family resemblance between the whole wheat package and the Kellogg family of packages as to color, set-up, etc. About three years ago we handled the package known as Kellogg's Shredded Whole Wheat Biscuit the same as Defendant's Exhibit No. 5. The first time that package was shown to me it would throw my idea to the package of Shredded Wheat without seeing the contents but if I were shown a package of Kellogg's Whole Wheat biscuit without any illustration on it I would not know what was in the package and would have to open it up the first time. If the package contained a picture of shredded wheat on it it would then revert back to the other Shredded Wheat.

I have associated "Niagara Falls" with Shredded Wheat ever since the package came into existence. I used to do a good deal of window trimming and in pyramiding them up we always tried to alternate the ends.

RE-DIRECT EXAMINATION.

If I saw a package like Defendant's Exhibit No. 6 so blanketed that I just saw the picture of the dish with the biscuit in it I would think of the original Shredded Wheat made at Niagara Falls.

RE-CROSS-EXAMINATION.

I would be very much surprised now to find that there was any grocery man in the grocery business who did not know that there were two brands of shredded wheat on the market, one Niagara Falls and the other Kellogg's.

JACOB J. COHEN.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

For approximately eleven years I have been in the general grocery business carrying a full line including cereals. Plaintiff's Exhibit No. 1 is Shredded Wheat which I have handled since I have been in the game. The biscuit has been substantially in the same form and appearance since I have known it.

The term "shredded wheat" to me means only the one biscuit which was the only one I knew of up until a few years ago when muffets came on the market which I handled too, at one time.

When a customer asks for shredded wheat I give her the package same as Plaintiff's Exhibit No. 1 as that is the only kind I handle. I handled Kellogg's Whole Wheat Biscuit at one time packed in the type package as Defendant's Exhibit No. 5. I got this lot from the wholesaler who said that I could sell the consumer telling him it was shredded wheat, that there were more biscuit in the package and it was a little lower priced than the National Biscuit product at that time. The sale of it did not increase as I hoped it would, the customers preferring the original Shredded Wheat and I was forced to wish it on a lot of customers by sending them Kellogg's when they phoned their

orders, unless they complained, which some of them did and then I had to give them the original Shredded Wheat.

Last Saturday in the Sunnybright Restaurant I asked for shredded wheat for breakfast and was given a little box. I said, "Have you got them," and he said, "No, this is shredded wheat, ain't it?" I accepted it and examined the box which said Whole Wheat Biscuit on one side and Shredded Whole Wheat on the other.

CROSS-EXAMINATION.

We have had both packages in the home and I really do not see a lot of difference in the taste. They both look alike and taste alike practically. They are both made of wheat and put into biscuit form. From the name I have assumed that they were made of wheat cut into little shreds and as far as I am concerned, the description fits the Kellogg Biscuit as well as the Niagara Falls biscuit.

The fact that the chain stores did not carry Kellogg's made an impression on me. The jobber who sold it to me, an old Clover Farm Company man said "here is a good chance to get back at the National Biscuit Company, there are more biscuits in the package and the price is lower too." At first I thought it would go across pretty good but it did not seem to so I had to use the argument that it had more in it and that it was a shredded biscuit biscuit. The Kellogg name was prominent on the package.

The National Biscuit Company changed their policy on the discount proposition in the cracker department in the past year or so but that change was not due to the competition of the Kellogg Company. They never tried to encourage the sale of their crackers through their shredded wheat line. About a year ago they started selling the grocer shredded wheat direct;

previously it was purchased through jobbers and the price was the same and their price was the same. About six months ago they started giving the same discount to everybody alike, before that independent grocers felt that the chain stores were getting a better discount in the cookie department.

I handle the full line of Kellogg's products with the exception of shredded wheat and that did not go across with me. I handle Kellogg's and Post's Corn Flakes. If a customer asks for Corn Flakes I give her Kellogg's unless she asks for Post Toasties.

RE-DIRECT EXAMINATION.

When talking about cracker discounts and chains, etc., I refer entirely to the sale by the National Biscuit Company of its regular line of crackers and cookies. This dispute has been going on right along, their contention being that the Federal Trade Commission had to give them permission to allow the sale. National Biscuit Company started selling Shredded Wheat about the first of the year and since then we have been getting a cracker discount on same of 17½%.

RE-CROSS-EXAMINATION.

The discount proposition came on this year—Kellogg's Shredded Wheat has been on the market two years or more and it is probably two years since I handled any of it as I did not have over two cases altogether. It did not move fast enough for me. I got rid of what I had although I regarded it as a slow moving product.

It would not surprise me to hear that they had quite a volume on the product now and if I thought it would move fast enough I would stock up with it again.

MARX ALTFELD.

Deposition taken in Cleveland, Ohio, December, 1932.

Direct Examination.

I am a grocer having been in business in Cleveland for about thirty years. I handle groceries and delicatessen including cereals. Plaintiff's Exhibit No. 1 is the old Shredded Wheat biscuit. I have never handled anything but the Niagara Falls Shredded Wheat and this is what a customer gets when asking for shredded wheat.

I have known Shredded Wheat for over thirty years and some thirty or thirty-two years ago I went through their factory at Niagara Falls. When a customer asks for Shredded Wheat I know she wants the Niagara Falls biscuit as I have never handled any other.

I recall Plaintiff's Exhibit No. 10 having had cartons like that in the store and remember seeing the building and the picture of the dish for a good many years. I also remember seeing the strip, Plaintiff's Exhibit No. 35 in stores but not recently. I do not remember ever seeing the biscuit displayed in a glass globe like Exhibit No. 36.

Cross-Examination.

Yes, I have heard of Kellogg's Shredded Wheat but not for long. It has always been my thought to confine myself to as few lines as possible and that if I would confine myself to Shredded Wheat people would take that, if they did not want that I would let it go. That was my reason for not putting in Kellogg's Shredded Wheat. I have seen the Kellogg product and recognize it as the same kind of a biscuit but smaller. I do not remember ever seeing Defendant's Exhibit No.

6. When it first came out it was in a package much like Defendant's Exhibit No. 5.

CARL MILLER.

Deposition taken in Cleveland, Ohio, December, 1932.

Direct Examination.

I have been in the grocery and meat business for approximately twelve years, previous to that had experience in the grocery business since about 1916.

I recognize Plaintiff's Exhibit No. 1 which you have in your hand as shredded wheat and the contents of the package as shredded wheat biscuit which I remember as a little boy when mother had them and if I remember rightly they were the same then as now. I have known them continuously since then and their form, shape and appearance has remained practically the same. Shredded wheat means to me only one thing, the biscuit contained in the package you have in hand.

When a customer asks for shredded wheat I give her the package same as in your hand, Plaintiff's Exhibit No. 1, never anything else. Years ago I saw a package like Plaintiff's Exhibit No. 10, the picture of the biscuit in the dish on the end of the package has been on every box that I have ever seen that I can recall. It is not on Plaintiff's Exhibit No. 1 and I cannot definitely say for how many years I have been familiar with it.

The strip, Plaintiff's Exhibit No. 35, I believe I have had at the store, Mr. Graham, the National Biscuit Company salesman having put them up in the store about a month or two ago.

Defendant's Exhibit No. 6 with the name blocked out suggests a Shredded Wheat Biscuit. I have never

stocked any of Kellogg's Whole Wheat Biscuit and never knew that they made a biscuit called Whole Wheat. No one from Kellogg's ever called on me and I never had a call for the product, if I had had enough of them I might have stocked it but I really do not know whether I would have or not as the package to me looks like a little bit of a steal.

The picture of the shredded wheat in the dish for one thing suggests the steal. If they were put in a package similar to Defendant's Exhibit No. 5, without the picture, I believe that would be a little more fairly taken. To me there is only one Shredded Wheat, that one package. (Referring to Plaintiff's Exhibit 1.)

CROSS-EXAMINATION.

That is a hard question to answer whether there is any other name that would describe that biscuit, I do not know of any. From just the name Whole Wheat Biscuit I would not have a definite idea what the package contained. It might be any one of 6 or 8 different kind of biscuit and to find out definitely it would be necessary to open the package. The picture of two shredded wheat biscuit on the package would indicate that it was a biscuit made of wheat in shredded form. I handle no Kellogg products whatsoever, no Kellogg representative having ever called upon me.

WILLIAM PERRY FISHER.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I am an interior director, thirty-six years old, not connected in any way with the National Biscuit Company and recognize Plaintiff's Exhibit No. 1 as the

National Biscuit Company Shredded Wheat which I have been familiar with about seven years, my younger sons eating most of the shredded wheat in our family. When I ask for a package of shredded wheat I expect to get the package with the picture of Niagara Falls on and I have never been handed anything else in a grocery store but had that experience in a restaurant at 8719 Huff Avenue, Cleveland, on Saturday, December tenth. I went in, asked for shredded wheat, toast and coffee. Immediately in front of me, at the back of the counter, I noticed small packages of Kellogg's Whole Wheat Biscuit—the man turned around, opened one of these packages, put it in a bowl and handed it to me. I looked the package over and noticed that it did not have the picture of Niagara Falls so I asked if it was shredded wheat and he said, "Yes, isn't that what you ordered?" He handed me the package which was marked Whole Wheat Biscuit and said it was the same thing, so I ate the biscuit and brought the package with me.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 37.")

CROSS-EXAMINATION.

I came to save this package this particular day because Mr. Owens, who is salesman for National Biscuit Company is a particular friend of mine and in discussing different products he told me that some stores and restaurants were serving Kellogg's Whole Wheat Biscuit for Shredded Wheat, so when I had this experience at Harvey's Restaurant where I dine whenever I am on Huff Street, I just brought the package out with me and gave it to him. When the biscuit was served in the bowl I had no doubt about it being a shredded wheat biscuit product, that is, a wheat shredded into shreds and put into biscuit form.

MRS. EMILY HERRON.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

My husband is a special salesman for the National Biscuit Company, traveling all over. I recognize Plaintiff's Exhibit No. 1 as being Niagara Falls Shredded Wheat which I have been familiar with for about fifteen or eighteen years, having used it in the home for a good many years as I have a youngster who uses it all the time. When I ask for a package of shredded wheat I expect to get the product made at Niagara Falls and which I have seen made.

About three weeks or a month ago I gave a telephone order to Hammer's, the store close to my home at One Hundred and Second Street and Madison, and among other items ordered Shredded Wheat. When the order was delivered I received Kellogg's Wheat Biscuit. The order arrived in my absence and I did not see the grocer that evening, in fact, I have not been there since. I served the biscuits to the youngster in the morning but she seemed to notice the difference in taste and refused to eat it.

I brought the box that the biscuits were in with me, the piece of cardboard attached with writing on must be the grocer's who took the order. This was in the box with the groceries when it was delivered. I could see the biscuits in the package through the glassine window. The writing in lead pencil on the package is "Sakot," the name of my sister and brother, with whom I live and who pay for all the things purchased.

(The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 38-A," and the box referred to was received in evidence and was marked "Plaintiff's Exhibit No. 38-B.")

CROSS-EXAMINATION.

The slip, which was received in evidence as Plaintiff's Exhibit No. 38-A, was with the groceries when I came home in the evening. I could see through the window in the package that this was not the Niagara Falls Shredded Wheat, there is a difference in the size and when I ate it noticed a difference in taste and texture, one seems crispier and harder than the other.

I have not ordered any shredded wheat from this store since. I intended to go to the store but as there were a few heavy things I did not care to carry I telephoned it and my husband then asked me to include shredded wheat. This is the only time I have ever received Kellogg's Shredded Wheat. The biscuit in the package looked like shredded wheat and I would not know any other name for it but it is what I have always called the regular Shredded Wheat which I have been accustomed to using and which I expected to get. I could see through the glassine window that the Kellogg product looked like shredded wheat but there was a difference. Sometime during the summer I was at Niagara Falls and saw the process of making the Shredded Wheat biscuits, saw it made into shreds and cut off into biscuit form and then baked, this was since the National Biscuit Company took over the business.

MRS. ADELINE LANSDOWNE (Mrs. S. J.).

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I am not related to anyone connected with the National Biscuit Company but have some friends employed by them. I keep house in Cleveland. I recognize Plaintiff's Exhibit No. 1 as the National Shredded Wheat which I have been familiar with for quite a

number of years. I have had eight in the family and have bought and used an awful lot of it. When I ask a grocer for shredded wheat I expect to get the Niagara Falls Shredded Wheat, same as Plaintiff's Exhibit No. 1.

A couple of times I have had the experience of getting something else when I asked for shredded wheat, the first time was one day last week. We drive a lot and I make purchases wherever it is handy. On this day I stopped at a store on Hayden Avenue and asked for a few things on my list including Shredded Wheat. The grocer said "I do not have Shredded Wheat but I have Kellogg's—it is just the same." I looked at it and said, "This is not made at Niagara Falls," he said "No, but it is just the same," so I took it. I cannot tell the name of the store, as it was in a neighborhood that I just happened to go through. The package I have in my hand is one of the packages I received when asking for shredded wheat. There is a yellow slip attached to it and the slip is marked Norris Grocery, which is the name of the store. The storekeeper wrote what is on it in pencil and Mr. Rank, one of the salesmen, wrote my name and address at the bottom of it. The second instance of receiving Kellogg's Shredded Wheat was in a store on Lakeview Road. I asked for shredded wheat, the grocer looked up on the shelf and said "I have Kellogg's." I told him that was not what I wanted and he said "it is just the same," so I took it and had the grocer give me a sales slip. I then gave the package to Mr. Rank.

(The yellow slip referred to, from the Norris Grocery, was received in evidence and was marked "Plaintiff's Exhibit No. 39-A," and the carton with it was received in evidence and was marked "Plaintiff's Exhibit No. 39-B.")

(The white slip referred to, from the grocery on Lakeview Avenue, was received in evidence and

was marked "Plaintiff's Exhibit No. 40-A," and the box accompanying same was received in evidence and was marked "Plaintiff's Exhibit No. 40-B.")

CROSS-EXAMINATION.

I noticed that the biscuits looked like shredded wheat, but were smaller than the Niagara Falls product and they were harder. I have been to Niagara Falls but have never been through the factory. The two products look very much alike until you come to try them. My children ate the Kellogg biscuit once but said they were harder and did not taste the same and were not as good as the others.

Mr. Rank was not with me when I made these purchases and he did not suggest these stores; he just asked me if I ever did any buying to ask for some shredded wheat and as I said whenever I am out riding I stop at any store that is handy. These are the only two instances where the Kellogg product was given me—I kept one of these packages and gave Mr. Rank the other. He wrote my name and address on one package and the signature on the box I kept is mine, written by me.

JACOB F. SCHNEIDER.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I have not been in business for twelve years, before that I was a grocer in Cleveland, twenty-five years for myself, and about fifteen years for other people. I have been in the retail grocery business since I was fourteen years old, all that time in Cleveland and for twenty-five years had my own store in which we took orders over the telephone, delivered goods and carried credit accounts.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, which I have been familiar with since they came on the market back in the nineties. My first knowledge of it came during their first advertising campaign in Cleveland and later I was a delegate to a convention of grocers held at Niagara Falls shortly after their plant was built. They met in the plant and had a banquet later and Dr. Perky gave us a lecture on shredded wheat and we went all the way through the plant. When the shredded wheat came to the Cleveland market I stocked it and carried it all the years after that. When a customer asked for shredded wheat I gave her the Niagara Falls Shredded Wheat as that is what it always meant to me and what it meant to the purchasing public.

Shredded wheat had a reputation which was acquired through advertising and being in our food show. Like all new articles, it is hard to get people to use it at first, but the people that bought from me took to it readily although some people do not like it, they did not at that time and at that banquet they had turkey, ice cream and different kinds of food, and everything had shredded wheat mixed in with it that did not appeal to us grocers who were mostly Germans and we had quite a time over the straw and hay we were fed at the banquet. Some of the public thought it was straw and hay at first, while others took to it very readily.

To the best of my recollection they kept plugging away at the advertising all the time. The demand for it grew as at first I used to buy in just small amounts and then I bought it by the case and when a deal was on I took in the deal.

Plaintiff's Exhibit No. 10 is an old timer. I cannot say how many years they used that sort of a package, but I remember handling it. Within the last two or three years I have asked for shredded wheat and been

given something else, but I insisted on getting Shredded Wheat until within the last week or two I was in a store on West Twenty-ninth Street, where they just call him Bob; there I ordered a few other goods and asked for a package of shredded wheat and was handled Kellogg's package. I said, "This is not Shredded Wheat, Mister" and he said, "yes it is. That is shredded wheat." I said nothing more to him and took the package and this is the box; the yellow slip attached to the box is a list of the items asked for and purchased. My son ate most of the contents of the carton.

(The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 41-A"; and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 41-B.")

When Kellogg's Whole Wheat Biscuit first came out a long time ago I carried it but it did not sell, people were used to Shredded Wheat. To the best of my recollection that Kellogg package when I had it said "Kellogg's Shredded Wheat" on the front of it.

CROSS-EXAMINATION.

My son, who is connected with the National Biscuit Company, asked me to make this purchase at Bob's store and I asked the grocer to make out a slip for me on which he wrote "shredded wheat," and I said "this is not shredded wheat." In some stores it is customary to make out slips, in others it is not, but they will all give you slips if you ask for them. The Kellogg product looked like shredded wheat biscuits only smaller, but whether they eat the same I do not know; as a matter of fact I do not like either one.

When Kellogg's Corn Flakes first came out in 1905 or 1906 I handled them; that was a big seller. I have a faint recollection of it just being called Toasted Corn Flakes at that time and after other corn flakes

began coming on the market it was called Kellogg's Toasted Corn Flakes to distinguish it. I also handled Post Toasties. If a customer asked for Post Corn Flakes she would be given a package of Post Toasties. If she asked for Kellogg's Corn Flakes that is what she would get and if she just asked for corn flakes I would ask which kind did she want, as I carried two.

If I were in business today and carried Niagara Falls and Kellogg's Shredded Wheat and someone came in the store and asked for shredded wheat I would give them the Niagara Falls product. If someone asked for Kellogg's Shredded Wheat I would give it to them provided I handled it; after I found out it did not sell I did not buy any more.

MRS. FLORENCE STIBELING.

Deposition taken in Cleveland, Ohio, December, 1932.

Direct Examination.

I keep house, am not related to anyone in the Biscuit Company, but one of the salesmen is a friend of mine. He recently asked me to make a purchase of shredded wheat for him which I did at a Y grocery and meat store at 168th and Euclid. I went in there, purchased four articles and asked for shredded wheat and was handed a box of Kellogg's Wheat Biscuit. I said, "Well, this is not shredded wheat," and he said, "No, but it is the same thing, only the biscuit are smaller." That is all that was said; he gave me a purchase slip and I have the slip and carton with me. The package of whole wheat biscuit I gave to Mr. King, the salesman, and wrote my name at the bottom of the slip.

(The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 42-A,"

and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 42-B.")

CROSS-EXAMINATION.

Yes, I asked the grocer for a sales slip. Mr. King told me the store to go to, to ask for shredded wheat and to take whatever was given me and to remark that it was not shredded wheat. He also refunded the price of the wheat to me. When the package was handed to me I immediately knew it was not the Niagara Falls Shredded Wheat, as I had seen that package on the shelves in the store some three or four months before. The first time I saw it I knew it was a shredded wheat product and that the package was different from the Niagara Falls package, but this was the first time I had bought any of it. I had been buying the Niagara Falls Shredded Wheat for myself and this is the only time that anybody handed me Kellogg's Shredded Wheat.

HARRY C. ROHN.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I am twenty-nine years of age, business—locksmith. I am not employed by the National Biscuit Company or related to any of its men. I recognize Plaintiff's Exhibit No. 1 as shredded wheat which I have been familiar with ever since I can remember, having used it at home, and it happens to be my favorite breakfast dish. When I ask for shredded wheat I expect to get Shredded Wheat and that means to me a little shredded wheat biscuit. The wife does all the buying. I do not see the package itself, hence I cannot say that it is associated with any place in my mind.

I recognize Plaintiff's Exhibit No. 1 as a shredded wheat biscuit.

Yes, I have asked for shredded wheat and have received something else. This happened last week Saturday at Huff's restaurant. I asked for an order of shredded wheat and received Kellogg's. It was served to me in a bowl, but I happened to see the package that it came out of before it was served to me in the bowl and I said "This is not shredded wheat." And, the waitress replied, "Sure it is. Doesn't it look like it?" She also said, "That is what we serve for shredded wheat." There were two biscuits served—I ate one of them. I asked for the carton they were served in and have same with me.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 43.")

CROSS-EXAMINATION.

Nobody asked me to get the carton, but the girl said it was shredded wheat and I said "it is not". I just wanted to prove to her that it was not shredded wheat. I ate one of the bircuit and it did not taste like the one you have here, the Niagara Shredded Wheat Biscuit. It tasted something like it but there is a difference. I think I could say that I know there are two shredded wheat biscuit on the market which have a somewhat different taste, one compared with the other. One of these is made by the Niagara Falls people and one by the Kellogg people.

After I got this carton I think I ran over here to the National Biscuit Company's office because there is a friend of mine that works over here and I breakfasted with him. At that time I came over here with him at his request but I made no written statement. His name was Mr. Gray and I gave him the carton. He is connected with the National Biscuit Company and happens to be

a friend of mine who took me to this restaurant. I do not remember whether he paid for this Kellogg Shredded Wheat. He had a breakfast but I do not know what it was. It was not at his suggestion that I asked for and retained this Kellogg carton. I did it purely to satisfy the young lady that it was not shredded wheat. I did not mean to say that it was not shredded wheat made at Battle Creek, Michigan, I mean that it was not the shredded wheat that I am used to eating. I meant that those two shredded wheat biscuit that came out of that carton were not shredded wheat biscuit made by the National Biscuit Company at Niagara Falls. I did not tell her that I simply told her "that is not shredded wheat." Nobody ever told me that it was not shredded wheat unless it was made by the National Biscuit Company. We just went there but it was by no suggestion of his that I made this purchase or any purchase. He suggested we go to that restaurant but he did not ask me to order shredded wheat.

That is the only experience of that kind I have had.

RE-DIRECT EXAMINATION.

The reason I said to the waitress "that is not shredded wheat" is that I seldom eat breakfast in a restaurant but at home for breakfast we get a large cake like that and that is what I am used to. And I think that is the first time I ever ran into the little biscuit. And it did not look like what I am acquainted with. That is why I said, "It is not shredded wheat." So when I asked this waitress for shredded wheat I had something definite in mind that I expected to get and that something was the shredded wheat biscuit I had previously eaten so much of.

RE-CROSS-EXAMINATION.

RXQ. 67. Mr. Rohn, if you went into a restaurant from now on and wanted to get this large biscuit, would

it not occur to you to ask for the Niagara Falls Shredded Wheat?

A. Well, I do not know. With me, shredded wheat is Shredded Wheat.

THE WITNESS: If I had liked this Kellogg product so much that I would have liked to have some more of it I would have asked for Kellogg's Shredded Wheat when I was in this restaurant. It was the first time I had ever heard of Kellogg's Shredded Wheat. I am now thoroughly educated to the fact that there are two shredded wheats on the market; one that is the Niagara Falls product and one the Kellogg product.

FRED LEIGHTON.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I live in Lakewood, a residential suburb of Cleveland, and am in the business of grocery and fruits, conducting a service grocery store. My clients are middle class people. I have no charge accounts but run a cash and carry store. I have been in the grocery business since 1918 and have been with every chain except the Clover Company. I have had my own store for 2½ years and during all my experience have been actively connected with the management of retail grocery stores and the handling of products in those stores with which I have been connected in various capacities as salesman and sales manager.

I have been familiar with cereals and recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and the contents which is called shredded wheat, the only name I know it by. I have been familiar with it as long as I have been in the grocery business and longer. I sold

Shredded Wheat when I was only a boy 14. I worked in Canada and I also went through the Shredded Wheat factory twenty-six years ago back in Niagara Falls. Shredded Wheat means to me just the one name, what it implies: Shredded Wheat.

When a customer asks for shredded wheat we give her Shredded Wheat, that is all she knows it by. It is practically all I know shredded wheat by. Just the one word is what it implies. That is all it means, a biscuit in its shape and form. When a customer asks for shredded wheat she only knows shredded wheat. When a customer comes in and asks for Shredded Wheat we give her a package of Shredded Wheat as we have always known it. I would not give a customer anything else than a package like Plaintiff's Exhibit No. 1 if she asks for shredded wheat. The buying public already has that one package in mind. She has that in mind as shredded wheat and she knows the package is a package of shredded wheat. That is all she simply knows.

I have carried Kellogg's Whole Wheat Biscuit. I do not carry it today because I do not have any demand for it. That is, when you ask for shredded wheat—and I did have what they had—the Kellogg's biscuit on the shelf, and I just disposed of it as shredded wheat, because I wanted to get rid of it. I had no demand for the Kellogg's biscuit, because, when they asked for shredded wheat, they wanted Shredded Wheat. And I had quite a time to get a demand for the Kellogg's biscuit. I did not give Kellogg's Whole Wheat Biscuit only when a customer asked for Shredded Wheat and I wanted to dispose of Kellogg's. I asked the woman would she take it. I gave the customer a good price. In fact, I gave it to her at lower than cost, to get it off the shelf, because I had quite a time to get it off the shelf. I told them it was shredded wheat and I said it might not be just the same, but they led me to believe

it was just the same; but, if she did not like it, I would gladly give her the money back. And I had a couple of different women there who really refused to take Kellogg's biscuit. One of them says, "Mr. Leighton, I have dealt with you quite some time, and I really believe what you tell me is true; but give me Shredded Wheat." Well, I said, "This is shredded wheat." She says, "No, I do not want it. I just do not want it. That is all." "I want Shredded Wheat," and I said "That is all right." I gladly gave it to her. I am familiar with the shape and appearance of the Kellogg's Biscuit.

Q. 32. What do you say as to the shape and appearance of the Kellogg's Biscuit.

A. Well, I would say that shredded wheat in biscuit form—that is, just a—well, there is a biscuit right there in front of me, and the customer knows it as Shredded Wheat. Now, you take—I really truthfully believe that Kellogg's putting out this Whole Wheat Biscuit is nothing more than a camouflage to deceive the customer, to make her believe that she is getting something that is a shredded wheat. That might be. But I really believe that it is nothing more than a clever camouflage to infringe the Shredded Wheat people.

I have seen a box like Plaintiff's Exhibit No. 10 and recognize the picture of the dish with biscuit in it. The Shredded Wheat Company used that carton with the picture of a dish on it a long, long time ago. So far back that I would not want even to say what I guess.

I have seen a strip like Plaintiff's Exhibit No. 35 recently because I have painted the price in there on the white space and used it in my own store.

CROSS-EXAMINATION.

I would rather handle just one kind of shredded wheat than two and one kind of Corn Flakes. There is only one Corn Flake, Kellogg's, the leading brand, and

if people just say corn flakes I give them Kellogg's. There is not much competition in these foods. We handle one Bran Flake—Post's. Kellogg's has a Bran and we handle their All-Bran but when people want Bran Flakes we give them Post's. It is just like a woman coming in and asking for a bar of soap. If she asks for a bar of soap, we naturally give her the P. & G. soap, unconsciously, maybe.

We do not often get better treatment from one manufacturer than another. They have all got that price. They all offer deals and when one makes a price the other follows.

XQ. 69. Assuming that there are no patents to prevent anybody from making a shredded wheat product, you do not think, do you, that there is anything morally wrong if a concern comes along and makes a shredded wheat, also, as long as they put their own distinguishing trade-marks on that package?

A. Well, yes. I do not just agree with you there. They could come out with an item that should be entirely different. I think that, for instance, it should not be a biscuit of that same type or form as Shredded Wheat. They are more or less camouflaging and deceiving the public. That is my idea.

WITNESS: From my chain store experience I know there are many brands of Corn Flakes but I do not feel that it was wrong for others to manufacture Corn Flakes in competition with Kellogg when he had started it. Post does not just put on there Corn Flakes but I would be a little prejudiced and feel that it was unfair to put out a corn flake as a competitor. I would be better satisfied to have one kind of Bran Flakes and one kind of Corn Flakes and one kind of shredded wheat. It would be simpler for me as a grocer.

RE-DIRECT EXAMINATION.

When a woman comes in and asks for a pound of sugar I would give her a pound of whatever sugar I may

have. There are many products like that but Shredded Wheat is Shredded Wheat; that is all. It is in a different class from ginger snaps or sugar or other common articles of trade. It is a cereal and it has a reputation.

RE-CROSS-EXAMINATION.

RXQ. 95. Mr. Leighton, it is true, is it not, that you, as a grocer, now know that there are two distinct brands of shredded wheat on the market; one made by the Kellogg Company at Battle Creek, and the other made by the National Biscuit Company at Niagara Falls?

A. No, I know only one. There is only one Shredded Wheat.

RXQ. 96. Yes, but I mean, do you know that the Kellogg Company is making a shredded wheat product?

A. Well——

RXQ. 97. Have you heard that in the trade?

A. I have tried to sell it as such.

WITNESS: I know that Kellogg's have a biscuit that they are trying to say is Shredded Wheat but I do not say it is Shredded Wheat. But I only know one biscuit as Shredded Wheat—put out by the Kellogg Company, I do not know—but they are trying to make the public think it is such. I do not know whether the Kellogg Biscuit is a Shredded Wheat product but I think they are trying to infringe on Shredded Wheat. They are so much alike that you would not know whether one was Shredded Wheat and one was the other biscuit, and if you cut them down to the same length I could not tell one from the other.

I can tell Post's Bran Flakes from Kellogg's Bran Flakes absolutely. Even a blind man can see the difference in appearance. My idea of interference here is that these two products are two near alike and I

think the Kellogg Company should make some other kind of shredded wheat product that would be sold regardless of price. Even if the new product were offered at half the price it would not do any good. I would have to do too much advertising or talking to people as compared with selling Shredded Wheat. I would have to use a lot of sales talk and would have to put on a whole bunch of clerks. And even if the cost would be less my profit would be just the same. It would be better to use Shredded Wheat even though I would charge her twice as much.

NICK PYROS.

Deposition taken in Cleveland, Ohio, December, 1932.

Direct Examination.

For nine years I have run a restaurant at 8305 Harvard Avenue. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, the kind I use. I know no other kind. When my customers ask for shredded wheat I supply them with just Shredded Wheat and that is the kind I use. I recognize the glass globe, Plaintiff's Exhibit No. 36 that came from the Shredded Wheat Company six or seven years ago. It has been in my place nine years. I found it there when I took the place and it had Shredded Wheat in it made at Niagara Falls. I recall the Shredded Wheat man putting the biscuit in the globe a long time ago. The date is on a piece of paper on the bottom, December 2, 1925. I had the globe on display right in the front window all the time that it was in the restaurant until day before yesterday when it was taken out.

Cross-Examination.

I sell Shredded Wheat in individual cartons and have for many years. We had the big packages too and

if I ran short I would get it from the grocery store. I have heard of Kellogg's Shredded Wheat but never knew anyone that used it. It was offered to me about a year ago but I refused to take it.

FLORENCE BERNARD.

Deposition taken in Detroit, Michigan, December, 1932.

Direct Examination.

I have no occupation and am not related to any of the employees of the National Biscuit Company but have friends in the organization. I recognize Plaintiff's Exhibit No. 1 as shredded wheat which I have been familiar with all my life—twenty-three years. The expression shredded wheat to me has always been a breakfast cereal, something that I did not like—tried to get out of eating. I only eat breakfast cereal when I am forced into it. I do not know much about its origin. I have never known any other article than the article in this package, called Shredded Wheat. I recently went in a store and asked for Shredded Wheat and was given something else. That was on December 12th in a grocery store at the corner of Percival and McLean. I was waited on directly by a boy—I imagine of high school age—but the proprietor of the store was the one selling me the goods, although I paid the boy. I asked the boy for a bag of pure Buckwheat Flour, he was unable to find it, he then called another boy and he could not find it, so the proprietor was called and he was unable to find it, so he told me he did not have any but would have it on the following day. I then asked for butter and a package of Shredded Wheat. The boy was standing directly in front of the case or wall, where cereals of all sorts were sold, and he looked at the shelves and said, "Hain't we any Shredded

Wheat?" The man said, "Why, yes, we have. It is right in front of you." The boy looked and looked and said, "Well, I cannot see any Shredded Wheat." The man came over and said, "Well, it is right in front of you." And he took down a package and handed it to the boy, who said, "Is this Shredded Wheat?" The package was then handed to me and I said, "Is this Shredded Wheat? It is not the package I am accustomed to purchasing. That has a picture of Niagara Falls." The man said, "Well, yes, it is shredded wheat, you are getting fifteen biscuit—it is a better size for serving." I have the carton given to me with me—on it is written my name in my writing, the contents were taken out and the package turned over to the National Biscuit salesman.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 44.")

CROSS-EXAMINATION.

Cullen is the only one I know connected with the National Biscuit Company, he took me to this store and paid for the things I bought and was within about two blocks when I made the purchases. He did not ask me to go to any other store and this is the only time anything of this kind occurred to me.

MRS. C. COE HARRIS (Arthur D.)

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a housekeeper, not related to anyone in the National Biscuit Company. I recognize Plaintiff's Exhibit No. 1 as the Niagara Falls Shredded Wheat. The contents look like Niagara Falls Shredded Wheat. I

have been familiar with it for a number of years, a long time. I buy it for the children, I am not particularly fond of it myself. I have had occasion to ask for it and receive something else, that was at the College Inn Cafe in Flint, Michigan, at the corner of Detroit and Second Avenue, on December 13th. This is a cafe, I picked up the menu, looked it over, and saw Shredded Wheat on it and ordered it, and half a grapefruit and a cup of coffee. She brought me the package which I have in front of me. When she handed it to me I asked her if she would serve it for me and she said, "Sure." I said, "Isn't that a cute little Box? This is different than what I have been used to buying. Have you no Niagara Falls Shredded Wheat?" She said, "No; but I think this is real good." I accepted it and ate it, That is not my writing on the printed slip. Yes, I identify the box, my name is on it and there is half a stick of gum inside. I took the box out to the car and took it home and showed it to Mr. Paine, the National Biscuit man, and gave him the box.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 45.")

CROSS-EXAMINATION

I had not been in that restaurant in a long, long time. I am in the habit of eating in Flint when I go in, regardless of the time. I usually do not go in there; but lately, I have been in the habit of going to the Home Dairy. Mr. Paine asked me at one time to go in any place, where I was, ask for Shredded Wheat and see what they gave me and to keep the carton. When the girl came back she asked me how I liked the Kellogg's, and I said, "It is real good." And she said, "We think it is real good." She did not say that she offered to substitute it or that she thought it was better or anything like that. She just simply said that they thought it was real good.

HAROLD O. YORKE.

Deposition taken in Detroit, Michigan, December, 1932.

Direct Examination.

I am a chiropractor and am not related to any one connected with the National Biscuit Company. I recognize Plaintiff's Exhibit No. 1 as a package of Shredded Wheat and the contents as Shredded wheat biscuits which I have been familiar with ever since I was a kid, as far as I can remember back. Shredded wheat conveys to me a biscuit made at Niagara Falls. We used to look for that on a package to identify it. There has never been anything the same as that, as far as I know.

I never had occasion to ask for Shredded Wheat and receive something else until I got this package in the Owen Grocery on Livernois Avenue one day last week. I went in and asked for Shredded Wheat and the woman said, "This is better than Shredded Wheat. It has got more biscuit in it, and you are foolish to buy the other stuff." And she said, "We do not sell that big Shredded Wheat. We only sell this." This is the package I got, I used part of the contents; the writing on the slip pasted on the package is my signature in my writing.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 46.")

Cross-Examination.

I knew as soon as I saw the package that it was not Niagara Falls Shredded Wheat. I made the purchase at the request of Mr. Smith, a salesman for the National Biscuit Company and a friend of mine. He asked me to go to this store and make this purchase—I have gone in there and bought things at different times. I

paid for the package and Mr. Smith refunded the money. I ate some of the biscuit but did not like it as well as Shredded Wheat. I have a little girl who has eaten Shredded Wheat ever since she started to eat cereals and I am a constant consumer of it myself. There is a difference in the taste and I do not like the Kellogg's Shredded Wheat as well as the Niagara Falls.

EPHRAIM McCLELLAN.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I live in Fenton, about eighteen miles out of Flint. I am a retired electrical engineer at which I worked all my life until a few years ago. Plaintiff's Exhibit No. 1 is Shredded Wheat, by the look. You cannot be sure about the contents. It might be and it might be Whole Wheat. I think we have been buying it for twenty or twenty-five years and possibly a little longer. When we asked for Shredded Wheat we expected to receive Shredded Wheat, of course, which meant a very good breakfast food; and the children liked it especially. They called it Shredded Wheat.

Mr. Paine took us around and dropped me in front of a store in Flint, I do not know where it was; I went in and called for a package of Shredded Wheat and he showed me this package, you see, and I looked it over and I said, "Haven't you the Shredded Wheat!" And he said, "No, we do not handle it." He said, "We think this is just as good or a little better." And he said, "The Shredded Wheat is owned by the big syndicates, and Standard Oil has money in it." And he says, "We are cutting that out." I paid for the package and took it away with me. I did not write what is on

that piece of paper but that is my name on it and the figures 12/13/32.

(The package referred to was received in evidence and was marked "Plaintiff's Exhibit No. 47.")

CROSS-EXAMINATION.

Mr. Paine did not take me to any store except this one where I made the purchase and he refunded to me the purchase price of the Kellogg's Shredded Wheat. My niece, Mrs. Harris, and I drove in from Fenton today at the request of Mr. Paine. Detroit is about fifty-six miles, something like that, from Fenton. I knew as soon as I saw the Kellogg package that it was not the Niagara Falls Shredded Wheat. I never opened the package but turned same over to Mr. Paine and he had it until I saw it here this morning. I have known Mr. Fenton four or five years; he is the National Biscuit Company man around Fenton.

JOSEPH C. MELLOURE.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a bookkeeper and am not connected with the National Biscuit Company. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat which I have been familiar with nearly all my life. About twenty years. Shredded wheat to me means a breakfast food and when I ask for Shredded Wheat in a store or restaurant I expect to get Shredded Wheat Biscuit. I have never known more than one Shredded Wheat.

On the twelfth day of December I went into the Eighth Street grocery in Flint to purchase a box of Shredded Wheat; he did not even say that he did not

have it. He put out one of Kellogg's packages. And when I questioned it as to whether it was Shredded Wheat, he immediately opened the package and explained that it was not the Shredded Wheat that I had been buying, but that it was the same thing, with more biscuit in the box, that it was electrically cooked, whereas, the original was baked with gas, and that, if I was not satisfied, my money would be returned; and that that was what most of them were then purchasing, meaning most of the customers.

I examined the biscuit inside the package, they looked about the same as I had always bought; maybe, smaller. I took away the package of Kellogg's Whole Wheat Biscuit that I purchased and can indentify it by my name and the date which I put on it. This is not the package that he opened for me, it was another similar to this one.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 48.")

CROSS-EXAMINATION.

Mr. Woods, salesman for the National Biscuit Company, asked me to make this purchase. He took me to the neighborhood and told me where the store could be found and later on he came and got me. I did not go to any other store. I had no previous experience with the Kellogg's Shredded Wheat and had never seen it before, nor heard of it before. I had never known of more than one shredded wheat product previous to this. I know now that there are two such products, one made by Kellogg and one by the Niagara Falls people. I was driven down this morning by the National Biscuit Company local man's car. His wife was the only other person in the car. Flint is from between fifty, and—about fifty-five miles from Detroit.

FRED SELL.

Deposition taken in Detroit, Michigan, December, 1932.

Direct Examination.

I am a retail grocer since 1894, in business always in Detroit. My store at present is a small cash and carry; I used to have a larger one. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and the contents as Shredded Wheat which I have been familiar with fifteen or twenty years, probably. It has a great reputation with us because the public demands it and when the public asked for shredded wheat they expect to get the box right here same as Plaintiff's Exhibit No. 1. I make this statement from my experience with the purchasing public. I have never had any substitutions for Shredded Wheat, just this here, all the time. I have never handled Kellogg's Whole Wheat Biscuit and do not know that I have ever seen it. I never was offered this. When I got Shredded Wheat I asked for Shredded Wheat and never took anything else.

I do not remember ever having seen Plaintiff's Exhibit No. 48. By covering up the name on it, it looks as though the package contained Shredded Wheat. I believe I did handle Shredded Wheat in a package like Plaintiff's Exhibit No. 10. I do not really remember if the picture of the dish was on it, but I do recall the picture of the factory on the front panel. The picture of Niagara Falls is familiar to me on plaintiff's exhibits.

Cross-Examination.

Today is the first time I learned that the Kellogg Company had a shredded wheat product on the market and I now know that there are two shredded wheat products made, one by Kellogg and one at Niagara Falls. I never knew the difference, because I only know the product in Plaintiff's Exhibit No. 1.

I would say that the contents of Defendant's Exhibit No. 6 are shredded wheat. The Niagara Falls product is a little longer. Yes, I handle Kellogg's Corn Flakes and recognize a family resemblance between the corn flakes package and the Kellogg's Whole Wheat package. The colors and dress look about the same and I recognize a clear distinction between this package and the Niagara Falls package.

RE-DIRECT EXAMINATION.

Some of the purchasing public behaves one way and others another. They come in, and if I would hand them a different package they might take it, and probably they would bring it back if I would not explain it first. Or, she might say right away, "That ain't Shredded Wheat" you see. Some of the purchasers are less careful than others as to what they buy. When a customer asks for shredded wheat I would give her that package there—pointing to Plaintiff's Exhibit No. 1. I would never give her anything else.

CROSS-EXAMINATION.

I never knew about Kellogg's Shredded Wheat until today. I handle Kellogg's corn flakes, also Post's corn flakes. If a customer just asks for a package of corn flakes I would give them Kellogg's unless they asked for Post's. If they asked for Kellogg's Shredded Wheat I would tell them that it is all I got, meaning Niagara Falls Shredded Wheat.

RE-DIRECT EXAMINATION.

If a customer demanded Kellogg's Whole Wheat Biscuit I would go to a wholesale house and buy a dozen or whatever I could get to please the customer. It would be foolish for me not to do it.

MYRTLE GREENE.

Deposition taken in Detroit, Michigan, December, 1932.

Direct Examination.

I am a housekeeper and not related to anyone in the National Biscuit Co. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, made by Niagara Falls, National Biscuit Shredded Wheat. Well, really, I do not just exactly recall how long I have been familiar with it, but it is quite a number of years.

The term shredded wheat means to me that it is whole wheat biscuit, and I know that the doctors are prescribing it, and it seems to be very good for you. When I ask for a package of Shredded Wheat I expect to get Niagara Falls Shredded Wheat, a package like that, pointing to Plaintiff's Exhibit No. 1. This morning I had occasion to stop at the Victory Lunch, I went in and ordered Shredded Wheat and coffee and the girl took a Kellogg's Whole Wheat Biscuit out of the drawer; and I asked her if it was Shredded Wheat. And she said, "That is the only shredded wheat we have." So, of course, I cancelled my order. And I was at Cunningham's a few days ago, and I asked for Shredded Wheat, and she gave me Kellogg's Whole Wheat. And they threw the package away, but you can recognize it instantly when you taste it. It was in Cunningham's drug store that I had Kellogg's Whole Wheat Biscuit served to me in a dish outside the package. I asked if that was Shredded Wheat, and the girl said, "Why, yes, that was shredded wheat." And I asked if I could see the package and they had thrown the package in the incinerator. And they went and got the package and here it is, Kellogg's Whole Wheat Biscuit. The package is identified by the initials on it in pencil.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 49.")

That experience has happened to me four times in the last two weeks in restaurants.

CROSS-EXAMINATION.

The National Biscuit Company man sent for me today and he was with me when I stopped in this restaurant. He did not suggest to me that I order shredded wheat. I have eaten it for the last two years every morning for breakfast. If Kellogg's Shredded Wheat should come into general use I would stop eating shredded wheat as I would not eat any other product than Niagara Falls Shredded Wheat. I had this package of Kellogg's biscuit from Cunningham's this morning. It did not make me ill but it does not taste like a hundred per cent. whole wheat biscuit to me. There seems to be some other ingredients in there. I have been eating Niagara Falls Shredded Wheat every day for about two years. I have no personal friends in the Biscuit Company, but I have been with drug companies previous to now and I have had salesmen calling on the drug store, otherwise, I do not know of any one with the National Biscuit Company. I was a soda fountain manager in a couple of drug stores and came in contact with a number of National Biscuit salesmen. I told my experience to Mr. Feldman and he asked me why I did not report it to the company, and when this came up he called me and told me that now is the time, if I wanted to present my package, to bring it in.

I think if I were blindfolded I could tell the difference between the two shredded wheat biscuits. I do not believe there is any great difference in the size between the two biscuit but there is a difference in the taste. If you are accustomed to using a certain kind of

shaving cream all the time and then are given a different kind, even if it is just as good, you do not like it as well and it is the same thing with this: if we order Shredded Wheat and they give us something else, we would not like it. It is the same thing. It all comes under the same heading. We want what we order.

MRS. FLORENCE L. COWLES.

Deposition taken in Detroit, Michigan, December, 1932.

Direct Examination.

I am a housewife and am related to Mr. Diesing of the National Biscuit Company, who is my uncle. He is a salesman of the National Biscuit Company.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat which I have been familiar with for about fifteen years and which I use in my home. When I ask for Shredded Wheat in the stores I expect to get the package with the picture of Niagara Falls on it. Shredded Wheat has never meant any other product to me. Recently I had an experience with the purchase of Shredded Wheat—this was over on Third Avenue at Dave's grocery store on the twelfth day of December this year. I walked in the store and asked for several articles, among them Shredded Wheat. She placed a box of Kellogg's Whole Wheat on the counter and I said, "Is this Shredded Wheat?" and the lady said "Yes." I said, "I thought the Shredded Wheat had a picture of Niagara Falls on it." And she said, "Well, this comes from Niagara Falls,"—meaning the Kellogg package which she placed on the counter. I asked her whether it was just as good as the other package that I referred to and she said, "Yes, just as good." This is the package and I have my initials on the bottom and it is the package that she had reference to when she

said, "This comes from Niagara Falls." The paper bag contains an itemized list of the things I had purchased—that is the clerk's handwriting.

(The paper bag referred to was received in evidence and was marked "Plaintiff's Exhibit No. 50-A"; and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 50-B.")

CROSS-EXAMINATION.

My uncle asked me to go to this store, to make this purchase and to get some sort of a bill for it. I gave him the whole package, I did not keep any of it. I have never eaten any of Kellogg's biscuit.

MRS. CLARA WESTPHAL.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a housewife, not related to anyone connected with the National Biscuit Company. I am familiar with the package called Plaintiff's Exhibit No. 1. It is Shredded Wheat which I use in my home and have been familiar with quite a long time. When I ask for shredded wheat in a grocery store I expect to get the National Biscuit package with the picture of Niagara Falls on it. I have always received this package until just here lately when I went to Shubert's, up Warren Avenue, on Monday of this week and asked for a package of Shredded Wheat. The lady handed me a package; and I looked at it and I told her it was not the kind I always got. And she said it was just as good as the other kind. What she gave me was a package of Kellogg's and I have here the package that I got which I can identify by my initials right on there. I had nothing to do with the piece of paper pasted on the end.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 51.")

I never knew there was a Kellogg's Shredded Wheat until just here recently, when I went to the store and the minute this package was handed to me I knew it looked different and I told the clerk it was not the kind I have used. Now that I know there are two kinds on the market I would specify the next time that I wanted Niagara Falls Shredded Wheat.

Shubert's store is not my regular grocery store. I went there at the request of Mr. Bernier, a neighbor of ours who is connected with the National Biscuit Company. He just asked me to go in there, ask for a box of Shredded Wheat and take whatever they gave me. He later refunded to me the purchase price. He drove me to the store and waited for me outside. I turned over the entire package to him and did not use any of the contents.

ANDREW B. MacELROY.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I buy some goods for G. & R. McMillan's, wholesale and retail grocers, and I have charge of the coffee department over there. They have been in business since 1848 and I have been connected with them about thirty years. They have a retail store where goods are sold to the public at retail and they also do a wholesale business in all lines of groceries in the same building. They are the largest grocery store in the State of Michigan.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat made in Niagara Falls which I have been familiar with about thirty years. If I were waiting on a

customer and she asked for shredded wheat I would give her the original package of Shredded Wheat made in Niagara Falls. That is the first package I have seen. I have seen the Kellogg's so-called shredded wheat under a different name. I have seen Shredded Wheat advertised in magazines and street cars and the papers for quite a number of years. Shredded Wheat has a reputation among the public, so far as the quality is concerned, it has a good reputation. We sell great quantities of it and have sold quantities of it for the last twenty years. G. & R. McMillan's have published 13 catalogues, the one you have in your hand now was published in 1913 and 1914. We had them in the store, thousands of them distributed among the public. The items that are carried in that catalogue are items that are offered for sale by G. & R. McMillan and were stocked by them at that time.

(The catalogue referred to was received in evidence and was marked on the page designated, "Plaintiff's Exhibit No. 52.")

THE WITNESS: We have those catalogues even at the present time. They are published every year.

The words Shredded Wheat referred to in the 1913 catalogue referred to the Niagara Falls product. I could not tell you whether subsequent catalogues have similarly carried that.

CROSS-EXAMINATION.

I buy some of the cereal for our concern. I might have seen Kellogg's product and not paid any attention to it. I do not buy their product. We handle some of the Kellogg's package goods. Our house is the largest wholesale and retail house in Michigan. They have handled some of Kellogg's Whole Wheat product; I have seen the package in the house and I have seen corn flakes and such as that. I know now that there

are two shredded wheat products on the market. In 1913 I was not connected with the buying end of the business. I never heard of the Ross Biscuit back in 1913; they might have handled it.

Mr. Freeman, of the National Biscuit Company, asked me to come down here today. I have known him for a number of years but he is no particular friend of mine. During all the time that I have personally known anything about Shredded Wheat referred to as Plaintiff's Exhibit No. 1, I have associated Niagara Falls with that product. This is the first time that it has been called to my attention that Kellogg's had a shredded wheat product on the market and I shall look to see if we have any when I go back to the store. I have no doubt about it now that there are two shredded wheat products on the market. If a customer asked me for Shredded Wheat, I would naturally give him the Niagara Falls and if he asked for Kellogg's Shredded Wheat I would give it to him.

RE-DIRECT EXAMINATION.

If a customer merely asked for shredded wheat I would certainly give him the product that has been on the market for years and it is a well-known product. If a customer asked me for Kellogg's Shredded Wheat, I would give him Kellogg's. That is what the clerks have been instructed to do—not to sell people what they want to sell them, but to sell them what they ask for.

RE-CROSS-EXAMINATION.

I know we handle Kellogg's Corn Flakes but I do not know what other kinds we handle. If a person ordered Corn Flakes I would give them Kellogg's because that is the only one I know. I do not know the other corn flakes at all.

HARRY O. PLANZ.

Testimony taken at Detroit, Michigan, December, 1932.

Direct Examination.

I am a retail grocer and have been in business for myself about eight years. I have been connected with the grocery business for nineteen years. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat which I have been familiar with all my life. I think the form, appearance or shape of it has remained just about the same, as far as I can remember.

When a customer asks for Shredded Wheat we naturally go to that style of package with the picture of Niagara Falls on it. In fact, that style of package has remained just about the same for the last eighteen or nineteen years.

The words "shredded wheat" to the housewife, in my opinion, is that particular serving. A lady would not know what to ask for if she did not ask for Shredded Wheat. I have never heard it called anything else.

Q. 17. Would you say, Mr. Planz, or would you be able to characterize for us this expression "shredded wheat" and the position that it holds, if any, in the minds of consumers?

A. At the present time, my idea is that the customer has in mind that there is only one Shredded Wheat that there is only one package of that type there, and that they are sold on that idea, that that is what they want. If that very same item there were put under another name, I doubt whether you could sell it. It is Shredded Wheat. It has been that product and it is sold as Shredded Wheat, if that is what you mean.

I do not think the sale of a product that was put out under slightly different name; say, "Whole Wheat Biscuit," which was made with a similar appearance to

Plaintiff's Exhibit No. 1 would be near as good as Shredded Wheat. To sell such a product you would have to use the words "shredded wheat" or say it was the equivalent of Shredded Wheat or like Shredded Wheat.

I recognize Defendant's Exhibit No. 6. I do not recall in the advertising of the Shredded Wheat Company the use of a dish with biscuit in it. If I saw this package with the name obliterated I would say it looked like Shredded Wheat.

CROSS-EXAMINATION.

We handle Kellogg's Whole Wheat Biscuit. We do not recognize this in our store as Shredded Wheat. We just call that Whole Wheat Biscuit, what it says on the package. If the picture were not on there it would not be possible to tell for the first time what was in the package. It might be one of six or seven different products. Of course, people would not buy it until they knew what was in there; but I would never recommend to the salesmen to sell this as Shredded Wheat.

RE-DIRECT EXAMINATION.

By MR. VILAS:

RDQ. 32. Would you consider selling Kellogg's Whole Wheat Biscuit as Shredded Wheat, like Defendant's Exhibit No. 6, as misrepresentation? You say you never misrepresent.

A. We never misrepresent, and I would not want to commit myself as doing such a thing.

RDQ. 33. If it were done.

A. Well, I will just change that question. If the lady says, "What is the nearest thing you have to Shredded Wheat?" we might recommend this, if you put the question that way.

RDQ. 34. Yes, but if she said "shredded wheat," and the grocer or clerk gave her Defendant's Exhibit No. 6, would you call that a misrepresentation?

A. Yes, I would call that misrepresentation, if he gave her this for Shredded Wheat.

MR. VILAS: May we stipulate that W. Cook, Boston and Dexter Boulevard, Detroit, Michigan, if called, would testify that he is a retail grocer in Detroit, that he handles the Shredded Wheat of the National Biscuit Company, formerly made by the Shredded Wheat Company, that he has known it for several years, and that, when customers ask for shredded wheat, the order is always filled with the product of the plaintiff?

MR. CLARKE: Yes, without prejudice to my objection that the subject matter of it is irrelevant and immaterial. And may it be further stipulated that said witness would also testify that customers who ask for corn flakes mean Kellogg's Corn Flakes in practically every instance, and that, where a customer asks for corn flakes, the grocer gives them Kellogg's?

MR. VILAS: Yes, subject to my objection.

MR. CLARKE: Certainly.

MR. VILAS: The taking of the depositions at Detroit is closed.

STANLEY A. MICHALAK.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am an accountant and have been doing work for the Western Electric Company.

I have been familiar with Shredded Wheat for a good many years because it is the brand that we have always used in our home.

I often order Shredded Wheat and cream for my lunch in restaurants. Recently, at Pixley & Ehlers, a restaurant located at 68 South State Street, Chicago, I asked for a bowl of Shredded Wheat and a cup of coffee. The counter clerk reached down under the counter (I had noticed that it had not been the National Biscuit Shredded Wheat that I had been receiving—it was a different type of package) and as he was doing that, he seemed to try to conceal something. He had his back facing me. Just as he slit open the package and was going to empty it into the bowl, I said, "Hold everything. That does not look like the thing I want."

The clerk tipped it out in the bowl, and he said, "Sure, that is the thing." And then he tried to explain to me what the difference was. He said that was Shredded Wheat and that was the thing.

I got hold of the menu card and I told him, how come that they have Shredded Wheat on the card, and then when you ask for Shredded Wheat you get some other brand. He started to tell me something about the patent and the rights expiring on some particular patent, but I did not get all of the paraphernalia.

I took away the menu card and on the back thereof wrote a brief story of what I had witnessed. I also took away the carton. (The slip referred to was received in evidence and was marked "Plaintiff's Exhibit hibit No. 53-A"; and the carton referred to was receivedin evidence and was marked "Plaintiff's Exhibit No. 53-B.")

A thing I have often thought about is the infringement on the good-will of National Biscuit Company. Let me explain—I understand—in fact I know—that National Biscuit Company has put out a product of good quality and worked up a good name and received the good-will of the people. And, naturally, a customer goes into a restaurant, and in a place of that kind he

asks for Shredded Wheat, and if they give you some else, it looks rather bad. It is more or less of an infringement, I think.

I know that the National Biscuit Company has conducted a rather extensive campaign advertising Shredded Wheat. I think that other people have also noticed this campaign. I also think that other people would rather have that than any other brand. I think if I was in another line of goods I would rather have the National Biscuit than any other item; I have tried other goods and naturally I always go back to the National Biscuit, because I know they carry a good line of goods.

CROSS-EXAMINATION.

THE WITNESS: I have never tried any of the Kellogg's cereals. No matter what kind of breakfast food I try, I always go back to National Biscuit Company's Shredded Wheat.

A personal friend of mine, Mr. Camphausen, who is connected with the National Biscuit Company, asked me to make this purchase at Pixley & Ehlers.

I called the matter of substitution to his attention and he asked me to come here as a witness.

The only time I have seen the Kellogg biscuit was the other day when the waiter tried to show me a slight difference between the two.

When I say shredded wheat biscuit I mean Shredded Wheat Biscuit made at Niagara Falls.

MR. CLARKE:

XQ. 62. Do you now know that the product which I call shredded wheat biscuit is coming from two different sources of manufacture? Have you not had experience with at least two different makes of shredded wheat biscuit?

A. 64. Two products alike; but, as far as the product itself is concerned, I do not know—that is—the

make-up of the thing, whether it is the same or not. It may have a different taste. I do not know. One may be more crisp than the other, and things of that kind.

THE WITNESS: It is a fact that I have encountered these two different products which look alike, served in packages which do not look alike, but I always associate Niagara Falls with the brand that I have always used.

Mr. Camphausen paid the bill at the restaurants we frequented for lunch.

Until recently I had never heard that there was another product known as Kellogg's Whole Wheat Biscuit. The Kellogg carton and the name "Kellogg's Whole Wheat Biscuit" would not tell me what sort of product was inside the carton.

RE-DIRECT EXAMINATION.

THE WITNESS: If I saw Defendant's Exhibit No. 6 with the name covered up but the picture visible, I would doubt whether it was Shredded Wheat Biscuit because it is a different picture on there that is unlike the Shredded Wheat picture.

When I hear the expression "shredded wheat" I have in mind just that—that is—that with the Niagara Falls on it—meaning Plaintiff's Exhibit No. 1.

MISS EVELYN LOUGHLIN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am an accountant and reside at 111 East Chicago Avenue, Chicago, Illinois.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat Biscuit. I have Shredded Wheat every morning for breakfast and have been eating it since 1920, when the doctor ordered it for me.

When I order Shredded Wheat in restaurants and in stores I always ask for the Shredded Wheat that I am accustomed to having, and I expect to get it. I generally always receive what I ask for, but yesterday there was an exception. I went to the Y. M. C. A. on Chicago Avenue, to the grill, and ordered Shredded Wheat. They brought me Shredded Wheat in a dish, and I ate it; then I asked for another package to take out with me and they brought me this package of Kellogg's. (The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 54.")

Mr. Elson, a salesman of National Biscuit Company, asked me if I would go in and order Shredded Wheat for my breakfast at this particular Y. M. C. A., yesterday morning. He said he would like to know what they were serving as Shredded Wheat. They served the Shredded Wheat to me in a dish—I did not see the carton—so I asked for another carton to take away with me.

CROSS-EXAMINATION.

THE WITNESS: The biscuit served to me were a little harder and a little drier than the Niagara Falls product.

I always notice the picture of Niagara Falls on the Niagara Falls package because I went through the Niagara Falls factory.

If I should learn to prefer Kellogg's product I would say that I wanted Kellogg's Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: Inasmuch as yesterday was the first time I had Kellogg's Whole Wheat Biscuit, I cannot exactly say whether I prefer one or the other. But, as long as I have used National Biscuit's Shredded Wheat so long, I would probably ask for that.

If the grocer sent me the Kellogg product instead of the National Biscuit Company product in an order I had telephoned to him I would send it back and would not expect that mistake to happen again. No woman would expect her regular grocer to send her a brand that she did not want more than once. On the other hand, if I found that, when he sent me this Kellogg brand of shredded wheat, I liked it better than the Niagara Falls product, I would then retain it, and, in the future, I would order it by the Kellogg name.

OSCAR RAYMOND HOLMER.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a distributor of check writers and reside at 1657 Edgewater Avenue, Chicago, Illinois.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been familiar with Shredded Wheat as far back as I can remember because we have always used it in our home, and I have sold lots of it, too. I was a clerk in a retail store in Chicago, and when a customer asked for Shredded Wheat I always supplied her with Shredded Wheat, meaning Plaintiff's Exhibit No. 17. I never gave customers anything else but Shredded Wheat because I did not know that there was anything that could be substituted for it.

When customers ask for Shredded Wheat they expect to receive Shredded Wheat, the same as when they ask for anything else by its trade name. It is something that they have been using for years and for that reason they will ask for it, if that is what they want.

Yesterday, at one of Raklio's Restaurants, I had my first experience of substitution. I went in there,

and among other things, I ordered Shredded Wheat. I saw the package that the clerk picked up, and it did not look familiar to me. I asked him what it was. I said, "I asked for Shredded Wheat. Don't you have Shredded Wheat?"

He said, "No, we do not." He said, "We carry Kellogg's Whole Wheat Biscuit, which is the same thing." And, of course, I took it.

MR. VILAS:

Q. 25. Did you take the package?

A. Yes.

I also took a printed card which I found on the counter of the restaurant. (The card referred to was received in evidence and was marked "Plaintiff's Exhibit No. 55-A;" and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 55-B.")

I stopped in another one of Raklio's Restaurants for a cup of coffee, and I noticed they had shredded wheat on the menu. I asked for a package of Shredded Wheat to take out with me and they gave me another package that was exactly the same as that one there. (I am referring to Exhibit No. 55-B.) I also took away one of the menus with me, on the back of which I wrote exactly what happened in the restaurant. (The menu card referred to was marked "Plaintiff's Exhibit No. 56.")

CROSS-EXAMINATION.

THE WITNESS: The clerk gave me the impression that he did not want me to see the package.

I never noticed Kellogg's advertisement of Shredded Wheat. I have seen Kellogg's Corn Flakes and All-Bran and so forth.

MR. CLARKE:

XQ. 51. Assuming that they were advertised, would you then think that the restaurants would be ashamed to put them on display?

A. It would not be a matter of being ashamed to put them on display. The way I looked at it, the Shredded Wheat people having introduced this product and created a demand for it and spend all that money advertising, and so forth, they certainly should be permitted to sell that product and not have somebody coming along and offering something as a substitution and reaping the benefits of years of advertising that the Shredded Wheat people had been doing.

I knew that after Corn Flakes was well established it ran into a flood of competitive corn flakes, but if a customer asked for Kellogg's Corn Flakes she always received Kellogg's Corn Flakes.

Mr. Arnold, who is connected with The Shredded Wheat Company, asked me to make the purchases and be paid for the products.

At the time I was connected with the grocery business I did not give any thought to the competition directed against Kellogg's Corn Flakes.

Since yesterday I know that there are two different makes of biscuit known as shredded wheat biscuit on the market.

I have always associated Niagara Falls with Shredded Wheat. As a kid, I used to sit—while I was eating breakfast at home—and read all the different things on the outside of the package.

After I had seen the biscuit taken out of the carton in the restaurant I knew right then it was not Shredded Wheat. After I had seen it out of the package, I knew it was made by the Kellogg Company. Judging by the appearance, I thought it looked like Shredded Wheat. I, of course, am used to eating Shredded Wheat in the longer biscuit, and would see the difference in appearance. I did not notice any difference in taste between the Kellogg Shredded Wheat Biscuit and the Niagara Falls biscuit.

From my experience in the grocery trade, it is fair to say that the Kellogg Company is a large advertiser of its various products, and it always had a very high reputation for fair dealing with the grocery trade.

At the time I was in the grocery business the average grocer was not dealing with the Kellogg people. They were dealing entirely through the jobbers. However, the grocers were always looked after and any goods that were not sold would be returned.

I would say that 50 per cent. of our customers who had asked for the Niagara Falls Shredded Wheat or the Kellogg Shredded Wheat product and who did not want the other product would send it back to the grocer.

During my experience in the grocery trade, the introduction of the new products competitive to old products was handled in the same way as they do today—that is—they usually sent a crew of men around to distribute samples, and gave them an introductory offer when they came into the store. Some of the customers might take advantage of that, and in that way they might break in.

I would not have any idea that this Kellogg package could be handed to any average customer who wanted the Niagara Falls Shredded Wheat, with the thought in the grocer's mind that she would accept this Kellogg's Whole Wheat thinking that that was the package she had been getting all along.

It does not look as if the Kellogg Company were trying to imitate the Niagara Falls product. You would recognize the Kellogg package the same way you would recognize the Shredded Wheat package.

RE-DIRECT EXAMINATION.

THE WITNESS: If the Kellogg biscuit were served to me in a restaurant in the dish, outside of the package, I would immediately think that the Shredded

Wheat people are making their biscuit into a smaller size.

When I say that there is no effort on the part of the Kellogg Company to deceptively imitate the package, yet I think the biscuit is capable of substitution, independent of the package.

I regard Corn Flakes as purely a descriptive expression like ginger cookies or soda crackers. I do not regard Shredded Wheat in the same category. I know there are several kinds of Corn Flakes on the market. I did not know there was anything, even an imitation of Shredded Wheat, until yesterday.

JOHN FRED MEGGELIN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the retail grocery business at 1100 South Cuyler Avenue, Oak Park, Illinois. I have been in the grocery business for the past twelve years.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat Biscuit. I have been familiar with it ever since I was a young boy and I have handled it since I have been in business.

When a customer asks for shredded wheat I always give her Shredded Wheat Biscuit. That is the only thing I handle (pointing to Plaintiff's Exhibit No. 1).

CROSS-EXAMINATION.

THE WITNESS: The first time I heard of the Kellogg product was about two months ago, when a salesman of the Kellogg Company called at my store. He told me it was a shredded wheat product, but I did not stock it. Since the salesman spoke to me a month or so back, I have known that there were two kinds of

this whole wheat product on the market—one made by the National Biscuit Company of Niagara Falls and one made by Kellogg at Battle Creek.

If a demand were created in my store for Kellogg's Whole Wheat Biscuit, I would stock it.

Kellogg's Whole Wheat Biscuit looks to me like an imitation of National Biscuit Company's Shredded Wheat Biscuit. The physical difference that I see between the two products is that one is shorter than the other.

I buy the Niagara Falls biscuit direct from the National Biscuit Company and the Kellogg's products through the Central Wholesale Groceries. The man at the Central said, "I have a new product coming on the market, and I would like to have you try it."

I said, "I am very sorry, but people know what Shredded Wheat Biscuit is, and they know what the picture is and everything." I said, "I don't care to try to stock two of the same kind of product."

I have never had any trouble with the National Biscuit Company. I was not concerned in any way with the trouble they had with independent grocers some years ago.

Mr. Camphausen, a salesman of National Biscuit Company, asked me to testify about my experience with Shredded Wheat Biscuit.

HARRY E. SCHLOESSER.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer in Chicago, operating four stores.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and have been familiar with it as long as I can remember.

When customers ask for shredded wheat, we supply them with a package like that (pointing to Plaintiff's Exhibit No. 1).

During the period of years I have known the biscuit supplied in cartons similar to Plaintiff's Exhibit No. 1, it has never been altered to my knowledge.

I am not familiar with Kellogg's Whole Wheat Biscuit. It has never been stocked in any of the four stores.

CROSS-EXAMINATION.

THE WITNESS: I was never solicited to buy Kellogg's Whole Wheat Biscuit.

I learned of the Kellogg product through the trade journals.

I have known for two years that I could get Shredded Wheat from at least two manufacturers of cereal goods, although I have never seen the Kellogg product.

Our four stores do not belong to any buying chains or voluntary chains.

I always associate Niagara Falls with Plaintiff's Exhibit No. 1. I have never heard it referred to as the Niagara Falls Shredded Wheat, but I have heard it called National Biscuit Shredded Wheat.

If we found a demand for Kellogg's Whole Wheat Biscuit, we would certainly stock it, although we would not stock it on solicitation. There are so many items coming out and they come out so fast that retailers—and particularly ourselves—find it difficult to have what the people do want and so we try to feed it from the other end—that is—find out what the people want and get the product.

I have from time to time introduced competitive products and in doing that it is customary to describe the advantages that there are for the newer product. I would not say that is like the old product, but cheaper

in price, because I have not found that very advantageous. My practice is to say that there is a larger content, that it is more for the money, or that the quality is better. In some instances, where I am getting better value for the customer, I regard myself as performing a service to the customer to that extent, in introducing the new product into the trade. We would follow the same procedure if we were introducing Kellogg's Whole Wheat Biscuit.

I would not be willing to say that the Kellogg product was another Shredded Wheat. Shredded Wheat to me is a biscuit, a whole wheat biscuit, in a certain shape. When I go to the restaurant and occasionally ask for Shredded Wheat, that is what I expect to get, and I have always received it. We have served people for twenty-five or thirty years in one or two or three or four locations, and people ask us for shredded wheat and we give them Shredded Wheat. It would be foolish for us to tell them that something else was better or just as good, when they have a different product in mind.

Looking at the Kellogg product, I would say it was Shredded Wheat. Assuming that a customer asked for shredded wheat and I sent the Kellogg product I would expect her to think I was attempting to substitute.

I do not think the Kellogg Company could build up a business by expecting that the grocers would substitute their product for the Niagara Falls package.

If a housewife asked for Shredded Wheat, by which I would asume she meant the Niagara Falls Shredded Wheat, and I sent her one of the Kellogg's packages, her cure for the whole situation would be to send it back. I would not send it to her again. I think the longer grocers are in the business, the less they will want to substitute.

RE-DIRECT EXAMINATION.

THE WITNESS: If I were induced to take the Kellogg's Whole Wheat Biscuit as a line, and a customer called up and asked for shredded wheat, I would send her the product that comes from the factory at Niagara Falls.

I think that what Frigidaire has come to mean to electric refrigerators, Shredded Wheat has come to mean to products of that type—just as a Kodak applies to cameras and Kellogg is a special name for Corn Flakes.

My wife, of course, practices substitution on me sometimes but I eat what is put before me because I have not had any occasion to examine it.

RE-CROSS-EXAMINATION.

THE WITNESS: If I had not seen Kellogg's Whole Wheat Biscuit I would expect to find cookies or crackers in the package instead of Shredded Wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: If I looked at only the picture on the Kellogg package I would think that Shredded Wheat was in it.

CAROLINE RISTIG.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a bookkeeper and reside at 4318 West Cullerton Street, Chicago, Illinois.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have known and used it for ten or twelve years.

When I purchase Shredded Wheat I expect to receive the only Shredded Wheat I have known and which I recognize by the shape of the box and the picture thereon.

Wednesday, of this week, I went into Mr. Prinz' store at 323 Leavitt Street and asked for a box of Shredded Wheat. The woman handed me a substitute and when I asked her why she did not carry Shredded Wheat, she said, "That is the thing."

I said, "Are you sure it is the same?" And she said it was identical.

(The carton was offered in evidence and marked "Plaintiff's Exhibit No. 57.")

The National Biscuit Company salesman filled out the slip of paper pasted on the carton.

CROSS-EXAMINATION.

THE WITNESS: Mr. Petri is the name of the National Biscuit Company salesman who asked me to make this purchase. I am a friend of Mr. and Mrs. Petri, and have been for years.

Mr. Petri did not refund the cost of the package to me—he evidently forgot to do that.

Mr. Prinz's store is not my regular store—Mrs. Petri took me there.

On another occasion I went to a National Tea Store to purchase Shredded Wheat, and they said they were out of it.

The only time I have ever bought or seen the Kellogg product was this one instance that I related. I have never eaten any of the Kellogg product. When the package was handed to me I knew by its appearance that it was not Shredded Wheat. I knew that it was an entirely different package than that which I had had.

MRS. BEATRICE M. KORSEN.

Deposition taken at Chicago, Ill., December, 1932.

Direct Examination.

The Witness: I reside at 3224 Beach Avenue, Chicago, Ill. At the present time I am not working, but I was secretary to a lawyer.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been buying and eating it right along.

Wednesday night, at the request of a representative of the National Biscuit Company, I went to the Food Shop located at 4302 North Crawford. Among other things I asked the clerk for Shredded Wheat and he offered me this other package. I noticed it was a different package and asked the clerk if that was what I usually used. He said it was just as good, only the biscuit were a little smaller; the package had 15 biscuit and they charged less—or something like that.

I took the box he offered me and wrote my initials on it. I also filled out the paper that was pasted on the end and gave both to the representative of the National Biscuit Company who told me to go to that store.

(The carton referred to was received in evidence and marked "Plaintiff's Exhibit No. 58.")

Cross-Examination.

The Witness: Mr. Damler is the name of the representative of the National Biscuit Company who asked me to go to this particular store. He waited outside for me in a cab while I made the purchase. They did not have National Biscuit Company Shredded Wheat in this store.

I accompanied another representative of the National Biscuit Company, named Mr. Weisselman, to a store in the neighborhood before I made the purchase

at the Food Shop. This was the only experience I had of getting the Kellogg product.

I know now that there are two different manufacturers putting out a shredded wheat product.

MRS. RUTH RACHLIN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife residing at 4423 Sheridan Road, Chicago, Illinois.

I am related, very indirectly, to Mr. Golden, a member of the sales department of National Biscuit Company.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, which I always buy. I have known it for many years because we always used it at home. Every time I buy Shredded Wheat I think of the picture of Niagara Falls on the box.

I do not recall the picture of a dish on the end of the package, marked Plaintiff's Exhibit No. 10.

On December 6th, at Mr. Benz's store, 4101 Potomac Avenue, Chicago, I was given Kellogg's Whole Wheat Biscuit when I asked for Shredded Wheat. When the storekeeper handed me the Kellogg package I knew it was not what I had usually received, but she told me it was just the same as Shredded Wheat. I asked her if it was Shredded Wheat, because I had never had that before, and she told me it was.

The writing on the piece of paper pasted on the package which I purchased is mine.

I could see the ends of the biscuit through the piece of glassine that covers what appears to be a hole in the package, and they resembled Shredded Wheat to me.

If I were to see a package such as that (referring to Defendant's Exhibit No. 6) with the name covered up, and only showing the panel with the picture on it, I would say that the product in that package was Shredded Wheat.

(The carton referred to above was received in evidence and marked "Plaintiff's Exhibit No. 59.")

CROSS-EXAMINATION.

THE WITNESS: Mr. McLean is the name of the man who asked me to make the purchase at that particular store. He told me to take whatever they gave me. I did and turned it over to Mr. Golden, who, in turn, gave it to Mr. McLean.

The store where I purchased the package of Kellogg's Whole Wheat Biscuit is not the one I regularly deal at.

If I were to order shredded wheat over the phone and receive the Kellogg product, I would call the grocer and ask why he made the substitution. If I were to find out that I liked the Kellogg product better than the National Biscuit Company product, I would probably become an adherent to the new product.

I always associate Shredded Wheat with the National Biscuit Company, because that is where the Shredded Wheat I have known comes from.

When the storekeeper handed me the package of Kellogg's Whole Wheat Biscuit I saw right away that it was a different kind of package.

WILLIAM FRANK RITTER.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a printer and reside at 2240 Augusta Boulevard, Chicago, Illinois.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and have been familiar with it for about eight years.

On December 16th a salesman of the National Biscuit Company asked me to go to a store at 2418 North Halsted Street and purchase a box of Shredded Wheat. They had sold their last box of Shredded Wheat at that store and the man asked me if I would like some other kind of cereal. The girl showed me Kellogg's and told me it was just like Shredded Wheat. I decided to try Kellogg's and had the package wrapped with a bottle of milk which I had also purchased.

I put my initials on the carton and also wrote my initials and the date. (Card received in evidence and marked "Plaintiff's Exhibit 60.")

MRS. BESS GOLDEN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife residing at 4423 Sheridan Road, Chicago, Ill.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been familiar with Shredded Wheat all my life, as far as I can remember.

Recently, at the store of T. Benz, on Potomac Avenue, I asked for a package of Shredded Wheat and

the girl brought me this package. (The package referred to was received in evidence and marked "Plaintiff's Exhibit No. 61.") I looked at it and told her that I wanted Shredded Wheat, the package of Niagara Falls. She told me that this was just the same as Shredded Wheat and I took it.

I put my initials on the carton and also wrote the slip of paper which is attached to the carton.

CROSS-EXAMINATION.

THE WITNESS: My husband is with the National Biscuit Company.

GEORGE H. WARREN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, operating a store at 1000 Beloit Street, Forest Park, Illinois. I have been at this particular store eight years, and in the grocery business twelve years.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been familiar with it for a good many years—and we have had it in the store as long as I have been there.

I am quite sure Plaintiff's Exhibit No. 10, with the picture of a dish on the end of it, is what I know as Shredded Wheat. It also has a picture of Niagara Falls on the other end. That is the only package I really know as Shredded Wheat.

When a customer asks for Shredded Wheat I supply her with a package like Plaintiff's Exhibit No. 1. To the purchasing public, as I know them, the term "Shredded Wheat" means the product put out by the National Biscuit Company. At one time we carried

another package in the store—I do not remember the shape—but the only one we could sell was the National Biscuit Company package. We had to return the Kellogg biscuit to the wholesale house.

We have quite a little telephone business and when an order comes in for a package of shredded wheat, it is the National Biscuit Company package that is wanted.

If I were carrying the two products today and a customer telephoned for shredded wheat, I would send her the National Biscuit Company product. I regard the words "shredded wheat" as designating the National Biscuit Company product.

I recall that before National Biscuit Company put out Shredded Wheat it was put out by another company, but I do not remember the name of the company. I do know, however, that the shape of the package has not changed at all. It is the same shaped box that always designated Shredded Wheat to me.

CROSS-EXAMINATION.

THE WITNESS: I know of no other name than shredded wheat for Plaintiff's Exhibit No. 1.

With the illustration covered on Defendant's Exhibit No. 6, I would think that the name "Whole Wheat Biscuit" meant some by-product of whole wheat, but I really would want to have it opened up before I would decide what was inside of it. But if the package said "Kellogg's Wheat Biscuit" I would expect it to contain the pillow-shaped affair, known to me as Shredded Wheat.

I would be surprised to learn that Defendant's Exhibit No. 6 contained Shredded Wheat Biscuit similar in texture and in shape to the biscuit manufactured by National Biscuit Company. I have never seen the inside of the Kellogg package.

MR. CLARKE:

XQ. 58. I ask you to look at the product inside of that package and say what you would call these.

A. Well, the first impression——

XQ. 59. Suppose you were asked to give a name to——

MR. VILAS: Let him answer. Your first impression?

XQ. 60. Yes, your first impression.

A. Well, it would look to me like someone was doing some copy work. Right off the bat, to see a product which is a seller, and a product that I know, looking at it, to me personally, it looks to me like somebody had done some copying work.

THE WITNESS: In texture it is similar to a Shredded Wheat Biscuit, but I would not call the Kellogg biscuit Shredded Wheat.

In our store the name "Kellogg" is always associated with Corn Flakes.

Mr. McLean, of the National Biscuit Company, asked me to come down here today and testify.

RE-DIRECT EXAMINATION.

THE WITNESS: The biscuit in Plaintiff's Exhibit No. 1 is known to me as whole wheat biscuit. It is known as Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: When the chain store was figuring Plaintiff's Exhibit No. 1 so fine that I could not meet the price I tried to sell the Kellogg product to my customers, but it did not sell.

When I substituted the Kellogg product on telephone orders and the customers returned it, I would not do that again.

LAURENCE SKEWES.

Deposition taken at Chicago, Ill., December, 1932.

Direct Examination.

The Witness: I am a musician residing at 1511 Walnut Street, Wilmette, Illinois.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. It has been my breakfast food for many years and my mother has eaten nothing but Shredded Wheat for the last three years.

When I ask for Shredded Wheat at the grocery store I expect to receive the package with the picture of Niagara Falls on it, and the building there, which I have been through. When I think of shredded wheat I do not think of any other product. It is quite original with me. I was not aware there was any other like product until a few days ago, when Kellogg's Whole Wheat Biscuit was substituted to me.

At Davie's Lunch, on Forty-seventh Street, Chicago, I asked for Shredded Wheat as it was listed on the menu. Two small biscuit were served to me in a dish. After I had eaten one of the biscuit I discovered it was not the original Shredded Wheat. I purchased another package to take away with me, and I put my initials on it. (The box referred to was received in evidence and marked "Plaintiff's Exhibit No. 62.")

Cross-Examination.

The Witness: Mr. Davidson, a salesman of the National Biscuit Company, asked me to go to Davie's Lunch and make the purchase. I recognized right away that the carton was not a Niagara Falls carton.

There was no attempt made to conceal the carton while the biscuit were being placed in a dish.

There was a difference in appearance between the two products. The Kellogg's biscuit was harder baked

and tougher, something that I would not eat as a regular diet. I recognized that I was eating biscuit made of shredded wheat.

Since that experience I know there are two concerns making that product.

BEN ZIEGMUND.

Deposition taken at Chicago, Ill., December, 1932.

Direct Examination.

The Witness: I am a wholesale grocer doing business at 2855 Lincoln Avenue, Chicago, Ill. I have been in the grocery business about twenty years—ten in the retail and ten in the wholesale.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, made at Niagara Falls. That is the original package I have been selling for twenty years. I have been selling that in the retail grocery business and also in the wholesale grocery business.

If someone sends in an order for shredded wheat we supply them with Shredded Wheat, the original package. We do not know anything else. Shredded Wheat has a reputation among the general public. When customers ask for Shredded Wheat they expect to receive the original package coming from Niagara Falls.

I also carry Kellogg's Whole Wheat Biscuit, and when customers ask for the Kellogg product they always receive Kellogg's Whole Wheat Biscuit.

Cross-Examination.

The Witness: On one occasion I opened a package of Kellogg's Whole Wheat Biscuit and noticed that it was made up out of the same kind of shreds as Shredded Wheat Biscuit, but I could tell the difference on account of the size.

OSCAR WILLIAM ZUEGEL.

Deposition taken at Chicago, Ill., December, 1932.

Direct Examination.

The Witness: I am a wholesale grocer doing business at 725 West Randolph Street, Chicago, Illinois. I have been in the grocery business twenty-eight years—fifteen years in the retail and thirteen years in the wholesale business.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have known Shredded Wheat a long time. When I was a young boy going to business college they had a plant here demonstrating Shredded Wheat and I used to go and watch them make it after school.

In my mind, the Shredded Wheat Biscuit has never been associated with any other product. As far as I have known it, there is only one made at Niagara Falls. When a customer gives me an order for Shredded Wheat I give her a dozen of the product from Niagara Falls.

The picture of the dish with two biscuit in it has always been featured on the Niagara Falls package. It has been a slogan of theirs for years, as I remember it.

If I saw a package like Defendant's Exhibit No. 6, with the name of the product covered and the illustration showing, I would think, from the shape of it, that it was Shredded Wheat.

I have carried Kellogg's Whole Wheat Biscuit, but not during the last several weeks.

Cross-Examination.

The Witness: When retail grocers sell the Kellogg product they specify it as Kellogg's Whole Wheat Biscuit.

HENRY J. TEXTOR.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer doing business at 5718 West Madison Street. I have been in the grocery business fourteen years.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and have been familiar with it as long as I have been in business.

When customers ask for Shredded Wheat I give them packages like Plaintiff's Exhibit No. 1. So far as I am familiar with the consuming public, they mean the Niagara Falls product when they ask for Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: We carry Kellogg's Whole Wheat Biscuit at the present time, but I do not know how long we have been carrying that product.

GEORGE M. GOTWALT.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I have been associated with the wholesale grocery business for thirty-eight years. During that time I have not only traveled throughout the country, but I have worked in different parts of it in the grocery business, principally wholesale. I organized Butler Brothers grocery department and also worked with Montgomery Ward as a buyer. At the present time I work as buyer for the Thrift Food Stores, which I organized. I have been organizing voluntary organizations for the past few years.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, the trade name by which it is known throughout the trade. During the course of my experience, I have bought and sold everything that is handled in a grocery, including Shredded Wheat.

I judged the expression "Shredded Wheat" to be wheat made into biscuit form, and that Shredded Wheat was really a coined name. Wheat, of course, is a common word for a cereal, but the two words hooked together always appealed to me as a coined name or word denoting that particular product.

Defendant's Exhibit No. 6 appears to me to be Plaintiff's Exhibit No. 1 in shorter form. The contents of Defendant's Exhibit No. 6 appear to me to be an imitation of Plaintiff's Exhibit No. 1, except as to size.

If I were to see Defendant's Exhibit No. 6 on a shelf with the name of the maker and product obliterated, so as to show just the picture on there, my impression would be that that is about the same kind of a dish that used to be on plaintiff's package.

I would think that the contents of Defendant's Exhibit No. 6 were Shredded Wheat, only Shredded Wheat looks longer than Defendant's Exhibit No. 6.

I recognize Plaintiff's Exhibit No. 10 as one of the first cartons used by The Shredded Wheat Company. It was used for quite some years.

CROSS-EXAMINATION.

THE WITNESS: I have heard of shredded codfish and shredded cocoanut and I would expect to find this type of product in shreds.

I think "Whole Wheat" is a good name for the Kellogg product. Of course, as the Kellogg product is a new one, they would have to use various kinds of publicity in order to tell the public what their product was.

I remember that when Mr. Kellogg put Corn Flakes on the market he gave away many samples. It took quite a while to get the public eating Corn Flakes.

RE-DIRECT EXAMINATION.

THE WITNESS: The public has been educated to know Shredded Wheat, by the people who packaged it and put it on the market, as Niagara Falls. If you stopped a hundred people on the street and asked them what shredded wheat was, they would immediately think of that item there (Plaintiff's Exhibit No. 1).

MR. VILAS:

RDQ. 62. What would you say if a similar product, such as is seen in the Kellogg box there——

A. Yes.

RDQ. 63. —in front of you——

A. Yes.

RDQ. 64. —were put on the market and referred to as Shredded Wheat.

A. I would say it was an imitation, a rank imitation.

RE-CROSS-EXAMINATION.

THE WITNESS: Even if the Kellogg product was listed in big letters as Kellogg's Shredded Wheat, I do not think that would change it any. They would still be using the trade name of the Niagara Falls product.

The biscuit can be in round form or square form or any other form, and you would still use the word "biscuit." But to add the words "shredded wheat" to it seems to me to be an exact copy of the Niagara Falls product.

After all, if I were the man that had built up the Shredded Wheat, I would not want a man coming along and imitating it.

I do not think that other manufacturers should be prevented from making that pillow-shaped biscuit

out of shredded wheat, but I do think that they should be prevented from using that trade name.

I have never handled the Kellogg product. I do not know what business the Kellogg Company has built up in some other part of the country, but I know that it is not common in Chicago.

JAMES A. FENCL.

Deposition taken at Chicago Ill., December, 1932.

Direct Examination.

The Witness: I am a wholesale grocer doing business at 4011 Ogden Avenue, Chicago, Ill. I have been in the wholesale grocery business for twenty years. I carry a full line of standard wholesale groceries, including cereals.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been familiar with it ever since I have been in business.

When customers ask for shredded wheat I always give them the Niagara Falls product.

I recognize Plaintiff's Exhibit No. 10—the carton with the picture of a dish on the end—as one of the first cartons used by The Shredded Wheat Company.

I believe Shredded Wheat Biscuit is known generally to the purchasing public because it has been advertised extensively.

When the expression "shredded wheat" is used among consumers and dealers it means the product contained in Plaintiff's Exhibit No. 1.

Cross-Examination.

The Witness: I do not know any other name for shredded wheat than Shredded Wheat. However, Shredded Wheat, to me, is a trade name.

I would not have any idea as to the nature of Kellogg's Whole Wheat Biscuit from the name. If I heard there was a product on the market under the name Kellogg's Whole Wheat Biscuit, I would think it was wheat in the form of shreds.

RE-DIRECT EXAMINATION.

THE WITNESS: I think a whole wheat biscuit put out in a shape similar to the shredded wheat in Plaintiff's Exhibit No. 1 would be infringing on the party who started to make the biscuit first.

I repeat that Shredded Wheat is a trade name and and that the public understand it as such. When the public want shredded wheat they expect it in that form (Plaintiff's Exhibit No. 1) and they know this trade name. They do not expect anything else in a biscuit like it.

ELMER J. KLEEMANN.

Deposition taken at Washington, D. C., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in business for myself, doing special investigation and collection work for finance companies.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been familiar with it ever since I have been a child.

To me the expression "shredded wheat" conveys the impression of a product made at Niagara Falls, that comes in a package with a picture of the factory on the front of it, like Plaintiff's Exhibit No. 1.

Last week I went into the Ennis restaurant, which is located on "F" Street, by Seventh, and ordered a portion of Shredded Wheat with bananas. After a

consultation with the counter man, the waitress came to me—I was sitting at the counter—and said, "We do not have any." I said, "You do not have any what?" She said, "Bananas." "Well," I said, "I will take the Shredded Wheat with milk." She went to the rear of the restaurant, behind this same counter, and came back with two biscuit in a bowl of milk; but they neither looked like Shredded Wheat nor tasted like it to me. I asked her what she had served me. She said, "Shredded Wheat."

And I said to her, "This is not Shredded Wheat."

Well, she said, "That is what we always call shredded wheat."

I said, "I would like to see the package."

She said, "Oh, I have thrown the package in the waste-basket."

I said, "Well, I would like to see the package, anyway." So she went back to the kitchen and she came back with a small squarish package that bore the name of Kellogg's Whole Wheat Biscuit. I kept the package there for a while and I tasted the biscuit, and they did not taste like Shredded Wheat. But I had ordered and paid for them, so I ate them, and that is about all there was to it.

MR. VILAS:

Q. 14. Did you finally obtain the carton?

A. Yes, she gave me the carton that she had taken the biscuit from which she had served me.

Q. 15. Have you got it with you?

A. Yes, I have.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 63.")

Q. 17. That is all that took place in reference to this shredded wheat transaction?

A. I had just mentioned, casually, that I did not feel that they should serve a product and claim that it was something else, because I did not care for it as much as I did for Shredded Wheat, and I felt that the substitution was totally unwarranted; and, in fact, I rather resented the substitution.

CROSS-EXAMINATION.

THE WITNESS: Mr. R. L. Taylor, who is connected with the National Biscuit Company, asked me to go to Ennis Restaurant and make the purchase. Mr. Taylor is a friend of mine of long standing. He asked me that in the event I was served any substitute for Shredded Wheat, at any time, to get the carton for him.

As soon as the biscuit were served to me in the plate, I recognized right away that they were not the Niagara Falls product.

It seems to me that I had seen or heard that the Kellogg Company was making a wheat biscuit in shredded form.

FREDERICK A. DODGE.

Deposition taken at Washington, D. C., December 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. I have been associated with the business for the past forty years, thirty-three of which I have been in business for myself.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have handled Shredded Wheat ever since there has been any sale of it in stores in Washington. When I first went into business I do not think I remember Shredded Wheat; but it has become a store name

with us, just the same as anything else. During the time I have known Shredded Wheat there has been no change in the form or appearance of the biscuit—or at least not to any consequence.

When customers ask for shredded wheat I give them a package similar to Plaintiff's Exhibit No. 1. There is no question about shredded wheat having a reputation with the buying public—I think it speaks for itself. During the last twenty years I do not believe I have been without a stock of Shredded Wheat.

I believe the sales of Shredded Wheat have remained constant. I would not say that Shredded Wheat is selling now as well or as much; but that might be due to other cereals. There are so many other cereals coming and going that, of course, it affects the sale of Shredded Wheat. For the last twenty years there has been a steady demand for Shredded Wheat.

The picture of a dish on Plaintiff's Exhibit No. 10 was used by them up until a few years ago. I remember the picture well because I used to buy Shredded Wheat in large quantities. I had to pile the boxes on the shelves and I would place one row with that end out and one row with the other end out—I can remember that well.

I have never handled Kellogg's Whole Wheat Biscuit.

If I were to see a package like Defendant's Exhibit No. 6 standing on a shelf with the name obliterated, I would think it was Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: I never saw Kellogg's Whole Wheat Biscuit until a while ago. I recognized them as shredded wheat, but they were much smaller in size than the Niagara Falls product.

RE-DIRECT EXAMINATION.

THE WITNESS: If the Kellogg product and the Niagara Falls product were put on a dish in front of me without any carton, I would say that the Kellogg product was Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: If I saw Defendant's Exhibit No. 6, without the illustration, I would have to open it to determine what was in it. I would not associate that package with the Kellogg product for the simple reason that I remember Mr. Caton, the getleman who represents the Kellogg organization, giving me a package of flat square biscuit. That was some years ago. I took that package home and we ate it. I remember that distinctly. We sold a few of those—not any great amount—it was Whole Wheat Biscuit as I remember. It was not pillow-shaped like Shredded Wheat—it was a little square and kind of a sweetened biscuit.

GEORGE R. WASHINGTON.

Deposition taken at Washington, D. C., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I own and operate a retail grocery store at 229 Upshur Street, N. W., Washington, D. C. I have been in the grocery business for about thirty-three years. My store is known as a Nation Wide Store, a member of a voluntary chain.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have known and been familiar with Shredded Wheat ever since it has been on the market—about thirty-eight or thirty-nine years. I have always sold it at my stores. When customers ask for Shredded

Wheat I give them the product I have always known; I have not had a call for the other one at all.

MR. VILAS:

Q. 21. Would you say whether the expression "shredded wheat" has any meaning to the buying public?

A. Well, I—just—I figure this way: If a person walked in and asked me for a box of shredded wheat, I certainly would give him the original Shredded Wheat,

THE WITNESS: I certainly would not give them the whole wheat package for Shredded Wheat—that is one thing I would not do.

If a customer asked for Kellogg's Shredded Wheat I would ask them which kind they preferred as I was carrying two kinds.

I recognize the dish on the end of Plaintiff's Exhibit No. 10.

CROSS-EXAMINATION.

THE WITNESS: If I had a package like Defendant's Exhibit No. 5 in stock and a customer asked for Kellogg's Shredded Whole Wheat I would give it to them.

LOUIS RICHARD SCHMIDT.

Deposition taken at Washington, D. C., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I reside at 602 Gilford Avenue, Hagerstown, Maryland.

I have been familiar with Shredded Wheat all my life as my mother always had it for our breakfast.

If I go into a store and ask for shredded wheat I expect to receive Shredded wheat Biscuit; I mean the product that is made at Niagara Falls.

The other day I went into Fisher's Store, on Salem Avenue, Hagerstown, Maryland, and asked for a package of Shredded Wheat. The man went to the shelf, got me this package (pointing to package) and wrapped it up. I asked for a bill, which he gave me. I put my identification on the package.

(The slip referred to was received in evidence and marked "Plaintiff's Exhibit No. 64"; and the box referred to was received in evidence and marked "Plaintiff's Exhibit No. 65.")

Later in the evening I had a similar experience. I went into Mrs. Dixon's restaurant on North Johnson Street, Hagerstown, and ordered Shredded Wheat. I watched her as she opened the package and put it into a dish for me. After finishing eating this package, I asked her if I could have one to take along and she said, "Sure." She fixed me one to take along, and this is the package. I was seated at the counter and could see the packages as they were in front of me. The bill is attached to the package, with her signature. I made this purchase at the request of National Biscuit Company.

(The bill referred to was received in evidence and marked "Plaintiff's Exhibit No. 66"; and the box referred to was received in evidence and marked "Plaintiff's Exhibit No. 67.")

CROSS-EXAMINATION.

THE WITNESS: I made these two purchases at the request of Mr. Wyan of the National Biscuit Company. He was with me when I went to Mrs. Dixon's restaurant, but stayed outside. He did not tell where to go when I purchased the package marked Plaintiff's Exhibit No. 67.

On previous occasions, before I knew Mr. Wyan, I have bought Shredded Wheat for my home and always received the Niagara Falls product.

In both of those instances when the Kellogg package was handed to me I recognized at once that it was an entirely different package than I had been buying before.

I did not notice any difference in the size of the biscuit that were served to me in Mrs. Dixon's restaurant as the biscuit were broken up in the dish.

Those are the only two instances of the kind that have ever happened to me.

WILLIAM LAIRD LUDWIG.

Deposition taken at Washington, D. C., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I reside at 284 Lincoln Way, West, Chambersburg, Pennsylvania.

I have known Shredded Wheat all my life as it has always been used in our home as a breakfast food.

When I go to the store and ask for shredded wheat I expect to receive that particular biscuit. (Pointing to Shredded Wheat.)

On the 19th of December I went into Martin Brothers Store, in Chambersburg, and asked for a package of Shredded Wheat. He handed me this particular box and I asked him to bill it to me. I have reference to the box with the pencil notations, the slip and the stamp on it. The pencil notations are my identification, the slip is the bill and the stamp is the stamp of the store.

(The bill referred to was received in evidence and was marked "Plaintiff's Exhibit No. 68"; and

the box referred to was received in evidence and was marked "Plaintiff's Exhibit No. 69".)

I had another experience yesterday when I went into Vanderew's Restaurant, in Chambersburg, and asked for an individual serving of Shredded Wheat. The girl handed it to me and I asked her for a bill and she said I would have to get it from the man at the desk in the restaurant. The man happened to be one of the sons that is in business with his father; he gave me the bill and I paid for it and went out. (This is the package and bill I received in that restaurant.) The pencil marks on the box are my handwriting.

(The bill referred to was received in evidence and marked "Plaintiff's Exhibit No. 70"; and the box referred to was received in evidence and marked "Plaintiff's Exhibit No. 71.")

CROSS-EXAMINATION.

THE WITNESS: I did not tell Mr. Vanderew's son what to put on the bill. I asked for a bill for the box of Shredded Wheat and that is the bill he gave me.

Mr. Cowden, one of the National Biscuit Company's men, asked me to make this purchase. Mr. Cowden is a friend of mine. I have known him for some time. He did not talk to me about the case—he asked me as a favor to go in and ask for a box of Shredded Wheat Biscuit.

Mr. Cowden took me with him in his car and he asked me if I would go around and get a box of Shredded Wheat for him. As we were driving around he stopped at a number of different stores. I did not go into these stores—I think he was taking orders as he went in with his order book.

As we reached Martin Brothers' Store I went in first and Mr. Cowden came in after me. I did not

speak to him but the man I bought the package from knows that I know him. I do not know why he came into the store.

When we reached Vanderew's Restaurant, I went in alone. I was in there and getting the bill when he came in, went back of the counter and bought something to eat. He was back there about ten minutes.

Mr. Cowden gave me the purchase price of these goods.

I never had any experience before of asking for Shredded Wheat and receiving the Kellogg product.

I have never seen the Kellogg product, only the picture. I did not open the package. According to the picture I would say it was shredded wheat.

ELMER R. JONES.

Deposition taken at Washington, D. C., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer located at 3404 Eleventh Street, N. W., Washington, D. C. I have been in the grocery business for about twenty-two years, located at the foregoing address for the last twelve.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat Biscuit. I have known it as long as I have been in the grocery business. When my customers ask for shredded wheat I know exactly what they mean—they mean the Shredded Wheat Biscuit that I know, that I have just seen (referring to Plaintiff's Exhibit No. 1).

During my experience with the purchasing public, if a customer or any member of the public asks for shredded wheat, they do not mean anything other than the biscuit in Plaintiff's Exhibit No. 1.

From my experience I would say that the name "shredded wheat" has acquired a reputation among the purchasing public. When the purchasing public ask for Shredded Wheat, they know what they are asking for. How they know is probably not for me to say. It might be probably through advertising purposes, the same as they would ask for a certain brand of canned goods, like the Del Monte brand. They have probably tried or seen it through the advertisements, or it might be a by-word on their tongue, like when anybody asks for a cracker, they would ask for a package of Uneedas.

I am carrying Shredded Wheat at the present time but there were times when I have not carried it. I was not on very friendly terms with the National Biscuit Company and had not bought any products from them for about eight years. At the time National Biscuit Company took over The Shredded Wheat Company, I was under the impression that I could only get it from the National Biscuit Company. At that particular time my jobber happened to be out of it—for what reason I do not know—and he suggested Kellogg's Whole Wheat Biscuit. I did not know anything about that product, but he told me that, as far as he knew, it was practically the same thing; but there were fifteen biscuit to the package.

I thought I would try it, and I put in the Kellogg's Whole Wheat Biscuit. When a customer asked for Shredded Wheat we knew what they wanted and I told them that we were temporarily out of them, but that Kellogg's had a Whole Wheat Biscuit that I thought was the same thing, but there were fifteen biscuit in a package. I sold them the Kellogg's Whole Wheat Biscuit and I continued to sell them for a considerable length of time.

The only comments that I could positively say I had received were that some people liked it because

there were fifteen biscuit in the package and the biscuit were a little smaller than Shredded Wheat; they liked it for that reason. I had one customer who had tried the Kellogg product but who insisted upon Shredded Wheat, and I would go to a neighboring chain store and buy a package of Shredded Wheat to fill that particular order. Outside of that, I do not believe I had to buy a package for anybody, because I suggested the Whole Wheat Biscuit.

I never tried to sell Kellogg's Whole Wheat Biscuit as Shredded Wheat. The customers got in the habit of asking for Shredded Wheat all the time, and we would tell them that they were the Kellogg's Whole Wheat. They said, "Well, that is what I mean. That is all right." And they asked for Kellogg's Whole Wheat Biscuit by the shredded wheat name. I am now carrying Shredded Wheat because in the last two months I am purchasing from the National Biscuit Company.

In my opinion the salability of any product depends entirely upon the method of merchandising and advertising that it is given and the method by which it is sold. In my opinion the considerations or elements that move the public to purchase Kellogg's Whole Wheat Biscuit is probably because of Shredded Wheat being on the market so many years, or probably through advertising or probably because it is a shredded wheat biscuit.

I can also say this: That, in regard to cleansers, people will ask for Old Dutch Cleanser, because, when they think of a cleanser, they think of Old Dutch Cleanser, as a rule.

Now, when they think of shredded wheat biscuit, they think of the Shredded Wheat Biscuit, because they know it is shredded wheat biscuit. They do not know it by any other name. I am not handling Kellogg's Whole Wheat Biscuit now. It is not because I do not

think it is a good product, because I have not given that any consideration at all. But I am not having anybody asking for Kellogg's Whole Wheat Biscuit.

All my customers ask for shredded wheat, and if I did not have Shredded Wheat in today I could sell them the Whole Wheat Biscuit. I do not believe they have any objections to using it.

I have never heard any comment from the trade regarding the reputation of Kellogg's Whole Wheat Biscuit being comparable to that of the Shredded Wheat Biscuit. I have had comments, as I stated before, that some of the trade liked it because it was a smaller biscuit and fifteen in a package, which was probably looking at it from an economy standpoint.

Q. 29. Let me have your opinion as to whether or not, if there had never been such a biscuit as Plaintiff's Exhibit No. 1, and Kellogg's Whole Wheat Biscuit came on the market as it has, whether it could be sold in quantities with the methods that have been so far been used?

A. In my opinion, if there had never been a biscuit made as the Shredded Wheat, I think it would take considerable advertising and a long time in order to promote a big sale.

Now I do not know the quantities sold of either Shredded Wheat or Kellogg's Whole Wheat Biscuit; but I have an idea that there is a great deal of it sold. And I have known Shredded Wheat from, I believe, the time I have been in business—that is, I cannot remember the time when I did not know of Shredded Wheat. And, when Shredded Wheat was spoken of, my idea was just of the biscuit form in which it is made.

Q. 30. Do you think that the presence on the market for so long a period of years that you have known it of the Shredded Wheat product has anything to do with the sale of the Kellogg's Whole Wheat Biscuit?

A. In my opinion, I think absolutely that the sale of Shredded Wheat, being on the market the length of time it has, and the popularity it has obtained, has a great deal to do with it.

CROSS-EXAMINATION.

THE WITNESS: There has been no change in the rate of discount given me by the National Biscuit Company that induced me to shift back to them. During the years I refused to deal with the National Biscuit Company I dealt with the Maryland Biscuit Company. A little matter came up that I just do not feel should be disclosed, I got sore at them and I called up the National Biscuit Company and gave them an order. And I have been buying from the National Biscuit Company ever since.

I did not feel that it would be embarrassing and a little difficult to handle the National Biscuit line without buying Shredded Wheat from them because I took it on before I came back with them. I know positively that I have not bought any from the National Biscuit Company since I have been buying back from them; but I have been buying it through my wholesale jobber.

A new product like Kellogg's Whole Wheat Biscuit would have to be suggested by the grocery men in order to sell it. By suggestion, I mean that I would say it was a new shredded wheat product, having fifteen biscuit to the package.

Sometimes customers have a natural curiosity about new products or new kinds of old product and are ready to change, but they have them right before them continuously. A man comes around with a new product that I do not know anything about and I have never heard of it before, and, ninety-nine times out of a hundred, I would not put his product in for the simple reason that I would have to use my own sales effort to put it over, unless it is nationally advertised. A ma-

rity of the products that I put in that are new are tensively advertised as, for instance, Bisquick—I t it in because it was advertised extensively and ople asked for it.

I have known of the Kellogg Company for many ars and have always had favorable dealings with em and their products. I know they would always and behind any product they sold me and that, if it id not sell, they would take it back. These sales ethods might make it easier to introduce a new prod- ct into the grocery trade, much more so than any ther concern you did not know anything about, but ou would not use so much sales ability because you ave so many articles to sell in the store you would ot stop to think of every article you have to sell.

My experience with the Kellogg Company has been hat they are wide advertisers. I will state this right ere, too: that, when anybody thinks of corn flakes—hen I do, and I feel that the public in general do—hey think of Kellogg's Corn Flakes. If a customer sked for corn flakes, I would understand her to mean Kellogg's Corn Flakes.

I would not be surprised if you were to tell me hat, in certain sections of the country where they ave what are known as self-service stores, where Kellogg's Whole Wheat Biscuit is put up on the shelf, considerable number of customers walk in there and ick that product up. I am not very familiar with that ind of business. I do not know what the attitude of he buying public is to buying in that kind of a store. The majority of my business is a telephone business but I have a lot of store trade, too. I was with the A. & P. Tea Company for many years and as a young boy I managed a store in York, Pennsylvania. I had chain store experience up to the time I went into busi- ness for myself. But, as far as a customer picking this up for himself is concerned, I haven't any idea

what the attitude of the public is toward products of any kind. I do know that, in chain stores, where there are different products of the same kind, and where it depends on price, that price tags and prices are a big factor in selling any articles; I do not care what it is.

XQ. 53. And if, in that type of store, the Kellogg product was advantageously displayed and priced, you would expect that people would ask for it on account of those displays?

A. Yes. There are people that would always buy, you understand, a new product, no matter what it is; but I will consciously say that the Whole Wheat Biscuit that was sold in my store was sold through Shredded Wheat, that is, by a customer asking for Shredded Wheat.

I would tell the customer that we had a new product that Kellogg put out, that I understood was just like Shredded Wheat, and asked them to try it. And they tried it under my recommendation.

I think that was a perfectly ethical way for me to sell that product. They asked for Shredded Wheat and I did not have it. We never tell a customer we are out of an article, that is, if we are out of an article and have something else that we substitute for it, we suggest it to them; and, if they won't try it, we tell them we will get the product they want. The reason we do this is that if my customer calls up and orders five or six items from me and she asks for an article that I have not in stock, and if I won't get it for her, she is obliged to go out to some place and buy it. Well, it is my business to keep her away from some other store.

I see nothing improper in my telling customers I was out of Shredded Wheat and suggesting they try Kellogg's Whole Wheat Biscuit. I have the article on sale and if I did not sell it that way it would probably be lying on my shelf yet.

RE-DIRECT EXAMINATION.

THE WITNESS: From my experience with the purchasing public it is my observation that there is a certain class of people who come into stores looking for bargains and looking around for suggestions; but I have found that the general public that go to chain stores buy the specials, and, of course, they buy other things, too. They are close observers of newspaper advertising, particularly.

If a customer in a self-service store or a chain store, having in mind that she needed Shredded Wheat, saw that package there with the picture of the dish on it and two biscuit in the dish (Defendant's Exhibit No. 6) I would think it possible that the customer, or any average customer, would be led to pick up that package thinking it was Shredded Wheat—a lot of them would. I would say that others would ask "Is this the same as Shredded Wheat."

RE-CROSS-EXAMINATION.

THE WITNESS: When I say that customers come into chain stores and ask for specials, I mean advertised specials—they are newspaper ads. By picking up almost any paper you will find that, with their distribution of stores, they can advertise effectively through newspapers because it reaches all sections of the city.

If Kellogg's Whole Wheat Biscuit were featured in the paper, in my opinion, the demand for it would depend entirely on the price at which it was advertised, or how well they knew the product.

I would not say that my customers now recognize the fact that there are two different makes of this pillow-shaped biscuit, this Shredded Wheat, because I have not had anybody, to my knowledge, ask for Kellogg's Whole Wheat Biscuit since I have been out of it. They do not know it by that name. When they

asked for Shredded Wheat I would tell them I was out of it but was carrying Kellogg's Whole Wheat Biscuit and they would say "that's all right."

I do not know of any other name for the product than shredded wheat or shredded wheat biscuit. If a customer came into my store and asked for a package of soda crackers I would not necessarily give them Uneeda Biscuit. Many of my customers use the Maryland products and call for "Wynnebrook Soda Crackers." If anybody asked me to describe Shredded Wheat I would say it was a shredded wheat, wheat cut into shreds, and formed into a biscuit. That is what I understand by Shredded Wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: The name on the Kellogg package is Kellogg's Whole Wheat Biscuit. I do not know what a whole wheat biscuit is. I know that Plaintiff's Exhibit No. 1 contains the pillow-shaped biscuit that we know as Shredded Wheat—we do not know it by any other name. On the bottom of Exhibit No. 1 is the slogan "One hundred per cent whole wheat." I do not think that plaintiff would advertise that slogan unless the product was one hundred per cent. whole wheat.

In my opinion it is fair to say that the product in Plaintiff's Exhibit No. 1 is whole wheat biscuit that is called shredded wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: I would say that the biscuit in Plaintiff's Exhibit No. 5 was a pillow-shaped biscuit. It looks like just what I would call a shredded wheat biscuit, but it does not look as large as the Niagara Falls product.

When I come in here today, Mr. Vilas came outside and talked to me for about two or three minutes.

PAUL R. WATKINS.

Deposition taken at Washington, D. C., December 20, 1932.

Direct Examination.

The Witness: I am a retail grocer, operating a store connected with the Nation Wide, a voluntary chain organization. I have been in the grocery business seventeen years the twenty-fourth of September. I never was in it before.

I recognize Plaintiff's Exhibit 1. That is Shredded Wheat, the only one I know about. I have known that article fourteen or fifteen years. Being born and raised in the country, I knew nothing about it until I came to the city.

If a customer asked for Shredded Wheat, she would naturally want Shredded Wheat and nothing else. She expects that box right there, Plaintiff's Exhibit 1, with Shredded Wheat on it, the one you just showed me. If you tried to give her anything else, I think she would put up an argument, because she wants nothing else.

When a person speaks or thinks of Shredded Wheat, they have in mind that biscuit right there.

Cross-Examination.

The Witness: If she asks for Shredded Wheat, she wants Shredded Wheat. She does not want anything but Shredded Wheat. I mean that box right there, Plaintiff's Exhibit 1. When you go to get it off the shelf, she expects you to bring down a box just like that. There is supposed to be shredded wheat in it, a long pillow, about that long, like bran. I do not know what it is made of. It is a pillow-shaped biscuit. I know nothing about any biscuit of that sort made by Kellogg Company. I never knew any shredded wheat biscuit

except that biscuit, that package. Nobody has ever tried to sell it to me. I would not have bought it if they had; because shredded wheat is Shredded Wheat.

I have handled Kellogg's Corn Flakes and Post Toasties, but no other brand of corn flakes. I had no experience with corn flakes other than Kellogg's. Post Toasties is different.

I talked with Mr. Frank, the National Biscuit Company salesman, who asked me if I would come here today. I did not have time. I asked him what it was. He said something about having a lawsuit and he wanted me to testify about something, that it would be a favor to him. I said all right. He called me a little while ago. I did not know what I was coming down here for, because I had never seen the Kellogg biscuit before I came in here a while ago. Nobody showed it to me. I happened to see it outside. I met somebody in the office. I do not remember who the gentleman was. I guess it was Mr. Savage I talked with. He did not say anything about the case in particular. He said they were trying to sell that for Shredded Wheat Biscuit.

XQ. 36. He said they were trying to sell that Kellogg's biscuit as the Shredded Wheat Biscuit?

A. That is what he said. He asked me if I thought it was fair. I said, "No, I do not think it is fair." I do not think it is fair for another man to come on the market with the exact same shaped biscuit, outside of it is a little tiny bit shorter, that a restaurant can serve for exactly the same thing. I do not think it is fair.

THE WITNESS: He did not open up the package. He did not talk about the case, but simply said the Kellogg Company was trying to sell their shredded wheat biscuit as the National Biscuit product. He did not say anything about its not being fair. I said I did not think it was fair.

RE-DIRECT EXAMINATION.

THE WITNESS: If I wanted shredded wheat, I would naturally buy your Shredded Wheat. I would not buy Kellogg's, because I do not know anything about it. I do not eat it, because I do not eat that brand at all. When you are working hard, it does not stick by you. Sometimes I cannot eat dinner or lunch until one-thirty or after.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not think they have the right to call that shredded wheat. That is not shredded wheat. That is the National Biscuit Company's Shredded Wheat. That is what I think about it. I think they have a trade name, Shredded Wheat; and I do not think there should be another biscuit made that looks anything like it. That is what I think about it.

RXQ. 43. Do you know any other name for shredded wheat biscuit than shredded wheat biscuit?

A. No, that is the only name I think of, as Shredded Wheat.

THE WITNESS: That is the only name anybody can think of. I know very well what Uneeda Biscuit are. It is Uneeda Biscuit. I would say I do not know any other name for it. I do not know that it is a soda cracker. I do not know what is in it. It might have soda or arrow-root in it. If a man in my store asks for Uneeda Biscuit, he gets Uneeda Biscuit, because I think it is the same as that everybody's sausage meat is not alike. Naturally, if they want mine, they will not want somebody's else. Many different people make sausage meat, but all does not have the same things in it. I would be in favor of one person having the sole right to call his product sausage meat. If he is making and putting out one particular kind of sausage meat, I think he should have the right to call it that kind of

sausage meat. If he had it patented, for instance, in a certain package, I think nobody else should be able to make it up in that shape package. As shredded wheat is made in the pillow shape, I do not think anybody else has the right to come along and make that biscuit in that shape. I do not think it is fair.

RE-DIRECT EXAMINATION.

RDQ. 54. I take it from what you say, Mr. Watkins, that you regard shredded wheat as a trade name, do you?

A. That is it exactly. It is Shredded Wheat. You cannot call it anything else.

RE-CROSS-EXAMINATION.

THE WITNESS: Assuming it is a trade name, I could not suggest any other name like soda cracker for Uneeda Biscuit. That is the only thing I know. I do not know what is in it. I do not know what Uneeda Biscuit is, except what you tell me. I have never seen it made. It might be different made from any other biscuit.

I like to be fair. If I have two brands, including my own, I am not fair to my own brand. If we have another brand, I am not fair to them. I am not fair to myself or them. So I feel it is unfair to have two brands of the same product in my store; because I think that is the only brand of shredded wheat you can really buy. I do not know whether there is anything unfair about having two kinds of corn flakes in my store. In one way, I think Post Toasties is not exactly like Corn Flakes. Post Toasties is a thick flake. Corn Flakes are thin. They have an altogether different flavor. Those who like Post Toasties might not even like Corn Flakes. There is a difference. I carry only one kind of ketchup, Heinz's. I would not carry Snider's. If

here are two of the same quality, what is the use of arrying both? A man is crazy to carry Snider's, if is the only one quality for two. Why should we carry wo of the same grade?

I call your Corn Flakes Kellogg's Corn Flakes. When they ask for Post Toasties, they get Post Toasts. When they call for corn flakes, they get Kellogg's.

CHARLES EDWARD JOHNSON.

Deposition taken at Washington, D. C., December , 1932.

Direct Examination.

The Witness: I recognize Plaintiff's Exhibit 1, Shredded Wheat, with which I have been familiar r some time. At the request of District Sales Mana- er Cooper of National Biscuit Company, I visited to- y a restaurant at 33 East North Avenue, Baltimore. placed an order for Shredded Wheat. I sat at a table. was served two biscuit in a saucer. I asked the aitress to let me see the package. Plaintiff's Exhibit is the package the waitress brought down to me. I d not see the package before they were served to me. e brought them to me in a dish.

I told her that was not Shredded Wheat. She id, "That is the only kind I know of," and then she ought me the package. Plaintiff's Exhibit 72 is the les slip the waitress gave me.

Cross-Examination.

Mr. Cooper asked me to make the purchase. He ok me there and waited outside. He took me to one her place, they served me the National Biscuit Com- ny Shredded Wheat.

FRED A. SCHWARZ.

Deposition taken at New York, N. Y., January 4, 1933.

Direct Examination.

The Witness: My business is retail grocer, at 16 Essex Market, Newark, New Jersey. I have been there fourteen months. It is my own business. My previous connection was with a delicatessen for twenty-two years, in the Public Market in Newark. In the course of my experience I did not have occasion to handle cereals, but I do now. I recognize Plaintiff's Exhibit 1 as Shredded Wheat. I have been familiar with Shredded Wheat about thirty-five years. I have been a user of it in my home. I recognize the contents of Plaintiff's Exhibit 1. I call it Shredded Wheat. During the thirty-five years I have been familiar with the product, the expression shredded wheat has not meant to me anything different from Plaintiff's Exhibit 1 or its contents.

In my own mind, this package is the only shredded wheat I have known of. Being in business at the present time, if a customer asks for shredded wheat, that is my idea of what they want. During the period of time I have been a user of Shredded Wheat, when I went to a store or restaurant and asked for Shredded Wheat or Shredded Wheat Biscuit, I expected to get that item there. In a restaurant, I would not know what they were serving.

Q. 20. Would you say whether or not, in your opinion, the expression shredded wheat has, in the mind of the public, as you know it, any significance as to the origin of the product?

A. From experience, I would say that—my personal experience of the public up to date, this exhibit here expresses the mind of the public as to what shredded wheat means, Plaintiff's Exhibit 1.

Q. 21. What do you say as to whether or not the expression shredded wheat is regarded by the public as a proprietary name or trade-mark?

A. Well, I do feel that it is regarded as a trade-mark name, the same as many other of our cereals, and that people, I do not believe, have any particular knowledge of the process or anything like that. They are interested in a certain package; and I would think that the words shredded wheat would identify this package more than anything else.

Cross-Examination.

The Witness: Referring to Plaintiff's Exhibit 1, I recognize the Shredded Wheat Biscuit by the picture itself. I have not heard, or I had not until a few days ago, of any other shredded wheat biscuit besides the Niagara Falls product. Then I heard there was another one on the market, made by Kellogg's. I have not seen it.

Re-Direct Examination.

The Witness: I remember seeing Plaintiff's Exhibit 10 package with the picture of the dish on the end of the package. I cannot say definitely how long that was in use. I believe it has been beyond the fourteen months I have been in the business. I do not remember seeing that picture since I have been in the business. I have seen it prior to the time I was in the grocery business.

If I saw a package like Defendant's Exhibit 6 on a shelf or in such manner that the name was obliterated and I could just see that picture, it would convey to my mind Shredded Wheat.

Re-Cross-Examination.

The Witness: What Shredded Wheat is made of, I do not know. The appearance I do know, and that is

that pillow-shaped biscuit. I would assume, from the use of the word *wheat*, it is made of wheat. I have heard of shredded codfish and shredded coconut. Those products are put up in shredded form.

RE-DIRECT EXAMINATION.

THE WITNESS: I never heard of shredded coconut put up in the form of a pillow-shaped biscuit. Shredded coconut is usually sold in bulk. Shredded codfish is also just in bulk, no particular shape or form, as far as the fish itself is concerned. It is just codfish turned into little shreds.

W. A. DOYLE.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am the same Mr. Doyle who testified in Boston. Since that time, I have put in some time in connection with this case. I have had experiences in my investigation. I secured witnesses to come in regard to substitutions and also good competent grocers to testify to their actions in connection with Shredded Wheat. I myself had experience with substitutions. I made four actual purchases in Kalamazoo, Michigan, and two purchases in Battle Creek, Michigan, both substitutions for the original product of Shredded Wheat that I asked for.

On the nineteenth day of December, about 8:30 A. M., I went into the Lull grocery store, 410 East Dutton Street, Kalamazoo, Michigan, and asked for a package of Shredded Wheat. The grocer handed me Plaintiff's Exhibit 74. I replied, "That is not Shredded Wheat." He said, "That is shredded wheat. See the biscuits in the dish?" I took it and went out. I wrote

on the package, so as to identify it. I took the two biscuit out of the package and folded it up.

My next call was the same day, about half an hour later. I went to the Sunshine Grocery Company, 838 Hull Street, Kalamazoo, Michigan. I asked the proprietor for a package of Shredded Wheat and was handed the package, Plaintiff's Exhibit 75. I replied, "That is not Shredded Wheat." He said, "That is shredded wheat." Those were his exact words. I had no further talk, took the package along with me.

On the same day, I went to Red and White Store, Fred Klopp, proprietor, East North Street, Kalamazoo, Michigan. I asked for a package of Shredded Wheat. The proprietor's wife brought me this package. I protested to her it was not Shredded Wheat. She said, "It is exactly the same." I said, "Suppose I take that package home and my wife tells me I did not get the right thing?" She said, "You won't have any difficulties that way. That is Shredded Wheat." Plaintiff's Exhibit 76 is the package I got there.

On the same day, at the store of Hoover & Barrett, East Avenue and Gayle Street, Kalamazoo, Michigan, I asked for a package of Shredded Wheat. The clerk handed me this package, Plaintiff's Exhibit 77. I replied, "That is not Shredded Wheat." The clerk said, "That is the shredded wheat we carry."

On December 20, 1932, I went to the store of A. L. Olmstead, 747 Capitol Avenue, N. E., Battle Creek, Michigan, and asked for a package of Shredded Wheat. The clerk brought me Plaintiff's Exhibit 78. I replied, "That is not Shredded Wheat." The answer was, "That is shredded wheat."

December 19, 1932, I went to the store of P. L. Mehan, 456 Capitol Avenue, S. E., Battle Creek, Michigan, and asked for a package of Shredded Wheat. The

clerk handed me Plaintiff's Exhibit 79. I replied, "That is not Shredded Wheat." He said, "Sure, it is shredded wheat."

I also made several other calls in and around Battle Creek. In these particular cases, when I asked for Shredded Wheat, I was asked which shredded wheat I meant, Niagara Falls or the original Shredded Wheat, or Kellogg's. They held up both packages. I made the answer I never knew there were two Shredded Wheats. The clerk replied, "We always like to push our home product." That was on three different occasions that same day, December 20th. I did not make the purchase, because they had both packages. The pencil markings on the tabs of the exhibits just offered were written by me and were memoranda of the conversations, so I would remember just what was said in each case. They were put on there at the time I made the purchases.

CROSS-EXAMINATION.

THE WITNESS: I was in Michigan from Sunday night the eighteenth of December until noontime the following Wednesday. We had a little gathering at Chicago that Friday. I stayed over Saturday and left Sunday for Kalamazoo. The only two stops I made were there and Battle Creek. I have told you all the stores I made inquiry at in Kalamazoo. There was another case, the restaurant in the hotel, New Burdick, a cafeteria, downstairs. I ordered Shredded Wheat one morning for breakfast. The girl passed out just a dish with two biscuit in it. I told her I would like to have it in the original package. She said they did not serve it that way but just in the dish. They had the small biscuit of shredded wheat. I recognized them as Kellogg's biscuit, as far as I could judge by the shape. I know they were not our biscuit. I knew right away they were not National Biscuit Company's Shredded Wheat.

Mr. Vilas and Mr. Savage instructed me to go to Kalamazoo and Battle Creek. They did not ask me to go to any other towns. I went alone. I went to the agency manager in Kalamazoo. He gave me a list of the stores to go to. That was so, also, in Battle Creek. I went to all the stores on his list. I did not go to other stores; but there was no list at all in Kalamazoo. He drove me to the stores, and I went in myself. He did not come in at all. He selected the stores I was to go to. Being a stranger, I thought that would be possibly the easiest way. He wrote a list of stores I was to go to in Battle Creek. He and his wife drove me to Battle Creek. Then I came to New York. They did not take me to the cafeteria at the New Burdick Hotel. I was stopping there. I looked the hotel up in the regular hotel catalogs. I am not familiar with it in any shape or manner. I met the local representative of the company at the agency in Kalamazoo.

At some of the stores I told them I did not know there were two kinds of shredded wheat until then. I still do not know it. I just made that statement, not meaning that that created in my mind that there were two kinds, because it did not. I did not mean to say I did not know about the Kellogg product or that I did not think it was made of wheat or that I thought it was made of rye or anything else than wheat. I do not know anything about the process of making the Kellogg biscuit. I have seen the shredded wheat made at Niagara Falls. I am sure I know nothing about Kellogg making it. My conversation in the stores was I did not know there was any other kind of shredded wheat except the Niagara Falls.

RE-DIRECT EXAMINATION.

THE WITNESS: In the hotel where I had breakfast, I did not notice where the waitress got the biscuit. All

the cereals were in little individual dishes. It was cafeteria style and you helped yourself. They were all set up. There were no packages visible. They had Kellogg's other cereals in some little individual packages there, but the biscuit were out of the package.

The stores where I made the purchases did not also have Shredded Wheat. Some of the other places I visited had both kinds.

RE-CROSS-EXAMINATION.

THE WITNESS: When I asked the restaurant girl for the package, she just said they were not served in the individual packages. I imagine she meant they took them out of the packages before they were served. She did not exactly say that. I presume she meant that, because all the other cereals were in the original package. I just asked her if I could have the original carton they were in. That is all I had to say. Her answer was that that was the only way they were served. I did not pursue the matter further.

RE-DIRECT EXAMINATION.

THE WITNESS: I had no reason to infer that the biscuit served to me were taken either from an individual package or a large package. I did not even take them. I knew from the size of it that it was not shredded wheat. They were not just what I wanted, and I did not bother taking them.

There was more than one dish on the counter of the cafeteria. They run them in rows. There were probably three rows of dishes with the biscuit in them and three rows of other cereals, quite a display there. I think I am correct in saying there were three dishes with biscuit in them.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not know how restaurants are serviced. I am not familiar with that particular end of it. In my travels around the territory, I have seen the individual packages of Kellogg's Whole Wheat Biscuit in various parts of the country, and in restaurants, stacked up on the counters. The restaurant in Kalamazoo is the only instance I have known of in which these biscuit were served in that particular way. That is the only one I visited myself.

RE-DIRECT EXAMINATION.

That is the only one I visited in Kalamazoo at that particular time. In my travels, I have observed the Kellogg biscuit in various other places set off in dishes without the package, frequently. I have noticed a number of different cases where they have not displayed the package at all. It is usually just two biscuit in a saucer. I remember in Chicago a particular case of that kind, where they did not have individual packages. They served it out of the package that way. It was not a cafeteria but a regular lunch room. The packages were under the counter. When I asked to see the package it came from, they showed it to me.

I think in Raklio's restaurant in Chicago they had biscuit displayed just the same as in the New Burdick. I am almost sure that is the place.

RE-CROSS-EXAMINATION.

THE WITNESS: In Chicago they were not displayed in the plates. She took them out from under the counter and put them in a dish. They were not up on display. I had no conversation with her as to why she was using the big package instead of the individuals. That is my particular experience. That is the only one I recall now. As far as my experience has been,

it is safe to say that both the National Biscuit Company and the Kellogg Company apparently endeavor to push the sale of their product to the restaurant trade in the small packages, especially the Kellogg Company, because, in almost every case, you get it in the individual size.

TRUMAN A. DEWEESE.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: 247 Park Avenue is my city address. I live in Scarsdale now. That has been my address since I was at Niagara Falls with Shredded Wheat. Until recently, I have been connected with the Shredded Wheat Company or with the National Biscuit Company as director of publicity, controlling all promotion work except sampling.

I was on the staff of the *Chciago Times Herald*, later the *Chicago Herald*, as an editorial writer. Having started my education as a physician, I was much interested in foods and dietetics. I used to do some writing for a magazine What to Eat, in our building and finally became the editor of it on the side, retaining my other editorial work. I once wrote an editorial there on white flour, taking the Government's analysis and showing that, by the modern roller process, they were throwing away the best part of the wheat grain. That editorial came to the attention of Mr. Perky, in Niagara Falls, who was evidently a subscriber to What to Eat. He wrote me, somewhere about 1904. In his letter he complimented me on the editorial and said he considered it very brave of me to write and publish such an editorial, that he was very much interested in that kind of work, the work he was doing,

making a whole wheat product, and he would be glad to see me sometime. I answered him. To make a long story short, he came to Chicago and telephoned me to see him at the Auditorium Hotel, which I did. He told me how he came to invent Shredded Wheat, and that my editorial had interested him very much. He asked me if, the next time I came to New York, I would stop off at Niagara Falls and see the Shredded Wheat plant. I said I would. In the meantime, I sent him suggestions for Shredded Wheat advertising, as I was already familiar with the product. I wrote two or three articles for him, one on domestic science, which he signed and paid me for. My name did not appear in connection with it in any way.

A short time after, I stopped off at Niagara Falls, visited the plant, ate Shredded Wheat, visited Mr. Perky, and stayed all night with him. He lived right across the road from the factory at that time. I went back to Chicago with my work.

In the meantime, he told Mr. Rankine and Mr. Porter, officials of Shredded Wheat Company about me. He was an eccentric fellow and got into a great many arguments with them. They were the financial men, and they would not do all he wanted them to do. He said, "There is only one man who really understands all about Shredded Wheat. His name is DeWeese, and he lives over in Chicago." A little while after that, I was made director of special publicity for the World's Fair at St. Louis. I resigned my job in Chicago, went down there, and put through my little plan of publicity which had been adopted by the Board down there as one of the most feasible and practical of the plans to get publicity for the exhibition.

In the meantime, I received a telegram from Mr. Rankine, of the Board, who was New York Commissioner and at that time a big financial man in the

Shredded Wheat Company. They were evidently trying to get it away from Mr. Perky and reorganize it, form a stock company, issue bonds, and so on. I met him down there and had lunch with him. Then and there, I made a contract with him to go to the Shredded Wheat Company immediately after the Fair closed, which I think was December 31, 1904, because I went with the Shredded Wheat Company the following year, 1905. I may be off a year there. At that time, it was called the Natural Food Company. Mr. Rankine told me: "Mr. Perky says you are the only chap who really understands shredded wheat. I want you to take care of the promotional end of it." Mr. Perky had left them about a month before that, I believe.

When I went to Niagara Falls, I immediately assumed duties in charge of promotional advertising and was in full charge of that branch of the business from then on, except the sampling. I did not have much to do with that. At first, the promotional work was largely demonstration. That had been Mr. Perky's idea of advertising, to show the biscuit to people, how to use it, and how it was made. That demonstration was to show the culinary uses of the biscuit. Mr. Perky had the idea that Shredded Wheat was a food to be combined with other foods, like creamed vegetables, meats, and so on. However, after being there awhile, I began to shape the advertising in a different direction, toward its being a breakfast cereal or food, retaining a good many of the more popular combinations with fruit and other things it combined well with, to carry out this demonstration idea, which we continued in a small way for a while.

He had some young women graduates of Oread Institute, a domestic science school he bought and founded in Worcester, Massachusetts, where the first factory was operated. They were kept in an apartment building in New York; and their job was to go

out and give luncheons in private homes and show the uses of Shredded Wheat. For instance, if a woman wanted to give a luncheon to repay her social indebtedness, she would allow these girls to come in. They would take hold of the luncheon and serve shredded wheat in a great many combinations, like creamed oysters, and such as that.

The other demonstration idea was carried out in the factory, where they took thousands of visitors through every year. They saw the process, were served Shredded Wheat generally in a simple way, with sliced bananas, or something like that. The average number of visitors per year was about a hundred thousand. Sometimes it was a hundred and twenty-five thousand or more. That continued all the time.

The demonstration idea was carried out in a more complete and extended way in what we call the mechanical exhibit, which was continued many years after Mr. Perky left. They were simply miniature Shredded Wheat factories, set up in different stores in cities and towns, where we installed the actual machinery and made Shredded Wheat Biscuit, serving it to the crowd, with a lecture on Shredded Wheat. Those were operated in all the large cities at different times of the year. We had one very extensive one in Atlantic City during the summer. One of the first was at One Hundred and Twenty-fifth Street in New York, visited by Mr. Darius Mills at one time. He became infatuated with Shredded Wheat, began eating it, and finally became the principal stockholder of Shredded Wheat Company, acquiring 51 per cent. of the stock, including a good deal of Mr. Perky's when he left. The idea was we could not take everybody through the factory, so we took the factory to them. We operated miniature factories in different parts of the country. Those were attended by thousands of visitors who

were served Shredded Wheat. It was a part of the demonstration plan, advertising Shredded Wheat.

That series of demonstrations lasted, I would say, roughly, fifteen years. They were finally abandoned as we began to get into national advertising. We realized Shredded Wheat was getting a distribution making it necessary to do a far-reaching style of advertising. We abandoned the demonstrations by the young ladies, closed up their apartments, sold out the furniture, and stopped the mechanical exhibits, or abandoned them for the time being; but we continued putting little shredders in windows of grocery stores and restaurants, instead of putting in the full exhibit. They started that fifteen-year period of demonstration about 1905 when I first went there.

One of our earliest forms of advertising was the lantern lecture, entitled "Wonders of Niagara," consisting of motion pictures, devoted half to Niagara Falls and half to Shredded Wheat. The idea was to use Niagara Falls to draw the crowd. After that, we would lead them into the Shredded Wheat factory. From there on, they were pictures of the process of making Shredded Wheat. They were shown in all the larger cities, wherever we could get into a church or Y. M. C. A., and so on. We would furnish the lantern, the lecturer, and the pictures free. We allowed the society or church to charge an admission of twenty-five cents or whatever they chose. That was done generally throughout the country, continuing for about ten years after I went with them. They were finally abandoned as expensive and reaching so few people at a time. It carried out Mr. Perky's idea of using Niagara Falls to attract attention to Shredded Wheat Biscuit. As we began to abandon these forms of demonstration, we began to advertise more extensively in magazines and newspapers, black-and-white publicity. In 1910, our newspaper advertising became nationwide.

Until then, it had been local where we were working a town. By 1910, we were, I think, in all leading newspapers in the different cities and towns of the United States, Canada, and Great Britain. I wrote the copy in those days.

When I first went there, I think they were in some few magazines. Mr. Parky had been. We continued in magazines very extensively, until 1910, when we began to drift out of magazines into newspapers, feeling that we had a larger distribution there which fitted a little more into our work. For instance, where we were sampling, having special sales, or a mechanical exhibit, the newspaper in that town could do local advertising for it in that city, which could not be done in a magazine.

The earliest magazine advertisements were lithographed inserts, showing Shredded Wheat with strawberries and other fruit, in colors. We drifted later into black-and-white advertising and had many full pages in *Saturday Evening Post, Leslie's, Collier's,* and so on. The Associated Sunday Magazine was a weekly Sunday supplement of many newspapers, probably twenty-five or thirty leading papers. We took full pages in that, sometimes back covers. We were in all the leading magazines of those days, *Munsey's, Harper's, Scribners, Century,* and *World's Work,* that type. We drifted out of them into newspapers I think about 1915.

The distribution of Shredded Wheat was getting to be very general about that time, 1910, 1912, along there, when we went into the newspapers, for the reason that it reached a larger number of cities and towns more intensively than we could in the magazines. Finally, we went out of the magazines for a long while, retaining back covers or full pages in a good many weekly magazines, and began spending four or five hundred thousand a year in the newspapers. We got

a lot of free advertising. It used to be my job to writ news articles, which the newspapers would print, s long as we advertised in them. They were educationa articles. In fact, all our advertising was of an edu cational nature. As a guess, I should say we adver tised in fifteen hundred newspapers at that time. Ou expenditures in them were from three to five hundre thousand a year, depending upon the appropriation Several times, it ran up to seven hundred thousand i a year. In this advertising, we continued to emphs size Niagara Falls and associate it with Shredde Wheat. We hardly ever printed an advertisemen without mentioning Niagara Falls. When the othe factories were built, we put them all in the advertis ing. We would feature Niagara Falls as the home o Shredded Wheat, and then we would mention thes other factories, across the river in Niagara Falls Canada; Oakland, California, and one in England.

I had been there but a few years when I suggested the change of name from Natural Food Company t Shredded Wheat Company, because we were losing so much advertising in the words *Natural Food Company* whereas, if we changed it, we would get advertising every time the corporation's name was mentioned. We had the name changed over the entrance from Natural Food Conservatory to Home of Shredded Wheat, cut in stone over the arch, and we began using that as the corporate name. That was long after Mr. Perky left. He would not have stood for that.

We were in street-car advertising very extensively in the larger cities and in elevated stations and sub ways for at least ten or fifteen years in the early part of the promotion; but, when we got into newspapers extensively, we got out of street-car advertising for a while. We used street-car advertising in New York City, Philadelphia, Brooklyn, Boston, Chicago, cities of that type; more extensively, of course, in New York,

where we went into subways and elevated stations. We had what we called single-sheet posters in all those places, in colors. We took those street-car cards, after they had been used, framed them, and put them in restaurants and grocery stores. They were all in colors, mostly illustrating the fruit combinations.

We got up a great many booklets under various titles, distributing them by the million all over the United States and Canada; by our sales agents in sampling campaigns, and many of them by mail in response to answers to advertisements, carried in many of the magazines, with an invitation for them to send to us for these booklets. Many of our sales agents were largely samplers. They took a State, organized it for sampling, and went right through from one end to the other. As our product went to the wholesaler and jobber, there was little else for them to do but distribute samples throughout the United States, from house to house. Everywhere they handed in a sample, one of those booklets went. The booklets were usually published in lots of one to five million. Some of them were called:

More Light; The Vital Question Cook Book; A Family Affair; Of Vital Interest to Mothers; Shreds of Life; For Old and Young; Come and See Us Make Shredded Wheat; A Way to Save; More Life; An Easy Road to Health; Shredded Wheat Dishes, a cookbook; Life and Health; The Bread of Health; Wonders of Niagara; Make It Your War Bread, gotten out during the World War; A Happy Way to Health; Health From the Whole Wheat; Fifty Ways to Serve Shredded Wheat. I wrote all those booklets except More Light, the Vital Question Cook Book, and A Family Affair, which were written by Mr. Perky before I went with the company. I wrote: Health in Every Shred. I will add to that: Ask Your Doctor, a special booklet used in a campaign with doctors.

These booklets all described the process of making Shredded Wheat and gave its nutritive food value, the reasons for the process, making whole wheat grain digestible, the different popular and easy ways of serving it. They were given out by our samplers, and we gave them to visitors at the Home of Shredded Wheat, Niagara Falls, and in many other ways, all of which I cannot recall now.

Our biggest distribution of literature, perhaps, was our four-page leaflets, printed, I think, in ten-million lots; a leaflet devoted to Shredded Wheat and showing some of the culinary uses of it. For many years they were handed in the doors with samples, with a cook booklet, also.

We furnished Shredded Wheat menu cards to restaurants free of charge, with the biscuit in a dish at the top, with strawberries, perhaps, or fruit of some kind, depending on the season we gave them to the restaurants. They were used by restaurants quite extensively in cities and towns all over this country and Canada. I figure we had used, up to 1926, twenty million of those.

In addition to the leaflets and menus, we supplied restaurants with a glass globe, filled with Shredded Wheat Biscuit, to put in the window, like Plaintiff's Exhibit 36. They would not all take them; but, where they would, we gave them. They put them in a show window or on the counter. That began about ten years after I came with them. I do not know exactly the number distributed, but it was considerable. Every once in a while, Mr. Meek, the purchasing agent, would order so many thousand globes from a glass concern. Biscuit were not served out of those globes. They were supposed to be refilled from time to time, but the restaurant men neglected it. I think you will find a lot of those globes still around in stores and restaurants. We had no other glass containers that I know of, used by restaurants in serving biscuit.

Our store advertising consisted of lithographed cut-outs for windows, such as picture of a woman serving a child Shredded Wheat Biscuit, and other forms which were set off in the window in the form of an easel, generally two or three feet high and two or three feet wide. Sometimes they were strips pasted on the sides of windows, with biscuit falling out of a carton, and all sorts of pictures we had the grocers put in the windows, wherever they could be persuaded to use them. Our agents would start right in at one end of the State and carry it right through to the other, with a certain number of cut-outs in a wagon or automobile, putting them in stores wherever we could induce them to put them up. We also used what we called street-car cards or hangers, to hang up in the stores, in colors, showing various uses of Shredded Wheat; with strawberries, in the strawberry season. In November or December, we would show sliced peaches; in winter, always sliced bananas. That was done very extensively throughout the United States and Canada.

We issued blotters by the millions. They were given with samples at certain times of the year, always a lady's blotter, that she could use with her secretary, with a picture of Shredded Wheat and an invitation to visit the factory if they came to Niagara Falls. To say we used easily a hundred million blotters would be well within the truth.

Post cards were used in the foyer of the factory at Niagara Falls. Visitors would sit down at the desks in the foyer of the factory there and write home on them. Sometimes I would get out postcards that had a message something like this: "We have just gone through this Home of Shredded Wheat . . . and eaten the biscuit, and it was delicious. Wish you were here," leaving a place for them to sign.

We had school charts, dimensions about two by two and a half feet, illustrating the process of making

Shredded Wheat from the whole grain. It started at the top with a view of a wheat field or farm, then a reaper reaping the wheat, then a threshing machine, then on down to its coming to the Shredded Wheat factory and being made into Shredded Wheat Biscuit, all illustrated; then a number of dishes printed on it, the food value of whole wheat, embracing a chemical analysis of Shredded Wheat, showing the two were just alike, very little difference: the analyses of whole wheat and Shredded Wheat. That was in the center of the school chart. They were sent to public school teachers all over the country, who would hang them on the wall to demonstrate the food value of whole wheat, and, incidentally, how Shredded Wheat, being a whole-wheat product, was made.

That was done in considerable quantity. We started in selling them at ten cents apiece, and we finally sent them free to anybody who could ask for them. When a teacher got one, she spoke to another teacher who would write in for it. If our samplers would go past a schoolhouse, they would go in and leave a school chart.

Quite a feature I originated when I was there consisted in getting up various contests. First, there was a recipe contest, where we advertised through magazines and newspapers cash prizes of thirty-five hundred dollars to women who would send in their favorite ways of serving Shredded Wheat, what they thought was the best way for serving it. Those prizes were awarded by judges selected at Niagara Falls, domestic science teachers and two others. I think we must have gotten about a half million recipes, at a conservative estimate, which had to be looked through by the company. One woman sent in a roll of a thousand all written on brown butcher's paper. Finally, we sifted fifty of the best ones out. There were a great many repetitions. The woman who wrote them on brown paper had

de up a lot of fanciful combinations not practical at
. We did not select them. We selected fifty, which
re published in a little booklet, entitled: Fifty Ways
Serving Shredded Wheat.

The next contest was an essay contest, where we
vited school children to write essays on Shredded
heat. For the best twenty essays, we brought twenty
pils, each with a teacher, to Niagara Falls and enter-
ned them for two days at the expense of Shredded
heat Company, showing them all the sights in the Ni-
ara Falls region, putting them up at the finest hotel,
e Niagara. Each pupil had to be accompanied by
s or her teacher. We did that twice, in two successive
ars; took pictures of the pupils and their teachers.
estimate we had about half a million essays on
redded Wheat from these two contests in 1926 and
27.

We had special campaigns. One of our booklets,
itled Building Better Babies, was sent to the mother
a baby about a week or two after the baby was born.
e got the names through boards of health in different
ties and towns, furnished to us through a firm in Chi-
go which made a business of gathering them. Two
eeks after the baby was born, we sent that mother
is booklet and a letter, calling her attention to the
ct that, if perhaps, the baby could not digest mother's
lk or did not have it and could not digest cow's milk,
redded Wheat baby food had saved thousands of
bies. That was a special campaign, kept up all
ound the year, every year, the whole year continu-
sly.

We carried special advertising in trade papers, that
ppealed to our retailers. I always took the position
at Shredded Wheat was a consumer and not a trade
roposition, that we had to sell it before it went on the
elves, and all the grocer had to do was to hand it out
hen it was called for. So we did not value trade

papers very highly; but we did it as a matter of trade policy; always with some special talk to the grocer.

In all the various kinds of advertising I have been describing, Shredded Wheat was pictured as the product. The advertising was all built around Shredded Wheat. I always figured we were selling not whole wheat but the process of making a whole-wheat grain digestible. That is what we had to get across, and that is how I came to originate that slogan, "It's All In The Shreds." I figured that came pretty near telling our story. We featured it in magazines and newspapers for a good many years and ran it on the cartons. It is on Plaintiff's Exhibit 10.

I see also on that exhibit the picture of a dish with two biscuit in it. About 1908, I went to Mr. Porter, then vice-president, and suggested that hardly anybody was satisfied with one biscuit to a serving, that it had been my experience that people ate two biscuit. I always ate two in my home, and why should we not change all our advertising to show two biscuit in a dish instead of one. Prior to that we had always had one biscuit in a dish. Mr. Porter did not see any objection to it. It looked like a good scheme for doubling the consumption of Shredded Wheat. We always advertised, after that time, about 1908, two biscuit in a dish as a proper serving, on the carton, and, after that, in the advertising. The two-biscuit picture has continued up to this time.

The bundle of papers, entitled Summary of Advertising and Promotional Work during the period from 1895 to July 31, 1927, consists of data made up under my direction. They must be substantially correct, because they were taken from the records of the company. The last few sheets contain a list of a number of publications, which I recall are publications in which advertisements of Shredded Wheat appeared. This was a newspaper schedule for one particular year, typical or illustrative of the wide range of our newspaper ad-

vertising and the kind of papers we used in different cities and towns. Plaintiff's Exhibit 83 is the schedule.

I remained with the Shredded Wheat Company from along in 1904 or 1905, when I assumed the position of advertising manager, about twenty-five years, or up to the time the National Biscuit Company took over our business. Then, through an arrangement with Mr. Tomlinson and Mr. Grossmore, and others of the National Biscuit Company, I went with Frank Presbrey Company, an advertising agency which had handled this advertising with the National Biscuit Company for a number of years. I understood I was to continue with handling the advertising of Shredded Wheat. That lasted until the present year. I retired during the year 1932. Sickness took me to a hospital for an operation and many months in a sanitarium. During that time, another agency came in and got the advertising. Anyway, I retired.

Plaintiff's Exhibit 84, a compilation consisting of several typewritten sheets pasted together, entitled Advertising and Promotional Expense in the United States, Canada and England, was made up from records of the company kept under my supervision. It shows, for the years indicated, from 1895, including 1926, the expenditures of the Shredded Wheat Company for advertising of various kinds, as set forth in the exhibit. Those figures are taken from the records of the company, and I think they must be correct.

The effect of this continual advertising of Shredded Wheat upon the expression *shredded wheat* was to make it a sort of household word, as if you would speak of starch or potatoes, as differentiated or distinguished from proprietary foods, like Grape-Nuts, or Mello-Wheat, or any of those foods in those days. You would not expect to find any of them mentioned in any book on dietetics, for instances, or in a book by a physician; but they mentioned Shredded

Wheat as if it were a commonly accepted well-known name of a food. For instance, Walter Page, in his books giving his experiences during the World War, mentioned Shredded Wheat in one of them. He said that, if his shredded wheat lasted, he would get through all right. There were references like that in a great many books, where they would not think of mentioning any other proprietary article.

Plaintiff's Exhibit 85, now shown me, is the extract from Walter Page's book I referred to where he mentions Shredded Wheat, being a letter from Walter H. Page to his son, dated London, April 7, 1918, copied from the Life and Letters of Walter H. Page, Volume II, page 369.

Plaintiff's Exhibit 86 is a list I prepared, after reading books on dietetics and other subjects, of references to shredded wheat.

MR. BYRNE: I am willing the record should show that, in the book from which Plaintiff's Exhibit 85 is copied, the words *shredded wheat* are not printed with capital initials; whereas, on Plaintiff's Exhibit 86, in respect to the same book, the expression *Shredded Wheat* has capital initials.

THE WITNESS: I recognize the dozen or more books on the table beside me as albums containing records of Shredded Wheat advertising. I kept Plaintiff's Exhibits 87 to 112, inclusive, as part of my official records, these albums, containing tear sheets and other samples of advertising used by the company. They are records which were in my office, kept under my direction.

The dates on the samples contained in these various volumes, either printed or written, are the correct dates upon which those ads respectively appeared. Some of the books, for example, Plaintiff's Exhibit 87,

contain newspaper clippings of a date prior to the time I went with the Shredded Wheat Company, beginning with, for instance, December, 1900. That volume and other similar volumes on this list of exhibits were in my custody during the twenty-five years I was at Niagara Falls, as part of the records of the Shredded Wheat Company. I identify and recognize these volumes as such. I have seen them before. This was all publicity given to Mr. Perky when he went to the Falls and started to build this factory.

(The witness was temporarily withdrawn and resumed the stand the following day, January 5, 1933.)

THE WITNESS: The three volumes marked Plaintiff's Exhibits 2, 3 and 4, for identification, purporting to contain samples of cartons, are familiar to me. The cartons contained in these books are samples of cartons used from time to time by Shredded Wheat Company. I do not think I could give you the dates of them. I know they are the Shredded Wheat cartons in use from time to time, and the carton on page 38 in Plaintiff's Exhibit 4 for identification was changed to two biscuit about 1908. I would say this carton was probably used prior to 1908. I made changes from time to time, in different years, in the phraseology of this reading matter on the back of the carton. The carton was substantially the same until we changed it and had the two biscuit here.

Cartons such as the one appearing on page 24a were used very early in the game, just as I was taking over the advertising of the Niagara Falls. We got the goddess Ceres off the carton, and Niagara Falls was substituted. She also appeared on the wooden cases.

The cartons in the back part of Plaintiff's Exhibit 4 for Identification, marked volume one, were some of

the oldest cartons in use, before I went with them. On page 2d is 1903. I should say that is probably correct. I saw some of those cartons when I was there. I do not know just how long they were used.

There is one of the Cereal Machine Company, Worcester, Massachusetts. Perk's idea was he would make more money out of selling cereal machines, like coffee grinders. Noting in volume two, Plaintiff's Exhibit 3 for Identification, page 44, a carton bearing a copyright legend 1911, I should say that would tend to fix in my mind the probable date of use of that carton. There is only one biscuit in the dish. To 1909, I think, we were using one biscuit in a dish.

The Chinese package on page 56 of Volume Two was used for export. That carton on the other page represents the same thing, copyrighted in 1916, Canadian Shredded Wheat Company.

On page 19 of Plaintiff's Exhibit 2 for Identification, marked volume three, there is an English carton containing two biscuit, which was subsequent to ours. That is carton number 134 on page 19, and there is a copyright date, 1911. I would think it was about 1910. On pages 16 and 17 of the same book are cartons, 1926. We began with the two biscuit a long time before that.

(The books, "Plaintiff's Exhibits 2, 3 and 4 for Identification," were received in evidence.)

CROSS-EXAMINATION.

THE WITNESS: On copy of trade-mark registration No. 52858, of the Natural Food Company, registered May 22, 1906, I recognize the picture of the woman as what I call the goddess Ceres that appeared on the cartons of the Natural Food Company, described as follows: "The trade-mark consists of the representation of the mythological character Ceres, represented

as holding a lighted torch in one hand and a sheaf of wheat in the other.' I have seen that lady on some of the cartons of the plaintiff's predecessors, and on the wooden cases.

I identify the Ceres woman as being on both ends of number one carton in book number one, marked Cereal Machine Company, office and factory fifty-three to sixty-nine Jackson Street, Worcester, Massachusetts. Underneath her are the words *trade mark*, shown on both ends of the carton.

Mr. Perky's first idea was to sell the little shredding machines that looked a great deal like coffee mills to the housewife and let her do her own shredding of the wheat, so she would shred the wheat in her own home. He thought there was more money in making the machine than the biscuit. I think that only lasted a year or so.

The same Ceres trade-mark appears on the second carton in the book, at both ends of the carton. The product is referred to on one face of the carton as Shredded Whole Wheat Biscuit, and on the other as Shredded Wheat Biscuit.

On the carton appearing on page 2a, marked in pencil 1901 and 1902, the name of the manufacturer is The Natural Food Co., and the Ceres woman still appears, marked *trade mark*, on both ends of the carton. On this carton, the name of the manufacturer, the Natural Food Co., Niagara Falls, New York, is succeeded by the words Successors to the Shredded Wheat Co. On this carton, the product is referred to in several places as Shredded Whole Wheat. The plaintiff's biscuit shown on this carton is considerably different from the biscuit as it now appears. It is the split biscuit. One of Mr. Perky's favorite ideas for serving Shredded Wheat was to run a knife through, split the biscuit, and toast it.

The Ceres woman still appears on both ends of the following carton, on page 2b, marked noticeably with the words *trade mark.*

It is also true of the carton appearing on page 2c, marked 1901, that the Ceres woman appears on both ends of the carton.

On page 2d there is a carton marked 1903, in which the Ceres woman appears only on one end of the carton and the words *Shredded Whole Wheat* on the other end. On the front and back panels of this carton, the product is referred to as Shredded Wheat. On the bottom, when the flaps are folded, it would appear as Shredded Whole Wheat. The phrase *Shredded Whole Wheat* has taken the place of the Ceres woman on one end of the carton. This is a carton of Natural Food Co., still marked Successor to the Shredded Wheat Co., Niagara Falls, New York.

The part on page 3, marked 1903, is generally similar to the next preceding carton. The Ceres woman appears on one end of the carton, and the words *Shredded Whole Wheat* are on the other end. I would say that the words *trade mark* on this Ceres woman end of the carton were very much smaller from the ones in the inscription *trade mark* on the earlier cartons.

These 1903 cartons appearing on pages 2b and 3 contain a rather prominent notice on top, reading:

"September 17, 1895, PATENTED October 15, 1895," and an inscription, reading: "This food, the process of making it, and the machinery used in the manufacture, are under the protection of the United States Government, by virtue of nineteen patents of recent dates. Patents have also been taken in the principal foreign countries. The Natural Food Co. Successor of the Shredded Wheat Co., Niagara Falls, New York."

The next carton, on page 4, marked 1903 in pencil, is generally similar to the immediately preceding car-

tons, the Ceres woman appearing on one end and *Shredded Whole Wheat* on the other. The manufacturer's name is still "The Natural Food Co., successor to the Shredded Wheat Company, Niagara Falls, New York." Mr. Perky was rather fond of the name Natural Food Co. and held on to it until we finally changed. We did not know at the time that it was ever the Shredded Wheat Co. I did not know they had ever used that prior to that time.

The carton appearing on pages 5-6 is a sample carton, marked *free sample*. On one side of the sample carton is the Ceres woman, beneath her being the words Manufactured by The Natural Food Co., Niagara Falls, New York. On the other side of the carton is Free Sample of Shredded Wheat. Judging by the size of the carton, I would say it held at least two biscuit. It looks like a very narrow carton, compared with the individual cartons used later on. The carton at the right of the page is marked Offices: Six & Eight Eastcheap, London, E. C., evidently for use in the English trade. The carton at the left contains under the picture of the Ceres woman the words "Manufactured by The Natural Food Co., successor to the Shredded Wheat Co., Niagara Falls, New York."

On the following carton, on page 6 of volume one, is marked in pencil "In 1905." I saw a picture of this carton some years after that, when we took off the picture of the goddess Ceres. They were using it when I went there. The carton shows the goddess Ceres on one end and the words *Shredded Whole Wheat* on the other end. At the top of the one panel are the words *Directions for using Shredded Wheat:* "Place biscuit in oven to renew crispness. Consists of the entire wheat grain (nothing added) made light and short by mechanical shredding and thorough cooking." Under that: "Keep the teeth and mouth in order, as a

natural food, by exciting proper and complete action in the natural way." That follows out the idea of the corporate name, Natural Food Co. That was Mr. Perky's idea.

Referring to the individual carton appearing on the pages marked 8-8 and 9-9, these two individuals are marked in pencil, the left-hand one, December 17, 1904, to July 25, 1905. That coincides with my recollection of the use of that carton, the two-biscuit sampler. It seems to be a little thicker individual carton than the ones we last referred to; also containing the name The Natural Food Co., successors to The Shredded Wheat Co., Niagara Falls, New York, the picture of Ceres on one end, and the words Shredded Whole Wheat on the other end, also the inscription on the top as to the product being patented.

The carton on page 10 contains Ceres on one end and the Shredded Whole Wheat inscription on the other, and, under Ceres, "Manufactured by the Canadian Shredded Wheat Co., Ltd., Niagara Falls, Ontario, made in Canada." I recall the use of that carton by the Canadian Company around that time. That was about the time I went with them.

On the carton 10-a, marked 4/8/05, the picture of Ceres is on one end, above her, the phrase Shredded Whole Wheat, and under her, the phrase The Natural Food Co., Successor to the Shredded Wheat Co., Niagara Falls, New York. The inscription under Ceres has become very small now. On the carton, above the words *Whole Wheat* and under the word *Shredded*, appears the word rather prominently in brackets, *trade mark*. The words *Shredded* and *Whole Wheat* are more prominent than *trade mark*. This marks the time when the printing ink on the carton was changed from black to purple, about that time, 4/8/05, trying to make the carton more attractive without destroying the orig-

inal design. This is the first carton on which the words *trade mark* have been associated with the word *Shredded.* The immediately preceding cartons on pages 7 to 4, contain the expression *Shredded Whole Wheat* but not the words *trade mark* under the word *Shredded,* as in carton 10-a.

The carton on page 11 is a very old one, marked in pencil *after April 8, 1905,* which looks as if it had been used from April, 1905, to April 22, 1908. It is printed in black ink and still carries the manufacturer's name as The Natural Food Co., successor to The Shredded Wheat Co., Niagara Falls, New York. It is fair to say that the words *trade mark* under the word *Shredded* on one end of the carton is several times as noticeable and prominent as the words *trade mark* have now become under the Ceres woman on the other end of the carton. This carton apparently used up to 1908, still contains the explanatory phrase "Consists of the entire wheat grain (nothing added) made light and short by mechanical shredding and thorough cooking."

The carton on page 12, marked April 30, 1907, appears to be a sample. It is marked *Sample.* It is a complimentary sample. On the end is Shredded (trade mark) Whole Wheat. It appears to be the first use of the phrase "It's All In The Shreds." It refers on the bottom to the product as Shredded Whole Wheat and on the front and back panels as Shredded Wheat. On one end panel, the only language used is: Shredded (trade mark) Whole Wheat. "It's All In the Shreds." On the other end panel are the words Shredded Whole Wheat, and under that the picture of Ceres and the phrase "Manufactured by the Natural Food Co., successor to the Shredded Wheat Co., Niagara Falls, New York."

The carton on page 12-a contains the notation March 5, 1906, and is printed in purple ink. We ex-

perimented with a lot of cartons. It is more blue than purple. It is generally similar to the previous carton, containing picture of Ceres on one end and Shredded (trade mark) Whole Wheat. It's All in The Shreds, on the other end.

Carton number 15 is a generally similar carton, marked for Canadian Shredded Wheat Co., Ltd.

Carton 16 on page 16 contains the notation July, 1907, is in blue ink, and generally follows the description of the last carton, having the words Shredded (trade mark) Whole Wheat It's All In The Shreds on one end, and the words Shredded Whole Wheat, the picture of Ceres, the small inscription trade mark under her, and the words The Natural Food Co., Successor To The Shredded Wheat Co., Niagara Falls, New York; and, on the bottom, the words: Shredded Whole Wheat. Open At The Opposite End. This 1907 carton still contains the phrase: Consists Of The Entire Wheat Grain (nothing added) Made Light And Short by Mechanical Shredding and Thorough Cooking.

Carton 16-a is the same type of carton, except it is a sampling carton, marked on the top: "Complimentary Sample." It still carries the Ceres picture, marked as a trade mark on one end, and on the other end, Shredded (trade mark) Whole Wheat. It's All In The Shreds.

Carton 17 is a carton of the Canadian Shredded Wheat Co., Ltd., of Niagara Falls, Ontario, marked "To January 1, 1909, Folding Box Co.," a full-sized carton, marked "Made In Canada." On one end it has the words "Shredded Whole Wheat," Ceres, marked trade mark, and the words "Manufactured by Canadian Shredded Wheat Co., Ltd., Niagara Falls, Ontario, Made In Canada." On the other end appear the words: Made In Canada. Shredded (trade mark)

Whole Wheat "It's All In the Shreds." Made in Canada. You will notice that these are folding cartons, instead of cartons with the strips pasted on.

Carton 18 is the same kind of carton we have just described, but made for The Natural Food Co., Successor To The Shredded Wheat Co., Niagara Falls, New York, and marked in pencil: Started running January 5, 1907. It contains Ceres marked as a trade mark on one end, and the words: Shredded (trade mark) Whole Wheat. "It's All In The Shreds" on the other end.

Carton 18-a is marked in pencil 11/5/07, and in pencil at the upper left-hand corner: "Reg." It also contains Ceres as a trade mark on one end and the words Shredded (trade mark) Whole Wheat. "It's All In The Shreds" on the other end. The Natural Food Co. still appears on the carton as Successor to The Shredded Wheat Co., Niagara Falls, New York. The carton contains on the top the patent notice previously referred to.

Carton 19 has a pencil inscription below it 4/22/08, and contains on the top a certain list of patents, dates, and numbers; the words "Patented, September 17, 1895, October 15, 1895. This Food, The Process of Making It, The Special Machinery for Its Manufacture, are Under The Protection of The United States Government By Virtue Of Many Patents, as follows:" (57 numbers follow.) The carton still carries Ceres, marked with the very small words *trade mark* on one end, and, on the other end, the words Shredded (trade mark) Whole Wheat. It's All In The Shreds.

The reason for the slogan "It's All In The Shreds" was that those five words seemed to embody everything there was to say about that whole wheat; It's All In The Shreds meaning that the whole wheat grain, all the whole wheat grain was in the shreds;

and then the other meaning conveyed was that the virtue of the product was in the shredding process, you see. So we meant to have those five words convey all there was to say about Shredded Wheat.

The following printed matter appears on the carton:

On the front face: "Guaranteed under the Food and Drugs Act June 30, 1908, Serial Number 6579.

"'TELL ME WHAT YOU EAT AND I WILL TELL YOU WHAT YOU ARE'

"Fine White Flour Products, such as Bread, Biscuit, Buns, Rolls, Doughnuts, Cookies, Crackers, Cakes, Pies, etc., are unnatural and impoverished food; and in the process of making, and serving, other heat-making products, such as Butter, Lard, and Sugar are largely used, forming a one-sided diet. Those who live on this so-called 'Staff of Life' have Weak Muscles, Weak Stomachs, Poor Digestion, Poor Nerves, Bad Teeth, and Poor Health generally.

SHREDDED WHEAT

contains all the elements of the Whole Wheat—a Perfect Food—and is made Light and Short without Yeast, Baking Powder, Soda, Saleratus, Cream of Tartar, Alum, or other foreign substances, and without the use of Salt Raising, Lard, Butter, Cottolene, Cotton-seed Oil, Oleomargarine, or other Greasy Materials, or substitutes therefor. It is a Fresh Food and is Free from all animal life. The thoroughly washed and cleansed Whole Wheat Grain goes into the hopper of the shredding machine and comes out Light and Short, without being touched by human hands.

"THE SHREDDED WHEAT COMPANY HEREBY GUARANTEES that Shredded Whole Wheat Biscuit and Tris-

cuit contain the entire wheat grain (nothing added), made light and short by thorough cooking and mechanical shredding. The Shredded Wheat Company hereby agrees to save all dealers who sell said goods harmless from all penalties under the Pure Food Laws, State and National, by reason of selling said products, —The Shredded Wheat Company.

THE SHREDDED WHEAT COMPANY
Formerly THE NATURAL FOOD CO.
NIAGARA FALLS, N. Y., U. S. A.

London Agency

THE SHREDDED WHEAT COMPANY
10 EASTCHEAP, LONDON, E. C.

Open at Opposite End SHREDDED OPEN AT OPPOSITE END."

On each side: "PLACE BISCUIT IN OVEN TO RENEW CRISPNESS."

On the rear face: "Guaranteed under the Food and Drugs Act June 30, 1906, Serial Number 6579."

DIRECTIONS FOR USING SHREDDED WHEAT.

PLACE BISCUIT IN OVEN TO RENEW CRISPNESS

"Consists of the ENTIRE WHEAT GRAIN (nothing added) made light and short by mechanical shredding and thorough cooking.

"Combines with the necessary bulk, all the food properties requisite for thorough nourishment.

"Easily digested—but not 'predigested.'

"Especially beneficial for those who suffer from indigestion, constipation, and kindred complaints.

"Promotes thorough mastication, as required in the digestion of all food, especially cereals.

"Keeps the teeth and mouth in order as a natural food should, by exciting proper and complete action in the natural way.

COOK BOOK OF RECIPES
FOR SHREDDED WHEAT MAILED FREE

"May be eaten with butter, fruit, syrup, jelly, milk, etc., or in a sandwich form, with meat, eggs, or cheese. As a breakfast cereal, moistened with milk, hot or cold, it cannot be surpassed. Made without salt, it may be seasoned to taste. For milk or cream toast the shredded wheat is most desirable. Being especially porous and absorbent, it forms for dishes made of jellies, blanc mange, creams, or other semi-liquid substances, a foundation of highly-nutritious and pleasant character. Opened and prepared with layers of berries, slices of juicy fruits or sauces, the shredded whole wheat forms a palatable and nutritious combination.

"With a layer of cheese between the halves and toasted, so that the cheese permeates the shreds, an excellent lunch dish is made.

"All cooked vegetables which have a flavored liquor, or are of moist character, such as spinach, peas, tomatoes, cauliflower, parsnips, etc., can be served therewith to marked advantage, as it will take up the flavor and liquor without becoming mushy and soggy.

"Baskets can be made by cutting a cavity in the top, which can be filled with minced meats, juicy vegetables, berries, mushrooms, cooked clams, oysters, etc., thereby forming attractive dishes.

AWARDED GOLD MEDAL, PARIS, 1900."

On one end: "SHREDDED

(Trade Mark)

WHOLE

WHOLE"

"IT'S ALL THE SHREDS"

On the other end is: "SHREDDED WHOLE WHEAT

(Picture of Godess Ceres)

Manufactured By

THE SHREDDED WHEAT Co.

Formerly THE NATURAL FOOD Co.

NIAGARA FALLS, N. Y."

I also recall the use of the following words

"THE SHREDDED WHEAT COMPANY HEREBY GUARANTEES that Shredded Whole Wheat Biscuit and Triscuit contain the entire Wheat Grain (nothing added), made light and short by thorough cooking and mechanical shredding. The Shredded Wheat Company hereby agrees to save all dealers who sell said goods harmless from all penalties under the Pure Food Laws, State and National, by reason of selling said products.—The Shredded Wheat Company" on cartons at that time. Apparently, this carton 4/22/08, is the first so far in which the company name is the Shredded Wheat Co., marked as formerly The Natural Food Co., Niagara Falls, N. Y., U. S. A. I think that was used about that time, in 1908.

Carton 19a is a sample carton, marked on the top Complimentary Sample, and containing, on one face: "Directions For Using Shredded Wheat: Place Biscuit In Oven To Renew Crispness. Consists of the ENTIRE WHEAT GRAIN (nothing added), made light and short by mechanical shredding and thorough cooking." It also contains on one end the words Shredded Whole Wheat, below that a picture of Ceres, and, under that the little phrase *trade mark,* and then the words Manufactured By the Shredded Wheat Co., Niagara Falls, New York; and, on the other end, the words: Shredded (trade mark) and a picture of a plate containing a spoon and one biscuit; below the plate the word Wheat, and below that the phrase It's All In

The Shreds. This is the first carton which we found that contains the picture of the biscuit in the dish, steam cooked. This carton still carries the picture of the Ceres woman and the phrase on one face "Consists of the ENTIRE WHEAT GRAIN (nothing added), made light and short by mechanical shredding and thorough cooking." On the end opposite Ceres, it contains the words Shredded (trade mark) and, below that, a picture of a plate with one Shredded Wheat Biscuit in it, under that Wheat, and below that It's All In The Shreds.

The large carton 20 seems to differ from previous cartons only in having the lock end, with the notations of all patents on one flap of the carton instead of two.

I remember carton 20-a, in which the panel on one end has the words Shredded Whole Wheat, and the picture of Ceres; on the other end, Shredded, under that in brackets trade mark, and under that the words Whole Wheat, and under that It's All In The Shreds.

I also remember carton 21, Complimentary Sample, the two-biscuit sampler, containing Ceres on one end and the single biscuit in a plate on the other, marked from 6/30/08 to 1/6/09. According to that carton, up to January 6, 1909, they were still using the goddess Ceres on one end and the words Consists of the ENTIRE WHEAT GRAIN (nothing added), made light and short by mechanical shredding and thorough cooking."

Carton 22 seems to be the same type of carton, without change, using Ceres on one end and the words Shredded (trade mark) Wheat, It's All In The Shreds on the other end, with the picture of a single-biscuit plate and spoon.

On page 22-a, there are cartons marked 22-a and 22-b. This is a complimentary sample carton, containing on one end a picture of Ceres with the words Shredded Whole Wheat, and, on the other end, Shredded (trade mark) Wheat, It's All In The Shreds,

with a picture of a single-biscuit plate and a spoon; marked 5/28/10. I remember a carton like that being used. It also contains the statement Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking. Carton 22-b is the first carton in this book which carries a picture of the factory on one face. My recollection is that the picture of The Home of Shredded Wheat first came on the cartons about 1910.

Carton 23 is a large-sized carton carrying a picture of the plant on one face and How to Serve Shredded Wheat on the other; Ceres on one end, and a picture of the single-biscuit plate on the other end, with the words: Shredded Wheat and It's All In The Shreds.

Carton 24, dated 8/8/10, is the same type of carton, also carrying the picture of a food factory, "The Home of Shredded Wheat" on one face, and Ceres on one end, and the words Shredded (trade mark) Wheat, It's All In The Shreds, with the picture of the single-biscuit plate on the other end. It also contains the phrase: Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking; and the carton also carries various patent numbers. The first sentence there is different. The phrase: Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking, has been slightly changed over some of the previous cartons. That change has been in there for several cartons.

Carton 24-a is a complimentary sample carrying a picture of the food factory on one face, the goddess Ceres on one end, and the words: Shredded (trade mark) Wheat. "It's All In The Shreds," with the picture of the plate and one biscuit in between the words *trade mark* and the word *wheat*, on the other end.

Carton 25 is the same general type of carton as the last one referred to, October 31, 1910.

Cartons 26 and 27 are Complimentary Sample cartons. I recall the use of those cartons at about that time, October 31, 1910. Carton 26, the one on the left of the sheet with no picture of the factory, is a Canadian carton. Carton 27 carries a picture of the plant, the Home of Shredded Wheat, on one face, and a picture of Ceres on one end. They are two-biscuit sample cartons.

Carton 28 is apparently the first carton we have come across shown in colors. There is no notation of a date. I cannot recall just when that change was made. I should say it was somewhere near 1915 they began to use a carton printed in several colors as shown on page 28 of volume one: red, black, and blue. The carton still carries the phrase: Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking. The plate of biscuit, on one end, still carries one biscuit.

Cartons marked 29, 30, 31, 32, and 33 are of the same general type as 28, with Ceres on one end, shown in blue and red, marked as a trade mark, Manufactured by The Shredded Wheat Co., Niagara Falls, New York. My best recollection is that these cartons were used somewhere near 1915.

Carton 34 is marked 1911 and carries a picture of Niagara Falls on one end and the Shredded Wheat plate on the other end. I recall the use of that carton. The reading matter on one end of the carton is: Shredded (trade mark)—then a space and the plate with the biscuit and spoon—then the phrase: Copyright 1911 by The Shredded Wheat Co.; then, in large red letters under that: Wheat. It's All In The Shreds. That is the first carton on which we find the words: Copyright 1911 by The Shredded Wheat Co., and the first carton on which we find, in place of Ceres, a pic-

ture of the Home of Shredded Wheat with a picture of Niagara Falls, I think. I thought the introduction of colors came a little later. I might be wrong. That is 1911. Possibly whoever made up this scrap book might be mistaken. It seems to me the full colors, red, blue, black, and green, came after that. I think the Falls took the place of Ceres. When she was taken off, she was not used again, except there may have been a stock on hand to be used. When the supply of old Ceres cartons was exhausted, nothing but the Niagara Falls picture was used. Mr. Perky's idea in building the factory at the Falls was advertising, to cash in on the fame of Niagara Falls, which was visited by a million or so people every year. He wanted to identify and connect up the Shredded Wheat factory with Niagara Falls. So, beginning at least as early as 1911, Niagara Falls was put on one end of the carton and has been kept there ever since. Since that time, Niagara Falls has been strongly associated with that package of Shredded Wheat. It was carried even after the other factories were built, and it was still referred to as Niagara Falls Shredded Wheat.

Carton 35 is a Complimentary Sample, generally similar to the preceding carton. The picture of Niagara Falls has displaced Ceres.

Carton 36, marked 1911, is generally similar to the last carton and contains, under the picture of the factory, the words, "The Cleanest, Finest, Most Hygenic Food Factory in the World," and "Copyright, 1911, by The Shredded Wheat Co." On one end of the carton there is a picture of Niagara Falls, with the words: The Home of Shredded Wheat, Niagara Falls, N.Y. On the other end are the words: Shredded Wheat with berries or other fruits in season, with a picture of one biscuit in a plate, covered with strawberries. Those were used in the strawberry season. It still carries the

phrase: Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking. It also contains the phrase: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food. I remember putting on, also, the line: The only breakfast food made in biscuit form. I do not know just what date that was.

According to carton 37, that same form of package was apparently used through 1912. I remember that carton, which appears to have been marked Copyrighted 1911, but it is dated in the book 1912, carrying generally the phrases just read for carton 36.

Carton 38, also marked: Copyrighted 1911 by The Shredded Wheat Co., has gone back and contains the plate with the single biscuit, without any strawberries. They used the strawberry carton in the strawberry season and the one without any berries the rest of the year. They tried to use some of those during the spring only, but they overlapped. It depended on how fast the grocer moved them. We might have some strawberry cartons in December, always figuring they had an advertising value, no matter when they were used.

I remember the Complimentary Sample carton 39, marked February 2, 1912, which is apparently another one of the thin or flat sample cartons, with the Niagara Falls picture on one end and the words: Shredded (trade mark) Wheat. It's All In The Shreds on the other end. From around 1911, the cartons were, as I recall, continuously printed in two or three colors.

Carton 40 is about the same type of carton as we have just discussed, and so is carton 41, except it is a Canadian carton, showing a picture of the Canadian plant instead of the Niagara Falls plant; I guess, the first one of the Canadian factory.

Carton 42 is a Canadian carton similar to 41, except the plaintiff's Shredded Wheat is shown with strawberries on the biscuit.

Carton 43 is the same general type, but it is American, showing strawberries on one end, and The Home of Shredded Wheat and a picture of Niagara Falls on the other end.

Referring to Plaintiff's Exhibit 3, volume two, carton 44, is the same general type, carrying a picture of the plant on one face, Niagara Falls on one end, a picture of the plate with one biscuit on the other end, and a series of patent numbers on the bottom.

Carton 45, marked 1913, is the same general type, printed in colors, with the Niagara Falls picture on one end, a plate with one biscuit on the other, the factory on one face, the other face containing, among others, the phrases: Shredded Wheat is made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking; and: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food. I recall the use of that carton in 1913. It is marked 9/25/13.

Carton 46 has on it the phrase, written: This carton in use January, 1915. It is still colored, containing the picture of plate with one biscuit on one end and a picture of Niagara Falls, with: The Home of Shredded Wheat on the other; and the factory on the other face, the words Shredded Whole Wheat on the top. This carton still carries the two phrases: Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking; and: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food. I recall the use of that carton about that time.

Carton 47 is the same general type of carton, marked for Canadian Shredded Wheat Co., and containing the picture of the Canadian plant.

Carton 48 is an individual carton of the same general type, carrying the same general matter, a reproduction of the large carton.

Carton 49 is an American Complimentary Sample, marked in use January, 1915, of the same general type of carton as I have just described.

Carton 50 is the Canadian carton in use about that time, complimentary sample. These were single biscuit samples. There were two kinds of carton, one thin, holding one biscuit; the other a double carton, holding two biscuit. Where the ends of the carton show just about the thickness of a one biscuit, they are single-biscuit cartons. Where the end panel is double that thickness, it is a two-biscuit carton.

Cartons 51 and 52 are United States and Canadian complimentary sample cartons of the same general character. They are used in sampling, but those are individuals the way they are served in hotels. They were made, I think, as individuals for sale, of the same general type of carton as the samples but not marked so. Carton 52, dated April 13, 1915, still carries on one face the phrase: Shredded Wheat is Made of Whole Wheat and is made digestible by steam cooking, shredding, and baking; also the phrase: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food; and, on one end, It's All In The Shreds.

Going back to carton 51, it contains on one face a picture of the factory, and on the opposite face: Individual Shredded Wheat for use in hotels and restaurants; and: Wholesome, nourishing, and satisfying for any meal. To serve the biscuit, pour hot or cold milk over it, add a little cream, then salt or sweeten to suit taste; and: Being in "little loaf" form, shredded wheat makes wholesome combinations with berries, sliced bananas, sliced peaches, prunes, baked apples, or other fruits. Cover the biscuit with the fruit, then pour

milk or cream over it, and sweeten to suit the taste. I recall the use of that carton, marked: First run, February, 1915.

Carton 53 is a large-sized carton containing those same phrases and also carrying the phrase on the end: It's All In The Shreds.

Carton 54 is the same type of carton, containing a Chinese label pasted to it. I do not recall just how it was fixed. I suppose the Chinese label is a translation of that reading matter. Whether it was finally printed on a carton I do not know. I think the Chinese trade did not justify printing a carton for it, so they just printed the label. It is my recollection that the package began to go into the Chinese market in some small quantity about that time. I composed the reading matter on carton 54 under the heading: How to Use Shredded Wheat. It took the place of what was originally on the carton, simplified, more understandable and direct. I thought it would help in the sale of the food to tell them it was made of whole wheat, made more digestible by steam cooking, shredding, and baking, and so forth. We continued to use those phrases in all our advertising, so I had them put on our cartons. I think they are still using them. I may have made a few little changes in them in the last few years I was there. I think this was used almost continuously after I changed the carton.

Those cartons run generally in the same character through 56, a complimentary sample with a Chinese label, and 57 and 58.

Carton 59, individual service of Shredded Wheat, a Canadian carton, is in a little different form. I do not remember why that was changed. It is for restaurants in Canada, a white carton, printed in black ink, containing no picture of the factory or of Niagara Falls. I am afraid I cannot recall when it was used. The picture just shows one biscuit in the plate in attempted natural

colors. The carton was for two biscuit. It says, "This package contains two biscuit." The front face contains: This package contains two shredded wheat biscuit.

Carton 62 is the same type of black-and-white individual or sample carton.

Carton 63 is a one-biscuit sample carton, with the picture of the factory on the front face, reading matter on the back, a picture of Niagara Falls on one end, and the single-biscuit plate on the other end.

Carton 64 is again a colored carton, also 65 and 66. I never could quite agree on the use of the word *biscuits*. I have always used the word in the plural, *biscuits*. The carton manufacturer always used the word *biscuit*, no matter how many were in there. In all my advertising I made it *biscuits*.

Carton 68, Canadian, is the first carton containing on one end the reading matter: Net Weight of Contents twelve ounces, Shredded (trade mark), a picture of a single-biscuit plate, the phrase: Copyrighted, 1911, by The Shredded Wheat Co., and then the large word *Wheat*, then the phrase: Twelve Biscuit, and, under that: It's All In The Shreds. I am not really positive why the reference was put on to twelve biscuit; but it seems to me it happened when some other attempts were made to manufacture Shredded Wheat Biscuit in cartons containing a different number. We put that on to make certain they knew there were twelve biscuits in there. That was a reaction to some form of competition, as far as I recollect.

Carton 69, marked 11/23/16, the Pacific Coast carton, there appears on one end: Net Weight Contents Twelve Ounces, and the carton also contains a list of various patents. It is an individual service carton, marked as being made by Pacific Coast Shredded Wheat Company, Oakland, California.

Carton 70 is dated January 15, 1917, a Canadian individual sample, containing a picture of Niagara Falls on one end and a single-biscuit plate on the other, and on the bottom: Patented May 27, 1898. This food, the process of making it, and the machinery used in the manufacture, are under the protection of the Government of the Dominion of Canada. Patents have also been taken out for the principal foreign countries.

Carton 71 is a three-color carton of the American Company, containing the same phrases we have referred to heretofore: Shredded Wheat is Made of the Whole Wheat and made digestible by steam cooking, shredding, and baking; and: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food. I recall that around that time.

It seems to me that the first attempt of Kellogg to put on a shredded wheat biscuit, which was finally abandoned, was about the time we began putting on: Net Weight of Contents Twelve Ounces, Twelve Biscuit, and so on. I think Ross was putting out a biscuit around that time. Anyway, this was a sort of reaction to competitors; an attempt to call attention to the fact we had twelve biscuit in the carton and that they weighed one ounce to a biscuit. A fellow over in Chicago started to make what we called Birds Nests, but I do not think that had anything to do with this.

Carton 75, dated 4/23/17, contains on the end, with the picture of the single-biscuit plate: Net Weight of Contents Twelve Ounces; Metric Equivalent 340 grams. Shredded (trade mark) Copyright, 1911, by The Shredded Wheat Co. Wheat. It's All In The Shreds.

Carton 77, dated 6/20/17, contains on the front face a representation of the Oakland factory of Shredded Wheat Company. It stills carries the two phrases: Shredded Wheat is made of the Whole Wheat and is made digestible by steam cooking, shredding,

and baking; and: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food.

Carton 78 is the same type, with the picture of the Niagara Falls factory. Twelve Biscuit and Twelve Ounces have been emphasized on the cartons and in the advertising since that date, and, as far as I know about the advertising, it is still emphasized.

I recall the use of carton 82, dated January 22, 1918. That is the same form of colored carton, containing the phrases previously referred to and Twelve Biscuit, and It's All In The Shreds, with the picture of Niagara Falls. That picture was used on every carton of the plaintiff and its predecessors since it was first put on, no matter what factory, and in the advertising. That is The Home of Shredded Wheat. No matter where it is made, that is still the home of it. That is the idea it was intended to convey, that it was Niagara Falls Shredded Wheat.

The numbered dates on cartons 84 and 85 were, I think, approximately the dates when those cartons were printed or put into use.

Carton 86, dated 9/9/18, still contains the picture of one biscuit in a plate and the phrases previously quoted. On cartons 86 and 87 the list of patents has dwindled down to a very short list, five; and seven patent numbers on carton 89, dated 10/10/18. The cartons were ordered in considerable numbers. It was hard to keep an exact supply on hand.

Further Direct Examination.

The Witness: Roughly, I should say the Shredded Wheat Company began to print its own cartons about ten years before I left there, about 1920 or 1921. At that time, they put in their own printing plant. Since then, they have printed their own carton blanks. Those printing plants are running continuously.

CROSS-EXAMINATION resumed.

THE WITNESS: Until that time, cartons were printed outside in very large quantities and sometimes carried over for several years. Some cartons were printed in 1915 that still carried the 1911 copyright on them. One floor there in Niagara Falls was almost entirely occupied by cartons already printed. My recollection that the Ceres woman may have been used up to 1915 is probably correct. As we used the cartons from that floor, we kept the supply piling up, against the general protest and complaint of everybody. They could not see any reason for piling them up that way, away ahead of demand.

I think the carton on page 102 of volume three was just a proof from the printer. I do not think it represents any cartons. It is just a color proof. The finished carton would be something like carton 103, complimentary sample. On one end panel of carton 103 is a picture of Niagara Falls, The Home of Shredded Wheat. On the other panel, reading matter under the picture is arranged as follows: At the top: The Original Shredded Wheat. Under that, a plate containing an illustration of one biscuit and a spoon in a dish. Under that: Copyright, 1911, by the Shredded Wheat Co. Some distance under that, in brackets: trade mark. Under that is: It's All In The Shreds. The words *The Original* above Shredded Wheat were also a reaction to competition of some sort and were put on there because another shredded wheat was being made. We wanted to identify this Niagara Falls Shredded Wheat as the original one. That was used for a while, and, I think, abandoned. That was, however, the reason for putting it on.

Carton 104 has on one end panel a picture of Niagara Falls arranged in a new way from any of the others, preceding it. That picture of the Falls has, I

think, always been in this same general form. On the other end of the carton are the words: Net weight of contents 12 ounces; metric equivalent 340 grammes. The Original Shredded Wheat. Below that: a dish with one biscuit. Under that, the words: Copyright 1911 by The Shredded Wheat Co. Under that in brackets: trade mark. Under that the word *twelve* and the numeral *12* in brackets, and *biscuits*, plural, and the phrase: It's All In The Shreds. I recall using that. The reference to Twelve Biscuit and The Original Shredded Wheat were a reaction to competition, again, put on there to tell people to look for the original Niagara Falls Shredded Wheat. That carton, dated March 6, 1921, still carries: Shredded Wheat is made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking; and: The crispness of its shreds promotes thorough mastication, which is the first process in digestion of all food.

Carton 106, marked Spring of 1922, is the same general type of carton we have been talking about, with the additional phrase: As made for twenty-five years, which appears also on carton 104. That was a new phrase which I think was added about the time Kellogg's biscuit first appeared on the market.

Carton 107, sample biscuit carton, also contains in large letters above the words Shredded Wheat, the words *The Original*.

Carton 112 contains on the dish end the words: The Original Shredded Wheat. The phrase: trade mark has been moved down below the dish, and the phrase: Copyright 1911 by the Shredded Wheat Co.

Getting to carton 119, the patent notices have entirely disappeared off the cartons. They had expired. They have been off the cartons for some time. Carton 117, marked 1923, has no patent notices on it. On carton 119, the trade mark expression is underneath the plate, under the words: Copyright 1911 by The

hredded Wheat Company, and above the words: welve Biscuit. At the top of the panel are the words: he Original Shredded Wheat.

Carton 130 has directions in Hebrew on the rear ace, and the words in English: Shredded Wheat is e Whole Wheat, and is cooked in steam, shredd nd baked. And "Kosher," with the Rabbi. Under- eath that: Shredded Wheat is a clean, strictly Kosher od, and here is the Rabbi's seal. It says: It may be aten with milk or meat throughout the year, except ring Passover.

Carton 131, not dated, also 130, are the first car- ns in which the end panel with the dish has a little ifferent reading matter, as follows: Net weight, 12 nces. Metric equivalent 340 grammes. Original rade Mark Shredded Wheat Reg. U. S. Pat. Off. hen, the representation of a dish with one biscuit. opyright 1911, by The Shredded Wheat Co. Twelve 12) Biscuit. It's All In The Shreds. I remember all ese changes; but I could not fix any definite date for em.

Such matters as the trade mark expression being own under the dish, as in carton 121, were decided an executive committee of the board, Mr. Porter d Mr. Mitchell. In a carton like that, the executive mmittee put that expression trade mark down at the ttom of the panel. Those were matters of company licy which we originated and discussed. We usually ent all over them at our Tuesday luncheons and de- ded all those things.

It was following that policy that the words: The riginal were put above Shredded Wheat and the rds Reg. U. S. Pat. Off. were placed below on carton 1. It was along about 1926 when the registrations re made, or later. I remember that package being ed some date after 1926. It carries: Shredded Wheat one hundred per cent. Whole Wheat and is made

digestible by cooking in steam, shredding and baking. Competition also suggested that one hundred per cent, which is not on previous cartons. The carton also contains: The crispness of its shreds promotes thorough mastication, which is the first process in digestion. It leaves off the word *food*. Made of Whole Wheat. Those little changes were made after discussions at our Tuesday meetings and I know they had in mind competition of some kind.

That would dictate the difference between carton 117: Shredded Wheat is made of the Whole Wheat and is made digestible by steam cooking, shredding and baking; and carton 131: Shredded Wheat is one hundred per cent. Whole Wheat and is made digestible by cooking in steam, shredding and baking. That was a reaction to competition, for fear there might be some question as to whether we used the whole wheat grain. Lots of people thought we did not. Every once in a while we would meet people who thought we had discarded a part of the whole wheat, did not use the bran.

Carton 132 still contains the expression: It's All In The Shreds. The expression: trade mark has been moved up from the place underneath the plate to the place above Shredded Wheat and under the words: The Original.

On the English carton, 134, the end panels are different from the American cartons. One end panel shows a package spilled out so as to show eight biscuit. The panel at the other end shows: Net weight 12 ounces; metric equivalent 340 grammes, and the words: The Original Shredded Wheat, a plate showing two biscuit in a dish, and: Copyright 1911 by The Shredded Wheat Co., Ltd., and: Twelve (12) Biscuit, and: It's All In The Shreds. That was used over there. That was the basis we used. They just took that. That was based on an American panel. The carton

was designed in Niagara Falls but used in England. It says: Copyright 1911 by the Shredded Wheat Co., Ltd., but the English carton has no reference to trade mark. I remember making this change on this one.

Carton 135, in volume three, is marked: Copyright 1926, by the Shredded Wheat Co. on the back panel; and, on the front panel, above the picture of the factory, under the words Shredded Wheat, is: trade mark, Reg. U. S. Pat. Off. On the back face, the language has been changed to read: Shredded Wheat, trade mark, Reg. U. S. Pat. Off.; made of the Whole Wheat—nothing added, nothing taken away. Contains in a digestible form all the elements for building muscles, bone and brain. Ready-cooked, ready-to-eat. It also contains in red very prominently the phrase: All the bran in the Wheat. That was also a reaction to competition of a bran product, Kellogg's Bran, and the other bran foods, of course. This carton has eliminated those expressions about being made of whole wheat and containing shreds in digestible form to get in this display. We wanted to emphasize all the bran in the wheat and twelve biscuits or twelve ounces. In order to give them proper display we had to condense all this, so we took off some of the reading matter. That, again, was a reaction to competition against shredded wheat. Those changes were the result of conferences between the executive committee and the rest of us. On that carton we dropped the expression: The Original. I do not know why. We arrived at the conclusion it did not amount to anything, that we did not gain anything by it and several things were much more important. I never liked the expression, but some of the rest did. It has still continued to be known as the Original Shredded Wheat. As a result of the advertising, the product, since at least 1911 has been generally known as Niagara Falls Shredded Wheat. Much of

our trade has been connecting it with Niagara Falls. It has advertising value, of course. It is even on the Pacific Coast cartons, Niagara Falls being emphasized. From the 1926 cartons onward we have continued to display the picture of the factory and of Niagara Falls. We are still using the term: It's All In The Shreds. It seems to me that this red line was: As Made For Thirty Years, instead of: As Made for Twenty-five Years. That was put on the 1926 carton when they got into use a year or so later and was used continuously since during my connection with the company. As Made For Thirty Years was to emphasize the fact it was the original Shredded Wheat.

Noting the two-biscuit plate on carton 142, marked Copyright 1926, I thought that was displayed before 1926, but perhaps it was not. A number of these cartons have the two biscuit in the dish. 1926 is probably correct.

The French carton, dated 5/9/30, has pasted thereon a slip reading: Subject: Canadian Shredded Wheat carton. Approved: Legal department. Date: 5/9/30. File Number: Blank. Sample finished job, new, C. A. V. and H. J. S. That is the approval of the new carton. It is stamped with a green stamp marked: Legal department received May 10, 1930. I was not connected with the company when that carton was approved or put out. The change was made in the picture of the biscuit across the face of the carton. From that date on I would not know anything about them.

I would not, I think, know anything about the putting of the phrase: Made since 1893, on the next carton, approved by the legal department 4/13/30. It seems to me we varied that expression a little, putting that instead of saying thirty years. The carton is marked: Copyrighted 1929, by The Shredded Wheat Co. I knew of this being done with the carton, but it was not under my direction. These changes were made

after the National Biscuit Company took over the company. I knew about them and was familiar with them, because I saw Mr. Oliva almost every day. I still handled the Shredded Wheat business, but through the Frank Presbrey Company. My connection with the cartons ceased.

The carton marked: Shredded Wheat carton, legal department, approved June 19, 1929, is the last carton we find containing a picture of Niagara Falls on one end and the two-biscuit plate on the other. The next carton, marked approved 4/30/30, above that carton, contains on each end the picture of Niagara Falls with: The Home of Shredded Wheat; and, across the face of the carton, the large picture of the shredded wheat biscuit.

I recognize the letter, Defendant's Exhibit 9, and the enclosure regarding the first attempt of Kellogg to make the shredded wheat biscuit. It was a letter dated August 16, 1927, addressed to News Editor State Journal, Springfield, Illinois. A number of letters like that were sent out to the newspapers which ran our Shredded Wheat advertising. That enclosure was a news item about it. It was the 1928 lawsuit against the Kellogg Company; and the enclosure marked: "Please do not publish before August 22nd," is the one referred to in the letter. It was part of my job to get all the free advertising we could. We asked them to print that as a news item. Letters like that were sent out generally to publications in which the Shredded Wheat Company advertised, with the request that they reproduce the news release.

I identify this enclosure as a sheet of a newspaper containing a reproduction of one of the articles prepared and sent out by me as vice-president of the Shredded Wheat Company. They were sent out to publications generally in which the Shredded Wheat Company advertised. We sent one to every newspaper

carrying our advertising, and, perhaps, other newspapers. It went to our list, as it often did when we wanted to get anything across. We used these newspapers as much as we could. One object was to get a correct statement of the case, and another, to get the advertising; and, also, to have the suit as widely known as possible, to have the fact of the filing of the suit by the Shredded Wheat Company against the Kellogg Company as widely published as it was possible to have it.

(The second enclosure, newspaper article, referred to, was marked "Defendant's Exhibit 10.")

Defendant's Exhibit 9 is as follows:

"The Shredded Wheat Company, Niagara Falls, N. Y., August 17, 1927.

Truman A. DeWeese, Vice-President in Charge of Publicity.

The News Editor, State Journal, Springfield, Ill.

Dear Friend: I am sure you will agree that the enclosed item, referring to our suit against the Kellogg Company, has enough news interest to justify its publication in your paper. The item will no doubt come to you through the regular news channels; but, as it vitally concerns the interest of this Company that has been a consistent advertiser in the newspapers for thirty years, I am sure you will appreciate our efforts to give you the exact facts. I know you will not want to show any prejudice in the matter, and yet I am sure you will want to be fair to this company. For this reason, I have confined the news article to the claims made in the complaint which was filed in the United States District Court. The matter of editorial comment is left entirely to your good judgment. We would like to have it printed just as it is written, but, of course, you are at liberty to make any condensations

that will better adapt it to your columns and your policies. We are sure we can depend on you not to print it before the date on which it is to be released. Needless to tell you, any courtesies you may show us in this matter will be greatly appreciated by our Company, as well as by the writer. Very truly yours, T. A. DeWeese, Vice-President in Charge of Publicity. TAD-M."

The enclosure for release is as follows:

"Please do not publish before August 22d.

THE SHREDDED WHEAT COMPANY SUES KELLOGG

The Company Asks the Court to Restrain Kellogg from Manufacturing an Imitation of Its Product and from Appropriating its Trade Name and Goodwill.

A lawsuit involving issues of far-reaching importance to manufacturers of food products was started when The Shredded Wheat Company filed a complaint against the Kellogg Company of Battle Creek, Michigan, and certain grocers, alleging unfair competition and unlawful appropriation of its trade name and its good-will. The suit was filed in the United States District Court at New Haven, Connecticut, on Monday, August 22d. The occasion for the complaint is the attempt of the Kellogg Company and some grocery jobbers and retailers to market a biscuit which is an imitation of the product of The Shredded Wheat Company under the name Shredded Whole Wheat Biscuit. The filing of this complaint by the Shredded Wheat Company is notice of its intention to enforce its rights and claims for damages against any manufacturer, wholesaler, or retailer manufacturing or distributing any product that is an imitation of its product.

The complaint covers in detail the growth and development of the business of The Shredded Wheat

Company, the various methods employed to educate the public regarding the food value of the product, and the money expended in creating consumer demand and building good-will all over the world. It places the value of this good-will and trade name at millions of dollars and asks for an injunction against the Kellogg Company. The complaint alleges that for 34 years The Shredded Wheat Company has given its biscuit a distinctive form, size, and shape, and, by extensive advertising has so fixed this form, size, and shape in the public mind that, even when the biscuits are displayed separate and apart from the carton, they are recognized by consumers as a product only of The Shredded Wheat Company. They have employed the words Shredded Whole Wheat Biscuit and Shredded Wheat, not as descriptive of the process of manufacture, but as fanciful and distinctive designations, identifying their particular product and indicating the source of manufacture. The complaint avers that The Shredded Wheat Company has expended over $24,000,000. in all kinds of educational work, until these terms or words have grown to be trade names of their product with only one meaning in the public mind in the United States and foreign countries, and that these names have not been used in respect to any other article of food for human consumption. Among the educational methods mentioned in the complaint are advertisements in newspapers and magazines, booklets, leaflets, lectures, store cards, and the distribution of millions of samples from house to house. It is also stated that an average of 100,000 persons have passed through the home plant in Niagara Falls every year for twenty years, to the end that customers now invariably associate the names Shredded Wheat Biscuit and Shredded Wheat with the one product made by The Shredded Wheat Company.

While much of the complaint stresses the unfairness of this sort of competition and the damage done to The Shredded Wheat Company through the appropriation of their trade name and good-will, a large portion of the complaint is devoted to calling the attention of the Court to the deception and fraud that will be practiced upon consumers who purchase the Kellogg Biscuit under the impression that they are getting the original Shredded Wheat Biscuit made by The Shredded Wheat Company, the only product associated with the words Shredded Wheat. Attention is also called to the fact that the consumer seldom sees the carton or container, hence he is easily led to believe that The Shredded Wheat Company is manufacturing a biscuit reduced in size and containing less wheat. The complaint alleges in fact that, in many instances, the Kellogg biscuit has been passed off as the Shredded Wheat Company's product. The complaint recites the fact that, in 1915, The Shredded Wheat Company brought a suit in equity against the Ross Food Company and certain grocers to restrain them from manufacturing and marketing an imitation Shredded Wheat. An injunction was issued restraining the defendants from making Shredded Wheat Biscuit, and this injunction afterwards was affirmed with some modification by the Court of Appeals.

It is further alleged in the complaint that the Kellogg package contains nine ounces of food as against the twelve ounces in the Shredded Wheat Company's package and is sold at less price as an additional means of deceiving the consumer who asks for Shredded Wheat and is given less weight under the impression that he is getting the real Shredded Wheat made by the Shredded Wheat Company. It is further claimed that, if Kellogg is not restrained, he will proceed to flood the market with imitation biscuit, relying upon the

market for Shredded Wheat Biscuit created throu years of advertising. The complaint asks that Kell be restrained from infringing upon the rights of T Shredded Wheat Company, from manufacturing imitation of their product, and from putting on th carton improper and misleading terms, thereby confu ing the product of the Kellogg Company with the re Shredded Wheat Biscuit. The Shredded Wheat Co pany asks for damages to be assessed and an injun tion issued."

THE WITNESS: At the time I referred to Mr. Rankine trying to get Mr. Perky out, about 1905, the Shredded Wheat business was still a very small busi ness. Mr. Perky had built this wonderful, expensive factory at Niagara Falls, and the contractors threat ened to close in on him. It looked kind of bad for him. Mr. Rankine and Mr. Porter and other members de cided the business would have to be reorganized finan cially and Mr. Perky eliminated. That was just pre vious to my going in. I knew all about it. We offered him a salary of ten thousand dollars a year, and he could still be president, if he would withdraw his ac tive interest in the business. He refused. He said he would not be in any business he could not run. His stock was mostly taken by Darius Mills, of New York. After that, the inscription in stone over the door of the Niagara Falls plant was changed from Natural Food Conservatory to: The Home of Shredded Wheat. Mr. Perky would not have consented to that change. Nat ural Food Conservatory was his idea. He originated the corporate name Natural Food Company. We also changed the name to The Shredded Wheat Com pany. Mr. Rankine was the man who had the real financial interest in the power company at Niagara Falls. When that was developed, they had to bring

dustries there to use the power, which is how the hredded Wheat Company was induced to move there rom Worcester, Massachusetts, and probably the eason that Niagara Falls was emphasized through the dvertising, making the product known as Niagara alls Shredded Wheat. Mr. Perky realized there were million or more visitors there every year. If they ent through the factory, they would be our greatest dvertisement.

If a customer went into the grocery store and aked for Niagara Falls Shredded Wheat, I should hink the grocer would know right away what was eant by that.

The little machines or mechanical exhibits I spoke f, for manufacturing shredded wheat, showed the hreds being drawn out into shred form and then being ut into shape as biscuit. The idea of that was to show he whole process by which the wheat was cooked by team and drawn out into little shreds through grooves, ou know, and baked. In some miniature factories the ntire process was carried out; in others, they just howed the shredding process, because the shredding ad a little novelty to it, and it attracted sightseers. hat was all to show that this wheat was drawn out nto shreds or strings and put into biscuit form. The echanical advertisements were used for about ten or ifteen years.

The Niagara Falls idea was emphasized. Some llusion may have been drawn into magazine adver- isements occasionally to the fact that you got power rom Shredded Wheat.

The glass globes were still being used here and here at the time the National Biscuit Company took it ver, but they did not issue them in any amounts. ome restaurants here and there had some of those lobes; and Mr. Carr, the general sales agent, distrib- ted some of those during his administration, which

was about until National Biscuit took over. If some one asked for a globe, we would still give them. It has been about four or five or six years since they ceased to be a feature. They simply dropped them as an important or valuable feature, but continued to supply them whenever they were wanted.

During all my connection with the company, the product was always referred to at the same place on the carton as Biscuit, and Twelve Biscuit. In other places, we just say Shredded Wheat.

Shredded Wheat means that pillow-shaped biscuit made out of wheat and put up into shredded form. With my experience and knowledge, it means the Shredded Wheat made at Niagara Falls.

I think that, in the last few years, when Mr. Carr became sales manager, occasional orders were given for the glass globes. I am pretty sure Mr. Carr put out some; because I know we discussed the question of changing the globes to a square container and finally decided to keep the round globe. So there must have been some distribution. I would not say they were dropped ten or twelve years ago. They continued putting them out; but it was not such a prominent or valuable factor. I think some of the sales agents carried them around to supply the restaurants; but it was not pushed as hard as it had been. The agents used other methods of getting into restaurants, cafes, etc.

The plaintiff and its predecessors have used the individual style of biscuit for furnishing the restaurant trade a great many years. As far as I know, the policy of the company has been to push in every way the sale of these individual cartons for use in the hotel and restaurant trade. There has been no effort on their part to hold back or retard the sale of the biscuit in the individual cartons, that I know of. It has been the policy of both the companies, as far as I could judge, to create all the demand they could for individual car-

tons for use in the restaurant and hotel trade; and, as far as I could tell, the Kellogg Company has also tried to sell its individual cartons as far as it could. As far as I know, both companies have discouraged the practice of taking the biscuit out of the large carton in selling them in hotels and restaurants; but there were certain classes of restaurants, big restaurants, that would sell them only out of the big carton. They had to do it ahead, some of them, and it was quick service. They did not want to open the cartons, for counter restaurants and other places. They still stick to the big carton. In the better class of restaurants, cafes, and hotels, they are served in the individual cartons. I believe the great bulk of the restaurant, cafe, and hotel trade now serve them in individual cartons.

RE-DIRECT EXAMINATION.

THE WITNESS: Refreshing my memory by looking at trade-mark registration 216593, August 17, 1926, with two biscuit in the dish, and observing the affidavit states that has been continuously applied to said goods since November 15, 1909, I am able to state that they began using the picture of two biscuit in the dish about that time, on the ends of the cartons and in all our advertising. This particular special application for trade-mark I do not recall. It was done by Charlie Brown, treasurer. I know that is about the date we began using two biscuit in the dish. If the sample cartons in Plaintiff's Exhibits 2, 3 and 4 do not show that, I would say that was a complete history of the cartons.

RE-CROSS-EXAMINATION.

THE WITNESS: Noting registration of the Shredded Wheat Company 85186, January 30, 1912, and the representation of a single biscuit, I remember the use of one biscuit in the plate from September 15, 1909 on.

In going through the cartons today, while we were n
able to produce or find any illustration or carton sho
ing a plate containing two biscuit, until sometime aft
1926, I think the use of the two biscuit in the dish ce
tainly antedated 1926.

MRS. CAROLINE CAVALIER.

Deposition taken at New York, N. Y., January
1933.

Direct Examination.

The Witness: I live at Stamford, Connecticut
and am a housewife, keeping house. I recognize Plain
tiff's Exhibit 1, Shredded Wheat, with which I hav
been familiar seven years in connection with my house
hold. I have to be a user of Shredded Wheat. I hav
known it longer than that. My husband was put on a
diet seven years ago. The expression shredded whea
has no meaning for me other than the article in Plain
tiff's Exhibit 1. I purchase Shredded Wheat at any
store I can get it. Sometimes I come through New
Haven and stop at different stores, and the A. & P.

I recently had an experience in purchasing
Shredded Wheat in a store in South Norwalk on East
Avenue, A. Greene's. I asked for Shredded Wheat,
expecting they would give me Shredded Wheat, but
they gave me Kellogg's Whole Wheat. I did not stop
to think or look at it until I got home. I saw the pack-
age when it was handed to me. I was buying three or
four items at the time. When I got home, I noticed it
was Whole Wheat. Plaintiff's Exhibit 80 is the pack-
age. That is my only experience of that kind. I had
never seen Kellogg's Whole Wheat Biscuit before. I
did not open this package.

I recognize the article taken by Mr. Vilas from De-
fendant's Exhibit 6 as Shredded Wheat, but I cannot

tell what kind it is. It looks the same as Shredded Wheat, and is the same shape and texture; but the other is just a little bit darker, I think. I never saw this biscuit before. If I saw this package as the one I have described in South Norwalk and the printing were obliterated except the picture, by those biscuit, you could not really tell the difference in the biscuits; but the box is different. The picture on the package looks like Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: The first time I noticed this Kellogg package was when I got the groceries home. I had never seen Kellogg's Whole Wheat before. The minute I saw the package I recognized it right away as a different box.

I did not open it, because there is a National Biscuit man, a friend of ours. My husband sells automobile parts. He happened to be there this morning, going to New York, stopped in, as always, for some equipment. I had just laid the things on the table. He wanted to look at that package and asked me if he could have it. Two days later, he told me there was a lawsuit and would I tell where I bought it and what the fellow said when I bought it. That was the only time I ever received this kind of biscuit, because I have been getting it at the A. & P., right around the corner. I happened to be at New Haven and stopped at the economy store for some groceries.

MRS. LEON E. TUTTLE.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I keep house. I have been a nurse. I recognize Plaintiff's Exhibit 1 as Shredded Wheat,

with which I have been familiar about twelve years. During that period, I have used it and purchased it from time to time. The expression shredded wheat does not convey to my mind any other product than the product contained in Plaintiff's Exhibit 1. I buy it at different places.

I have recently had an experience in purchasing Shredded Wheat, at the store of Frank Connolly, on Elm Street, in Stamford, Connecticut. I made a couple of purchases, asked for Shredded Wheat and was handed this box. I did not make any remarks to the grocer, and he did not say anything. I just accepted that along with my other purchases. This was December 30, 1932. Plaintiff's Exhibit 82 is the box and the cash slip that went with it. I was asked by the National Biscuit manager in Stamford, Mr. Beddell, to make this purchase. I did not go to any other stores. I paid for the items indicated on the slip, Plaintiff's Exhibit 81.

CROSS-EXAMINATION.

THE WITNESS: I knew right away, as soon as I saw this Kellogg package, it was not the Niagara Falls package I had been getting. I never had seen any of the biscuit inside the Kellogg package; but I have seen it since. I did not open up one of the packages, but I have seen them in Stamford and I saw one downstairs this morning. They all look much alike. I noticed the difference in size, Kellogg's being the smaller. I came down this morning from Stamford with Mrs. Cavalier. Mr. Beddell brought us, the National Biscuit general manager, who asked me to make this purchase. He told me to take whatever the clerk gave me.

RE-DIRECT EXAMINATION.

THE WITNESS: On the purchase slip appears, among other items, "One Sh. Wht." That is one Shredded Wheat. I paid twelve cents for that.

RE-CROSS-EXAMINATION.

THE WITNESS: That is the only experience I have had with the Kellogg biscuit. I buy Shredded Wheat right along. I have never seen the Kellogg product anywhere except in this one store.

CHARLES BERMAN.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, in the business five years; with no experience in the grocery business before. I recognize Plaintiff's Exhibit 1 as Shredded Wheat, with which I have been familiar a long time. We used to use it in the house, have used it for several years. We carry it in the store.

If a customer asked me for Shredded Wheat, I would give her Shredded Wheat, never had any other kind. I never knew of anything else under that name. I never had Defendant's Exhibit 6. If I saw the package with just the picture, without the name, I would say it was Shredded Wheat. To compare it with Plaintiff's Exhibit 1, I would have to look at the inside to see what it looks like. Otherwise, I would not know. The biscuit taken out of Defendant's Exhibit 6 looks like Shredded Wheat. There is a resemblance between the contents of Plaintiff's Exhibit 1 and the contents of Defendant's Exhibit 6. They look alike, except in size. If a customer asked me for Shredded Wheat and I had Defendant's Exhibit 6 in stock, I would not give them to her; because, if she asked for Shredded Wheat, I would have to give her Shredded Wheat.

Q. 20. Would you recognize Defendant's Exhibit No. 6 as Shredded Wheat? Is that what I understand you to mean?

A. I could not.

Q. 21. Do I understand, then, that you understand Shredded Wheat as a term applicable to one product only?

A. Yes.

THE WITNESS: I do not know what to think of a product like Defendant's Exhibit 6, looking like Shredded Wheat. I never had it and never heard of it before until the other day from a woman. She came in and asked for a package of Shredded Wheat. I took it off the shelf. She said, "No, I do not want that." I said, "What do you want?" She said, "It is a little smaller than this." She did not know the name or who made it. She is a customer of mine. She said, "They come in a little small, square package." I said, "I never heard of it. I can ask the salesman tomorrow." The next time he came, I asked him and he gave me a square package of—I forget the name of them; not like Defendant's Exhibit 6. It was a square biscuit. It was Triscuit he sent me. She came in. I showed it to her. She said, "No, it is not that. I will get you the empty package." The salesman lives near me. I asked him, and he said, "No, I have no other kind but these two." She brought me the package and showed me that, which was the first time I saw it. I had never heard of it. I did not see the biscuit. She is the only one I ever had a call from for this other biscuit. I have had people ask for the Niagara Falls product, some of them—always Shredded Wheat most of the time. Some people come in and say, "Give me a bale of hay." When they say that, I know what they mean. I always have it on display.

CROSS-EXAMINATION.

THE WITNESS: We handle corn flakes, no bran flakes. I have heard of shredded codfish and shredded coconut. I handle them. I have Post Toasties, which

is a corn-flake product. I do not know any other name for Shredded Wheat, except Shredded Wheat. If anybody asked me what a Post Toasty was, I would say it was a corn flake. If anybody asked me what shredded wheat was, shredded wheat is the only name for it I know.

There are several different kinds of whole wheat biscuit, so I would have to see a picture of Whole Wheat Biscuit to know what it was like. Looking at Defendant's Exhibit 6, if I saw that package for the first time and could not see the plate, I would have no idea what was in the package. I would have to open it to find out. To that extent, it is purely a blind package, as to telling the contents of the package from the name.

RE-DIRECT EXAMINATION.

THE WITNESS: If I saw the picture of the dish on the package, that would be a different story. I could then tell what was in the package.

RE-CROSS-EXAMINATION.

THE WITNESS: It is a common practice in the food line and most of the canned products and packaged products I have carry a picture of a plate with some of the food shown therein.

RE-DIRECT EXAMINATION.

THE WITNESS: I never saw shredded coconut or shredded codfish made up in a pillow-shaped biscuit, just loose in a package or box. I used to wonder why they called this Shredded Wheat, anyway.

HANNAH BENDER.

Deposition taken at New York, N. Y., January 4, 1933.

Direct Examination.

The Witness: I know Shredded Wheat and have known it for about two years, but I do not have it so often now. I recognize Plaintiff's Exhibit 1. That is what I know as Shredded Wheat. Plaintiff's Exhibit 113 is a package I have brought with me. I happened to walk into Sixty-eighth Avenue, B. Weiss. He handed me a package of Shredded Wheat. I looked at it. It did not seem so nice a box, from my standpoint. It was dirty. While I looked at it, he told me he had a small size of the same thing he can give me. I said all right and asked him if that was the same. He said, "Yes, that is the same thing." He gave me Kellogg's Whole Wheat, this package I have brought here. I took it because he told me it was the same. I did not use it. I gave it to one of the National Biscuit Company salesmen. This happened December 5th, 1932. That is the only time I received a package like that. Prior to that, when I asked for Shredded Wheat, I expected to receive Shredded Wheat, like Plaintiff's Exhibit 1.

Cross-Examination.

The Witness: The National Biscuit salesman I gave the package to I just know as Benny. I cannot remember his second name. He told me to go in that store and ask for Shredded Wheat, and to take whatever they gave me. The only reason I did not was I thought it was a dirty package. While I looked at it, he said, "I have the smaller size, if you care to have it." Benny had told me before that there were two kinds of shredded wheat on the market; but I had never before seen Kellogg's. He told me there was another kind of

Shredded Wheat; but I did not know it was Kellogg's. That is not my regular store. I take anywhere I go, when I feel like, because it is in the market. Benny told me to go to just that one store, no other. I never did open up a package of Kellogg's before, and I do not know what it looks like inside.

NATHAN SALBIN.

Deposition taken at New York, N. Y., January 4, 1933.

Direct Examination.

The Witness: I am a grocer located at 104 Orange Street, Newark, New Jersey. I have been in the grocery business twelve years, no experience in it before that. I am in business with my father.

I recognize Plaintiff's Exhibit 1. I call it Shredded Wheat, with which I have been familiar ever since I have been in business. When our customers ask for Shredded Wheat, I give them a package of that style, like Plaintiff's Exhibit 1, with a picture of Niagara Falls on it. I do not know anything else my customers would have in mind when asking for Shredded Wheat. When customers come in for Shredded Wheat, I know what they mean and what they want. When they ask for Shredded Wheat, I give them the package with the Niagara Falls picture on it. They ask for Shredded Wheat, and that is really the only one I have. We do not handle the other. When I supply them that package, I never have had them bring it back and say it is not what they want.

I have seen a package like Defendant's Exhibit 6. I do not handle it. If I saw a package like Defendant's Exhibit 6, with the name covered up, it would be pretty hard to say what was in the package. I see a picture there. It is a biscuit in some form. I never saw any of

Kellogg's Whole Wheat Biscuit until today. I hav had salesmen come in and talk to me on it; but they never showed it to me, because I told them I was no interested in it. I had no trade for it whatever. I never had anybody come in and ask me for Kellogg's in the last few years. If they come in and ask for Shredded Wheat, I give them Shredded Wheat. I give them what I have.

GEORGE OLIVA.

Deposition taken at New York, N. Y., January 4, 1933.

Direct Examination.

The Witness: I am assistant advertising manager of the National Biscuit Company. I was advertising manager for some years. Since the National Biscuit Company acquired the Shredded Wheat Company, I have been in charge of Shredded Wheat advertising. I have brought with me samples of advertising which have been used since I have charge of it.

I identify Plaintiff's Exhibit 108 as one of the volumes containing some of the samples of advertising used by the National Biscuit Company for Shredded Wheat in 1932. At the request of Mr. Vilas, I have prepared table of amounts expended by the National Biscuit Company in advertising Shredded Wheat during the years the company has had the Shredded Wheat Company. Plaintiff's Exhibit 114 is a tabulation of the figures of 1927 and 1928, secured from our general office and the statements of the old Shredded Wheat Company, old Shredded Wheat books in the custody of the company. They are absolutely a correct transcript of the books, as far as I know.

Plaintiff's Exhibit 115, consisting of four sheets, shows the expenditures by media from 1929 to 1932,

inclusive, for different kinds of advertising, which expenditures were made under my direction. The pencil note in 1932 indicates that sampling was started again in 1932, approximately three hundred thousand dollars expended for it, which should be added to the total appearing on the fourth sheet for 1932.

After the National Biscuit Company took over the Shredded Wheat Company, the advertising policy of the old company was practically continued, with some slight, not very noticeable changes of media, although the copy theme has been more or less the same. Colonel DeWeese continued to write advertising copy for Shredded Wheat all the time up until 1932.

I have with me samples of store cards, hangers; and the magazine and newspaper copy is in Plaintiff's Exhibit 108.

Plaintiff's Exhibit 116 is a floor cut-out, in which the actual packages are inserted. It stands up like an easel. The packages hold up the exhibit. We ordered fifty-one thousand, all of which are or have been in use. Plaintiff's Exhibits 117 and 118 are cut-outs, on which there were two runs, fifty-one thousand for each run; with the picture of Niagara Falls, used with packages, similar to the previous one.

The four pieces marked Plaintiff's Exhibit 119 are price cards, printed out of the waste coming out of the previous cut-outs. They were used in stores for the display of the product, Shredded Wheat. We had fifty-one thousand of each of those pieces.

The eight carton inserts marked Plaintiff's Exhibit 120 are slips placed in the National Biscuit Company varieties. The total number of these carton slip inserts used is twenty-eight million five hundred and sixty thousand. They are mechanically inserted in the packages of biscuit when they are put up.

Plaintiff's Exhibit 121 is a window poster, to be pasted on the grocer's window. Fifty-one thousand

of those were ordered, and practically all have been used. That is recent, the hundred and ninetieth edition.

Plaintiff's Exhibit 122 is a three-sheet poster, approximately forty-one inches by eighty-two inches, placed on the elevated stairways in New York, Brooklyn, and the Bronx. We have used seven hundred of those. In addition, we have a one-sheet poster, with the same design, which goes on the delivery equipment of the National Biscuit Company all over the country. We ordered two thousand seven hundred and fifty of them.

Plaintiff's Exhibit 123 is a shopping bag which is distributed at food shows. We ordered twenty thousand and have used about fifteen thousand.

Plaintiff's Exhibits 124, 125 and 126 are hanger cards, to be hung in grocery stores. Of the carton inserts mentioned before, added to Plaintiff's Exhibit 120, we have used eighteen million three hundred and sixty thousand. Of Plaintiff's Exhibit 124 we have used twenty-five thousand; of 125, seventy-two thousand; and of 126, seventy-six thousand five hundred; all distributed.

Plaintiff's Exhibit 127 is a price card to go with a stack of Shredded Wheat in cartons. We have ordered fifty-one thousand of those, and they are all out.

Plaintiff's Exhibit 128 is also a price card, red. We have had fifty thousand of those.

Plaintiff's Exhibit 129 consists of four broadsides we send out to our salesmen, telling them about our Shredded Wheat campaign that happens to be running at the time. We use three thousand of each of those.

Plaintiff's Exhibit 130 is a recipe book, being used currently. We have ordered five hundred and twenty-three thousand. Practically all of them have been used. We are right at the end of the book.

Plaintiff's Exhibit 131 is a restaurant hanger for restaurants, lunch rooms, and drug stores, supplied by us to them. Ten thousand seven hundred were ordered, and they have all been used.

Plaintiff's Exhibit 132 is a restaurant menu of the kind now supplied by us. Since March, 1929, we have purchased approximately eight and a half million. Our predecessors used millions of them before we took over. They are still being distributed. They have been changed slightly. This is one at present in use.

Plaintiff's Exhibit 133 are three window posters. The combined order of the three was approximately 200,000.

Plaintiff's Exhibit 134 is window posters, designed to be pasted on the window, suggesting the sale of Shredded Wheat, with strawberries. We had fifty-three thousand seven hundred of those, all in 1932.

Plaintiff's Exhibit 135 is a price window poster, sixty thousand of which have been used.

Plaintiff's Exhibit 136 is a panel poster, fifty-one thousand of which were ordered. The distribution is going on now. It is used in the store window right alongside a wall.

Plaintiff's Exhibit 137 is one of the postcards which are distributed to visitors at the Niagara Falls factory. A hundred and fifty thousand of those have been used; but we have had previous orders, of which we have no record. They are in use at the present time.

Plaintiff's Exhibit 138 is a letter and circular which were distributed with free samples of Shredded Wheat from house to house. In the last six months of the year, sampling was done in a national way, from coast to coast. Practically nine million of these circulars were distributed with small sample packages, the individual-size package, with two biscuit in it, the standard large-size biscuit. The National Biscuit Company has continued to make use of the picture of a dish with two

biscuit in, as shown on some of the exhibits I just handed you. Every time we use an illustration with biscuit in the dish, there are always two of them.

The large volumes or bundle I have here, three bundles, marked Plaintiff's Exhibit 139, are newspaper schedules, a list of the papers in which our advertisements for Shredded Wheat appear, showing the dates.

(The examination was continued until the following day, January 5, 1933.)

CROSS-EXAMINATION.

THE WITNESS: The representation of Niagara Falls as on the large cut-outs and store cards has been a prominently displayed feature of the plaintiff's advertising since I have been connected with it, more recently, within the last two years. But Niagara Falls has been very strongly featured in connection with Shredded Wheat. On some of the large cut-outs we have prominently featured Twelve Full-Size Biscuit. That type of expression has been prominently featured in that way in the last year. The plaintiff has some smaller-sized biscuit, the individual restaurant size, a little smaller in length than the Kellogg biscuit, possibly. I do not know. I never measured them. They are slightly smaller than a full-sized Niagara Falls biscuit, what we call an individual or restaurant-sized biscuit. I do not think our standard-sized packages have ever contained more or less than twelve biscuit to the package. We pack thirty-six packages to the case, which has been standard practice, except we have put up some bundles. I think there may be four in a bundle. All cases have contained thirty-six, as far as I know the practice of the plaintiff.

As long as I have been connected with plaintiff, the term: The Home of Shredded Wheat, with the Niagara Falls factory, has been featured strongly in con-

nection with the packages, on all packages. All our advertising copy is submitted to the legal department before it is released. That has always been done. Every piece of copy prepared has been submitted to the legal department.

I was with plaintiff's organization when Plaintiff's Exhibit 10 was changed by dropping the picture of the plate with two biscuit on one end and substituting therefor Niagara Falls. I do not know the particular reason for that. It was not done to emphasize the picture of Niagara Falls on both ends; but I am not able to suggest any other reason. It was done about two and a half or three years ago. At the same time, the large picture of a shredded wheat biscuit was put on the front face of the carton. I do not know, but I think It's All In The Shreds was dropped sooner. Looking at Plaintiff's Exhibit 10, I see that that expression appears under the plate on the end. If that is the only place it appeared, that would tend to refresh my recollection, because that whole panel was changed. That is only on the large package. It still appears on the small individual package. I know the plaintiff at the present time is marketing two sizes of individuals, one with the standard size biscuit, and the other a smaller sized biscuit.

In explanation of the heading: Advertising Salaries, on the advertising statements I submitted, the old Shredded Wheat Company charged certain advertising salaries to advertising expense. I think it consisted of salaries of girls who mailed out literature, direct advertising. I know it did not include the advertising manager's salary, because that was 1928 and 1929. That practice has since been discontinued. In our system of bookkeeping, salaries are not now included under the advertising account. We do not charge any salary of demonstrators, samplers, or salesmen to advertising. Advertising items include simply straight

items of expenditure, either for space or material, or the like.

I have looked the books of sample cartons here in evidence over. I know there have been a number of changes. I did not make the books up. The cartons were changed very often, previous to my time. Since I have been with them, I think the most important change we made was putting the biscuit on the carton. I would not say that the substitution of Niagara Falls for the plate was so important. The biscuit was put on there to add a little attractiveness to the package and show the contents of the package. I would not regard the illustration as being foreshortened in any way. It is the actual size of the biscuit. It does not create the impression of the biscuit being any shorter than it actually is. It was put on to improve the appearance of the package in general. As an advertising man, I would regard that biscuit, insofar as it blots out part of the representation of the factory and the large phrase, The Home of Shredded Wheat on the old carton, as an æsthetic improvement of the carton and its appearance.

RE-DIRECT EXAMINATION.

THE WITNESS: It is the practice of the National Biscuit Company to feature on a large proportion of their cartons a picture of the goods contained in the carton. It is at the present time the general policy to do so. That includes such items as soda crackers, ginger snaps, and cookies of various kinds.

RE-CROSS-EXAMINATION.

THE WITNESS: I would not say that the practice of illustrating the product itself on the outside of the carton is very old. More of it has been done in recent years. I would be surprised if told Mr. Clarke went to a grocery store and picked out many dozens of cans

and packages, all of which had representations of goods in a dish. I do not think there are many in a dish. I do not recall any offhand. It is not an uncommon practice to illustrate the product in an edible and appealing way on the outside of the package. My experience with the plaintiff does not go back to a discussion whether one or two biscuit should be featured in a plate. That was before my time.

RE-DIRECT EXAMINATION.

THE WITNESS: The plate with two biscuit in is still in use by the National Biscuit Company in all our advertising material. We still use it on the small carton. It is on the latest large carton, which has not yet come out.

RE-CROSS-EXAMINATION.

THE WITNESS: On Plaintiff's Exhibit 136, the biscuit do not look longer than the actual biscuit itself. That package to me is a little larger than the actual sized package. So the illustration of the biscuit would be larger. In every one of the four places in which biscuit had been illustrated on the package, the question of length is fully represented actual size. The carton shown at the bottom of Plaintiff's Exhibit 136 is in the actual colors of the carton. Plaintiff's Exhibit 1 is not the same package. That is the new package that is being run at the present time, the one with deep blue background, as appears on Plaintiff's Exhibit 136. The illustration of the carton on Plaintiff's Exhibit 136 is not an accurate representation of the carton of the plaintiff as it is being marketed at the present time. That particular package is not out yet. It is being prepared for marketing by the plaintiff. In that package, the factory is exactly the same factory, the same position of it. You are looking at the one on

your left in perspective, and it distorts it a bit. The factories should be exactly alike. They are not different in detail. The background is changed, and some little lines have been removed. One is a lithographed reproduction, which always brings out the colors a little better than the printing on the carton itself.

HENRY W. STENECK.

Deposition taken at New York, N. Y., January 4, 1933.

Direct Examination.

The Witness: I am now a wholesale grocer, located in Brooklyn, and have been in the wholesale end about four years, always in Brooklyn. I was in the retail grocery business in Brooklyn for about forty years. I recognize Plaintiff's Exhibit 1, Niagara Falls Shredded Wheat. I have known and think I have been selling Shredded Wheat something like thirty years, at retail as well as wholesale. The purchasing public mean, when they ask for Shredded Wheat, Niagara Falls Shredded Wheat, like Plaintiff's Exhibit 1. When the public hear the expression shredded wheat, they think of Shredded Wheat. That is wheat that is shredded. That is about the only way you can bring it out. When customers asked me for Shredded Wheat, I never gave them anything else except the product represented by Plaintiff's Exhibit 1.

I am a little familiar with Kellogg's Whole Wheat Biscuit, such as Defendant's Exhibit 6. I have carried it in the wholesale business. Kellogg's salesmen came to us with shredded wheat and asked us to take twenty-five cases. We did not want to, but they explained they would sell it for us and have their wagons come and pick it up. The wagon came down

and back, sometimes two packages, sometimes five cases out at a time. They would sell them, come back, and take more. We got rid of the first twenty-five, and he induced us to take another twenty-five. We have not sold any direct, ourselves, only through the wagon, what they came and took away.

Looking at Plaintiff's Exhibit 10, particularly in reference to the dish on the end of the package, I am familiar with it and have been quite a long while, probably longer than ten years. They had thirty-six in a case, I believe. Looking at Defendant's Exhibit 6, with the name obliterated and the picture exposed, that suggests Shredded Wheat to my mind.

CROSS-EXAMINATION.

THE WITNESS: I do not know how many packages to a case now of Niagara Falls Shredded Wheat. We do not sell many now. The National Biscuit Company sells it all direct to our customers, the delicatessens. It was, I believe, at one time, packed thirty-six to the case. I have not seen any lately. We only have a few on hand, unless once in a while one of our customers asks for it. We have a case of Shredded Wheat on hand to send them. Very little is distributed through wholesale grocers.

We have some Kellogg's Whole Wheat Biscuit in our store. The Kellogg product looks like a shredded wheat biscuit. There is a difference in size. It looks the same as Shredded Wheat. Since the Kellogg product has been on the market, I understand there are two different manufacturers producing shredded wheat biscuit: Kellogg and the Niagara Falls people. The Kellogg people have sold their product that was in my warehouse, by their specialty salesmen; through just what channels I do not know.

RE-DIRECT EXAMINATION.

THE WITNESS: I would not sell a package like Defendant's Exhibit 6 as Shredded Wheat. I would ask the customer what she wanted. If a customer asked for Shredded Wheat, I would know what they wanted and give them the Niagara Falls Shredded Wheat.

I have seen the Kellogg biscuit today, but not before. It is similar to Shredded Wheat, except in size. Otherwise, it looks like Shredded Wheat, only I think it is a little browner than Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: If a customer asked me for Kellogg's Shredded Wheat, I would send her the Kellogg biscuit.

JAMES T. McKINNEY.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer in Brooklyn and have been in that business just forty years last April, all the time in the Flatbush district, a service grocery, with charge accounts, telephone orders being about 75 per cent. of our business.

I recognize Plaintiff's Exhibit 1. It is Shredded Wheat. In 1905, I think we had our first convention at Niagara Falls in the Shredded Wheat Building. We handled Shredded Wheat before that time. I was established in 1892. That is about the first product we had. It is a lifelong article, you know. We have handled it probably as long as it has been on the market.

When customers ask for Shredded Wheat, the only thing they can ask for is this package, like Plain-

tiff's Exhibit 1, that they expect to get. If a customer telephones and asks for Shredded Wheat, we send her Shredded Wheat, never anything else. The expression shredded wheat has, of course, a definite meaning with the purchasing public. My own mother used it, and my wife uses it. We use it in the home, for breakfast. People have been to Niagara Falls and have seen this Shredded Wheat made. They come back and say, "Gee, that is the finest thing I have ever tasted. I have seen it made. We will have some of it. Is that Shredded Wheat? Yes." That is the way some people feel about it. The advertising, of course, that you put forward there, made a sale for it, like all cereals. To my knowledge, Shredded Wheat has been extensively advertised.

With Defendant's Exhibit 6 held so I can see the picture on it but not the name, I would say that looks something like Shredded Wheat. I remember Plaintiff's Exhibit 10, with the dish on the end of the carton, somewhat similar to that. I think that would have been on there all the time, as far as I know, one side Niagara Falls and the other side Shredded Wheat in that plate.

I do not handle Kellogg's Whole Wheat Biscuit. I never saw it until today. I saw the biscuit. It resembles Shredded Wheat exactly in appearance, except in size, I would say.

CROSS-EXAMINATION.

THE WITNESS: We do have whole wheat flat biscuit in the shape of saltines. Uneeda Biscuit, the soda crackers, are called biscuit. The name Whole Wheat Biscuit, in itself, would mean nothing to me, unless I saw a picture of what was meant by that particular whole wheat biscuit. As a rule, most of them have a picture of the cracker on the package, something like Shredded Wheat.

If I had never seen Defendant's Exhibit 6 until today, I would have no idea at all what Kellogg's Whole Wheat Biscuit looked like. It would be what might be called a blind package. I would have to open it up to see what was in it. That is the way I feel about it. If anybody told me the biscuit in the package was a shredded wheat biscuit, I would know what it would look like. I would imagine it would look like the Shredded Wheat Biscuit, that pillow-shaped biscuit that looks as if it were made of shreds, the way I have seen it made in Niagara Falls, the way I have seen it in the package, the way I have eaten it. That is the only way it comes. I do not know any other way. I do not know any other name that would describe it than shredded wheat biscuit. I have never seen it any other way. I am not able to suggest another name.

FRANK H. NEWS.

Deposition taken at New York, N. Y., January 4, 1933.

Direct Examination.

The Witness: I am a retail grocer, have had my own store for the past there years. Before that, I was in Bohack's seven years. That was my entire experience as a grocer. I recognize Plaintiff's Exhibit 1. That is what I would call real Shredded Wheat, with which I have been familiar for the past fourteen years, because I went through their plant the time I was married, and I ought to know. I took a trip to Niagara Falls. When I said that is real shredded wheat, I understand these other wheat biscuit came out and were supposed to be the same; but I do not believe they are.

I have had Kellogg's Whole Wheat Biscuit in the store one time about eight or nine months ago. I got rid of it; but it took me a long time. I just put it down

and got rid of it that way. I did not give it to customers who asked for Shredded Wheat. They just told me to give them that biscuit up there, and I did. If a customer asked me to give him Shredded Wheat, I would give him the package with Niagara Falls and the building on there. A customer asks for Shredded Wheat, and I give him that package. That is the only package I ever knew for Shredded Wheat. My customers asked for Shredded Wheat. When I gave them Shredded Wheat, they never brought it back.

JOSEPH WISHNIE.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, in business about fifteen years, of which the last four years was for myself. My store is cash-and-carry. I recognize Plaintiff's Exhibit 1 as Shredded Wheat, with which I have been familiar ever since I have been in business. When a customer asks me for a package of Shredded Wheat, I give her Shredded Wheat with Niagara Falls on it. We never carried anything else.

I am familiar with Kellogg's Whole Wheat Biscuit. We never carried it; but a man came around in a little flivver and tried to sell it. We told him we carry nothing unless a customer calls for it, for the simple reason that, if we carried everything, we would have to have a department store like Macy's. If they call for it, I can order it for the jobber. I never got a call for it.

If I saw a package like Defendant's Exhibit 6 and saw just the picture on it with the name obliterated, I would say Shredded Wheat was in the package.

CROSS-EXAMINATION.

THE WITNESS: If they asked for Kellogg's Shredded Wheat, naturally, I am in the business to make money, and I would sell them that. If I carried Defendant's Exhibit 6, and the customer said, "I want Kellogg's Shredded Wheat," I would give her the package, if she asked for it. She would have to say Kellogg's. If she said Shredded Wheat with the Niagara Falls on it, I would give her that. If she said Kellogg's Shredded Wheat, I would understand she wanted Defendant's Exhibit 6, naturally.

I understand there are two concerns making shredded wheat: Niagara Falls, and Kellogg. So I see, the way you brought it down to me.

RE-DIRECT EXAMINATION.

THE WITNESS: If a customer asked me for Shredded Wheat, I would give her the one with Niagara Falls on it, because I know what it is. I eat it myself.

RE-CROSS-EXAMINATION.

THE WITNESS: I have never eaten the Kellogg product.

ALLAN H. FAGAN.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a structural steel erector, construction man. I am familiar with the product known as Shredded Wheat and have been between twenty-five and twenty-eight years. I come from Niagara Falls, Canada, where it is made. I was through the American Shredded Wheat plant about fifteen or twenty years

ago. I have also been through the Canadian plant and have seen it going through the process. I have been a user of Shredded Wheat, but use it now only once in a while. If I go to a grocery store and ask for it, I expect to get the National—what they called the Shredded Wheat before the National took it over.

In a restaurant in Newark on the twenty-ninth of December, 1932, I asked for Shredded Wheat, at the Waldorf Restaurant, 738 Broad Street. I went in there, had breakfast, asked for Shredded Wheat, and the waitress served me one of those small packages, which I believe has two shredded wheat in it. I said "This is not Shredded Wheat." She said, "It is." I took it and ate it. I brought the carton away with me. Here it is. Plaintiff's Exhibit 140 is the carton served to me in that restaurant. Up to the time I had this experience, I had never seen the product known as Kellogg's Whole Wheat Biscuit, and I was not familiar with it.

CROSS-EXAMINATION.

THE WITNESS: The Kellogg product was brought to me in the carton. After I ate it, I had no further discussion with the restaurant people, did not try to tell them any more it was not a shredded wheat product. I could not say there was any difference between it and shredded wheat made by another concern. I did not notice any. As soon as the little package was handed to me, I knew right away it was not Niagara Falls Shredded Wheat, by the box. When I took the biscuit out of the carton I noticed it was a small biscuit.

ALEXANDER AITKEN.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I will be fifty-two this month. I am a retail grocer, and I have been engaged in the grocery

business all my life, never did anything else. I was born into the retail grocery business. During the conduct of my retail grocery business, I have had occasion to sell Shredded Wheat Biscuit for quite a number of years back, at least twenty-five years, during which time I have handled the Niagara Falls Shredded Wheat Biscuit in my store all the time, like the package marked Plaintiff's Exhibit 1, which I have picked out from among those on the table.

I know the package of the Whole Wheat Biscuit put out by the Kellogg Company, and the size of it. The biscuit is smaller in size, although I have never eaten it. I know quite a few people who come in contact with it and do not want it, because it is not the kind of biscuit they have been acquainted with, the Niagara Falls biscuit.

The biscuit just taken from Defendant's Exhibit 6 is, I think, the Kellogg biscuit to which I have referred. That is it. The Niagara Falls biscuit is a larger biscuit. As to taste, I would not swear, because I, personally, have not eaten it. I think it is quite different in form and appearance. It is a little longer biscuit. The Shredded Wheat Biscuit is a shade longer than the Kellogg biscuit. It seems to me the Kellogg biscuit is a little higher and the Niagara Falls is flat. They are both substantially pillow-shaped. When people come to my store and ask for Shredded Wheat, they have in mind Niagara Falls Shredded Wheat.

I have been familiar with the picture of a dish with biscuit in, as shown on Plaintiff's Exhibit 10. If I saw that representation without any printing, I would think it was Niagara Falls Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: Within the last month I have known there are two different manufacturers of shredded wheat, the Kellogg Company and the Niagara Falls

people. That is the first I had known there was another shredded wheat on the market. A representative of Kellogg came into my store and wanted to sell it to me from the wagon. I refused to take it in.

Assuming I had never seen Defendant's Exhibit 6 before, with the illustration of the plate concealed, just seeing the words Whole Wheat Biscuit, that, in a way, would not say anything about it, unless I would see what sort of diagram these packages carry. If I would carry a package, I would want to know what was inside. Whole Wheat Biscuit might be one of six or eight different kinds of products, a flat biscuit, a pillow-shaped biscuit, or a rosette-shaped biscuit, to me. If, however, the package carried the name Kellogg's Shredded Wheat Biscuit, I would expect to find shredded wheat. I would know it was shredded wheat; meaning, by that, a pillow-shaped biscuit made out of wheat in shredded form.

The term Niagara Falls has always been very actively advertised in connection with Shredded Wheat since I first saw it. You see a picture of Niagara Falls in a great many bill posters that advertise it. It says specifically on it: The Home of Shredded Wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I refused to take Kellogg's Whole Wheat Biscuit from the salesman, because, in all my experience in the grocery business, I did not want to have any shelf-warmers. I want them to go out of that store, so I can utilize whatever money I have in them somewhere else. I cannot do that, if I have it on the shelf. That is the only reason I refused to have it in my place.

RE-CROSS-EXAMINATION.

THE WITNESS: If customers asked me for Kellogg's Shredded Wheat, I would stock it, but I am afraid they

would have to ask me more than three or four times for it. If they asked for it in large enough quantity, I would. We must not forget that, if a woman came in and asked for Shredded Wheat, and if I gave her a package of Kellogg's biscuit and she brought back even one package of it and told me she did not like it, I would take it and ship it back to Kellogg immediately at their own expense. I would refuse to keep it in my store.

RE-DIRECT EXAMINATION.

THE WITNESS: I would say the term Shredded Wheat as well as the picture of Niagara Falls, has been advertised very extensively. I am a great fellow, going along, you know, to see the placards in the bus or railroads. That is what I am going by. I see Shredded Wheat, The Home of Shredded Wheat, a picture of Niagara Falls, the waterfall there.

MRS. IDA MUND.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I reside in New York City. I am familiar with the food product known as Shredded Wheat and have been for a considerable period of time.

I attempted to make a purchase of Shredded Wheat and another product was handed to me, November 30th of last year, at the store of Mr. Klee, 279 East Thirty-ninth Street. I went there and asked for Shredded Wheat. Plaintiff's Exhibit 141, the package of Whole Wheat Biscuit, was handed to me as Shredded Wheat. That is my signature on the package, by which I identify it as the package I purchased.

One of the National Biscuit Company salesmen who knows my husband asked him to send me to make

this purchase. My husband told me to ask for Shredded Wheat and to take whatever was handed me as proof of what he sold me for Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: That store is in my neighborhood, but I very seldom go there. That is the first time I asked for Shredded Wheat there. My husband asked me to go just to that one store. I asked the grocer if that was real Shredded Wheat. He told me it was just as good but put up by another company. He did not tell me it was Shredded Wheat. I asked him if it was real Shredded Wheat because he gave me this package, which I do not regard as Shredded Wheat. Plaintiff's Exhibit 1 is the only package of real Shredded Wheat. He said right away it was not the Shredded Wheat, but it was put out by a different company. I was not asked to and did not go to any other store. I never had this happen anywhere else.

SAMUEL A. LEONARD.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am seventy-five. I know of Shredded Wheat. I have had it in my home from time to time. I recently went to the store of V. Pettrolala, Belleville, New Jersey, and said: "I would like to have a box of National Biscuit Shredded Wheat." He was standing behind the desk. In back of him there was a well-dressed fellow, Italian, and he began to look around. My son, who was with me, said he did not have any in the place. The fellow who stood on the opposite side of the desk said: "Right up there." He said,

"Oh, yes," and pulled down one of these Whole Wheat packages.

I said, "That is not the National Biscuit, is it?" He says, "Yes." "Well," I said, "it does not say so." Well, he says, "It is Shredded Wheat." "All right," I said, "I will take a box of it."

I think that was Wednesday of last week. My son, who is a salesman out there at that place, took the package down to Mr. Ehrlach. It was the same package as Defendant's Exhibit 6. I went to the store at the request of my son, who is connected with the National Biscuit Company. That is the only store I went to. I asked for National Biscuit Company's Shredded Wheat and received a package like Defendant's Exhibit 6, took it away with me, and delivered it to my son. The date was on the package. I do not have the package with me. I did not visit any other store.

CROSS-EXAMINATION.

THE WITNESS: The grocer said it was National Biscuit. When I pointed out to him that the National Biscuit name was not on it, he said it was Shredded Wheat. He said just that it was Shredded Wheat, not anything about it being made by another manufacturer. I said, "That is what I want. I will take it."

I saw right away, when he handed me the package, that it was not Niagara Falls Shredded Wheat. I noticed the name Kellogg's on there. I did not open the package. I have used some of Kellogg Corn Flakes, but never used any of their shredded wheat; and I never used any of it since. I never saw any of it opened until today. There was one of them opened down there. They did not say anything about it.

RE-DIRECT EXAMINATION.

THE WITNESS: When I spoke to the storekeeper and told him this was not made by the National Biscuit

Company, all he said was it was the National Biscuit Shredded Wheat. I did not see any other man except this man who stood in front. It was a small store. There was a little fellow with him, a clerk, or probably his son. He did not want to wait on me. I think the proprietor of the store waited on me. In fact, I know it was, because my son had just been in there. He had his salesman's book. I met him on the next corner, and he said it was the proprietor.

JESSE W. PARNELL.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty years old, manager of the Hempstead branch for the Firestone Tire & Rubber Company. I am familiar with the edible product known as Shredded Wheat. I have eaten it for years.

At the restaurant of Otto Steuer at Hempstead, when I asked for Shredded Wheat and milk, he substituted Kellogg's. I told him it was not Shredded Wheat. He said it was just as good and the same as Shredded Wheat. I knew by the box, Niagara Falls, and he substituted this and called it Shredded Wheat to me. Plaintiff's Exhibit 142 is part of the package he handed to me, the upper part. The other part he took before I had a chance to take any more of it. I saw right away it was not Niagara Falls Shredded Wheat. He said it was just the same. I told him Shredded Wheat had a picture of Niagara Falls on it and that is what I wanted. This did not have a picture of Niagara Falls. There were two biscuit in the package. I ate one and brought one here. This is one of the two biscuit that were served to me as Shredded Wheat.

(Stipulated between counsel that the witness produced a Kellogg's Whole Wheat Biscuit.)

Quite often they have tried to substitute Kellogg's. I would not take it if I could purchase Shredded Wheat. It was substituted in this instance. He said he served me this as regular Shredded Wheat, that he sold it as Shredded Wheat. This occurred just two or three days ago. I went to that restaurant at the request of a National Biscuit Company salesman. I eat there regularly every day. He asked me if I ate Shredded Wheat. I told him I did. He told me to ask for some Shredded Wheat, some of his product. That is the only restaurant I went to and asked for Shredded Wheat, obtaining Kellogg's Whole Wheat, on that particular day. I remember it has been submitted to me quite often, not necessarily in this particular place but in more than one place. After this occurrence, I reported back to the salesman who asked me to make the purchase.

CROSS-EXAMINATION.

THE WITNESS: I never made a note of it in any other restaurant. I cannot recollect it to give you the name as sworn testimony. I might have been in lots of places but not know the names they were conducted under. I do not take particular notice of a place when I come out.

I knew right away this was not the Niagara Falls Shredded Wheat I have been getting, because I am used to noticing Niagara Falls on the box. The shape of the biscuit was different, because it was smaller.

RE-DIRECT EXAMINATION.

THE WITNESS: The Kellogg biscuit is a different type of biscuit, duplicated to the point the taste is not exactly the same. The shape is patterned after Shredded Wheat, only a smaller biscuit. As I see it, it is the same shape, except the Kellogg biscuit is smaller, because I am not in the bakery business and cannot find out.

C. WAYNE TUTHILL.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am of mature age. I am familiar with the product known as Shredded Wheat. I have been through the factory and have eaten quite a lot of it. I have been familiar with it for about twenty years.

On the thirty-first of last December I went into an Italian delicatessen and grocery at Seaford, Long Island, and asked for some groceries. The last article I asked for was a package of Shredded Wheat. He says, "You mean Bisc'?" and I said, "Yes, the biscuit." He went to a shelf and handed me Plaintiff's Exhibit 143. That is my name on the package. He said, "This is all I have." I said, "No. Haven't you the other package of Shredded Wheat, the old package of Shredded Wheat?" He said, "That is coming in this afternoon. This is the same thing." I said, "If you haven't the other, I will take that." He said, "That is the same as the other," and handed me a package of Kellogg's Whole Wheat Biscuit.

I went to the store again yesterday. I had never eaten this kind, and I wanted to try it. I asked him if he had a package of Shredded Wheat. I wanted to see if he had the other. His wife, this time, got another package off the same shelf, with the same material. Yesterday, I got another package of Kellogg's Whole Wheat Biscuit.

Mr. Slocum, a National Biscuit salesman in our territory, asked me to go to that store and make this purchase. From my own curiosity, not because he told me, I went back to the same store and got another Kellogg package. He did not even offer me the original Shredded Wheat as I know it, which is manufactured in Niagara Falls. He evidently did not have it in the

store, referring to a package, like Plaintiff's Exhibit 1, with which I have been familiar for some considerable time. I am in the restaurant business. I have occasion to sell it sometimes. I carry Shredded Wheat there a package at a time, not in large quantity, because I am a buyer of National Biscuit products from the branch in Hempstead. To keep it fresh, we buy it in the store.

I never sold any Kellogg's Whole Wheat Biscuit in my restaurant. The first time I ever saw it was when I went to this Italian store of C. D. Gaetano. That is the first time I ever did know of it.

CROSS-EXAMINATION.

THE WITNESS: I ate the second package of Kellogg biscuit. I should say it tasted like Niagara Falls Shredded Wheat; but I think it was a little bit stale; because the edges were a little tough and did not dissolve like Niagara Falls Shredded Wheat. It may have been stale. Otherwise, I do not think I can tell the difference. I knew right away on both occasions that I was not getting the Niagara Falls package. The first time I said to the man I wanted Niagara Falls Shredded Wheat. I asked him if he did not have the original package. He seemed to know what I meant, because he said they were getting them in that afternoon.

WILLIAM JOHN BOHNET.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: My business is meat and groceries, in which business I have been about fifteen years. We have had places in Amityville and Mineola. Twenty-five years ago, we used to operate one of the largest

places in Hempstead. We have another place at Roosevelt, Long Island, now.

During the time I have been in business, I have been familiar with Shredded Wheat of Niagara Falls. Picking out the package to which I refer it is right here, Plaintiff's Exhibit 1. I have been familiar with the shape and appearance of that particular biscuit for a considerable period of time, and have sold it in my store. When people call at my place of business or order Shredded Wheat from me, I understand they mean the Shredded Wheat they have been buying for years, with Niagara Falls on the side of the box. That is what they always look for. The kiddies say that, also the women. I have not visited the Niagara Falls plant.

A considerable portion of my orders are taken over the telephone, and people come to my store to place their orders. I do not handle any other whole wheat product. I am not in any manner familiar with any other whole wheat edible product. It seems to me there was a man around trying to sell me some biscuit like you hold in your hand. I had some on hand then, and I did not want any more. I asked him to let me see the biscuit, what it looked like. I opened up an original Shredded Wheat Biscuit, and I said, "How is it they have the same kind of biscuit as the original Shredded Wheat?" I do not remember what he said; but I knew there was a difference right there and then. Nothing was said about it, and I did not buy any. He has not been around to see me since. I do not know who he was or with what store he was connected. The package he showed me at that time was a tall square package like Defendant's Exhibit 6. The salesman opened the package and showed me one biscuit. I remember that, because I took one out of my stock, opened the biscuit, and compared them. I did see at that time that the Kellogg Whole Wheat Biscuit was a lot shorter than the Shredded Wheat. I thought it was Shredded Wheat Biscuit they had on there. I do

not know now or see what it is; but I remember it was shreds. I was wondering how they could work in conjunction with Shredded Wheat. Nothing was said after that. He discontinued the conversation after I started asking some questions about it. I did not know just what to think of it at that time. I thought it was quite strange they were putting out a biscuit like this one. I thought I would find out soon what it was all about. They never came around any more or tried to sell it, so I never asked any more about it. There is a difference between the two biscuit. One is larger than the other. The shape is generally the same, the thickness of it.

I think, in a lot of places, they can pass off Kellogg's Whole Wheat Biscuit for Shredded Wheat Biscuit, if they have it on hand and shove it over, saying it is the same thing. Some women are shrewd buyers. They can see right away or when they get it home that it is not the same thing. I think there is a possibility of a grocer passing it off one for the other.

CROSS-EXAMINATION.

THE WITNESS: For the time being a woman might take a Kellogg package, such as Defendant's Exhibit 6 and think she was getting a package like Plaintiff's Exhibit 1, being familiar with the latter, until she got home and saw it was not the same package. Assuming she looked at it when she got it, I think there would be a possibility of her taking the one package and thinking she was getting the other. A lot of people do not know of Kellogg's biscuit as it is put up there, as they do Shredded Wheat Biscuit. If I gave a lady one of Kellogg's, she would ask me what is the difference and how long the Kellogg's biscuit are going to be on hand. If I just had them in, I would say I had just got them. I would inform her that there are two kinds of shredded wheat biscuit.

MISS BESS EVANS.

Deposition taken at New York, N. Y., January 5, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am familiar with Shredded Wheat, have eaten it for years and years. I am familiar with its package. I identify Plaintiff's Exhibit 1 as a Shredded Wheat package. I had occasion to attempt to make a purchase of Shredded Wheat recently when something else was given me.

I went in a store, got some other groceries, and asked for Shredded Wheat. He said it was twelve cents a package. I told him there was a sale at chain stores, two for nineteen. He said, "We do not have sales. Here is a new shredded wheat on the market, twelve cents, just the same as Shredded Wheat, and I really like it better. Won't you try a package?" I said, "I do not know. I think this is an imitation." I purchased this package, Plaintiff's Exhibit 144, last Friday, December 30, 1932. The name of the store is written on there, Midtbo, on Forty-second Street, Brooklyn. I think he is German. He said it was just the same as Shredded Wheat, and I purchased it.

I went to that store at the request of Mr. Dunton, a representative of the National Biscuit Company. I was employed two Saturdays demonstrating Shredded Wheat for the National Biscuit Company in June, I think, at Rogers Avenue and Lincoln Road. I said to Mr. Midtbo, "Where is your Shredded Wheat?" When he first said it, he had Kellogg's out there. He had the other back. He said, "Why don't you try this? It is the same thing and I really like it better."

I was just a demonstrator two days for Shredded Wheat; but I have been a demonstrator for the A. & P. before they broadcast, for months, three or four days a week, about a couple of years ago.

During the time I have been purchasing Shredded Wheat, I have been familiar with the form of the biscuit. I would know a Shredded Wheat Biscuit by its form, also by the package in which it is contained. I have not eaten any of the Kellogg biscuit which I purchased, yet. I had two boxes of the other shredded wheat given to me by a neighbor who was going on a vacation. I thought I would eat what was good. I did not know anything about the other.

The biscuit you hold before me (taken from Defendant's Exhibit 6), looks like an imitation to me, because Shredded Wheat is much longer than that. I would not say that the form of the Shredded Wheat Biscuit and the Kellogg biscuit is the same except as to size. It looks like an imitation. It does not look like Shredded Wheat to me. Shredded Wheat is longer.

During the time I have been demonstrating, I have been familiar with names on different articles of merchandise that have been sold. The names applied thereto have value in identifying the products. I have demonstrated, for instance, Mazola Oil. I have seen other articles demonstrated which were identified by trade names. I demonstrated a tooth brush copied from another product. We had trouble with it because it was an imitation.

It is my experience and observation that, when people call for or desire Shredded Wheat, they desire the product of a particular concern. When a person gets used to a product and it has been used for years and years, if they put something like it on the market, it is an imitation. You know it does not come up to the original product. I have purchased and eaten Shredded Wheat twelve or fifteen years. I suppose since it has been out. The first time I knew of the Kellogg Biscuit as in Plaintiff's Exhibit 144, I had seen it occasionally on the shelf in a store but never

paid any attention to it; just like My-T-Fine or some other product you would not care to use.

CROSS-EXAMINATION.

THE WITNESS: As soon as I saw the Kellogg package, I certainly knew it was not the Niagara Falls package I had been buying. They told me it was the same thing. You would be surprised just the two days of demonstration my sister and I did for just two Saturdays, to see how many cases of Niagara Falls Shredded Wheat it sold, also to know how many people we told about Shredded Wheat who had not been using it or had not known about it before and get it now. I am two years out of a hospital for an intestinal trouble operation, and Shredded Wheat has made my health very much better. There were many people we found who had heard of it but they would not eat it because they thought it was like hay or straw. You would be surprised at the people who buy it in our neighborhood. My sister and I are never without it. If I am out of it in the morning, I get dressed right away and go around the corner and get it, because I have to eat it every day. Those people we introduced it to said they did not know about it. They ate other cereals before. If we spoke so highly of it, they would try it out.

I personally never knew of Kellogg's Shredded Wheat before, except I got a box of it to try. Then a friend of mine went off for a week-end and gave me two boxes of National Shredded Wheat. I thought well, we know what this is and we will eat it first. This was the first time a grocer ever tried to introduce a new product to me by saying it was the same kind as the old product but made by a new manufacturer. I never had a grocer say, "We have got a new make of the old product," because I have been buying at

chain stores. They very seldom introduce anything except something of their own they want to push. In the old type grocery stores, I know they will often introduce new products by saying it is a new manufacturer in the field and they think it is a good product and they would like me to try it.

I suppose I will eat the box of Kellogg biscuit I have. What is the use of trying it out? There is Royal Pudding. They have another lower priced. They cannot even get me to try it. I will not even taste it. My sister and I do southern pastry cooking by order. We do not do much right now, because people will not pay the price. My prices are like Schraffts'. When you have a good product and know how to cook them, you know what they are, and you know what an imitation is, too. You can make a delicious cooked cereal out of Shredded Wheat with just warm water and cooking, if you like it warm.

The National Biscuit Company representative did not repay me for this package. I just brought the package in there and gave it to them for nothing. I made the purchase in that store; and the man told me it was the same thing and he really liked it better. The National Biscuit salesman, Mr. Dunton, really did ask me to make the purchase and expected me to let him have the package. I went to one other store, asked for Shredded Wheat, and got the Niagara Falls product. He told me to go to that store, too.

RE-DIRECT EXAMINATION.

They had Kellogg's at both stores. At Dutson's store, the second store, they had both Shredded Wheat and Kellogg's Whole Wheat. I asked for Shredded Wheat. I said, "Aren't you having a sale? The chain stores are two for nineteen." He said, "No, they are twelve cents." I said, "Give me a box." He said;

"Why don't you try this Kellogg's? Do you want to try it?" I said, "No." He said, "It is just the same thing," so I bought the package.

I paid twelve cents for that one and ten for the other. The package I got at Dutson's was like Plaintiff's Exhibit 144, which I purchased at the first store where they told me they did not have sales. At the second store they had both products, and he told me did run sales. I purchased the Kellogg product at a less price than I could have purchased Shredded Wheat, which was twelve that day, and he sold me that package there for ten.

RE-CROSS-EXAMINATION.

THE WITNESS: Both the grocers made the same explanation about its being a new product and they would like to have me try it. One man said it was the same thing, and he really liked it better.

NORA G. EVANS.

Deposition taken at New York, N. Y., January 5, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have given my name and address. I am familiar with the food product known by the name of Shredded Wheat and have been familiar with it for at least fifteen years. I eat it every morning and sometimes at night. I have purchased it myself. I am a sister of Miss Bess Evans who testified a few minutes ago.

I have ordered Shredded Wheat in restaurants. I recently had an experience in ordering Shredded Wheat and obtaining something else. I went into a cafeteria and ordered Shredded Wheat. They brought

this Whole Wheat and fixed it in the bowl, where it looked like a long biscuit. I said, "That does not look like Shredded Wheat to me. Bring me the box. I want to see." She did not bring the box. I suppose she told a story and she did not want to get caught. After I tasted a little bit, I said "Bring another one and bring the box with it." She brought the box. I said, "That is not Shredded Wheat. That must be a new biscuit that is put out. I never saw it before." She said, "It is just the same." I said, "You are mistaken. It is not." This was at The Meadow Cafeteria, 72 Henry Street, Brooklyn. With me then were my sister, Miss Bess Evans, and Mr. Dunton, who is connected with the National Biscuit Company. It was at luncheon time. Mr. Dunton asked me to go to this restaurant. I placed the order with the waitress. I said, "I want an order of Shredded Wheat Biscuit." She brought this Whole Wheat Biscuit. I did not know what it was at the time. She had it in a bowl. It looked just like the original Shredded Wheat. She did not bring the original container I called for. I ordered another order of it, and then she brought another container, which I have produced here, Plaintiff's Exhibit 145. I ate part of one, and the other biscuit is in there. The biscuit I first had and this are the same biscuit.

(Stipulated that the biscuit produced by the witness is a Kellogg biscuit.)

I never have made any other purchases of Kellogg's Whole Wheat Biscuit. I never used it. I always use the other, the Shredded Wheat.

I did not like the Kellogg biscuit in the cafeteria as well as the Shredded Wheat, because it seemed harder than the other and did not seem to me to have the same flavor.

I demonstrated Shredded Wheat for the National Biscuit Company for just a short time in Brooklyn, in

the A. & P. and in Wamselles', in Flatbush; just two days, in June, 1932. Before I demonstrated Shredded Wheat for them, I was familiar with their product. That is why Mr. Dunton wanted us to demonstrate it; because we knew Shredded Wheat and knew what it does for you. I feel it is a good, edible product and it does the system real good. It is wonderful. I eat it every day and sometimes at night. When I feel I need a laxative, I take Shredded Wheat instead, and it is marvelous. My sister has made demonstrations of products for other stores. I have not. When I order Shredded Wheat in a store, I expect to receive Shredded Wheat, the original kind. If I received the other, I would send it back. I always use the same brand of everything. From my experience, the name of a product has importance, because people would say: "What kind of Shredded Wheat is that?" I would say, "The original, with Niagara Falls on it." A lot of people feed that to their children. If you use Pillsbury's Flour, for intance, you would not use any other brand. I use Royal Baking Powder and would never use any other, no matter what people told me. I have always used that, and I think it is the best. When I go to a store, I ask for Royal Baking Powder. Sometimes they put out Davis, which is a cheaper brand, the same size. They tell me that. I do not take it, because I think Davis does not have cream of tartar but some stronger chemical.

CROSS-EXAMINATION.

THE WITNESS: I tried Davis Baking Powder, but I did not like it. I had it in somebody's else house. I do not use it. I do not like prepared flour, because I think it is not nearly as good for baking. I use Swans Down Flour for cakes. I do not know what other baking powders have, but it is not light like Royal, and

it makes the cake heavy. I tried Presto, but it is heavy and I do not like it. I very seldom try anything new, because I like standard kinds and brands of things that are all right. I do not use anything but standard kinds of cereals. I do not like corn flakes, or Rice Crispies. I do not like anything new. I have tried them, eaten them in different places. I meet people who have them. I always have Shredded Wheat. I always have it. It is really a meal when you eat it. When I have Shredded Wheat for breakfast, I have a real meal there. That and a piece of toast is about all I eat. I am typical, in that I do not like new things and I like old things. I have tried different things at other people's houses, sort of by accident. If they bring you a certain cereal, naturally, you are going to eat it. A great many people, however, do like to try new things. I do not. I want to go and order what I know about. I use a certain brand of coffee. I like the old brand, and I do not try new. What is the use of taking something you do not know what you are getting, if you have something you are satisfied with. I do not recall any instance of trying a new product, finding it better and being glad I changed. I use Gold Medal Flour and Swans Down Flour for cakes. I used Presto, but I did not like it.

When I saw the Kellogg biscuit in the plate, I knew right away it was not Niagara Falls Shredded Wheat, as soon as I saw the package. I thought it was a sample. Shredded Wheat looks the same. I thought it was a sample when they brought it. I knew I had not seen any of the samples of Shredded Wheat they put out except the original size. That is why I knew it was not the same thing. When I saw the outside of the little package with Kellogg on it, I knew it was not the original Shredded Wheat, not the trade mark.

RE-DIRECT EXAMINATION.

THE WITNESS: They had a menu at the cafeteria when I was there. Here it is, Plaintiff's Exhibit 146, last Friday. It says Shredded Wheat, milk, ten, meaning ten cents. It was not Shredded Wheat at all.

I am familiar with the shape and form of Shredded Wheat Biscuit. When she brought the package, I thought it was a Kellogg sample, because I knew the samples of Shredded Wheat when I had demonstrated were larger than that. When the dish with two biscuit placed end to end was before me, I did not at that time know that Kellogg was putting out a Whole Wheat Biscuit. I asked for Shredded Wheat. I would say the Kellogg biscuit is substantially the same as Shredded Wheat, except as to size. It does not seem as fine as Shredded Wheat. It is coarser. The shape is just the same.

RE-CROSS-EXAMINATION.

THE WITNESS: As soon as I came in contact with the Kellogg biscuit, it is fair to say I knew there are two shredded wheat biscuit on the market, one made by the National Biscuit Company, and one by Kellogg. In ordering shredded wheat from now on, I would specify whether I wanted the Kellogg or the Niagara Falls product. When I demonstrated on Shredded Wheat, I had a great number of people who had never tried the Niagara Falls product, and who, through my demonstration, I succeeded in getting to try it.

JOHN F. L. McCRUM.

Deposition taken at New York, N. Y., January 5, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-five unemployed at this time. I was with a Wall Street broker's house. I made

a visit recently to a store and asked for Shredded Wheat, at 222 Rochester Avenue, near St. John's Place, Brooklyn. I received a box of Kellogg's Whole Wheat Biscuit, Plaintiff's Exhibit 447. I went into the store, asked for a small can of evaporated milk and a box of Shredded Wheat. He put them in a bag and handed them to me. The grocer did not say anything to me. I went to the store at the request of Mr. Dunton, of the National Biscuit Company. After I had made the purchase, I told him about it.

CROSS-EXAMINATION.

THE WITNESS: I saw the package he took down from the shelf, that it was a Kellogg package, when he put it on the counter. I recognized then right away it was a Kellogg package. I have been eating National Biscuit Shredded Wheat, and I was familiar with the appearance of the package of Niagara Falls or National Biscuit Shredded Wheat. I knew right away, when I looked at it, that it was not the package the grocer was handing down to me. I did not ask him anything.

Mr. Dunton had asked me to go to that particular store, ask for Shredded Wheat, and take what was given to me. He gave me a list of two other stores, but I had no trouble there. They handed me the right National Biscuit Shredded Wheat. I have never tried Kellogg's Shredded Wheat. I never had heard of it before. I do not know now there are two kinds. The only one I ever heard of was National Biscuit Shredded Wheat. I did not open this pckage to find out whether there was any shredded wheat in it. Looking at the contents of Defendant's Exhibit 6, I really could not tell you whether that looks like Shredded Wheat. It does not look like the National Biscuit Shredded Wheat. Now that you show it to me, I can see that it looks like

Shredded Wheat Biscuit. It is hard to say if it looks like the National Biscuit Company's Shredded Wheat Biscuit. I could not tell you. All I know is that there is one National Biscuit Shredded Wheat. I do not know whether the Kellogg biscuit is shredded wheat or what it is. I cannot tell by looking at it. It does not look to me like National Biscuit Shredded Wheat. The three stores I have testified about were the only ones Mr. Dunton told me to go to and were the only three experiences I have had in buying Shredded Wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: Plaintiff's Exhibit 1 is the Shredded Wheat box with which I have been familiar.

GEORGE OLIVA, recalled.

Deposition taken at New York, N. Y., January 5, 1934.

Further RE-CROSS-EXAMINATION.

THE WITNESS: Plaintiff's Exhibit 148 is one of the new cartons of plaintiff. The phrase: It's All In The Shreds is still used on some of the cartons of the plaintiff company. I cannot say why it is not on all. That is the latest carton that was put out for the large or grocery-store size. It has been left off, for no reason I know of. I presume I left it off. I would say I took the initiative. I left it off. I had no reason for leaving it off, only that whole panel was left off. It happened to be on that panel.

The French carton indicated, made in the Canadian Home of Shredded Wheat, approved by the legal department 5/9/30, does not carry the phrase. The Canadian carton for the French trade carries it, but we left it off this one. This carton, approved by the legal de-

partment 4/30/30, carries the phrase: It's All In The Shreds. That carton is still in use to the restaurant trade, lunch rooms, and drug stores, individual cartons.

It is the policy of plaintiff company to foster and push and encourage the sale of individual cartons in the restaurant and lunch-room trade. It is doing everything it can to promote the sales of them. I would not say it is doing anything to hold them back or discourage the sale of them. I do not know any reason why they should. Those cartons are pushed, pressed, and promoted in every way to get every restaurant and hotel that wants to handle their biscuit that way to handle and serve them in individual cartons. It is to our interest to carry that advertising material on the carton right through to the consumer, to have that carton go with the name Niagara Falls and: The Home of Shredded Wheat on it, right on through to the ultimate consumer.

It is served in different ways. Most hotels serve them loose. We sell to the hotel trade with the idea they will use them in individual cartons. Some of them take them out of the carton, quite a few of them. We have no way to persuade them to stop doing that, except through our selling force, which, as a whole, is out to promote the sale of individuals in that trade.

The carton marked Approved by legal department June 19, 1929, carrying: As Made Since 1893, and: It's All In The Shreds, is not now in use. It was discontinued, I should say, about two or two and a half years ago. This carton approved April 30, 1930, replaces that, to the best of my knowledge, and omits the two phrases: As Made Since 1893, and: It's All In The Shreds. I took them off. Evidently, it was approved with them off. I wanted to repeat Niagara Falls on both ends, not to make a double emphasis on Niagara Falls, but to make it uniform, one side to look like the other. In doing that, I chose Niagara Falls rather than

the two-biscuit plate. That led me to put on both ends: The Home of Shredded Wheat, Niagara Falls. Since April 30, 1930, that type of carton for the grocery trade has had those two pictures of Niagara Falls, one on each end.

We also represented on this carton of April 30, 1930, the big biscuit partly covering the front face of the factory; and, on the rear face, the expression: As Made Since 1893. We also left off that carton the reference to twelve ounces and twelve biscuit which had been on the previous carton. It was later put back again, although I do not remember why. I believe it was because of the requirements of Federal laws to state the weight and number of the biscuit.

The carton approved March 27, 1931, a Canadian package, has the Twelve Biscuit in relatively small type at the bottom of the face of the carton. On the American carton of the same date, it is just in connection with the name, twelve biscuit; with no reference to ounces.

The carton marked C. A. V. August 28, 1931, contains a reference to Twelve Biscuit and Twelve Ounces; and the copyright notice was changed from 1929 to 1931.

The British carton, marked originally as approved 4/21/31, then marked not approved, contains on one panel the words: One Dozen Original Shredded Wheat, a picture of a plate containing two biscuit; under that: Shredded Wheat (nothing added, nothing taken away) It's All In The Shreds. That language is still used on that British carton. They are made at Welwyn Gardens in England. The only place on the American or Canadian cartons where It's All In The Shreds is now used is on individual cartons.

On carton approved 2/26/32, appear on both end panels, under The Home of Shredded Wheat, the In-er-Seal trade-mark of Uneeda Bakeries. That is still used on present cartons, and we put down as manufacturer

of the product, National Biscuit, and, under that, Uneeda Bakers, Twelve Biscuit, Twelve Ounces. The phrase: Twelve Full-Sized Biscuit is used in display advertising, on some car cards, along with Niagara Falls.

On the cartons which carry the Uneeda Biscuit In-er-Seal trade-mark, we put prominently on the face, opposite the face which has the factory picture, the phrase: Shredded Wheat Bakeries, Niagara Falls, New York, Oakland, California, The National Biscuit Company, Uneeda Bakers. There have been no changes in the signs on the Niagara Falls factories. It is still called The Shredded Wheat Bakeries.

The two cartons to which you refer, stamped legal department received June 15, 1932, are Canadian cartons, with reading matter on one of them for French Canada. The others are used, one in English Canada, and one in French Canada; although some of the English are also using some of the French Canadian, in the Quebec territory. Those Canadian cartons do not have the In-er-Seal trade-mark, nor do they carry the phrase: Shredded Wheat Bakeries, National Biscuit Company. The name there is Canadian Shredded Wheat Co., Ltd. So, at present, the biscuit, on opposite sides of the American-Canadian line, are being marked in Canada by The Canadian Shredded Wheat Co., Ltd., Niagara Falls, Ontario, Canada; and, on this side of the line, under the name: National Biscuit Company, Uneeda Bakers.

The sample carton marked Approved 8/18/32 does not contain the phrase: It's All In The Shreds. That is distributed from house to house in the United States.

The other two cartons on the same page, both approved 6/14/32, contained in the same place on the end panels the term: As Made Since 1893, and the phrase: It's All In The Shreds. Those are used in sales to dining cars, restaurants, and for individual service in

general. There is no other difference between the sample cartons and the individual cartons, that I know of.

I do not know why the sample carton has merely: Made Since 1893, and the individual carton has also: It's All In The Shreds, unless it was just to fill out.

The last carton is Plaintiff's Exhibit 148, which, as far as I know, has been approved by the legal department as a United States carton for the regular grocery trade. On the end panel is: The Home of Shredded Wheat, Niagara Falls, and, under that: The National Biscuit Company, In-er-Seal mark, slightly differently arranged from prior cartons, the words run together; and the National Biscuit name, instead of between Shredded Wheat and Niagara Falls, is under: Niagara Falls. That was done just to improve the design. This carton is the first grocery trade carton in about two years with the dish with two biscuit in it. We put that on the back face of the carton with the words: Trade mark, Reg. U. S. Pat. Off. At the bottom is: All the Bran and the Wheat. Elsewhere on the carton we have: One hundred per cent. Whole Wheat, and: Nothing added, nothing taken away, and: A hundred per cent. Whole Wheat, all the bran and other food substances. We have not emphasized it. It is all copied on the back. It was just put in that way for a layout. That is part of the message; but there are other messages on there also important.

Under the biscuit, on the front face, we have rather prominently: One hundred per cent. Whole Wheat. It is fair to say that the five or six features on there of the name Shredded Wheat, the picture of the factory, of the biscuit itself, and the phrases: The Home of Shredded Wheat; under that: Twelve Biscuit, Twelve Ounces; and, under the picture of the biscuit: A Hundred Per Cent. Whole Wheat, are the features we have given to the front panel of that carton.

RE-DIRECT EXAMINATION.

THE WITNESS: The Company has absolutely not ceased or cut down its efforts to sell its Shredded Wheat in packages containing twelve biscuit. It sells all the individual biscuit it can, and, when they are sold to lunch rooms or elsewhere, there are no strictures on the benefit purchaser that they must take it to the table of the consumer in the package. That is a matter of choice for the lunch room keeper. The company does not endeavor to get any advertising that way, having the carton brought to the table of the consumer with the biscuit in, and the company has neither issued any strictures in regard to it nor offered propaganda in any way whatsoever as to that.

RE-CROSS-EXAMINATION.

The company has no control in the restaurant, as to whether biscuit are served to the consumer in or out of the carton. All it does is supply the biscuit in individual cartons. That is where the control ends, so far as how the biscuit is going to be served is concerned.

The biscuit are not served in individual cartons in our own restaurant here. I do not know what carton they come out of; but they are not served in the carton in the restaurant itself.

MICHAEL WEINSTOCK.

Deposition taken in New York, January 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the wholesale grocery business of A. Krasne, 845 East One Hundred and Thirty-sixth Street, carrying a full line of groceries wholesale.

We cover a territory of Brooklyn, New York, Long Island, New Jersey, up-state New York and New England. We employ ninety-eight salesmen and have twelve thousand customers, being one of the largest wholesale grocers in New York.

I recognize Plaintiff's Exhibit 1 as a Shredded Wheat package. I have been familiar with Shredded Wheat ever since I was a youngster. We carry it now and have done so for fifteen years.

In the trade, the expression "Shredded Wheat" has the significance of a trade name, as to a particular product of particular origin. The way I understand it, it is an item that has been named as Shredded Wheat, and the name has been registered. That is my understanding of the meaning of the expression Shredded Wheat in the minds of the purchasing public. Shredded Wheat is made at Niagara Falls and has association in the general opinion of the public with Niagara Falls.

I am familiar with the whole Wheat Biscuit manufactured by the Kellogg Company. We carry it in our store. I remember the dish in the picture on the end of the carton, Plaintiff's Exhibit 10. It has been used as long as I can remember. As long as I know the package, I remember seeing that on the package, and I have seen it in connection with other advertising matter of the Shredded Wheat Company.

The Shredded Wheat Company has been an extensive advertiser of its product, and the result of that advertising on the minds of the public is that, when it was advertised, it was more in demand.

When I receive an order from a customer for Shredded Wheat, I fill that order with Niagara Falls Shredded Wheat. If they ask for Shredded Wheat, I give them Shredded Wheat.

The picture of the two biscuits on Defendant's Exhibit No. 6 is similar to the picture on the Shredded

Wheat package and a person casually seeing that picture would figure it is the same as Shredded Wheat.

I identify the biscuit contained in Plaintiff's Exhibit 1. It has been exactly the same thing during the time that I have been familiar with it.

Grocers have remarked to me several times that they did not see how Kellogg could put out the same item as Shredded Wheat. The appearance of the Kellogg biscuit as contained in Defendant's Exhibit 6 is almost identical with Shredded Wheat, except that it is shorter than Shredded Wheat. Its shape is exactly similar.

If a woman is accustomed to buying Shredded Wheat right along, she would buy it according to the appearance of the package; but, if the grocer has not Shredded Wheat in stock and has Whole Wheat Biscuit instead, he will try to use his high-pressure salesmanship in selling Whole Wheat Biscuit, going so far as to open the package to convince her it was the same.

I would say it would be possible for a grocer to sell an unwary customer Whole Wheat for Shredded Wheat.

I carry the Kellogg product but very seldom sell it. The only time it sells is when they do specialty work from store to store and their salesmen come to our warehouse and take it to the grocer. That is the way most of the Kellogg stock moves.

The public in general ask for the product in Plaintiff's Exhibit 1 by asking for a package of Shredded Wheat. That is quite general.

The wholesale price of the Kellogg product is a trifle lower than Shredded Wheat. As to retail price, they can sell it two cents a package below Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: I have known the Kellogg Company for quite a while, not as to the Whole Wheat Biscuit, but their corn flakes is an old item. Their reputation in the trade for fair dealing is very high.

I recognize the Whole Wheat Biscuit package shown me as being a distinctive Kellogg package, similar in color, shape, etc., to all the rest of the Kellogg family, such as corn flakes.

The high reputation of the Kellogg Company for fair dealing would help in introducing new products into the channels of retail trade.

The Kellogg Company is a very large advertiser of its product, ranking fourth or fifth among national advertisers of grocery products. I have seen advertisements of Whole Wheat Biscuit in newspapers, on car cards, store cards, and displays of that kind. All that sort of business depends on continued advertising. If either of the companies ceased to advertise, their business would practically vanish in four or five years time.

I would not be surprised and would credit the statement that two of the National Biscuit Company demonstrators who testified here a few days ago said they reached hundreds of people who had never tried Shredded Wheat before. The National Biscuit Company is digging up new customers of Shredded Wheat every day; and any idea that it is established for all time and would just roll along with no advertising is erroneous.

The Kellogg Company would have to do the same for Whole Wheat Biscuit, stir up the trade with specialty salesmen, and look for new customers.

I personally know of self-service stores, where a customer takes a basket and picks the goods out. I have not noticed whether they carry both the products.

If a customer asked for Kellogg's Shredded Wheat, I would send the Whole Wheat Biscuit. If anybody asked me what a shredded wheat biscuit was, I would describe it as a pillow-shaped biscuit, made out of whole wheat in shredded form. When I speak of being familiar with shredded wheat, I mean that type of biscuit, a shredded whole wheat biscuit in pillow-shaped form.

I would say that there has been very general knowledge through the grocery trade for several years that the Kellogg Company was making a shredded wheat biscuit. While, up to several years back, there has been competition with Shredded Wheat, it has been a product like it but smaller and a different shape altogether.

The Whole Wheat Biscuit is sold in distinctive Kellogg packages.

It is fair to say that a considerable proportion of people dealing with the grocery trade are experimental and like to try new products. Upon hearing of a new kind of shredded wheat on the market, there would be a tendency of most people to try it, to see whether they liked it better or whether it was different.

Constant advertising by the Kellogg Company of its Whole Wheat Biscuit would tend to arouse curiosity and interest in the new product on the part of many people.

"Whole Wheat Biscuit" or "Whole Wheat" would suggest to me any one of ten or fifteen kinds of products that would be all whole wheat.

If I looked at the Kellogg package without the picture of the biscuit on it and had never seen that before, I would not have any idea of what was inside. Whole Wheat biscuit might be in different shapes. National Biscuit Company's product, Uneeda Biscuit, is called a biscuit, and it is a soda cracker, an entirely different sort of thing from this. Quaker Muffetts is

referred to on the carton as "Whole Wheat Biscuit," and is an entirely different kind of product from shredded wheat.

I know that the current name of a product like Uneeda Biscuit is soda cracker and rolled oats is oatmeal. There could not be any other name than shredded wheat biscuit or shredded wheat to describe Shredded Wheat, that product. Any other name that could be used for this whole wheat biscuit would not describe it, but shredded wheat or shredded wheat biscuit does describe it exactly.

It is a fact that the restaurant and hotel trade is usually serviced by and the great bulk of that trade is supplied through special hotel or restaurant jobbers.

My concern does not handle the individual type of carton of shredded wheat with two biscuit in the package. That would go through the restaurant and hotel jobbers.

I would say that Shredded Wheat and Shredded Wheat Biscuit of the National Biscuit Company and of the Kellogg Company are both subject to increasingly severe competition from other forms of whole wheat products, such as wheat flakes and puffed wheat; and, insofar as the public would be induced by advertising to use those other forms of wheat products, that would tend to affect the sales of shredded wheat.

In my opinion, the sale of shredded wheat by both the National Biscuit Company and the Kellogg Company or either of them is less rapid than it used to be. I attribute this to competition by other forms of whole wheat products, or what the public regards as more attractive forms, or new forms.

I regard the name "Kellogg's" on Defendant's Exhibit 6 as just as prominent as on the rest of the Kellogg family of packages, and that is as big as they

make their name. As far as those cartons go, Kellogg is the dominating name of the product.

It is a fact that it is a very common practice in the food line to put a dish on the package with some of the contents in the dish, whether it is spinach or baked beans, and it has been a common practice for a number of years to display a product in some attractive form in a dish on the package. That is a common advertising device to let the public know what the product looks like

I have not, in recent years, seen any package like Plaintiff's Exhibit 10, but I have seen packages with the plate on. In recent years, the package has been like Plaintiff's Exhibit 1, with a picture of Niagara Falls on each end, and the dish has vanished off the package.

I have not seen any of the Shredded Wheat packages like Plaintiff's Exhibit 148. On that exhibit, the words "Shredded Wheat" have been printed in red ink on both sides of the carton; whereas, in Plaintiff's Exhibit 1, the words "Shredded Wheat" are printed in red ink on the front face and in blue ink on the rear face of the carton.

Until about 1929, the National Biscuit Company just had a sort of cracker or biscuit line. It had no product like Shredded Wheat or shredded wheat biscuit. At about that time, it added the Shredded Wheat to the National Biscuit Line.

Since then, I have not heard of any attempts at the beginning to get the cracker line into grocery stores by saying, "If you want Shredded Wheat, you must buy the whole cracker line." I do not know anything about that either way.

The principal competitors of the National Biscuit Company, in the cracker line, are Sunshine, made by the Loose Wiles Biscuit Company. They have no shredded wheat product of any sort, that I know of. They have a cracker line and dog biscuits, Austins.

The National Biscuit Company have a dog biscuit, also, called Bennett's Milk-Bone.

It is a fact that a great many grocers carry the Loose Wiles Biscuit line rather than the National Biscuit Company's cracker line, for a particular reason. Some grocers are prejudiced against the National Biscuit Company. If they could not get the Niagara Falls Shredded Wheat except through the National Biscuit Company, it would be possible for the National Biscuit Company to say, "If you want Shredded Wheat, we want you to put in the National Biscuit line." That is mathematically true, but is not true in actual practice. I have not heard of it. I do not know anything about its being actual practice. I never heard of it.

I do know however that competition is very keen between the National Biscuit Company and Loose Wiles. I also know that many grocers would like to handle just one brand of each line. For instance, they would like, if they could, to have just one good brand of baked beans, and of shredded wheat biscuit and of corn flakes. They do not like to load up with two or three different kinds of corn flakes.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not mean to be understood as saying that there are now two brands of shredded wheat. As I understand, there are two brands of shredded wheat biscuit. I wish to be understood as testifying that Kellogg is making a shredded wheat biscuit similar to the Shredded Wheat. I mean by that that the Kellogg wheat biscuit is similar to the Shredded Wheat, as to the looks and appearance of the biscuit that it sells, except for size.

When my customers refer to Shredded Wheat, they ask for it, and they get the item "Shredded Wheat." It is manufactured by the Niagara Falls plant.

Until the Kellogg Company put up its Whole Wheat Biscuit like Defendant's Exhibit 6, there was another cereal, in addition to Shredded Wheat, made of whole wheat and put up in biscuit form, called Muffetts, manufactured by the Quaker Oats Company, put up in a package like Defendant's Exhibit 11, made of whole wheat filaments similar to Shredded Wheat filaments. Muffetts could not be readily passed off as or confused with Shredded Wheat on account of the shape of the biscuit.

It is usual or customary in the trade, when one product has been carried in a picture on the carton, like Plaintiff's Exhibit 10, for another manufacturer of a similar product to feature his product in the same manner, two biscuit in a dish, I find that in other products besides Shredded Wheat, where one manufacturer imitates another.

I do not know, offhand, of any other product than Shredded Wheat and Kellogg's, where the manufacturer of a product illustrates the product on the package, putting it in a dish and another manufacturer has come along with a similar product and put it in a similar picture. That is the only one I have in mind now, Kellogg's and Shredded Wheat Biscuit, where the picture of two biscuit in a dish is substantially the same.

It is the custom of all cereal manufacturers to advertise extensively. I would attribute what I say as to some falling off in the distribution of Shredded Wheat wholly to the competition of other cereals and not partly due to the economic conditions generally in the country. The present economic depression has nothing to do with the falling off of sales.

The diminution of distribution of Shredded Wheat that I have noticed in recent years I would figure as about thirty per cent. Shredded Wheat has been a very steady seller for a great many years. It increased

regularly for many years in its distribution. It has been falling off for the past three or four years. That is a conclusion I would draw from my own experience. I do not know whether or not that is general throughout the country.

The proportion of people who are of an experimental type of mind, as contrasted with the portion of the purchasing public who prefer to continue with what they know is, I believe, about twenty-five per cent. of the people who use cereals. The others would be more or less conservative.

RE-CROSS-EXAMINATION.

THE WITNESS: I would say only a very small proportion of customers, like invalids, use Shredded Wheat year in and year out for any considerable number of years. Most people will use a product like that for just a year or so and then they will go to some other cereal; but there will be a few invalids or special cases who have had it prescribed and will eat it year in and year out. The great bulk of the people come in and out frequently. That is why concerns like the National Biscuit Company and Kellogg Company must advertise so constantly and give out samples, so as to constantly recruit users of their products, so that every time a user steps out, a new user will come in.

I know of other shredded food products, such as shredded codfish and shredded coconut.

In a line like baked beans, or canned spinach, or canned corn, I would say that there is an almost universal practice on the part of all those manufacturers of showing their product on a dish on the outside of the package.

I have not heard of Ross Shredded Wheat Biscuit.

If a customer asked for Kellogg's Shredded Wheat, I would send this Kellogg product, Whole

Wheat Biscuit. I would say that that would be a general practice in the trade.

From time to time, there have been a great many brands of corn flakes on the market made by different producers. That was probably truer some years ago than in recent years. Still, some of the large chain systems have their own brands of corn flakes. The common current name for that product is corn flakes. Many of those producers refer to the product as corn flakes or toasted corn flakes.

RE-DIRECT EXAMINATION.

THE WITNESS: I never heard of anyone taking what they call shredded codfish or shredded coconut and making it up into a pillow-shaped biscuit. It is usually just in bulk, loose in the package.

People like a variety in the cereals they eat and do not, as a rule, eat one constantly day in and day out. They have some variety.

RE-CROSS-EXAMINATION.

THE WITNESS: It is true that not all the customers of a grocer are set on any particular brand. They would specify the brand. In the majority of cases, they specify the brand. In the case of baking powder, they would be apt to say that they wanted Royal Baking Powder or Davis Baking Powder, or some other.

It is fair to say that people who had seen the Kellogg advertisement and had tried the Kellogg's shredded wheat, would say, "I want Kellogg's shredded wheat." And it is fair to say that, during practically the whole time that I have known this National Biscuit Company or Shredded Wheat Company's Shredded Wheat, I have known it as Niagara Falls Shredded Wheat; and Niagara Falls has always been associated with that product strongly, on the package

and in the advertising; so that, if anybody spoke of Niagara Falls Shredded Wheat, I would know instantly that they meant Shredded Wheat.

I would not say that it would be practically impossible for the Kellogg Company to expect to build up any kind of business by having the grocers just try to substitute its product, without explanation, for the Niagara Falls product. I would say that, if a person asked for the Niagara Falls Shredded Wheat and the grocer wanted to sell them Kellogg's, he would say, "Here is a new shredded wheat that we would like you to try," and that, if he did not do that, if he simply sent the Kellogg product on a telephone order, he would expect to have it come right back to him. The great bulk of the customers would send that product right back.

If the grocer would explain to some customers who asked for shredded wheat that the Kellogg Company was putting out a shredded wheat, that there are fifteen biscuit to the package, and that he would like them to try it, that would produce a certain number of customers who would try it, and they would know they were getting a new product. None of them would think he was getting the Niagara Falls Shredded Wheat. It would be true that a certain proportion of them would thereafter say, "I want Kellogg's Shredded Wheat." That is, they might. If they asked for Kellogg's, they would get Kellogg's. If they had tried the Kellogg product and found out that they liked it, they would, in re-ordering it, say, "Give me Kellogg's Shredded Wheat," no doubt.

I have never seen any of the small shredded wheat biscuit that the National Biscuit Company are putting out.

RE-DIRECT EXAMINATION.

THE WITNESS: In introducing or putting up Kellogg's Whole Wheat Biscuit, as defendant's counsel has just been asking me, it would be possible for the grocer to sell it as a substitute for Shredded Wheat or as a form of shredded wheat.

I never heard a customer ask for Niagara Falls Shredded Wheat, just in those words. They ask for Shredded Wheat. In answer to counsel's questions in which he spoke about Niagara Falls Shredded Wheat, I did not mean to infer that people ask for it in that way.

CHARLES E. DUNLAP.

Deposition taken in New York, January 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am controller of the National Biscuit Company and have been connected with the accounting department of that company since I took charge of that department in August, I think, of 1916. Since that time, I have been responsible for the methods of accounting of the National Biscuit Company and its subsidiaries. That is true of companies subsequently acquired, like the Shredded Wheat Company.

When the National Biscuit Company acquired the Shredded Wheat Company, it took over the accounts and books and all the records of that company, all the books of account and audited such books, which auditing was done by me and by assistants under my direction.

Included in those records and in the audit so made were records of annual sales of Shredded Wheat. I have had prepared, at Mr. Vilas' request a transcript of the sales of Shredded Wheat, by cases of thirty-

six packages, beginning with the year 1896 and concluding with the year 1932. The paper shown me contains that transcript, taken from the books of the Shredded Wheat Company and for subsequent years from the National Biscuit Company's books. Those books are under my control and the figures are correct, to my knowledge.

(Plaintiff's Exhibit No. 149.)

The records of expenditures for advertising, account of Shredded Wheat Company, have likewise been audited by me and kept in my department. I am familiar with Plaintiff's Exhibit 84. I have, at Mr. Vilas' request, caused the advertising expenditures in the United States to be abstracted from said exhibit and carried along in parallel columns by years with the figures in Plaintiff's Exhibit 149. The paper I now have before me is an absolutely correct transcript of those figures, combined from the two exhibits, and these figures have been used for our own purposes in figuring advertising costs per case for all those years.

(Plaintiff's Exhibit No. 150.)

CROSS-EXAMINATION.

THE WITNESS: Referring to the years 1929, 1930, and 1931, I have a star, with the footnote that these advertising totals do not include sampling and field expense; but that, in 1932, the total of $973,581.76 includes three hundred thousand dollars for sampling. My reason for not including sampling in the 1932 total is the difference in the accounting methods, as between the National Biscuit Company and the Shredded Wheat Company.

The Shredded Wheat Company handled all of that through a special account; but, when the sales department of the National Biscuit Company took Shredded

Wheat in, it ceased to be handled from Niagara Falls, but was handled from here.

Wood was brought down here, and his men who were doing that same sampling work, which Shredded Wheat had done previously, were all handled on the sales department payroll. Without someone identifying each man and going back over all expense vouchers and seeing what part of their traveling expense and so forth was allocable to sampling work, it would be impossible to bring it in there without inflating those figures, if it was in there altogether. It is difficult to say how much, but I would say it probably would add three hundred thousand dollars to those figures; that is, for 1929, 1930, and 1931, those years that are low. While it is a fact that the field work and sampling were discontinued shortly after the National Biscuit Company took over the Shredded Wheat Company, it is not so much due to that as to the fact that we utilized those men in various ways and did not figure it was all a proper charge against advertising. We did our promotional work in a different manner.

I did not, in 1932, figure any expense for sampling crews. We did not have those crews in 1932. We went at it in a different manner. The three hundred thousand dollars for sampling in 1932 was for a special sampling campaign; covering the cost of the samples, and the cost of distribution through various concerns who make a specialty of that, such as the Postal Telegraph Company, and Campon & Company, over in Brooklyn. We believed it was cheaper to use people like that who had made a specialty of distribution and had the equipment. Then, when you had finished and were through with it, you were through, instead of having a lot of equipment on your hands. It would include the equivalent of salaries, but paid instead to the Postal Telegraph Company. We used whatever equipment they had, in the campaign.

The sampling was not kept up from 1929 down to 1932, and it was not resumed in 1932, which was a special campaign, along slightly different lines than the Shredded Wheat Company had done. It was a house-to-house sampling campaign, instead of having grocers put it in the baskets, as they used to do. It was not a full-sized package but a sampling package, with two biscuit in it, an individual sample, two biscuit to the carton. In one very limited locality, in the neighborhood of Fitchburg, Massachusetts, we had full-sized carton samples. Other than that, 90 per cent. of the sampling was individual-sized samples.

In Fitchburg, Massachusetts, there was an idea that there were some particular stores whose good-will had been lost for some reason I do not know; and the National Biscuit field representative recommended that we try it out, with the idea that it might be changed in the next sampling campaign. It was experimental. We bought from the groceries in Fitchburg, which was a more expensive form of sampling than the other; depending, of course, entirely on what results were secured.

Advertising expenditures on Niagara Falls Shredded Wheat are kept separate from the biscuit line of the National. There is no intermingling or overlapping of those expenditures in any way whatever. They were different crews. Our people had absolutely nothing to do with it, except to warehouse them, to be called for by these sampling crews. But the direct deliveries are made as joint, common deliveries. The same trucks or wagons pick up the cracker line and Shredded Wheat and make those deliveries.

Since the National Biscuit Company took over the Shredded Wheat Biscuit line, that product has mostly been distributed direct by the National Biscuit Company, rather than through jobbers or wholesalers; but,

of course, in some instances, we ship direct from the National Biscuit Company to the warehouse of the wholesaler or jobber. The great bulk of our delivery is now direct. There never was a time when the jobbers were absolutely cut off for a while; except that the effect of the taking over of the Shredded Wheat Company by the National Biscuit Company would naturally eliminate the jobbing business. If any jobber wanted to buy, however, he could always do it. In fact, we went after it. Not only could they do it, but we wanted it; that is, the two methods of delivery; our own trucking people and the jobber. The effect of our own delivery has naturally been to cut off the jobber in communities where we have quick service and delivery, if they want it. The jobbers may come and take orders here. I do not know how often. In that way, jobbers would regard our delivery service as in direct competition with them. I do not know whether they would consider it better service than their present service, or quicker; but they certainly would consider it competition.

I know, in a vague way of the marketing by the National Biscuit Company of a type of biscuit that is even smaller than the Kellogg Biscuit; that something of the sort was done some time back, I believe, for the restaurant trade; just as we bring out a Uneeda Biscuit for the restaurant trade and a graham for the restaurant trade. I do not know whether they are still on the market or not. I would not be surprised if Mr. Clarke told me that he bought some at the Union Station in Washington, within the last six weeks or a month, or that he could not. I do not know whether the National encourages or pushes the sale of its biscuit in individual cartons to restaurants. I am not in the sales end of it. All I am interested in is how much money we can make.

RE-DIRECT EXAMINATION.

THE WITNESS: What I have stated on cross-examination about the distribution of Shredded Wheat going away from the jobber and being done by the company would naturally result in a decreased volume by any jobber, in Shredded Wheat. It would be a rare exception if it did not. It would have to be some jobber who was located or had his business in such an isolated section that he practically controlled the business. I do not know of any such section in the country, today.

For instance, the effect of the National Biscuit Company's policy in the last three or four years would be to appreciably diminish the volume of a jobber in New York City who has been accustomed to handling Shredded Wheat in large quantities. With the National doing its delivery direct, I cannot see how the jobber could do any business, especially in New York City.

It is a fact that the National Biscuit Company, while still selling some Shredded Wheat through the jobber, does distribute it to the retail grocers direct, along with its crackers and other merchandise; so the National Biscuit salesmen who visit grocers and take orders for crackers also take orders for Shredded Wheat, just as if it were any other item of biscuit.

It is a fact that Shredded Wheat is now sold in bundles of twelve packages, and a grocer can buy a dozen packages without having to buy a whole case. Twelves, however, are not sold through jobbers. I do not say a jobber could not get twelves. I do not know of any reason why he could not have them if he wanted them; but I could not see how would want them.

RDQ. 70. Plaintiff's Exhibit No. 149 shows that, beginning in 1928, the curve of sales in cases appears to be declining. To what do you attribute that?

A. Well, there is no question; it is competition.

RDQ. 71. Competition of other cereals, do you mean?

A. Competition of Kellogg's Shredded Wheat, of which I am well aware.

RE-CROSS-EXAMINATION.

THE WITNESS: If Mr. Weinstock testified this morning that some of the falling off was due to competition with other cereal products made of wheat, I would have no way of contradicting that testimony, except that up to 1928 or 1929, along about that time when we acquired Shredded Wheat, there were just as many good cereals on the market as there are today. I do not see why competition of those same cereals or similar cereals—because there is a new one coming in and an old one going out all the time—could have had any more effect in 1928, 1929, and 1930, than it had previously.

I do not know whether the Kellogg Company was putting out its shredded wheat when the National took over The Shredded Wheat Company or not. That acquisition was at the end of 1928, 1929 being the first year that it was operated as a National subsidiary. That is my recollection.

I did not know that there was a suit pending by the Kellogg Company against The Shredded Wheat Company, Inc., prior to and in the early part of the year 1928, until after we had acquired Shredded Wheat, when I knew it in a very vague way. The only way I found out about it was that we had to make payments to a firm of attorneys. If we had not had to do that, I would not have known anything about it.

The reason for the National putting out bundles of twelves is not necessarily that wholesalers would break up the thirty-sixes and distribute them in small

lots to customers. In fact, it is not the prime reason, as I understand it. I do not know about the wholesalers selling to retail merchants in less than thirty-six-package cases. I know that our reason for putting it out in the smaller package was so that the smaller stores would have fresher stocks.

I do not know whether the jobber would break the case; but, if he did, then our service would be somewhat paralleled by the wholesaler; except that he would destroy the keeping qualities by breaking it up. The case helps to preserve the packages. I would not think that the wholesaler would break a case and sell twelve of them if the other twenty-four were going to remain on his shelves very long.

I would have to refer to my records, but it is my recollection that, in the year 1932, there was a falling off of about 248,000 cases over the preceding year in the sale of Niagara Falls Shredded Wheat, according to Plaintiff's Exhibit 149. If that figure is about 11 per cent., I guess it is right.

WILLIAM E. MacKAY.

Deposition taken in New York January 11, 1933.

Direct Examination.

The Witness: I am a law student connected with the legal department of the National Biscuit Company.

I am a user of Shredded Wheat and have had occasion to order it in a restaurant recently. About nine-thirty on the evening of October 3, 1932, I went into a restaurant called the Hanover Cafeteria, on Lexington Avenue between Fortieth and Forty-first Streets, and asked for Shredded Wheat. I turned my back and looked around the restaurant. When I turned around again, the clerk was opening this package of Kellogg's and turning out the Whole Wheat Biscuit.

I said, "That is not Shredded Wheat." He said, "Yes, this is Shredded Wheat." We had some other conversation. I said, "That is not the kind of Shredded Wheat I know." He said, "Yes, this is Shredded Wheat. It is a new kind. It is much better than the old." That is the substance of our conversation. I accepted the product. The carton now before me is the carton that the biscuit was taken out of at that time.

(Plaintiff's Exhibit 151.)

CROSS-EXAMINATION.

THE WITNESS: When I said that, I meant that it was not Shredded Wheat. I did not mean by that to tell the clerk that it was not a wheat product that I got. I simply meant to tell him that it was not Shredded Wheat—at least, what I had in mind when I asked for Shredded Wheat. I really do not know what the Kellogg product is. I have looked at it, and, judging by the appearance, I would say that it was a wheat product. I do not know how it is made. I do not know by appearance whether there are shreds in it or not. I know that our product is made of shreds. I do not know how the Kellogg product is made. Judging by the appearance of it, it looks that way. It is a noticeably shorter biscuit than the Niagara Falls biscuit; but it is generally a pillow-shaped biscuit; it is similar.

I knew what the clerk was trying to convey to me when he said that this was a shredded wheat product made by a new concern. He was trying to tell me that it was physically a shredded wheat biscuit, but that it was made by the Kellogg Company.

Sometimes I go into a restaurant at night and order Shredded Wheat before going to bed. When I am handed any of the Kellogg's products, it is not my practice to say "Oh, that is not Shredded Wheat." I might do it, though. Being associated with the Na-

tional Biscuit Company, I might engage the attendant in conversation about it. I would try to boost my own company's product. I would not go into any statement that the Kellogg's product is not a shredded wheat product, I think, with an attendant or waitress, because that sort of conversation does not usually mean much to them.

This restaurant was a cafeteria. You go up to the counter and ask for things at the counter. He got the package from underneath the counter, I believe. I turned around, and, when I turned back again, he was opening this package. That was in my full sight. I knew right away that it was not the Niagara Falls Shredded Wheat that I had been accustomed to getting.

I have known that the Kellogg people had a package like that on the market since June of 1932, when I became connected with the legal department of the National Biscuit Company.

I had another experience in the same place in just the same way, when they took the package from under the counter and started opening it up. In that case, I ate the Kellogg product. It tasted harder, more brittle, and not so palatable as the Shredded Wheat. I do not remember exactly what it tasted like. I remember it was harder and more brittle, as if it were baked more and more brittle.

CHARLES T. WARD.

Deposition taken in New York, January 11, 1933.

Direct Examination.

The Witness: I am president of Francis H. Leggett & Company and have been connected with them for forty-two or forty-three years. They are in the wholesale grocery business, being wholesale distributors of food, also manufacturers. We have been, during that entire period, distributors of cereals and other foods.

I am familiar with the product known as Shredded Wheat, having known it about thirty years. Our house has handled it during that time. The term Shredded Wheat means to me a proprietary item of some sort, or brand, owned by the Shredded Wheat Company formerly, I think, and now by the National Biscuit Company.

By the term "proprietary article" I mean to convey some item that is owned individually by somebody. I have been familiar with the appearance of the Shredded Wheat package and with the article itself.

I recognize the package, Plaintiff's Exhibit 1, and the contents thereof. I would say that, during my knowledge of it, the appearance of the biscuit known as Shredded Wheat Biscuit has remained substantially the same as I see it in this package, in every way.

We have orders for this item, in my experience, from time to time. They ask for it as Shredded Wheat. When a customer asks for Shredded Wheat, we supply that item, Shredded Wheat, Plaintiff's Exhibit 1, the only one I know of, that Shredded Wheat right there.

From my experience as a merchant in dealing with the purchasing public, I would say that, undoubtedly, the expression "Shredded Wheat" has a definite meaning to the public generally. It means that Shredded Wheat there, Plaintiff's Exhibit 1.

I am familiar with the fact, also, that the Shredded Wheat Company has extensively advertised the product for a good many years, and the effect of that advertising has been to identify it as a proprietary article.

In my opinion as a merchant, I do not think there is any question in my mind about the fact that the advertising and the sales of Shredded Wheat, as I know it, resulted in identifying Shredded Wheat as a proprietary article.

I am slightly familiar with the Kellogg's Whole Wheat Biscuit. We carry that, also. I recognize the package, Defendant's Exhibit 6. If the name were obliterated on that package and I could see only the picture on the package, I would think it was more or less of an imitation of Shredded Wheat.

Q. 33. Look at the biscuit contained in Defendant's Exhibit No. 6, which is the Kellogg's biscuit.

A. Yes.

Q. 34. What do you say as to the appearance of that biscuit, as compared with the Shredded Wheat in Plaintiff's Exhibit No. 1?

A. Well, do you mean the impression it gives me?

Q. 35. Yes.

A. Or the physical difference?

Q. 36. No, the impression you get from it.

A. Why, I would think it was made to imitate Shredded Wheat.

THE WITNESS: It is a similar shape, a little different, and of similar appearance as this pillow-shaped biscuit, and is made of what appears to be threads or shreds of wheat. It is a little different in size.

CROSS-EXAMINATION.

THE WITNESS: I would not identify Kellogg's product, Defendant's Exhibit 6, with what I know as Shredded Wheat Biscuit. I do not think I am qualified

to answer as to whether it is just as much a shredded wheat biscuit as this product from Niagara Falls. Do you not think it would take an expert to tell that?

I have talked to Mr. Vilas about this before I came upstairs. We discussed this matter of proprietary products in general but not so carefully before I came up. Mr. Vilas asked me a lot of questions about it. It means only the Niagara Falls product to me, Plaintiff's Exhibit 1.

Shredded Wheat means nothing to me but that product right there made by those people. I could not possibly identify it except by that.

If people asked me what a shredded wheat was, I could tell them it was a biscuit made of wheat. I could not tell them it was made of wheat run out into shreds, because I have never seen it manufactured. I would identify it with Plaintiff's Exhibit 1, in my mind; that package right there. That is the only one, in my mind, Plaintiff's Exhibit 1. That (referring to Defendant's Exhibit 6) looks like an imitation to me. By that I mean I think it is something calculated to deceive whoever buys it. I cannot identify that as a wheat product. I cannot look at a thing and say "It is made out of wheat." I am not a cereal expert. How can I say that.

I say the product in Plaintiff's Exhibit 1 is Shredded Wheat. I have no doubt about that being what they say it is, from the long period of advertising of the product that I have seen in the magazines, of their advertising. It is good advertising.

XQ. 58. Have you any doubt about its being shredded?

A. Well, if that is what you call shredded, it is shredded.

XQ. 59. Does not the word "shredded" mean anything to you?

A. As shredded wheat, yes. If you associated "shredded" and "wheat," there is only one thing that

comes to my mind, and that is that biscuit right there, Plaintiff's Exhibit 1. If I went into a hotel or restaurant and asked for Shredded Wheat, I would expect that thing right there, that I have seen for years.

If we got an order for Kellogg's Shredded Wheat, we would say that we do not have such a thing as Kellogg's Shredded Wheat. We would not argue with anybody. In the way we do business, if a man would order a case of Shredded Wheat, he would get that, Plaintiff's Exhibit 1. If the salesman were taking the order, he would not take that for Shredded Wheat. Any of our salesmen would know better. But, if an open order came to us for Shredded Wheat or Kellogg's Shredded Wheat, they would get that for Shredded Wheat, Plaintiff's Exhibit 1. In Kellogg's, we do not have any such thing as Shredded Wheat; it is a Whole Wheat Biscuit.

If an order came to us for Kellogg's Shredded Wheat, if it was an order for Shredded Wheat, and we thought that they wanted Shredded Wheat, that is what they would get, Plaintiff's Exhibit 1.

If an open order came to us for Kellogg's Shredded Wheat, we would undoubtedly send it back. I would ask him if he wanted Kellogg's Whole Wheat Biscuit or Shredded Wheat. That is probably what would happen. Until he returned the order to me as Kellogg's Whole Wheat, it would not occur to me that he would want the Kellogg product. If he said Shredded Wheat, including Kellogg's, I would think he was mistaken and wanted Shredded Wheat.

If I had the product as named on Defendant's Exhibit 5 for identification in stock and an order came for Kellogg's Shredded Wheat, I would deliver, undoubtedly, Shredded Wheat; no question about it. That is Kellogg's Shredded Whole Wheat Biscuit. Now, if a man asks for Shredded Wheat and associated the name

of Kellogg or any other name with it, I would think they wanted that, Plaintiff's Exhibit 1. And we would go back and find out what he had been getting. If it was Shredded Wheat that he used before, that is what he would get.

If we were carrying Kellogg's Shredded Whole Wheat Biscuit, and he would send in for Kellogg's Shredded Wheat, we would not fill that order. We would think he was mistaken somewhere in his mind.

I would imagine we carried the Kellogg's Shredded Whole Wheat Biscuit at some time. I have no idea. I am president of Francis H. Leggett & Company. There are thousands of orders come in there. I do not know every order that comes in. But, if there was an element of doubt as to what the man wanted, we would not ship it. If a man said Kellogg's Shredded Wheat, we would think he had that in mind, Plaintiff's Exhibit 1; so we would raise the question to find out. No experienced salesman of our own would send in an order for Kellogg's Shredded Wheat. If he wanted Kellogg's Whole Wheat Biscuit, that is what he would specify.

I do not know how many different brands of corn flakes we carry. I know there are several. We have our own brand, Premier Corn Flakes. It never has occurred to me that there was anything unfair about that, as far as the Kellogg Company was concerned.

I do not know that, in ninety-nine cases out of a hundred, when people ask for corn flakes, they mean Kellogg's. I will tell you, for your own information, that probably the first people to use the word "Flakes" in this country were the Leggett & Co. people. It used to be known as *rolled oats*, and we coined the name, or so we thought, as "Oat Flakes." So Kellogg's does not have any priority to the word "flakes." Corn flakes simply means a cereal.

The Kellogg Company may have tried to establish proprietary rights in toasted corn flakes in suing the Quaker Company. I have never seen any papers on it that I know of.

I would say there are more brands of corn flakes today than there were ten years ago. Among certain people, the non-proprietary name of the Uneeda Biscuit is soda crackers. I suppose some people call it biscuit. Oatmeal is not referred to as rolled oats by anybody who knows the difference. If you take an oat and roll it, it becomes what we call a flake; whereas oatmeal is oats ground up, some fine, some coarse, and some medium. It is not sold in a meal.

The only name that is associated with Plaintiff's Exhibit 1, in my mind, is the proprietary name, Shredded Wheat. If I were in America and asked for a non-proprietary name of Uneeda biscuit, I would say that it was a soda cracker or a saltine cracker, I guess; but, if I were in England, I would probably call it a biscuit. Soda cracker would be a non-proprietary name for Uneeda Biscuit, a name that everybody or anybody would use. I cannot suggest any name like that for Shredded Wheat Biscuit. I know it simply as Shredded Wheat. That is the only name for it, for over a period of thirty years, at least. During that time, I have never known of any other manufacturer of shredded wheat biscuit, except the Niagara Falls Company. I never heard of the Ross Biscuit. I do not think I ever heard of the Williams Biscuit. The reason I say Plaintiff's Exhibit 1 is Shredded Wheat is that that is the only concern I have heard of. Based upon my experience, I should think they have a monopoly on all biscuit in that form. The competition of corn flakes is quite different. There is no comparison between corn flakes and shredded wheat. Shredded Wheat is single. There are hundreds of brands of corn flakes.

I know only one manufacturer of Shredded Wheat; that is the Shredded Wheat Company of Niagara Falls. Their successors are still making it. Because no other manufacturer has made that for a number of years, I would not think that any other manufacturer could properly make it or lawfully make it.

I think we handle the other Kellogg's products, like corn flakes. To be positive, I would have to go and see the stock; but I will say yes. I am pretty sure of it. I will change that and say we do handle them, Kellogg's Corn Flakes.

I would also say that Francis H. Leggett & Company handle some of the other Kellogg products: Whole Wheat, Bran, Pep and several like it.

To my knowledge, I think the Kellogg Company have been quite unfair in their dealings with the grocery trade. Many years ago, we, like others, had a corn flake; and they sent out bulletins, at a time when a man named Murphy had charge of their sales, saying it was unfair for another jobber to have a corn flake. I think that was decidedly unfair. It did not leave any feeling in my mind; but I think it was unfair. I did not, at that time, regard it as wrong for wholesalers to be, at the same time, pushing a manufacturer's brand and a private brand of their own. All the people in the trade would not agree with me on that, and I do not want them to.

We carried Niagara Falls Shredded Wheat at that time. We still sell it. I could not tell you what the policy of the National Biscuit Company is as to distribution direct. I know we handle it, like many other jobbers. I do not know anything about their cutting the wholesalers out by distributing it to the retail trade direct or giving better service. I do not know what the sales of Niagara Falls Shredded Wheat are, as compared with what they were. It could have fallen off

twenty-five or thirty per cent. or increased the same amount, and I would not know it.

There is not usually a special type of jobber or wholesaler who services hotels and restaurants. Our men, some of them, have both hotels and restaurants. They generally handle that trade in the same way and at the same time. A man might call on a retail grocer at this corner and there might be a hotel customer right around the corner. I know that of my own personal knowledge

I do not know whether Francis H. Leggett & Company carry either the Kellogg's or the Niagara Falls Shredded Wheat in individual cartons. If there is a demand for Shredded Wheat in the individuals, we surely have it. I do not know whether we carry them or not; but, if there is a demand for it, we do carry it. We carry everything there is a demand for.

I have never identified Kellogg with Shredded Wheat, by any means. I have known of Kellogg's Whole Wheat product, I would say, just a few years. If anybody asked me now whether or not more than one concern was making this shredded wheat biscuit, I would still answer that there is only one Shredded Wheat, in my opinion. I would have to answer there is only one known as Shredded Wheat. My answer still would be that there is only one concern making shredded wheat biscuit.

My idea is that the words "Shredded Wheat" are a proprietary trade-mark; although the package is marked " "Reg. U. S. Pat. Off."

I do not know anything about any falling off in demand for Shredded Wheat. I would not know if it had increased or decreased thirty per cent.; although, if there was any decided falling off of Shredded Wheat, the probabilities are that the buyer of that department might say something to me about it.

I do not think I have ever seen Kellogg's Whole Wheat Biscuit advertised. I study the grocery trade business pretty carefully; but I do not think I have ever seen any newspaper or magazine advertisements of Kellogg's or any in grocery stores or any car cards or store cards.

I have seen the Niagara Falls Shredded Wheat advertised in magazines. I do not think I have ever seen any car cards or store cards or anything like that. I may have; but I do not think I have ever seen it in any store. I am not very apt to go around in retail stores.

There is no objection in our concern as a general policy, to have more than one kind of a proprietary product, as many kinds as there is a demand for. I would not think there was an objection among the grocers. I would not be surprised if grocers had testified here that they would like just one kind of corn flakes, one kind of white flour, and so forth. I think they would be very foolish to testify that way, if there was a demand for more than one. I think a man who is a good merchant is foolish to take that stand, if there is a demand for something else. I think that, as a good grocer, he should welcome any additional brands that there is a demand for.

I do not favor monopoly. I do not consider Shredded Wheat as a monopoly. If there is only one concern entitled to Shredded Wheat who may manufacture it and distribute it, I do not think that is a monopoly, Shredded Wheat. I think they are entitled to it. Shredded Wheat means only one package, to me, only one thing, and that is Plaintiff's Exhibit 1.

I would not consider it an absolute monopoly if the National Biscuit Company would be the only concern in the country that could make this pillow-shaped article and call it Shredded Wheat. I would consider

this Kellogg product, put out under the name of Whole Wheat, as an imitation. I would think that it is unfair for them to put it out as shredded wheat, Whole Wheat Biscuit. I do not think there is anything unfair as to the name, Whole Wheat Biscuit; but I certainly do with respect to the style of package. I think that is a very deliberate way of imitating Shredded Wheat. If they did not, they would have put it in some other shape. They must have thought there was some value to putting it out that way.

I would have to see both our package of corn flakes and the Kellogg Company package of corn flakes to know whether they differ in shape. If they were or were not, it would not make any difference to me. I would not regard that as an imitation of anybody else's package. I do not think that makes very much difference.

I would not call the Kellogg Whole Wheat package a fair package. In the second place, it is, in my opinion, an imitation package. If Kellogg had something good, he would give it an entirely different name. I could suggest a package for that product other than a rectangular package. For instance, put it in a round package, if you want, like the Muffetts. You could put them in that. That is one shape. It would not be so close a following of that one, the first one there, Plaintiff's Exhibit 1.

I have heard of such products as shredded codfish and shredded coconut. The original shredded codfish was Beardsley's. Shredded codfish is codfish drawn into small shreds, torn apart, in bulk and in packages. Shredded coconut is the same thing, torn apart. Neither one of them would resemble that, however, as a shredded product. You can call them shreds if you want to.

RE-DIRECT EXAMINATION.

RDQ. 215. Let us just go a little bit further in comparison of these packages. In response to Mr. Clarke's cross-examination, I think you said that you still regarded Defendant's Exhibit No. 6 and the biscuit in it as an imitation of Shredded Wheat. Now, you were examined at length upon the question of fairness and unfairness. I ask you to look at Plaintiff's Exhibit No. 147. I call your attention, in the first place, to the window on the front of it, showing the ends of the biscuit. I call your attention to the legend on one end of the package, "Kellogg's Whole Wheat Biscuit; Shredded Wheat in its most delicious form," and, on the other end, "Kellogg's Whole Wheat Biscuit, a shredded wheat product." What do you have to say as to the fairness or unfairness of that package, as compared with the plaintiff's package?

A. Taking in both sides of the panel and the window front, and the printed statement and the two sides there, I think it was intended to create the impression that it was the original Shredded Wheat, like that that you have over there, Plaintiff's Exhibit No. 1.

RE-CROSS-EXAMINATION.

THE WITNESS: I would not attach any significance at all to the word "Kellogg's" on the package. I would assume that you follow it with significance as to what I just testified to there as Shredded Wheat.

With regard to a distinction between the imitation and the thing itself, I would not look at something that was not an automobile and tell you that that was an automobile and say that it was an imitation. If it were a child's automobile and it looked like a big automobile, I would call it a toy.

With regard to Shredded Wheat Biscuit, I have always known that one, Plaintiff's Exhibit 1, as Shredded Wheat. It is what I consider a proprietary name owned by the Shredded Wheat people. I do not know Defendant's Exhibit 6 as Shredded Wheat; although I do say that the shape and the wording here would tend to deceive me that it might be the Shredded Wheat that I have always known as Shredded Wheat. I say it looks like an imitation. I would not think it was the same thing as Shredded Wheat. It certainly does look a little different to me. The shape is different, I think. And I think you will find that yours is toasted on both sides, and Shredded Wheat is not. In those respects, I regard it as tending to make one think it is Shredded Wheat, which, in my opinion, it is not.

If I got hold of the specifications of machinery, with my manufacturing ability, I could turn out a biscuit which would be a shredded whole wheat biscuit; but I would not do it that way. Legally, if I could do it. I do not think I could turn out a shredded wheat biscuit. I would not turn that out and call it shredded wheat biscuit. I can assure you of that. Even if I could, I would not.

Mr. Clarke says that the product in Defendant's Exhibit 6 is not an imitation, that it is shredded wheat biscuit. I will not concede that it is shredded wheat. If anybody asked me what a shredded wheat biscuit is, I would have to tell them that that is the only Shredded Wheat Biscuit that I know, Plaintiff's Exhibit 1. I base that on at least twenty-five or thirty years contact with that item. At one time, I was a buyer of Shredded Wheat. If anybody came to me with that and told me that was Shredded Wheat, I could not believe it, referring to Defendant's Exhibit 6.

RXQ. 235. But it looks like an imitation of shredded wheat, you say, and not shredded wheat itself?

A. I would say it was an imitation of Shredded Wheat.

RXQ. 236. By "imitation", you could conceivably mean the same thing under another name?

A. No, I would mean something that was gotten up tending to deceive, to mix the buyer up.

RXQ. 237. Suppose I told you frankly that the Kellogg Company was trying its best to make a shredded wheat biscuit; would you doubt that it could do it?

A. Well, I do not know whether they could or not. I suppose the verdict in this case will show whether you can or not. But I will say that, according to my notion, I should think they could not call it Shredded Wheat. And I think, if they called it Shredded Wheat, they were trying to get the benefit of what I call Shredded Wheat.

That one there, Plaintiff's Exhibit 1, is the only one that I know as Shredded Wheat, by seeing it, by eating it, by seeing it advertised, and by buying and selling it, and, when that comes along, Defendant's Exhibit 6, I cannot place that as Shredded Wheat. I say it looks like Shredded Wheat. It would not fool me, between the two, for a moment. Assuming that that is Kellogg's, I would know that that was not, to my mind, Shredded Wheat, that I have learned after all these years of contact.

RE-DIRECT EXAMINATION.

THE WITNESS: Kodak is a camera made by the Eastman people. If somebody else, a stranger to Eastman, manufactured a camera and called it a kodak, it would not, to my way of thinking, be a Kodak. I know what a Cadillac is, a kind of automobile. If somebody else should make a car that would look like

a Cadillac and should call it Cadillac, it would not, to my mind, be a Cadillac.

Somebody might make a biscuit out of wheat and make it look like the biscuit, for instance, in Defendant's Exhibit 6, the Kellogg package here. In my opinion, however, it would certainly not be Shredded Wheat.

The biscuit taken from Plaintiff's Exhibit 1, Shredded Wheat, has, to the best of my recollection, always been of similar appearance, the same size, shape, and appearance. That has been the same for many years, as I can remember it.

RE-CROSS-EXAMINATION.

THE WITNESS: Kodak is a camera identified with Eastman. If I would think of Kodak, I would think of two things: Eastman and camera. If I contemplated going into the camera business, I could call my camera a Ward's camera. I think I would go to the same lengths on Eastman. I would call it Kodak. And I would call it Filmo; but, if either of those two were meant, you would not call them the one thing. I know a Kodak is a camera, and I know it is an Eastman's Kodak, but it is a camera. If you would say you had your Filmo, I would know you were talking about a camera made by the Filmo people.

I think the National Biscuit Company has established a name for their own product. They have established "Uneeda" for their soda cracker. I would look upon Shredded Wheat as a descriptive name. It was a name which was intended to be a descriptive name. I think, originally, in the minds of the people that started that, they had coined the proprietary words "Shredded Wheat". I think Shredded Wheat is a proprietary brand. A descriptive name for Plaintiff's

Exhibit 1; you have it, Shredded Wheat. I think it is a proprietary brand, Shredded Wheat. The name is descriptive, that it is made of wheat. I think you could coin a descriptive word for that. Yes, you could coin another proprietary word. For a descriptive word, I would have to go to work and do a lot of things if I wanted to establish that as Shredded Wheat.

Leaving off the trade name or trade-mark, I cannot suggest any other descriptive name for that product.

RE-DIRECT EXAMINATION.

THE WITNESS: Except that it is made out of wheat. It does not tell me what kind of wheat, either. It might be soft or hard; I do not know.

RE-CROSS-EXAMINATION.

THE WITNESS: It might be whole wheat, or it might be wheat with something taken out. It could not possibly be wheat in shredded form. I do not know what process it goes through in the making of it. I have not the remotest idea.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 2

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

No. 56

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONS FOR CERTIORARI FILED { SEPTEMBER 10, 1937. MAY 23, 1938.

CERTIORARI GRANTED MAY 31, 1938.

TRANSCRIPT OF RECORD

(IN TWO VOLUMES)

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Third Circuit

No. 3801. October Term, 1935.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,

v.

KELLOGG COMPANY,
Defendant-Appellee.

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1—Carton of Shredded Wheat, Witness Wallace	I	246	...	...
2—Book Containing Samples of Cartons, Witness DeWeese	I	574	Not printed	
3—Book Containing Sample of Cartons, Witness DeWeese	I	574	Not printed	
4—Book Containing Sample of Cartons, Witness DeWeese	I	574	Not printed	
5—Kellogg Package, Waitress 172/8/11/32, Biltmore Hotel, Providence, Witness Sweet	I	326	...	...
6—Restaurant Check, Paid September 2, 1932, Biltmore Grill Room, Providence, Witness Sweet	I	327	Not printed	
7—Kellogg Package, Delivered September 2, 1932, Biltmore Hotel, Providence, Witness Sweet	I	327	...	...
8—Menu, September 2, 1932, Providence, Biltmore Hotel, Witness Sweet	I	327	Not printed	
9—Kellogg Carton, Served, Biltmore Hotel, Providence, September 1, 1932, Witness Sweet	I	328	IV	1
10—Old Style Carton, Shredded Wheat, Witness Schapansky (Saucer With Two Biscuit)	II	720*	IV	3
11—Kellogg Package, Grocery, Hamilton, Mass., Witness Sanborn	I	359*	IV	7
12—Kellogg Carton, Hawthorne Hotel, Salem, Mass., Witness Barrett	I	361*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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14—Kellogg Package, Grocery, Salem, Mass., Witness Creedon	I	364*	...	...
15—Kellogg Carton, Grocery, Castle Hill, Salem, Witness McCabe	I	366*	...	...
16—Kellogg Package, Biltmore Hotel, Providence, Witness Doyle	I	388*	...	...
17—Menu, Biltmore Hotel, Providence, Witness Doyle	I	388	Not printed	
18—Large Kellogg Carton or Case, Burlington Grocery, Burlington (Photograph to Be Substituted), Witness Sharpley	I	400*	...	...
19—Individual Kellogg Carton, Vermont Lunch, Burlington, Witness Thayer	I	406*	...	...
20—Menu, Montpelier Tavern, Burlington, Vt., Witness Bradbury	I	408*	Not printed	
21—Individual Box Shredded Wheat With Kellogg's Whole Wheat Biscuit Therein, Dorn's Cafe, Burlington, Vt., Witness Bradbury	I	409*	...	...
22—Menu, Vermont Lunch, Burlington, Vt., Witness Bradbury	I	409*	Not printed	
23—Sales Slip, Duritsky's, Uniontown, Pa., Witness White	I	423	Not printed	
24—Kellogg Carton, Duritsky's, Uniontown, Pa., Witness White	I	423	...	...
25—Sales Slip, H. L. Black Grocery, Juniata, Pa., Witness Colliflower	I	427	Not printed	
26—Kellogg Carton, H. L. Black Grocery, Juniata, Pa., Witness Colliflower	I	427	...	...
27—Sales Slip, Huber's Grocery, Altoona, Pa., Witness Goodman	I	430	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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28—Kellogg Carton, Huber's Grocery, Altoona, Pa., Witness Goodman	I	430	...	...
29—Sales Slip, Witherow Store, Altoona, Pa., Witness Miller	I	433	Not printed	
30—Kellogg Carton, Witherow Store, Altoona, Pa., Witness Miller	I	433	...	...
31—Kellogg Carton, Isaly's Dairy, Steubenville, Ohio, Witness Trescher	I	445	...	...
32—Kellogg Carton, Restaurant, East Liberty, Witness Borneman	I	446	...	...
33—Kellogg Box With Paper Attached, Isaly's Dairy, Steubenville, Ohio, Witness Keeder	I	451	...	...
34—Kellogg Carton, Kresge's, Steubenville, Ohio, Witness Keenan	I	452	...	...
35—Strip Display Sign, Showing Dish Containing Two Biscuit, Witness Nubermeyer	I	454	Not printed	
36—Glass Bowl, Witness Nubermeyer	I	454	...	...
37—Kellogg Carton, Restaurant, Cleveland, Ohio, Witness Fisher	I	463	...	...
38-A—Order Slip, Hammer Grocery, Cleveland, Witness Herron	I	464	Not printed	
38-B—Kellogg Box, Hammer Grocery, Cleveland, Witness Herron	I	464	...	...
39-A—Yellow Slip, Norris Grocery, E. Cleveland, Witness Lansdowne	I	466	Not printed	
39-B—Kellogg Carton, Norris Grocery, E. Cleveland, Witness Lansdowne	I	466	...	...
40-A—White Slip, Grocery, Lakeview Road, Cleveland, Witness Lansdowne	I	467	Not printed	
40-B—Kellogg Box, Grocery, Lakeview Road, Cleveland, Witness Lansdowne	I	467	...	...
41-A—Yellow Sales Slip, Bob's Grocery, Cleveland, Witness Schneider	I	469	Not printed	

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41-B—Kellogg Carton, Bob's Grocery, Cleveland, Witness Schneider	I	469	...	...
42-A—Sales Slip, "Y" Grocery, Cleveland, Witness Stibeling	I	470	Not printed	
42-B—Kellogg Carton, "Y" Grocery, Cleveland, Witness Stibeling	I	471	...	...
43—Carton, Kellogg's, Huff Restaurant, Cleveland, Witness Rohn	I	472	...	...
44—Kellogg Carton, Grocery Store, Detroit, Witness Bernard	I	481	...	...
45—Kellogg Carton, Cafe, Flint, Mich., Witness Harris	I	482	...	...
46—Kellogg Carton, Grocery Store, Detroit, Witness Yorke	I	483	...	...
47—Kellogg Carton, Grocery Store, Flint, Mich., Witness McClellan	I	485	...	...
48—Kellogg Carton, Grocery Store, Flint, Mich., Witness Melloure	I	486	...	...
49—Kellogg Carton Victory Lunch, Detroit	I	490	...	...
50-A—Brown Paper Bag, Grocery Store, Detroit, Witness Cowles	I	492	...	...
50-B—Kellogg Carton, Grocery Store, Detroit, Witness Cowles	I	492	...	...
51—Kellogg Carton, Grocery Store, Detroit, Witness Westphal	I	493	...	...
52—G. & H. McMillan's Catalog, Detroit, Witness MacElroy	I	494	Not printed	
53-A—Slip, Menu Card, Restaurant, Chicago, Witness Michalak	I	499	Not printed	
53-B—Kellogg Carton, Restaurant, Chicago, Witness Michalak	I	499	...	...
54—Kellogg Carton, YMCA, Chicago, Witness Loughlin	I	502	...	...
55-A—Card, on Counter, Restaurant, Chicago, Witness Holmer	I	504	Not printed	

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55-B	Kellogg Carton, Restaurant, Chicago, Witness Holmer	I	504	...	...
56	Menu Card, Restaurant, Chicago, Witness Holmer	I	504	Not printed	
57	Kellogg Carton, Grocery Store, Chicago, Witness Ristig	I	512	...	...
58	Kellogg Carton, Food Shop, Chicago, Witness Korsen	I	513	...	...
59	Kellogg Carton, Grocery Store, Chicago, Witness Rachlin	I	515	...	...
60	Kellogg Carton, Grocery Store, Chicago, Witness Ritter	I	516	...	...
61	Kellogg Package, Grocery Store, Chicago, Witness Golden	I	517	...	...
62	Kellogg Box, Davie's Lunch, Chicago, Witness Skewes	I	520	...	...
63	Kellogg Carton, Restaurant, Washington, D. C., Witness Kleeman	I	528	...	...
64	Kellogg Carton, Grocery Store, Hagerstown, Md., Witness Schmidt	I	533	...	...
65	Kellogg Box, Restaurant, Hagerstown, Md., Witness Schmidt	I	533	...	...
66	Bill From Restaurant, Hagerstown, Md., Witness Schmidt	I	533	Not printed	
67	Kellogg Box, Restaurant, Hagerstown, Md., Witness Schmidt	I	533	...	...
68	Bill, Marked One Box Shredded Wheat, Grocery Store, Chambersburg, Pa., Witness Ludwig	I	534	Not printed	
69	Kellogg Box, Grocery Store, Chambersburg, Pa., Witness Ludwig	I	535	...	...
70	Bill From Restaurant, Chambersburg, Pa., Witness Ludwig	I	535	Not printed	
71	Kellogg Box, Restaurant, Chambersburg, Pa., Witness Ludwig	I	535	...	...

PLAINTIFF'S EXHIBITS—Continued.

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72—Sales Slip From Restaurant, Baltimore, Witness Johnson	I	549*	Not printed	
73—Kellogg Carton, Restaurant, Baltimore, Witness Johnson	I	549*	...	...
74—Kellogg Package, Lull Grocery Store, Kalamazoo, Mich., Witness Doyle	I	552*	...	...
75—Kellogg Carton, Sunshine Grocery Company, Kalamazoo, Mich., Witness Doyle	I	553*	...	...
76—Kellogg Package, Grocery Store, Kalamazoo, Mich., Witness Doyle	I	553*	...	...
77—Kellogg Carton, Grocery Store, Kalamazoo, Mich., Witness Doyle	I	553*	...	...
78—Kellogg Carton, Grocery Store, Battle Creek, Witness Doyle	I	553*	...	...
79—Kellogg Carton, Grocery Store, Battle Creek, Witness Doyle	I	554*	...	...
80—Kellogg Package, Grocery Store, South Norwalk, Conn., Witness Cavalier	I	612*	...	...
81—Purchase Slip, Grocery Store, Stamford, Witness Tuttle	I	614*	Not printed	
82—Kellogg Carton, Grocery Store, Stamford, Witness Tuttle	I	614*	...	...
83—Newspaper Schedules (Summary), Witness DeWeese	I	571*	IV	11
84—Compilation of Numerous Sheets Entitled "Advertising and Promotional Expense in the United States, Canada, and England," Witness DeWeese	I	571*	IV	41
85—Paper, Letter From Walter H. Page, Witness DeWeese	I	572*	IV	43
86—List of Publications Referring to Shredded Wheat, Witness DeWeese	I	572*	Not printed	
87 to 112—Books or Albums Containing Records of Shredded Wheat Advertising, Witness DeWeese	I	572*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
113—Kellogg Package, Grocery Store, New York, Witness Bender	I	618*	...	...
114—Sheets (Two), Figures From 1927 and 1928, Tables of Amounts Expended by Advertising Shredded Wheat, Witness Oliva	I	620*	IV	45
115—Sheets (Four), Showing Expenditures by Media From 1929 to 1932, Witness Oliva	I	620*	IV	48
116—Cut-out, Floor, Witness Oliva	I	621*	Not printed	
117—Cut-out, Witness Oliva	I	621*	Not printed	
118—Cut-out, Witness Oliva	I	621*	Not printed	
119—Four Price Cards, Witness Oliva	I	621*	Not printed	
120—Eight Carton Inserts, Witness Oliva	I	621*	Not printed	
121—Window Poster, Witness Oliva	I	621*	Not printed	
122—Three Sheet Poster, Witness Oliva	I	622*	Not printed	
123—Shopping Bag, Witness Oliva	I	622*	...	...
124—Hanger Card, Witness Oliva	I	622*	Not printed	
125—Hanger Card, Witness Oliva	I	622*	Not printed	
126—Hanger Card, Witness Oliva	I	622*	Not printed	
127—Price Card, Witness Oliva	I	622*	Not printed	
128—Price Card, Witness Oliva	I	622*	Not printed	
129—Four Broadsides, Witness Oliva	I	622*	Not printed	
130—Recipe Book, Witness Oliva	I	622*	Not printed	
131—Restaurant Hanger, Witness Oliva	I	623*	Not printed	
132—Restaurant Menu, Witness Oliva	I	623*	Not printed	
133—Three Window Posters, Witness Oliva	I	623*	Not printed	
134—Window Posters, Witness Oliva	I	623*	Not printed	
135—Price Window Poster, Witness Oliva	I	623*	Not printed	
136—Panel Poster, Witness Oliva	I	623*	Not printed	
137—Postal Card, Witness Oliva	I	623*	Not printed	
138—Letter and Circular Distributed With Free Samples of Shredded Wheat, Witness Oliva	I	623*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

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139—Three Bundles of Sheets of Newspaper Schedules, Witness Oliva	I	624*	Not printed	
140—Kellogg Package, Restaurant, Newark, Witness Fagan	I	635*	...	...
141—Kellogg Package, Grocery Store, New York, Witness Mund	I	638*	...	...
142—Kellogg Package (in Part), Restaurant, Hampstead, Long Island, Witness Parnell	I	641*	...	...
143—Kellogg Package, Grocery Store, Seaford, Witness Tuthill	I	643*	...	...
144—Kellogg Package, Grocery Store, Brooklyn, Witness Evans	I	651*	...	...
145—Kellogg Box, Cafeteria, Brooklyn, Witness Evans	I	652*	...	...
146—Menu, Cafeteria, Brooklyn, Witness Evans	I	655*	Not printed	
147—Kellogg Box, Grocery Store, Witness McCrum	I	656*	...	...
148—New Carton, National Biscuit Co., Witness Oliva	I	657*	...	...
149—Transcript of Annual Sales of Shredded Wheat, Witness Dunlap	I	675*	IV	50
150—Combined Schedule of Advertising Expenditures, Witness Dunlap	I	675*	IV	51
151—Kellogg Carton, Cafeteria, New York, Witness MacKay	I	682*	...	...
152—Kellogg Package, Restaurant, Fresno, California, Witness Schapansky	II	716*	...	...
153—Kellogg Package, Black's Package Store, Fresno, California, Witness Schapansky	II	717*	...	...
154—Kellogg Carton, Grocery Store, With Sales Slip, Fresno, California, Witness Schapansky	II	718*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
154-A—Kellogg Carton, Hotel Berry, Coffee Shop, Sacramento, California, Witness Sowles	II	727*	...	...
155—Kellogg Carton, Grocery Store, Sacramento, California, Witness Sowles	II	727*	...	...
156—Menu Card, Smith's Coffee Cup, Stockton, California, Witness Burkner	II	732*	Not printed	
157—Kellogg Carton, Smith's Coffee Cup, Stockton, California, Witness Burkner	II	732*	...	...
158—Kellogg Carton, Foster's Lunch System, San Francisco, California, Witness Baird	II	736*	...	...
159—Kellogg Carton, Grocery, Berkeley, California, Witness MacCool	II	739*	...	...
160—Kellogg Carton and Purchase Slip, Miller's Store, Witness Fatjo	II	743*	...	...
161—Kellogg Package, Santa Clara, California, Witness Van Artsdale	II	767*	...	...
162—Menu, Steamship Line, Ross, California, Witness Mears	II	1196*	Not printed	
163—Menu, Ship Monterey, Ross, California, Witness Mears'	II	1196*	Not printed	
164—Menu Card, Restaurant Owner, San Francisco, California, Witness Dubac	II	1235*	Not printed	
165—Kellogg Carton, Large Size, Burlingame, California, Witness West	II	1190*	...	...
166—Kellogg Carton, Burlingame, California, Witness West	II	1190*	...	...
167—Kellogg's Window Display Carton, Burlingame, California, Witness West	II	1191*	...	...
168—Kellogg's Window Display Carton, Burlingame, California, Witness West	II	1191*	...	...
169—Kellogg Carton, Restaurant Owner, Witness Lee	II	1255*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
170—Menu Card, With Paper Attached, Restaurant owner, Witness Fierstine	II	1259*	Not printed	
171—Kellogg Carton, Witness Cooper	II	776*	...	...
172—Kellogg's Wheel of Knowledge, San Diego, California, Witness Cooper	II	776*	Not printed	
173—Kellogg Carton, Purchaser, San Diego, California, Witness Cooper	II	777*	...	...
174—Kellogg Carton, Purchaser, Los Angeles, California, Witness MacFarland	II	783*	...	...
175—Kellogg Carton, Los Angeles, California, Witness MacDuffie	II	787*	...	...
176—Kellogg Carton, Purchaser, Los Angeles, California, Witness MacDuffie	II	787*	...	...
177—Kellogg Carton, Purchaser, Glendale, California, Witness Anderson	II	792*	...	...
178—Kellogg's Individual Carton, Witness Lierley	II	798*	...	...
179—Kellogg Carton and Cash Slip, Witness Ruch	II	802*	...	...
180—Clipping, Brownwood Bulletin, Kellogg Sales, Witness Wilde	II	1333*	Not printed	
181—Fort Worth Grocery Co., Price-List, Witness Wilde	II	1339*	Not printed	
182—Kellogg Carton, Witness Bullock	II	882*	...	...
183—Kellogg Package, Witness Burke	II	884*	...	...
184—Kellogg Carton. Cellophane Front, Witness Mahaffey	II	889*	...	...
185—Kellogg Carton, Witness Tutt	II	900*	...	...
186—Kellogg Carton, Witness Reynolds	II	902*	...	...
187—Sales Slip, Witness Staloup	II	904*	Not printed	
188—Kellogg Carton, Witness Staloup	II	904*	...	...
189—Slip of Paper, Witness Hunsaker	II	907*	Not printed	
190—Kellogg Carton. Witness Hunsaker	II	907*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

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191—Kellogg Package. Witness Guthrie	II	936*	...	...
192—Kellogg Carton, Witness Guthrie	II	938*	...	...
193—Menu Card, Witness Guthrie	II	938*	Not printed	
194—Page of the Wichita Independent, Witness Guthrie	II	938	Not printed	
195—Kellogg Package, Witness Branson	II	943*	...	...
196—Purchase Slip, Witness Branson	II	943*	Not printed	
197—Page of the Winona Republican Herald, Dated January 20, 1933, Witness Kolvoord	III	1411*	Not printed	
198—Newspaper Advertisement of the Decatur Home Stores, Witness Kolvoord	III	1415*	Not printed	
199—Old-Style Kellogg Folder Cut, Witness Kolvoord	III	1415*	Not printed	
200—Newspaper Advertisement, Reading Eagle, April 28, 1932, Witness Kelly	III	1443*	Not printed	
201-A—Newspaper Clipping, Kalamazoo Gazette, Witness Mahan	III	1476*	Not printed	
201-B—Sheet, Containing Same, Kalamazoo Gazette, March 2, 1933; Newspaper Clipping, Witness Mahan	III	1476	Not printed	
202—Price-List Put Out by the Kellogg Company, Dated February 1, 1933, Witness Mahan	III	1476*	IV	53
203—Paper Showing Picture of Kellogg's Whole Wheat Biscuit Containing Two Biscuit in a Dish to Be Addressed to Store Managers. Witness Mahan	III	1477	IV	55
204—Tear Sheet From the Battle Creek, Michigan, Moon Journal, October 21, 1932, Witness Mahan	III	1477	Not printed	
205—Hand-Bill Used by I. G. A. Stores, Witness Mahan	III	1477	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

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206	Sheet From the News Telegraph, Dated March 10, 1933, Sharon, Pa., Witness Ander	III	1638	Not printed	
207	Page Twenty-nine of the Pittsburgh Press, Dated March 25, 1932	III	1638	Not printed	
208	Package of Hat Cleaner, Witness Rush	III	1727	...	...
209	Package of Camel Cigarettes, Witness Rush	III	1728	...	...
210	Copy of the Reading Eagle, May 5, 1932, Witness Miller	III	1846*	Not printed	
211	Page of the Reading Eagle, February 4, 1932, Witness Miller	III	1846*	Not printed	
212	Sheet Containing Ad of the Kellogg Company of the Reading Eagle, May 12, 1932, Witness Miller	III	1846*	Not printed	
213, 214	(Numbers Skipped, No Such Exhibits Marked.)				
215	Package Resembling Plaintiff's Exhibit No. 166 (a Kellogg Shredded Whole Wheat Biscuit Carton), Witness Hopkins	III	1871*	...	...
216	Package Resembling Plaintiff's Exhibit No. 165, Witness Hopkins	III	1872*	...	...
217	Cardboard Liner, Used by Kellogg Company in Whole Wheat Biscuit Cartons, Witness Hopkins	III	1872*	...	...
218	Easel or Study Advertising, Witness Hopkins	III	1874*	Not printed	
219	Sheet of the Reading Eagle, March 31, 1932, Witness Hopkins	III	1875*	Not printed	
220	Sheet of the Reading Eagle, March 5, 1932, Witness Hopkins	III	1875*	Not printed	
221	Sheet of the Reading Eagle, March 17, 1932, Witness Hopkins	III	1875*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
222—Copy of Modern Merchant and Grocery World, Witness Hopkins	III	1875*	Not printed	
223—Cash-and-Carry Bulletin, Witness Hopkins	III	1875*	Not printed	
224—William Montgomery & Co., Price-List, Witness Hopkins	III	1876*	Not printed	
225—Copy of Modern Merchant and Grocery World, February 9, 1933, Witness Hopkins	III	1876*	Not printed	
226—Standard Government Form of Bid, Witness Hopkins	III	1879	Not printed	
227—Price Bulletin of Provisional Contracts, Witness Hopkins	III	1879	Not printed	
228—Copies of Requisitions, Consisting of Six Sheets, Witness Ruckman	III	1912*	Not printed	
229—Advertisement, Minneapolis Journal, April 30, 1932, Witness Ruckman	III	1940*	Not printed	
230—Breakfast Menu, Hotel Paxton Coffee Shop, Witness Dubois	III	1947*	Not printed	
231—Menu, Main Dining-Room, Hotel Paxton, Witness Dubois	III	1947*	Not printed	
232—Room-Service Menu, Hotel Paxton, Witness Dubois	III	1947*	Not printed	
233—Board of Control Specifications, Witness Sawyer	III	1965*	Not printed	
234—Consolidation Agreement, Dated May 19, 1890, Witness Malone	II	958*	Not printed	
235—Copy of Certificate of Incorporation, Dated May 7, 1900, Witness Malone	II	978	Not printed	
236—Letter, Division Passenger Agent, Atchison, Topeka & Santa Fe Railway Co., April 13, 1933, Witness Malone	II	979	Not printed	
237—Certified Copy Resettled Final Decree in Shredded Wheat Company Against Humphrey Cornell Company	III	2005	IV	57

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
238	Menu Card, The Fenway Inn	I	251	Not printed	
239	Photographs (24), Illustrating Plaintiff's Operations	I	271	IV	63
240	[illegible] Diamond-Shape Biscuit	I	271	Not printed	
240-A	Photograph of Two Biscuit of Plaintiff's Exhibit No. 240	III	2019	IV	111
241	Box of Cone-Shaped Biscuit	I	272	...	...
241-A	Photograph of Four Biscuit of Plaintiff's Exhibit No. 241	III	2019	IV	113
242	Box of Doughnut-Shaped Biscuit	I	273	...	...
242-A	Photograph of Two Biscuit of Plaintiff's Exhibit No. 242	III	2019	IV	115
243	Box of 3-inch Round-Cut Biscuit	I	274	...	...
243-A	Photograph of Two Biscuit of Plaintiff's Exhibit No. 243	III	2019	IV	117
244	Box of 2-inch Round-Cut Biscuit	I	274	...	...
244-A	Photograph of Three Biscuit of Plaintiff's Exhibit No. 244	III	2019	IV	119
245	Box of 3-inch Round-Moulded Biscuit	I	275	...	...
245-A	Photograph of Two Biscuit of Plaintiff's Exhibit No. 245	III	2019	IV	121
246	Box of Biscuit Baked in Automatic Machine	I	276	...	...
247	Sheet Tampa Morning Tribune, July 9, 1932	I	303	IV	123
248	Sheet The Tampa Daily Times, July 8, 1932	I	303	IV	125
249	Sheet The Saint Paul Pioneer Press, April 26, 1933	I	304	Not printed	
250	Digest of Style for Government Printing	I	304*	...	...
251	Stipulation Re Depositions in Connecticut Case	I	306	IV	127
252	Four U. S. Trade-mark Registrations of Plaintiff	I	315	IV	129

*Formal offer and admission of exhibit in evidence deleted in condensing record.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
	No. 85,186, January 30, 1912	I	315	IV	129
	No. 178,725, January 15, 1924	I	315	IV	133
	No. 216,593, August 17, 1926	I	315	IV	131
	No. 213,456, May 25, 1926	I	315	IV	135
253	Twenty-seven State Registrations of Trade-mark Shredded	I	315	Not printed	
254	Certificate of Incorporation, Natural Food Co.	II	1004	Not printed	
255	Certified Court Order Supreme Court, New York, Authorizing Change of Name to Shredded Wheat Company	II	1005	Not printed	
256	Certificate of Organization National Biscuit Co.	II	1005	Not printed	
257	Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
258	Second Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
259	Third Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
260	Bill of Sale, 30th April, 1930, From Shredded Wheat Company to National Biscuit Co.	II	1005	Not printed	
261	Carton Purchased at Kenosha on December 24, 1932	III	2018	...	...
262	Sketches A and B Used in Cross-Examination of Witness Penty	II	1127	Not printed	
263	Report on Hot and Cold Cereals	II	1137	Not printed	
264	Report on Hot and Cold Cereals	II	1137	Not printed	
265	Slip Referred to by Witness Poole	II	1145	Not printed	
266	Package of Plaintiff's Reprocessed Biscuit	III	2018	...	...
267	Package of Plaintiff's Reprocessed Biscuit	III	2018	...	...
268	Package of Plaintiff's Biscuit, Part Reprocessed	III	2018	...	...
269	Bundle of Photographs	III	2018	Not printed	

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
270—Package Like Plaintiff's Exhibit 2, Kellogg's Shredded Whole Wheat Biscuit	III	2018	...	...
271—Defendant's Carton Put Out September, 1932	III	2018	...	...
272—Carton Kellogg's Shredded Whole Wheat	III	2018	...	...
273—Decree in Case of Natural Food Co. v. Bulkley, et al.	III	2020	Not printed	
274—Carton Champion Flake Butters	III	2024	...	...
275—Dupont Company Price-List on Cellophane	III	2036	Not printed	

PLAINTIFF'S EXHIBITS UNDER RULE 46.

A—Publication of the Cyrus Curtis Pub. Co.	III	2019	Not printed	
B—Opinion of the Court of Appeals in Williams Case	III	2020	Not printed	
C—Decree of Court of Appeals in Williams Case	III	2020	Not printed	

DEFENDANT'S EXHIBITS.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
1—Letter of Mr. Sweet	I	340	Not printed	
2—Letter of Mr. Sweet	I	340	Not printed	
3-A—Letter of Mr. Sweet	I	340	Not printed	
3-B—Letter of Mr. Sweet	I	340	Not printed	
4—Kellogg Carton, Witness Hamilton	I	357*	...	...
5—Kellogg Carton, Witness Hamilton	I	357*	...	...
6—Package Kellogg Whole Wheat Biscuit	I	495*	...	...
7—Slip of Witness' Signature Torn Off Plaintiff's Exhibit No. 54, Witness Loughlin	I	502*	Not printed	
8—Box or Carton, Kellogg's, Witness Dodge	I	531*	...	...
9—Letter and Enclosure; News Release, Re: Suit Against Kellogg, Witness DeWeese	I	604	IV	137
10—Newspaper Article, Filing of Suit by Shredded Wheat Company, Witness DeWeese	I	604	IV	138
11—Quaker Muffetts Package, Witness Weinstock	I	667*	...	...
12—Package, Codfish, Witness West	II	1194*	...	...
13—Package, Baker's Cocoanut, Witness West	II	1194	...	...
14—Package, Kellogg's Whole Wheat Flakes, Witness West	II	1194*	...	...
15—Package, Kellogg's Muffetts, Witness West	II	1194	...	...
16—Triscuit Carton, Witness Powell	II	1266	...	...
17—Wheat Krumbles Carton, Witness Thompson	II	1275*	...	...
18—Poster, Wheel of Knowledge, Witness Thompson	II	1277*	Not printed	
19—Poster, Jumbo Kellogg Carton, Witness Thompson	II	1277*	Not printed	
20—Sheets, Ads, Witness Thompson	II	1278*	Not printed	
21—Kellogg's Corn Flakes, Witness Thompson	II	1285	...	...
22—Kellogg's All-Bran, Witness Thompson	II	1285	...	...
23—Kellogg's Pep, Witness Thompson	II	1285	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
24—Kellogg's Wheat Krumbles, Witness Thompson	II	1285	...	...
25—Kellogg's Rice Krispies, Witness Thompson	II	1285	...	...
26—Kellogg's Kaffee Hag, Witness Thompson	II	1285	...	...
27—Kellogg's Wheat Krispies, Witness Thompson	II	1285	...	...
28—(Number Skipped, No Such Exhibit Marked.)				
29—Kellogg's Whole Wheat Flakes, Witness Thompson	II	1285	...	...
30—Package of Tear Sheets From San Francisco and Oakland Papers	II	775*	Not printed	
31—Package of Kellogg's All-Bran, Witness Anderson	II	1339*	...	...
32—Package of Post's Whole Bran, Witness Anderson	II	1339*	...	...
33—Package of Uneeda Graham Crackers, Witness Anderson	II	1339*	...	...
34—Package of Brown's Graham Crackers, Witness Anderson	II	1339*	...	...
35—Package of Sunshine Dutch Rush, Witness Anderson	II	1339*	...	...
36—Package of Holland Rusk, Witness Anderson	II	1339*	...	...
37—Package of Brown's Vanilla Wafers, Witness Anderson	II	1339*	...	...
38—Package of Uneeda Vanilla Wafers, Witness Anderson	II	1339*	...	...
39—Package of Van Camp's Spaghetti, Witness Anderson	II	1340*	...	...
40—Package of Thrift Spaghetti, Witness Anderson	II	1340*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
41—Package of Swans Down Biscuit Mix, Witness Anderson	II	1340*	...	...
42—Package of La France Biscuit Flour, Witness Anderson	II	1340*	...	...
43—Package of Uneeda Assorted Biscuit, Witness Anderson	II	1340*	...	...
44—Package of Sunshine Specialties Assortment, Witness Anderson	II	1340*	...	...
45—Package of Baker's Cocoanut, Witness Anderson	II	1340*	...	...
46—Package of Premier Spaghetti, Witness Anderson	II	1340*	...	...
47—Package of Van Camp's Kidney Beans, Witness Anderson	II	1340*	...	...
48—Package of Premier Beans and Pork, Witness Anderson	II	1340*	...	...
49—Package of Van Camp's Spaghetti, Witness Anderson	II	1340*	...	...
50—Package of LaChoy Shredded Sprouts, Witness Anderson	II	1340*	...	...
51—Package of Van Camp's Hominy, Witness Anderson	II	1340*	...	...
52—Package of Beech-Nut Pork and Beans, Witness Anderson	II	1340*	...	...
53—Package of Battle Creek Fig and Bran, Witness Anderson	II	1340*	...	...
54—Package of Van Camp's Hominy, Witness Anderson	II	1340*	...	...
55—Package of Beech-Nut Spaghetti, Witness Anderson	II	1340*	...	...
56—Package of Baker's Sweet Potato Shredlets, Witness Anderson	II	1340*	...	...
57—Package of Dunham's Original Shred Cocoanut, Witness Anderson	II	1340*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
58	Package of Baker's Cocoanut Shredded; Witness Anderson	II	1340*	...	...
59	Package of National Shredded Wheat Biscuit, the Larger Individual Carton, Witness Baskett	II	1342*	...	...
60	Package of National Shredded Wheat Biscuit, the Smaller Individual Carton, Witness Baskett	II	1342*	...	...
61	Photograph of the Interior of the Wyatt Self-Service Store, Witness Baskett	II	1344	Not printed	
62	Package of Post Toasties, Corn Flakes	II	905*	...	...
63	Package of Genuine Egg Noodles	II	905*	...	...
64	Postal Card of Clover Farms Store, Reads, "Valuable Coupon," Witness Walters	III	1402*	Not printed	
65	Jumbo Carton Display, Witness Kolvoord	III	1405*	...	...
66	Display Piece With Stand, Picturing a Saucer With Two Biscuit, Witness Kolvoord	III	1406*	...	...
67	Grocers' Display Piece Which Holds Carton Kellogg's Whole Wheat Biscuit, Witness Kolvoord	III	1406*	...	...
68	Sheet of Day Advertisements, Winona Republican Herald, January 20, 1933, Witness Kolvoord	III	1416	Not printed	
69-A and 69-B	Advance Sales Notice, Consisting of Two Sheets, Witness Chapelle	III	1418*	Not printed	
70	Package, Kellogg's, Witness Hatfield	III	1444*	...	...
71	Package of Shredded Wheat, Witness Hatfield	III	1444*	...	...
72	Individual Kellogg Package, Witness Tyler	III	1446*	...	...
73	Mat, Used in Newspapers in Printing, Witness Kolvoord	III	1449*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
74—Menu, Referring to Kellogg Carton, Witness Miller	III	1454	...	...
75—Small Individual Kellogg Package, Witness Gray	III	1529*	...	...
76—Kellogg Individual Package, Witness Gray	III	1529*	...	...
77—Older Package of Muffetts, Witness Lewis	III	1534*	...	...
78—Newer Package of Muffetts, Witness Lewis	III	1534*	...	...
79—Copy of Bid, Woman's Relief Corps Home, Witness Lewis	III	1536*	IV	142
80—Kellogg Package	III	1631	...	...
81—Shredded Wheat Package	III	1631	...	...
82—Forty-inch Advertisement, Martins Ferry, Witness Ander	III	1632*	Not printed	
83—Large Set-up Window Photograph Display, Witness Ander	III	1633*	...	...
84—A Smaller Set-up Window Photograph Display, Witness Ander	III	1633*	...	...
85—Copy of Bid, Tubercular Sanitarium, Cresson, Pennsylvania (Department of Health)	III	1641*	Not printed	
86—Copy of Bid, Specifies Kellogg's Whole Wheat Biscuit, Tubercular Sanitarium, Cresson, Pa., Witness Ander	III	1642*	Not printed	
87—Copy of Bid, Pennsylvania Soldiers' and Sailors' Home, Witness Ander	III	1642*	Not printed	
88—Package, Rippled Wheat, Witness Bell	II	954	...	...
89 and 90—Kellogg Deal Price Cards, Witness Mazman	III	1750*	...	...
91—Ross Carton, Witness Witherell	III	1764*	...	...
92—Chester Lowry's Blue Book Price List, Witness Bickham	III	1801*	Not printed	
93—Camden Price List, Lowry's Blue Book, Witness Bickham	III	1801*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
94	Advertisement From Reading Eagle, February 4, 1932, Witness Miller	III	1841*	Not printed	
95	Letters From National Biscuit Company to Jobbers, December 1, 1931, Witness Miller	III	1842*	IV	143
96 and 97	Two Circulars Carrying Advertisements of Kellogg's Whole Wheat Biscuit, Witness Moyer	III	1850*	Not printed	
98	Story Book of Games, Witness Hopkins	III	1863*	Not printed	
99	Wheel of Knowledge Chart, Witness Hopkins	III	1863*	Not printed	
100-A	File Copy of Standard Government Form of Bid, for Use by Navy Department, for Supply Department, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866	Not printed	
100-B	Standard Government Form of Bid, by Navy Department, U. S. Navy Yard, Washington, D. C., Witness Hopkins	III	1866	Not printed	
101	Standard Form of Bid, Dated January 12, 1933, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866	Not printed	
102	Federal Standard Stock Catalogue, N-C-191, Witness Hopkins	III	1868	Not printed	
103	Small Kellogg Carton, Purchased on Dining Car, Northwestern Railroad	III	1944*	...	...
104	Letter to the Kellogg Co. From the F. H. Cobb Co., Inc., Cortland, N. Y., Dated March 22, 1933, an Addendum to the Testimony of Mr. A. J. Twentyman	III	1952*	Not printed	
105	Case Used for Packing National Shredded Wheat, Witness Sawyer	III	1957*	...	...
106	Sketch, Diagram of Threads, Witness Malone, Made by Mr. Clarke	II	963	Not printed	

*Formal offer and admission in exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
107	Sketch Diagram of Threads, Made by Witness Malone	II	963*	Not printed	
108	Photostatic Copy of Ad in the Denver Republican, Dated March 11, 1894, Witness Hurd	II	974	IV	145
109	Certificate of Incorporation Colorado Shredded Wheat, January 25, 1895, Witness Hurd	II	977*	Not printed	
110-A and 110B	Government Bid, Fort Logan, Dated April 11, 1933, Witness Copeland	III	1989*	Not printed	
111	Package of Egypt Stick Candy	III	1990	...	...
112	Second Sheet, Page Five, Denver Times, March 17, 1894	III	1990	Not printed	
113	Second Sheet, Page Five, Denver Times, March 10, 1894	III	1990	Not printed	
114	Third Sheet, Page Eight, Daily News, Denver, Colorado, July 17, 1895	III	1990	Not printed	
115	Fourth Sheet, Page Eight, Daily News, Denver, Colorado, July 14, 1895	III	1990	Not printed	
116	Fifth Sheet, Page Eight, Daily News, Denver, Colorado, July 27, 1895	III	1990	Not printed	
117	Sixth Sheet, Page Eight, Daily News, Denver, Colorado, July 7, 1895	III	1991	Not printed	
118	Seventh Sheet, Page Eight, Daily News, Denver, Colorado, July 10, 1895	III	1991	Not printed	
119	Eighth Sheet, Page Eight, Daily News, Denver, Colorado, July 28, 1895	III	1991	Not printed	
120	Copy of Record in the Case of Shredded Wheat vs. The Humphrey Cornell Co. and Frederick H. Towne, Witness Ross	III	1992	Not printed	
121	Photostatic Certified Copy of Majority Opinion of the U. S. Circuit Court of Appeals, Witness Ross	III	1992	IV	147
122	Copy of Petition for Rehearing, Witness Ross	III	1993	IV	159

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
123—Kellogg Carton Used From About 1910 to 1912, Witness Ross	III	1999*	...	...
124—Kellogg Carton Used From 1913 to 1914 to Some Time in 191[illegible] Front Panel of Carton Entitled Kellogg's Toasted Wheat Biscuit, Witness Ross	III	2000*	...	...
125—Kellogg Carton Used From 1915 Until 1918 (About) or 1919, Front Face Reads "Copyright 1910 by Kellogg's Toasted Corn Flakes Co.," Witness Ross	III	2000*	...	...
126—Certified Copy of Mandate, Witness Ross	III	2005	IV	163
127—Shredded Wheat Company Chart, "Educational Exhibit of Shredded Wheat Biscuit"	I	288*	Not printed	
128—Book of Labels Illustrative of Jordan Testimony	II	1002	Not printed	
129—Book of 1929 Newspaper Advertising	II	1003	Not printed	
129-A—Book of 1928 Newspaper Advertising	II	1003	Not printed	
129-B—Book of 1929 Newspaper Advertising	II	1003	Not printed	
129-C—Book of 1930 Newspaper Advertising	II	1004	Not printed	
129-D—Book of 1931 Newspaper Advertising	II	1004	Not printed	
129-E—Book of 1932 Newspaper Advertising	II	1004	Not printed	
130—Board Containing Samples of Defendant's Cartons, Marked A to R	II	1006	...	...
131—Holder Containing Kellogg Poster Advertising Before Suit Brought	II	1016	...	...
132—Packages Prepared by Witness Jordan	II	1016	...	...
133—Form Letter to Newspapers Re Kellogg Advertisements	II	1016	Not printed	
134—Five Bundles of Retailer Advertisement of Kellogg's Whole Wheat Biscuit	II	1016	Not printed	
135—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat Biscuit	[illegible]	1016	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
136—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat	II	1017	Not printed	
137—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat	II	1017	Not printed	
138—Batch of Advertisements of Plaintiff	II	1025	Not printed	
139—Odd Advertisements of Plaintiff in Woman's Home Companion	II	1035	Not printed	
140—Plaintiff's Pamphlet "Uneeda"	II	1035	Not printed	
141—Standard Government Form of Bid, Department of Interior	II	1043	Not printed	
142—Federal Specification for Cereals (Breakfast Foods)	II	1043	Not printed	
143—Defendant's Bid Naval Supply Department, Norfolk, Va., May 16, 1933	II	1044	Not printed	
144—Defendant's Bid Naval Supply Depot, Norfolk, Va., March 15, 1933	II	1045	Not printed	
145—Samples of Defendant's Early Advertisements of Kellogg's Toasted Wheat Biscuit	II	1047	Not printed	
146—Early Carton of Kellogg's Shredded Whole Wheat Biscuit	II	1048	...	...
147—Blank Carton Sanitas Toasted Corn Flakes	II	1050	...	...
148—Advertisements Kellogg's Shredded Krumbles	II	1052	Not printed	
149—Carton of Kellogg's Krumbles, Shredded Whole Wheat	II	1053	...	...
150—Carton Kellogg's Wheat Krumbles	II	1053	...	...
151—Carton Kellogg's Wheat Krumbles (U. S.)	II	1058	...	...
152—Letter May 3, 1933, N. A. Relfrich to Kellogg's Sales Co.	II	1059	Not printed	
153—Proposal April 8, 1933, to Navy Purchasing Officer, New York	II	1060	Not printed	
154—Price Bulletin of Provision Contract for May, 1933, Port of New York	II	1061	Not printed	

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
155—Bid March 3, 1933, Navy Purchasing Office, New York	II	1062	Not printed	
156—Bid June 8, 1932, Naval Air Station, Lakehurst, N. J.	II	1062	Not printed	
157—Bid February 23, 1933, Selfridge Field, Mich.	II	1063	Not printed	
158—Bid May 9, 1933, West Point, N. Y.	II	1063	Not printed	
159—Invitation for Bid August 22, 1932, Veterans Administration Home, National Military Home, California	II	1064	Not printed	
160—Invitation for Bids, October 25, 1932, Veterans Administration, Washington, D. C.	II	1064	Not printed	
161—Invitation for Bids, October 25, 1932, U. S. Marine Hospital, St. Louis, Mo.	II	1064	Not printed	
162—Bid March 21, 1932, Fort Benjamin Harrison, Ind.	II	1065	Not printed	
163—Bid September 8, 1932, Fort Hoyle, Md.	II	1065	Not printed	
164—Invitation for Bids, May 19, 1932, U. S. Property and Disbursing Officer, Trenton, N. J.	II	1065	Not printed	
165—Bids January 9, 1932, The Army War College, Washington, D. C.	II	1065	Not printed	
166—Bid August 18, 1932, Fort Moultrie, S. C.	II	1066	Not printed	
167—Bid November 11, 1932, Langley Field, Va.	II	1066	Not printed	
168—Bid January 19, 1933, Fort Crook, Neb.	II	1066	Not printed	
169—Bid March 25, 1933, Fort McClellan, Ala.	II	1066	Not printed	
170—Bid April 4, 1932, Fort Mason, San Francisco, Cal.	II	1066	Not printed	
171—Bid July 21, 1931, Fort Warden, Wash.	II	1067	Not printed	
172—Bid July 13, 1932, Quartermaster Supply Officer, Brooklyn, N. Y.	II	1067	Not printed	
173—Bid Marine Barracks, Navy Yard, Portsmouth, N. H.	II	1068	Not printed	
174—Invitation for Bids, Pennsylvania Department of Health, Sanitarium No. 2, Cresson, Pa.	II	1068	Not printed	

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
175	Specification for Cereals, Pa., December 10, 1932	II	1069	Not printed	
176	Specifications State of South Dakota	II	1069	Not printed	
177	Request for Bids, December 19, 1932, Maine	II	1070	Not printed	
178	Proposal, Rockland State Hospital, Orangeburg, N. Y.	II	1070	Not printed	
179	Invitation for Bids, March 13, 1933, Tennessee	II	1070	Not printed	
180	Order April 1, 1933, Wassaic State School, Wassaic, N. Y.	II	1071	Not printed	
181	Order January 16, 1933, Newark State School, Newark, N. J.	II	1071	Not printed	
182	Order March 23, 1933, Great Meadow Prison, Comstock, N. Y.	II	1071	Not printed	
183	Order January 14, 1933, Willard State Hospital, Willard, N. Y.	II	1071	Not printed	
184	Specifications Division of Purchases and Supplies, Springfield, Ill.	II	1072	Not printed	
185	Individual Carton Kellogg's Whole Wheat Biscuit	II	1072	...	...
186	Large Carton Kellogg's Whole Wheat Biscuit	II	1072*	...	...
187	Menu Card, Chicago, Milwaukee, St. Paul and Pacific	II	1074	Not printed	
188	Menu Card, Hotel Fort Shelby, Detroit, Mich.	II	1075	Not printed	
189	Bid March 13, 1933, Naval Supply Depot, Norfolk, Va.	II	1088	Not printed	
190	Bid February 11, 1933, U. S. Marine Corps, Navy Building, Washington, D. C.	II	1089	Not printed	
191	Bid of Price Brothers, May 18, 1933, Naval Home, Philadelphia, Pa.	II	1091	Not printed	
192	Plaintiff's Individual Carton, Large Biscuit	II	1098	...	...
193	Blueprint Diagrammatic Sketch Defendant's Mill	II	1107	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
194	Photographs (13) Illustrating Defendant's Operation	II	1111	Not printed	
195	Sample of Shreds First Time Through Rolls	II	1116	...	...
196	Sample of Shreds Second Time Through Rolls	II	1116	...	...
197	Sample of Shreds Third Time Through Rolls	II	1116	...	...
198	Carton of Fifteen Biscuit at 400 Degrees 1½ Hours	II	1117	...	...
199	Sample of Biscuit With Brown Band	II	1122	...	...
200	Sample of Biscuit With Green Band	II	1122	...	...
201	Sample of Biscuit With K Stamped Thereon	II	1123	...	...
202	Sample of Biscuit With Red Food Coloring	II	1123	...	...
203	Sample of Biscuit With Brown Food Coloring	II	1124	...	...
204	Sample of Biscuit With Green Strip on Top	II	1124	...	...
205	Sample of Biscuit With Green Strip on Bottom	II	1124	...	...
206	Sample of Biscuit With K Impressed Thereon	II	1125	...	...
207	Sample of Biscuit With Brown Stripes	II	1125	...	...
208	Sample of Biscuit With K Impressed Thereon	II	1125	...	...
209	Biscuit as Shown, Sketch A Attached to Exhibit 262	II	1130	...	...
210	Sample Diamond Shape Biscuit	II	1179	...	...
211	Sample Diamond Shape Biscuit	II	1179	...	...
212	Sample Biscuit With Band of Paper	II	1139	...	...
213	Sample Biscuit With Tag	II	1140	...	...
214	Sample Biscuit Enclosed in Envelope	II	1140	...	...
215	Large Card Carrying Samples of Plaintiff's and Defendant's Cartons	II	1151*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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216	Large Card Carrying Samples of Cartons of Defendant's Cereal Products	II	1151*	...	...
217	Defendant's Shipping Container Case No. 360	II	1152	...	...
218	Defendant's Shipping Container Case No. 324	II	1152	...	...
219	Window Display Card of Plaintiff	II	1152	...	...
220	Samples of Defendant's Cartons	II	1153	...	...
221	Photographs (2) of Store Displays	II	1153	Not printed	
222	Letter June 2, 1932, C. K. Brace, Manager, National Biscuit Co., Denver, Col., to All Jobbers	II	1154	IV	169
223	Chart of Kellogg's Shredded Wheat Biscuit Cartons	II	1155	Not printed	
224	Three Cartons Kellogg's Shredded Krumbles	II	1155	...	...
225	Advertisement Chicago Daily Tribune, June 2, 1928	II	1155	Not printed	
226	Advertisement The Battle Creek Moon Journal, May 25, 1922	II	1156	Not printed	
227	Open Letter of Plaintiff to "Dear Madam"	II	1157	Not printed	
228	Carton Complimentary Samples Shredded Whole Wheat	II	1157	...	...
229	Pamphlet Fifty Ways of Serving Shredded Whole Wheat	II	1157	Not printed	
230	Recipes for New and Delicious Energy Dishes	II	1157	Not printed	
231	Carton Kellogg's Battle Creek Shredded Wheat	II	1158	...	...
232	Registration No. 276,592, Battle Creek, Shredded Wheat	II	1158	Not printed	
233	Chamber's Journal, January 27, 1900	II	1158	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

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234	File Wrapper and Contents, Trade-mark Registration No. 178,725, Shredded Wheat	II	1159	IV	171
235	File Wrapper and Contents, Trade-Mark Registration No. 213,456 Shredded Wheat	II	1159	IV	181
236	Book of Trade-Mark Registrations of Plaintiff	II	1160	IV	193
237	Collection of Correspondence	II	1161	Not printed	
238	Samples of Shredded Paper, Shredded Gelatine and Shredded Cellophane	II	1161	...	...
239	Reproduction of Kellogg Biscuit Prior to 1920	II	1162	Not printed	
240, 240-A, 240-B	Box of Split Peas, Lima Beans and Pop Corn, With Cellophane Windows	II	1163	...	...
241	Advertisements in Grocery World, Five Sheets	II	1165	Not printed	
242	Perky U. S. Patent No. 548,086, October 15, 1895	II	1166	IV	207

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	Perky U. S. Patent No. 520,496, May 29, 1894	II	1166	V	5
	Perky U. S. Patent No. 532,286, January 8, 1895	II	1166	V	11
	Perky U. S. Patent No. 532,480, January 15, 1895	II	1166	V	15
	Perky U. S. Patent No. 532,481, January 15, 1895	II	1166	V	21
	Perky U. S. Patent No. 532,697, January 15, 1895	II	1166	V	25
	Perky U. S. Patent No. 532,698, January 15, 1895	II	1166	V	29
	Perky U. S. Patent No. 533,551, February 5, 1895	II	1166	V	33
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	Perky U. S. Patent No. 533,553, February 5, 1895	II	1166	V	41
	Perky U. S. Patent No. 533,554, February 5, 1895	II	1166	V	45
	Perky U. S. Patent No. 533,555, February 5, 1895	II	1166	V	49
	Montgomery U. S. Patent No. 533,821, February 5, 1895	II	1166	V	55
	Perky U. S. Patent No. 548,086, October 15, 1895	II	1166	V	59
	Perky U. S. Design Patent No. 24,688, September 17, 1895	II	1166	V	61
	Perky U. S. Patent No. 571,284, November 10, 1896	II	1166	V	65
	Perky U. S. Patent No. 598,745, February 8, 1898	II	1166	V	77

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	Burbank U. S. Patent No. 683,100, September 24, 1901	II	1166	V	143
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	Perky U. S. Patent No. 713,795, November 18, 1902	II	1166	V	169
	Perky U. S. Patent No. 746,145, December 8, 1903	II	1166	V	173
	Burbank U. S. Patent No. 770,159, September 13, 1904	II	1166	V	181
	Horner U. S. Patent No. 785,554, March 21, 1905	II	1166	V	189
	Perky U. S. Patent No. 797,604, August 22, 1905	II	1166	V	201
	Smith U. S. Patent No. 1,195,114, August 15, 1916	II	1166	V	225
	Anderson U. S. Patent No. 1,334,429, March 23, 1920	II	1166	V	231
	House U. S. Patent No. 1,592,768, July 13, 1926	II	1166	V	243

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	Anderson U. S. Patent No. 1,621,863, March 22, 1927	II	1166	V	313
243	Valentine U. S. Patent No. 831,909, September 25, 1906	II	1166	V	319
244	Book of Patents Issued to Defendant, Viz.:				
	Valentine U. S. Patent No. 1,102,614, July 7, 1914	II	1166	V	331
	Kellogg U. S. Patent No. 1,159,045, November 2, 1915	II	1166	V	355
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	Kellogg U. S. Patent No. 1,197,297, September 5, 1916	II	1166	V	361
	Kellogg U. S. Patent No. 1,783,434, December 2, 1930	II	1166	V	361
	Hanford U. S. Patent No. 1,091,509, March 31, 1914	II	1166	V	373
	Valentine U. S. Patent No. 1,124,363, January 12, 1915	II	1166	V	411
	Valentine U. S. Patent No. 1,143,151, June 15, 1915	II	1166	V	417
245	Book of Miscellaneous Patents Issued to Others Than Plaintiff or Defendant, Viz.:				
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	Williams U. S. Patent No. 991,584, May 9, 1911	II	1167	V	489
	Williams U. S. Patent No. 1,024,168, April 23, 1912	II	1167	V	493
	Williams U. S. Patent No. 1,062,627, May 27, 1913	II	1167	V	505
	Black U. S. Patent No. 1,210,589, January 2, 1917	II	1167	V	511
	Williams U. S. Patent No. 1,263,009, April 16, 1918	II	1167	V	513
246	Bid of Plaintiff May 8, 1933, Department of Interior, Washington, D. C.	II	1170	Not printed	
247	Bid of Plaintiff December 12, 1932, U. S. Marine Corps, Washington, D. C.	II	1171	Not printed	
248	Bid of Plaintiff March 17, 1933, U. S. Marine Corps, Washington, D. C.	II	1172	Not printed	
249	Bid of Defendant February 3, 1933, Marine Barracks, Dover, N. J.	II	1172	Not printed	
250	Advertisement, The Natural Food Co. in New York Daily Tribune, May 12, 1907	II	1176	Not printed	
251	Advertisement, The Shredded Wheat Co. in Trade, Detroit, April 9, 1913	II	1176	Not printed	
252	Package of Arrowroot Biscuits	II	1177	Not printed	
253	Package of Fig Newtons Biscuits	II	1177	Not printed	
254	Package of Hydrox Biscuits	II	1177	Not printed	
255	Certificate of Incorporation of The Colorado Shredded Wheat Co.	II	1177	Not printed	
256	Carton of Kellogg's Corn Flakes	II	1178		
257-A	Clarke Sketch of Cutting of Diamond-Shape Biscuit	II	1178	Not printed	

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259—Box Plaintiff's Butter Thin Biscuit	III	2035	...	...
260—Box Plaintiff's Uneeda Biscuit	III	2035	...	...
261—Box Plaintiff's Graham Crackers	III	2035	...	...
262—Box Plaintiff's Premium Flake Crackers	III	2035	...	...

DEFENDANT'S EXHIBIT UNDER RULE 46.

A—Proceedings in the Patent Office	III	2021	Not printed	

Proceedings in the United States Circuit Court of Appeals are included in Vol. 3-A

JOSEPH F. BECK.

Deposition taken at New York, January 13, 1933.

Direct Examination.

The Witness: I am connected with the advertising business, with the Federal Advertising Agency. I am in no way connected with the National Biscuit Company and never have been. The Federal Advertising Agency is not at the present time connected in any way with the National Biscuit Company. My only interest, let me say, would be the fact that I know both Mr. O'Brien and Mr. Ed Hughes, both in your sales division.

I am quite familiar with the product known as Shredded Wheat, also with the package; and I have used it, I suppose, for probably twenty years. I have been a user and purchaser of Shredded Wheat. It is always on the shelf in the pantry at home. As I do a lot of traveling, I suppose I average three or four Shredded Wheat breakfasts a week, and also at home.

I recognize Plaintiff's Exhibit 1 as the Shredded Wheat package, and, also, the individual one. I also know the color scheme when I see it, and so on. I recognize Plaintiff's Exhibit 21 as the individual package.

The expression "shredded wheat" does not convey to my mind any other product at all. Shredded Wheat, to my mind, is a trade-marked brand, and that trade-marked brand I connect with the product, Shredded Wheat Biscuit, made in Niagara Falls.

About three to four times a year, I make a complete round on a campaign of merchandising advertising, for a number of our clients. That is a trip that usually takes me to Chicago at my first stop, or, possibly, to St. Louis, and then to Kansas City, and Fort Worth, Tulsa, New Orleans, Atlanta, and back home. I have made that complete circuit three times this past

year; and then, I would pick up a piece of it and have been just in connection with one particular account alone for just about three years.

In the course of my travels, I have had occasion to order Shredded Wheat at hotels and restaurants regularly; usually, the better class of hotels, where the individual package is brought out.

As to my experience, while traveling, with respect to ordering and receiving Shredded Wheat, I first took real notice of it, I believe, in July of last year, on one of these complete circuits, in Waco, Texas. I believe it was the Hilton Hotel, or maybe it was the Waco. It is one of that Hilton chain of hotels, which are all throughout Texas.

I took particular notice of that incident, because it was in one of the chain hotels; and I figured it might be well to call that to Jim O'Brien's attention and see that he got it cleared up.

I ordered Shredded Wheat for breakfast; and the waitress brought me, not the Shredded Wheat package that I insisted on, but she came out with the Kellogg package, with the top off, a package like Plaintiff's Exhibit 71. This was in a little sort of coffee shop, a little restaurant connected with the hotel. I was seated at a table. I ordered Shredded Wheat. I do not recall whether Shredded Wheat was shown on the menu. I usually do not look for it there. I have my mind made up as to my regular breakfast. The waitress brought a package like Plaintiff's Exhibit 71. I had no conversation with her at all, not a thing, not in that particular case.

That was not the first time this had occurred to me. This happened right along. As I say, the only reason I took particular notice of that was that it was a chain hotel. I thought, if other people were experiencing the same thing in other hotels of that chain,

Mr. O'Brien was missing a pretty good bet, and he might want to look into it and get the business he was asking for.

This was not the first time. That is the only time I really took particular interest in the fact, because it was a chain of hotels. I do not know how many times it had happened to me before. Any number. Let me say about twenty or twenty-five times, that I know of; not in any specific way; but let me say that I do know that it has happened about that number of times; starting usually about Kansas City. That is usually my first or second hop.

After my experience in Waco, Texas, I reported it to Mr. O'Brien. I said that he probably would want to look into it and see that they were getting the business that they were entitled to. He did look into it; but I do not know what happened.

On this last trip, I think our first stop was Chicago on October 31, 1932. I spent a couple of days there and went on to Kansas City. We were there about the third, fourth, and fifth, and then to Tulsa, at the Mayo Hotel in Tulsa. I am pretty sure it was the seventh of November.

I, along with two other fellows who were having breakfast, ordered Shredded Wheat, in the little coffee shop right off the main lobby. I just asked for Shredded Wheat, and the package that was brought out was that particular Kellogg package, with just the top off, like Plaintiff's Exhibit 71.

I remarked to the waitress that I had ordered Shredded Wheat and that was all that came back to me. Her little comment was "This is Shredded Wheat." So I let it go at that. There was no time for arguing with her. We were in a hurry. That happened at Tulsa, I believe on Sunday and Monday, two days. The second day, I merely ordered Shredded

Wheat and had the idea that I would get the same package with a different waitress, and it did happen. I said nothing more about it. I did remark to both my traveling companions that this was just another one of those cases of brand substitution, a well-advertised trade-marked brand being substituted for another well-advertised one. We were all in the advertising business, and that was our interest in it.

The next stop was at Forth Worth, at the Blackstone Hotel, I believe, on November 9th. They also have this little coffee shop, counter, and tables set up there right off the lobby. Again I ordered Shredded Wheat, and this Kellogg package was brought out. Nothing was said about it. One of the reasons I said nothing was, of course, that the Blackstone Hotel is a favorite of mine; and I would not say anything that might involve any particular young lady or anybody else in the hotel. That was the only time at the Blackstone.

We hopped out of there in a hurry. The next stop was Roosevelt Hotel, New Orleans. We had adjoining rooms, and our breakfast was served in the room. I ordered Shredded Wheat, and the waiter brought up the entire breakfast and an unopened package of Kellogg's, a package like Plaintiff's Exhibit 71. Similar to that. I made no comment about it to the waiter; but it involved a discussion of about ten minutes with one of my partners there.

I did not, on any of these occasions or on any occasion when I ordered Shredded Wheat and the Kellogg package was delivered to me, have occasion to look at the menu card. I knew what I was going to order. As I say, for years I have just had this same idea of about three breakfasts of Shredded Wheat a week. I follow that up every other day, and sometimes I go three or four days in a row with it. I rarely look for Shredded Wheat on the menu; but I know what

I want and I look for that particular package, and I want to get that particular delivery; or, at least, I seem to have a taste for Shredded Wheat.

Those are the specific cases that I remember. I had other cases, but I made no note of them. In fact, the only memorandum that I have of these is this little memorandum right here, which has my expense account and other things on it.

I mentioned it to Jim O'Brien in New York. He said he would like to have me come down and talk to him about it, would like to have the case straightened out down there and get his sales department to work on it. In that connection he introduced me to Mr. Vilas. He wanted to know if I would tell my story to you, which I did. That is the occasion for my being here.

CROSS-EXAMINATION.

THE WITNESS: In all the cases in which Kellogg's was served to me, it was in the individual cartons. Although I might not be able to tell, I doubt very much if it was served in bulk; although I suppose that is the way it goes in lunch places.

In each case when the Kellogg package was brought to me, I recognized right away that it was not the Shredded Wheat package of Niagara Falls, yes. I ate the biscuit in every case where the Kellogg product was served to me. I must say there is a slight difference, in my opinion, and I do not know why, but I will also say that I did not finish the two biscuits in any of the cases. That might also happen with Shredded Wheat.

XQ. 52. In your travels, when you asked for Shredded Wheat, how often were you served the Niagara Falls product?

A. I would say that, in the last year—I have a pretty good idea, just in my travels, in my trips around,

in the last year, say three complete circuits, and all that sort of thing, I would say that, in about sixty per cent. of the cases, I was served Shredded Wheat—no more than sixty per cent.

XQ. 53. And, in the other cases, you were served Kellogg's Shredded Wheat?

A. In the other cases, Kellogg's Shredded Wheat, in that individual package—just in that individual package.

THE WITNESS: I would not say that I would have any other name, any solution for that part of it, other than shredded wheat. Just Shredded Wheat is the only product I ever knew.

If somebody asked me what a kodak was, I would say that was a special Eastman name for camera; and, if somebody asked me what Uneeda Biscuit was, I would say that it was a special or proprietary name for soda cracker. If somebody asked me what a non-proprietary or non-trade-marked name for this product that I had, I would say it would be a shredded wheat biscuit; that would be my idea.

Another name I can give for that product, I would say a whole wheat biscuit, in shreds, whole wheat biscuit shredded, in shredded form. Other than that, or shredded wheat or shredded wheat biscuit, I do not know what it would be. I was very, very much surprised when the waitress, in the case I referred to, said, "Well, that is shredded wheat." I was surprised because of the fact that we were in the merchandising end of the business; and that they, after the amount of money which has been put behind Shredded Wheat—it is the biscuit I wanted—the trade-marked product, Shredded Wheat Biscuit, and, to think that, after the amount of money and time they had spent on the product and the advertising and sales promotion work that had been done, all that money that had been spent on

the public, in getting the public acquainted with their service and getting it over to the public, you see.

It did not occur to me, when the waitress said that that was shredded wheat, that she meant that that was a product made out of wheat in shredded form. Shredded Wheat means only one thing to me. I was astonished when the waitress said, "This is shredded wheat."

I have heard of the secondary meaning of a thing. I know that there is what is supposed to be a secondary meaning; in which the first meaning is that it means the product, and the secondary meaning is that it is a product made at Niagara Falls. I have heard of a double meaning or secondary meaning. I certainly do know that this waitress was talking to me about the secondary meaning or double meaning; but I should think that, after all these years, Shredded Wheat, to that young lady—or, at least, to the manager or someone there, would mean the Shredded Wheat product made at Niagara Falls.

If this young lady had brought me a soda cracker and said, "This is shredded wheat," I would have said, right away, "This is not shredded wheat," surely. And I suppose, to some of these girls, any shredded wheat biscuit to them would be a shredded wheat product. To me, shredded wheat biscuit is made out of wheat, shredded, and put into biscuit form and put up by the Shredded Wheat Company of Niagara Falls. I did not try, in any sense, to tell these people that this was not shredded wheat made by the Kellogg Company at Battle Creek, Michigan. I did not try to argue with them at all. In fact, in several cases, I said, "This looks like Shredded Wheat Biscuit; but it is not the thing that I have ordered."

When I said, "It looks like Shredded Wheat Biscuit," I had no doubt at all, from what I saw of it, that this biscuit was shredded and made out of wheat.

I do not think that a business like the Shredded Wheat business of the Kellogg business would go on unchanged if the advertising were stopped. Ceasing to advertise shredded wheat would mean that there would be a dropping off, I believe.

I realize that there is a great deal of experimentation, as between the many wheat products and corn products and so forth; and that many people do not like those, and that they do not use them year in and year out, throughout their lives; that they use shredded wheat for a while, and then use some other cereal. The facts will prove that. I know that the cereal companies are bringing out demonstrators who are constantly bringing the product to the attention of new users.

It is fair to say that one of the purposes of advertising is to recruit the users who drop out of a product and to put in new users of the article to replace the former users of the product who have dropped out.

I know that the Kellogg Company is a large advertising concern; and I use most of their products, other than this.

I have not seen any of their window displays or newspaper advertising of their Whole Wheat Biscuit, or noticed it. I am in the agency business, doing advertising for advertisers, space and time and marketing work.

If you just put one of either the Kellogg or the National product there, I probably would not notice any difference in size; but I have had enough time to make a comparison; and, to me, the Kellogg biscuit is a bit smaller; that is, it is not as long. I do not know about the other dimensions, as to thickness or height. I would have to see them together. I believe I would notice it in nine cases out of ten, because the first thing I do is to pick it up and break it, like this. In each instance, I noticed the difference in the cartons, of the Kellogg carton from the Niagara Falls

carton. As an advertising man, I would say that that carton was a distinctive carton, as compared with the Niagara Falls biscuit carton.

I am familiar with the Kellogg carton, and I would recognize it as one of the Kellogg family of cartons. I know the name, and I know the style of lettering and so on.

I am conscious of a distinct difference in taste between the Niagara Falls product and the Kellogg product. Of course, I get up with a different taste, as most of us do, on many mornings, just as we do in our shaving habits, and so on.

I know nothing at all about what some of those differences are due to. The difference in taste might be due to the act that we had onions the night before, or broccoli, or something.

I am appearing here voluntarily, not under subpœna. My only interest is to see Jim O'Brien get every piece of business he is entitled to. He is a friend of mine. I mentioned it to him, and he said, "Will you be good enough to tell this to Mr. Vilas?"

I have known of the Kellogg biscuit being on the market for probably three years. Since my first experience with it, it is safe to say that I know this type of product is now being manufactured by two different concerns, the National Biscuit Company at Niagara Falls, and the Kellogg Company at Battle Creek.

I am a constant user of Shredded Wheat. I sometimes try other cereals. If you looked into our pantry, you would probably find Grape-Nuts, Wheatsworth, Kellogg's Corn Flakes, Kellogg's All Bran, certainly Shredded Wheat, and maybe others.

As to trying new products, I used Wheaties once, and Heinz got out a hot cereal three years ago, which I tried. I tried Kellogg's Rice Crispies. I have also used Heinz Rice Flakes, but I have lost my taste for rice cereals.

I hope it is fair to say that advertising of a new product will attract attention and that people will try the new product; otherwise, all this money has been wasted. From my experience around the country, and as an advertising man, I would be firmly of the opinion that advertising of a new cereal product would cause people to try it.

I have heard of shredded coconut. I do not know about shredded codfish.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know how shredded coconut is put up. We have it at home, a Baker product, I believe. It looks good to me, and it is shredded. It may be, as far as I know, a fresh coconut shredded. I mean by that torn up into small shreds, little pieces.

Mr. Clarke asked me if, when I had the conversation with the waitress, any pillow-shaped biscuit apparently made of wheat drawn out into shreds or filaments would, to the waitress' mind, be a shredded wheat biscuit. In my opinion, the waitress would at once apply that name to such a product because of the amount of publicity and promotion put behind Shredded Wheat and the Shredded Wheat Biscuit in that form.

I saw one of the large-sized packages of the Kellogg product down here this morning, just glanced at it. If I saw the package, Plaintiff's Exhibit 147, with the name obliterated and the window on it, through which the contents are visible, that would convey to my mind just one thing as to the contents of the package, and that is Shredded Wheat.

If, in addition to that, I examined the package and saw on one end the words "Shredded Wheat in its most delicious form," and on the other end, "A shredded wheat product," my reaction, as a merchandising and

advertising man, to that would be that it would be a very easy way to substitute this for the product that I know, Shredded Wheat.

I mean by that that a package of that kind, with the words and appearance indicated on Plaintiff's Exhibit 147, is something in the hands of the dealer to promote easy substitution. I think that putting just that little slant in the hands of the dealer, I believe we have learned from experience would be a very good selling point, a very good merchandising point on the dealer's shelf, to substitute this for Shredded Wheat.

I have seen advertising of Shredded Wheat Biscuit, two in a dish; but I am afraid I cannot say that I would distinguish between the Shredded Wheat advertising and that of Kellogg's. I have seen a package like Plaintiff's Exhibit 10. Looking at the other side of Plaintiff's Exhibit 147, I see a picture of two biscuit in a dish. I would say that it is just a bit misleading. I suppose some of our friends would accept that as a Shredded Wheat Biscuit when they asked for it. We would not. By that, I mean that I think some individuals among the purchasing public would be less careful than others in discriminating between pages. I believe that has also been the experience of Rice Crispies, competing with Rice Flakes.

RE-CROSS-EXAMINATION.

THE WITNESS: If I never had any prior experience with the Kellogg biscuit or package and saw Plaintiff's Exhibit 147 for the first time, with the panel or view of the biscuit removed, I would have the idea that Kellogg's Whole Wheat Biscuit was a biscuit. I would be rather curious to see what it would be. Uneeda Biscuit, a soda cracker, is called a biscuit; very many types of English crackers or cakes are called biscuit; and the little muffin type of product that women bake at home

are also called biscuit. So, having in mind the many definitions of biscuit, if I saw this Kellogg package for the first time without any illustration on it, it would arouse my curiosity as to what kind of product was inside of it; but it would not be a package that would tell me what kind of product was in it until I had opened it for the first time. Of course, there would probably be other descriptive matter on that box.

Assuming, however, that there was no other descriptive matter on it, and taking away that little window there, I believe I would have to open up this package to find out what kind of product was in it. To that extent, without descriptive matter or the picture, it is what you might call a blind package.

The use of a dish with some of the product contained in the package, such as spinach or fruit salad, vegetables or cereals, is, in my experience, a very common advertising device. It is a very common form of advertisement to show the product in a dish served in various ways, with different kinds of sauces or fruits on it.

I have had personal experience with forms of what might be called fraudulent substitution, where one package is made to imitate another package so closely that, when a customer asks for the first package and gets the second, she really thinks she has gotten the first package. I have heard of such cases, although I do not believe I could mention to you just what a case might be; but as in the cases mentioned by Mr. Clarke, where people used to ask for Baker's Chocolate and did not get the original, and where they asked for Waterman Pens and got an imitation, thinking they were getting the original.

I would not, in my own mind, think that any woman who was familiar with the Niagara Falls Shredded Wheat package, such as Plaintiff's Exhibit 1, who was given a package like Defendant's Exhibit 6 or Plain-

tiff's Exhibit 147, would think she had gotten the Niagara Falls package.

If, as Mr. Clarke says, some grocers have testified that, on telephone orders, if they were to send the Kellogg biscuit when people asked for the Niagara Falls biscuit, some customers would send the package right back, I think very few would send it back, not necessarily that they would want to try it, but because of the bother of it all, so much bother that they would not want to send it back.

I have never been in the grocery business myself; although, as I say, I have had some experience along merchandising lines. I have spent a day or two in the grocery store, with mixed and blended coffee, etc., in several stores on Long Island and actually waited on people in the store, although just for a few days at a time, just for the experience.

I am familiar with the old and the new campaigns of the National Biscuit Company and Shredded Wheat Company advertising Niagara Falls Shredded Wheat. The recent or present campaign is a very good one, I think, much better than the old one of just the little ads. In my mind, the name *Niagara Falls* has been associated strongly in connection with all the advertising of that product.

RE-DIRECT EXAMINATION.

THE WITNESS: When I said I thought the majority of people would not return a package like Plaintiff's Exhibit 147, if it were sent them as Shredded Wheat, I meant that was my impression of the average psychology of the purchasers.

As I said to Mr. Clarke, if a customer asked for Shredded Wheat and were given this package, like Plaintiff's Exhibit 147, she would know right away that it was not the Niagara Falls product. I believe

the dealer would say right away. "This is Shredded Wheat Biscuit." I would not be surprised if dealers, in some instances, said "This is the same thing." As I say, I believe those two lines would be a good basis for that kind of selling, on the part of the dealer. As a merchandising and advertising man, I do not approve of that kind of selling.

RE-CROSS-EXAMINATION.

THE WITNESS: If, in self-service stores, where a customer picks up a basket and goes through the store, selecting what she wants from the shelves, I found a substantial number of women who picked out the Kellogg product, I would assume that that is what they wanted, in some cases, probably; but I believe that, with the window idea, which, as I say, I looked over this morning up here, any number of women would pick up that package, wanting the Shredded Wheat or Shredded Wheat Biscuit made at Niagara Falls. That, of course, as I say, is based entirely on the amount of money and promotion effort that has been put behind Shredded Wheat; certainly a whole lot more than has ever been put behind the Kellogg's Whole Wheat Biscuit.

In self-service stores, with a display of both the Niagara Falls Shredded Wheat and the Kellogg's shredded wheat, I think very few women who picked up the Kellogg's shredded wheat would do it because they wanted the Niagara Falls package that was right there on the shelf. I think that, in many cases, the people who did pick it up would pick it up because they wanted that Kellogg package.

RE-DIRECT EXAMINATION.

THE WITNESS: There is no question that, as to self-service stores, the result would depend somewhat on

the way in which the packages were displayed. I am familiar with the Piggly-Wiggly type of self-service store, where a customer has to go in and pass through all the aisles before she can get out. I would say that those customers of poorer education, having in mind purchasing Shredded Wheat, if the Kellogg product was displayed in advance of the Shredded Wheat product in packages with a window like Plaintiff's Exhibit 147, would probably pick that up for Shredded Wheat, quite a few; but, as far as the better classes go, I do not believe they would pick up the Kellogg package if they wanted Shredded Wheat. In foreign language sections and among the poorly educated, I think they would.

Children are frequently sent to the store to purchase such products, and I think the window idea would probably appeal to the youngsters, even though they were sent out to get Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: There are usually a number of competitive brands to products like canned baked beans, ketchup, tomato juice, canned tomatoes, etc. I would expect to find Campbell's Baked Beans and Heinz' Baked Beans, and probably one or two other brands. That is also true of corn flakes, that there are a number of manufacturers making different brands. There are quite a number of private label brands of corn flakes.

I do not know of any other product besides Shredded Wheat, where the claim is made that only one manufacturer has the right to make that product.

I have known for at least three years that there are at least two different concerns making Whole Wheat Shredded Biscuit, that pillow-shaped biscuit. I do not doubt that it may have been before that that I was personally acquainted with them.

RE-DIRECT EXAMINATION.

THE WITNESS: I should think it would be perfectly above-board and legal to make another biscuit; but I have wondered and mentioned the fact that this particular biscuit, being styled the same or looking the same as Shredded Wheat—in fact, I started several years ago to wonder why Kellogg made a biscuit that looked so similar and were able to cash in on some of the merchandising work put behind Shredded Wheat.

I remember the advertising of a biscuit put out by the Quaker Oats Company, called Muffetts. I do not remember what the advertising was like; but I do know the name *Muffetts*. I do not really know what the product appears like. I have never paid any attention to that particular product.

GEORGE SCHAPANSKY.

Deposition taken at San Francisco, California, February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have never had any business connection with the National Biscuit Company. I am a salesman in the Frigidaire Corporation through Fisher & Glassford, a hardware and Frigidaire concern in Fresno, California.

I have had experience in the grocery business as a clerk for approximately a year.

I recognize Plaintiff's Exhibit 1. It is Shredded Wheat. I recognize the item Mr. Viles takes out of Plaintiff's Exhibit 1 as Shredded Wheat Biscuit. I have been familiar with Shredded Wheat approximately ten to fifteen years and have been a user of it in my home. I use it right along.

During the period I have known it, it has always been of the same general shape, appearance and size. It is very similar to what it has always been. I used to think, years ago, that the biscuits were joined together. It just seems to me that, a couple of years ago, when I was first acquainted with it, I have at times seen two biscuit fastened together.

The thing in particular by which I identify Plaintiff's Exhibit 1, that I always paid attention to, was the picture of Niagara Falls on the package. In my experience, there has never been anything, other than Plaintiff's Exhibit 1 or the biscuit therein meant to my mind by the term "Shredded Wheat."

When Shredded Wheat is purchased in my home, sometimes I buy it, and sometimes my wife orders it. Shredded Wheat is served at my table at breakfast time. It is brought to the table in dishes, usually with cream and so forth, ready to eat. Very seldom is the package brought to the table. I usually have breakfast first and leave the home. Later on, when the baby gets up, her breakfast is served, and my wife eats with her.

The package is usually delivered on the back porch, where it is brought by me or by the grocery boy. Mrs. Schapansky puts them in their place. When breakfast is served in the breakfast room, it is usually served in a dish as Shredded Wheat.

I very often order Shredded Wheat in a restaurant, where it is served the same way. In one particular case, it was served in a package, cut right before me, very recently, in a little restaurant in Fresno on Van Ness Avenue. I called for Shredded Wheat, and I asked afterwards for the package. He said he had thrown it in the waste basket and I could not take it with me. I saw the package. It was marked "Kellogg's" on the package. It was a regular, small, in-

dividual-size package, like Plaintiff's Exhibit 152. This was approximately a week and a half ago, in Fresno. The waitress got the package right off the shelf in back of the counter; reached underneath and set it on and cut it open, put the biscuits in the plate, and served it with milk, cream, and sugar. At that time I recognized the Kellogg's package. I asked them for it; but he said no, he had already thrown it away and could not give it to me. I did not say anything more; passed it up and just let it go at that. He asked me a question: "Why did you want the package?"

I said: "I am interested in Shredded Wheat. I want to know the difference in the signs." I saw the package. He offered to open another one or sell me a package, but I told him there was no need.

I have had other experiences of a similar nature quite often in restaurants, where I would be served out of the package, never knowing what package it would come out of; and it would be Shredded Wheat to me. On occasions, I have had a biscuit served to me where I never saw the package at all. I was not in a position to know at that time whether the biscuit served were Shredded Wheat or the product of the Kellogg Company.

I cannot tell you, even roughly, how many times that has happened to me, because I do not pay much attention to it. It just happens when I go in a restaurant, what I crave or desire; and I usually order it and forget about it after I am through. But I will say that on an average of once or twice a week I have shredded wheat biscuits in a restaurant. I very seldom see the package, because we usually eat at the restaurant across the street from us now. We either go and sit in a group or we sit at the rear table and converse. The dishes are brought from the back to us with the shredded wheat right in them and ready to

serve, without the package. We never get the package at all, any more.

I have had experience recently in purchasing Shredded Wheat at stores. The other day I went into a grocery store called Black's Package Store, in Fresno. I said to the clerk: "Where do you keep your Shredded Wheat?" He said, "Aisle" so-and-so, "on the center table." That is a self-service store; but I asked the clerk where it was kept. I walked up to that counter, and the first package was one with a little window in it. I looked in there and saw that it was Shredded Wheat. I reached back of it and picked one up, walked right over to the counter. I then recognized that it was the other make, and I went back and exchanged it for Shredded Wheat. It was like Plaintiff's Exhibit 153. The package I picked up was the same package.

The reason I picked up a package like Plaintiff's Exhibit 153 was that, in the first place, there was no Shredded Wheat. This was on special display, possibly featuring it for that particular day. I asked for Shredded Wheat, and he told me that was the place where it was kept. However, on another counter, with all the breakfast foods, etc., the other shredded wheat, the Shredded Wheat as I recognized it, was kept.

When I went through the store after asking where he kept his Shredded Wheat, I went to the table to which he pointed me, and that was the table where Kellogg's Whole Wheat Biscuits were displayed with some other breakfast foods, as specials. There was no shredded wheat on that table, except like Plaintiff's Exhibit 153, which I picked up. I just saw the shredded wheat through the window and reached back of it, because it says on there "Not for sale," and it was just there for display. I reached back and walked up to the counter and started to pay for my groceries. Then I recognized it was Whole Wheat. I said, "I want to ex-

change and get the other." The clerk kind of laughed, and he said, "You seem to be kind of particular what you eat." They know me pretty well in there. I said, "No, it is not that. I just want Shredded Wheat." I walked back and exchanged it and paid the difference.

I went into Reeder's grocery store and purchased and asked for a package of Shredded Wheat. The young lady in the store at the time was very small. Her husband is a good-sized man. He was not there. Naturally, he had the Shredded Wheat on the very top shelf. She said, "Will you help yourself?" I reached up there and took it down. I said, "This is not Shredded Wheat."

She said, "Yes, it is, only in the other package." I took her word for it and walked out with it. The carton, Plaintiff's Exhibit 154, is the one I got at that time. As I reached up to the top shelf, I could not see what I was getting, except that it was either just Shredded Wheat or this food right here. She said, "That is it, right there," and it was the only kind that was in the store. I did not see any other kind on the shelf at all. I did not see any packages like Plaintiff's Exhibit 1, at all.

Reeder's store is on South Second Street, number 532, in Fresno. This took place the latter part of November, 1932. The piece of yellow paper attached to the carton is the cash slip on which I paid for it; and the piece of white paper pasted on there is my memorandum made at the time. That is the conversation that took place.

I was asked to make that purchase of a package of Shredded Wheat by Mr. Weller, the manager there of the National Biscuit Company. He did not say why he wanted it. He is a customer of mine there. He said, "George, will you drive by and get me a package of Shredded Wheat on your way home?"

I said, "Yes, I am off duty at twelve o'clock or so. I will drive by the store and purchase a package of Shredded Wheat for you." He said, "Well, I will be back later and pick it up."

I did not even know that he had Shredded Wheat in his place of business out there. It seemed so peculiar afterwards, why I should go and buy Shredded Wheat, because he was always fooling with us. He would come and ask me to do something on his automobile. It was kind of interesting the way he would do that.

So I purchased that package of Shredded Wheat for him and gave it to him. It did not take very long. When he came in he said, "What took place when you bought this?" I told him approximately what took place. He put it down on a piece of paper and said, "Would you sign that statement that that is true?"

I said, "Certainly. That is what took place; why should I not?" He said, "In that case, then, will you get a sales receipt for me?" I said, "Certainly I can." I said, "I want to get some cigarettes, anyway." So I drove by the store and I asked Mrs. Reeder to give me a receipt. At that time, Mr. Reeder was in. She said, "Mr. Reeder, will you kindly give this gentleman a receipt for Shredded Wheat just like that up there? That is what he purchased a while ago." And he did. He gave me that receipt and I brought it over to Mr. Weller. That is the yellow slip attached to the exhibit.

I have noticed advertising of the Shredded Wheat Company to a certain extent. I have noticed their billboards occasionally, where they have a dish with two Shredded Wheat Biscuits in there, and cream, and a boy ready to eat it, coming up there as if it were for his breakfast, or something to that effect. When I see the dish with two biscuits in it, the only thing I ever think of is Shredded Wheat. The dish on the end of Plaintiff's Exhibit 10 looks similar to the one I refer to as having seen. I do not know how long I have noticed

that. It has only been here in the last year or so that I have paid particular attention to bill-board advertising, for the reason that our company at that time went into it very extensively. Then I began to notice more bill-board advertising than at any time before. I have seen a carton like Plaintiff's Exhibit 10 very often.

If I were to see the package Plaintiff's Exhibit 153 facing me with the sides showing the picture of a dish with two biscuit in it, with the name partially or wholly obliterated, it would bring to my mind Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: Plaintiff's Exhibit 10 is not the package of Shredded Wheat which I have seen right along in the last year. I have seen that for some fifteen-odd years, as far as I can remember back; but I have seen Shredded Wheat packages like that or very similar to it. That is the package with which I am still familiar as Shredded Wheat. Plaintiff's Exhibit 10 is the Shredded Wheat package with which I am now familiar on the market.

Mrs. Reeder I have not known personally at all. I just purchase off and on, here and there, in the neighborhood where I used to work. I know Mr. Reeder only through his son, who used to be junior president of the Chamber of Commerce there and now has had charge of the Fox Wilson Theatre there for a number of years. I have known him quite some time. He is not a friend, just an acquaintance through business. Through him I have known his father who runs this Reeder store. He would drive by my place of business every day with his truck, which says "Reeder's Grocery," a very nice advertisement.

Reeder's grocery is not our regular grocery store; it is just one of the stores I purchase from in the neighborhood where I work. Mr. Weller did not tell me to

go there. He just asked me to purchase a package of Shredded Wheat on my way home. Sometimes I have purchased next door. I do not know which particular place he had reference to. I was on my way; it dawned on me I was to get a package of Shredded Wheat; and I walked into the store and asked for it. Mrs. Reeder met me at the door and talked to me. We conversed a few minutes. I said, "I want a package of Shredded Wheat." She told me to help myself. I reached for it, took it down, paid for it, and walked out.

That afternoon, Mr. Weller came up and asked me if I had made the purchase for him, and I said, "Yes, here it is." He said, "What took place when you purchased this?" He came back later and asked me if I would put it in writing. I told him yes. He took it down, typewrote it out, and put it on the package. I signed it.

Mrs. Reeder said approximately as I have written on there, "That's Shredded Wheat, only it's the other kind," something very similar to that. That is my statement signed by me. It says: "I went to Reeder's Grocery and asked for a package of Shredded Wheat Biscuit. Mrs. Reeder told me to help myself from the shelf, and then I said, 'That is not Shredded Wheat Biscuit, is it?' Mrs. Reeder replied, 'Yes, that's Shredded Wheat; it's the other kind.'" That is just exactly what she said.

I did not know it was the other kind when I took it down from the shelf. I did not pay any attention to it. I never did. I just walked to the shelf, when she said "That is it up there," and I took it down. I never paid any attention to it. I called for Shredded Wheat. She said, "That is it," just pointed it out to me, "right there on top," and I took it down.

I did not make any purchases anywhere else at that particular time, except just that one store. I have purchased Shredded Wheat at numerous other places;

but it has never been called to my attention like it was at that time.

Except for once when my wife bought it and I was not with her so I do not know anything about it, that is the only package of Kellogg's shredded wheat I ever bought. I picked that off the shelf myself, just what she told me. It did not look any different from Niagara Falls Shredded Wheat to me when I took it down off the shelf. She said that was shredded wheat. That is what I wanted.

When she pointed, I did not look to see what was on the shelf, except just what she says, "That's it right there;" and I reached up and took it down; and that was the end of it. I did not look at it, no more than I saw it was the biscuits there, and I recognized that Shredded Wheat immediately, never looking at the name. That was the farthest thing away from me.

I was a grocery clerk approximately a year or a little over, at the E. K. Smith Grocery, Reedley, an independent grocery. I handled Shredded Wheat during that year.

I do want the record to stand, certainly, that, when that woman pointed to that shelf and said "That is Shredded Wheat," I did not see anything there except the plate with the two biscuit in it. I recognized it as Shredded Wheat; by that, I mean a pillow-shaped biscuit shredded out into shreds and put in the form of a biscuit. When I say that I recognized it as Shredded Wheat, I mean I thought those pillow-shaped biscuits made out of shredded wheat were in that carton.

When she pointed out this package of Kellogg's to me on the shelf, there was no window on the package. This was on the shelf there just like that, and I reached up and took it down.

All I saw was just the plate with the Shredded Wheat biscuit. I did not see the name Kellogg's. I did not even look at it, did not even pay any attention

to it. After I got it down, I said, "Is that Shredded Wheat?" Then I did look at the package, and I turned it around a couple of times and walked out with it, after I had paid for it and said no more about it.

When I looked at it, it just seemed like it was just a different package all at once. To my own mind, I said, "I guess they have changed packages and changed the size of their package," never making any statement to anybody.

I did not recognize this Kellogg package. As a grocery clerk, I have handled Kellogg's Corn Flakes. I may possibly have handled other Kellogg products, but I do not recall them now. I never noticed that their packages are predominantly green and red. I do not recognize any family relationship between the Kellogg's Whole Wheat Biscuit package and the Kellogg's Corn Flake package; because the box is so much different than the other one. Kellogg's Corn Flakes is a tall box, and this is a square box, very similar to the Shredded Wheat box. That is the only difference between Kellogg's Whole Wheat Biscuit and Kellogg's Corn Flakes that I recall now, as a grocery clerk.

When I went back to ask for this receipt or bill of sale, I asked for a package of cigarettes, and I asked her if I could have a sales receipt on the Shredded Wheat and the package of cigarettes both. She says, "Yes, certainly," and it was written out. Mr. Reeder wrote it out. Mrs. Reeder asked Mr. Reeder to give me the bill of sale. The only reason I did that was because Mr. Weller asked me to go back and get a bill of sale. I said, "I want the cigarettes anyway; I might just as well get it all at one time." I could have asked them to leave these cigarettes off, as far as that is concerned. It made no difference to me.

I had never had any experience with Kellogg's Whole Wheat Biscuit before that day. I did not even know they were on the market. I really cannot say

how long I have known Mr. Weller. Possibly about six months in the service station business there. I met him one day when he bought a new Pontiac. I do not remember whether he refunded me the money on this purchase. The only written statement I made of the transaction is the one on the package. I did not make a statement to anyone other than Mr. Weller about the purchase of it. I have never had any memorandum taken down as to this transaction. In fact, at the time, I did not even know what it was all about. The only experience I have ever had with Kellogg's Whole Wheat Biscuit is this one instance in the Reeder store. It would be hard for me to say how many instances in restaurants, eating out regularly. I have only had Kellogg's served to me in a carton in a restaurant once.

I have had the Niagara Falls product served to me in restaurants in cartons, in individual packages. That is the way it is served in restaurants. I have never had it served in dining cars in that carton. I do not use diners. The usual way in small restaurants, I would say, is to have the Niagara Falls product or the other product served in the cartons. When, however, you purchase it in a larger restaurant, it always comes in the dish. If I request it, they will have it heated, with cream, or they will serve it in a dish with milk or cream on the side, and I never see the package.

XQ. 143. Is the Kellogg's Whole Wheat biscuit just the same kind of a biscuit that the Niagara Falls Shredded Wheat Biscuit is?

A. I have never recognized the difference.

XQ. 144. You have not noticed any difference?

A. No.

XQ. 145. Then, when they were served outside of the carton, how would you know whether you were being served the Niagara Falls biscuit or the Kellogg biscuit?

A. I would not know; I would think I was getting Shredded Wheat.

THE WITNESS: All the biscuit that have ever been served to me in any restaurant outside the carton have been long biscuit very similar to that in Plaintiff's Exhibit 1.

The only instance where I have been served with the Kellogg product in a restaurant was this one instance in which the little Kellogg individual carton was thrown away. At least, that is when I really began to pay particular attention to it, after I knew that there were two different shredded wheats on the market; and I have naturally watched for it to see if I could determine the difference. The only time I determined the difference was when he opened the carton and I looked at the carton and asked for the carton, but he had thrown it away. He asked me why I wanted it, and I told him to let it go at that. He said he would open another package or sell me a full package if I wanted to. I said there was no need. That occurred quite a bit after the Reeder purchase; only about a week and a half ago. That is the only instance in which I know that the biscuit that was served to me in a plate was the Kellogg biscuit, rather than the Niagara Falls product. The only time I have ever recognized that there was a difference was when I saw the carton. When that Kellogg product was shown to me, I recognized that that was a pillow-shaped biscuit made in the form of shreds.

RE-DIRECT EXAMINATION.

THE WITNESS: I am not able to say at this time that I never was served, outside of the package, any of the biscuit manufactured by the Kellogg Company. About a week and a half ago is the first time I have particularly noticed that the Kellogg Company's Whole

Wheat Biscuit that looked like Shredded Wheat Biscuit was served out of the carton, and that it was different than I had been getting.

I cannot tell at the present time whether or not I was ever served, in response to a request for Shredded Wheat, Kellogg's Whole Wheat Biscuit outside of the carton. I do not know. It might have happened, and I did not know it. In other words, if I had gone into the particular restaurant that we go in to eat, our Shredded Wheat is served to us on the plate, never seeing the carton.

DONALD J. SOWLES.

Deposition taken at San Francisco, California, February 8, 1933.

Direct Examination.

The Witness: I am a tile setter. I did some work for the National Biscuit Company last winter, for a day or two a week through the winter, unloading cars. That is my only connection with the company.

I recognize the package, Plaintiff's Exhibit 1. It is Shredded Wheat. I have been familiar with Shredded Wheat as a consumer about the last fifteen years. I have heard of it and have it in my home most of the time. I have a family of four. We keep house. Shredded Wheat is served at our home. I buy it most of the time, and I ask for it as Shredded Wheat.

I eat Shredded Wheat in a restaurant once in a while. About a month and a half ago, in the Hotel Barry Coffee Shop, at Sacramento, California, on Eighth Street, between J and K, I went in and asked for Shredded Wheat. She gave me a package of the Kellogg's Whole Wheat Biscuits. I told her that did not look like Shredded Wheat to me. She said it was Shredded Wheat. I said, "Are you sure that is

Shredded Wheat?" and she said, "Yes." She said, "You know, you have got to take it and shred it all up in your dish, when you eat it." I recognize Plaintiff's Exhibit 154-A as the box that she gave me. The handwriting on one of the inner sides of the carton is not mine. It is, I believe, that of Mr. Minturn, in Sacramento. The date written there refreshes my recollection of the date of the occurrence as being November twenty-third.

I had a similar experience in purchasing Shredded Wheat. I bought some at Anderson's Grocery on Sixth Avenue and Sacramento Boulevard, in Sacramento. I went in and asked the price of Shredded Wheat. That was the first of the conversation. She told me the price of it. I believe the figure she gave me at that time was fifteen cents. I told her it seemed that Shredded Wheat was not coming down any.

She said, "The National Biscuit Shredded Wheat has not come down any, but we have another shredded wheat here, and it has more in the package. That would really be cheaper," and she sold me the Kellogg's Whole Wheat Biscuit for the same as Shredded Wheat. I took the package and turned it in to Mr. Minturn, but I believe he failed to send it in. It was not a package with a window in; but it was a package with a dish with two biscuits in it on each face, like Plaintiff's Exhibit 155.

I have noticed advertising of Shredded Wheat through handling it, through purchasing it. I have seen the picture of a dish, as shown on the end of Plaintiff's Exhibit 10, on packages, ever since I have been buying it, as far back as I can remember. I have also seen the picture of the dish with two biscuit in it on show cards, in the windows and on the counters. If I saw a package with the picture of a dish with two biscuit in it, that would bring to my mind, as it has always, Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: When I received the package like Plaintiff's Exhibit 155, I knew right away that it was a different package from the Shredded Wheat I had been formerly getting. That was the first time that the fact that the Kellogg Company was putting out a whole wheat biscuit was really brought to my mind distinctively. Before that, however, I had had some sort of impression or had heard that the Kellogg Company was making a shredded wheat biscuit, as well as the Niagara Falls concern.

It is fair to say that, since this incident, I know perfectly well that there are two different concerns making these shredded wheat biscuit products; one of them being the National Biscuit Company and the other being the Kellogg Company.

If I should want to buy any more of the Kellogg product, I would have to ask for whole wheat biscuit, I guess, or ask for the Shredded Wheat, and, if I got it, I would turn it down. That is all I could do. I believe I would ask for Kellogg's shredded wheat. If I did, I would expect to get the Kellogg product.

This instance in which I had the Kellogg's biscuit served to me was the only time that I really ever had it served in the carton. I had it once before, and I got the National Biscuit Shredded Wheat. As soon as it was served to me, I recognized it as the National Biscuit Shredded Wheat. I never had any of the Kellogg's shredded wheat served to me before outside of the carton. It has only been three times I have bought it in a restaurant, and once was this morning.

I did that because I was sent by Mr. Weller to make the purchase. He told me to make that purchase in this restaurant that I have told you about. He also told me to go to the California Coffee Shop on Eighth and I. I went there and asked for Shredded Wheat,

and she gave me the Niagara Falls Shredded Wheat out of a large box. I saw the box. She had it in a bin, and I was sitting right alongside of it. She picked it up, took the biscuit, and put them in the dish. It is a little coffee shop connected with the hotel there.

Mr. Minturn explained to me about a lawsuit being on and my being called to testify in this case. I came down to San Francisco alone, at the expense of the National Biscuit Company.

I buy the Shredded Wheat for my family most of the time, and I also buy other groceries for them. The only time that I got the Kellogg product like Plaintiff's Exhibit 155 was the one instance that I referred to. Most of the time I go right to the shelf and get it myself, as I deal more with the Arata Brothers in Sacramento, which is a help-yourself store. I usually buy from them.

Mr. Minturn did not tell me to go to the store where I purchased Plaintiff's Exhibit 155. I went down to the corner from my mother's house, where I had been for dinner at the time I made the purchase. That was at three-thirty in the afternoon. I turned it over to Mr. Minturn about a quarter past four the same afternoon. He did not write. He did not make any memorandum of that transaction. I gave it to him. He said he mailed it down; but I do not know what has become of it. It has been mislaid some place.

Most of the time, when I really go to make a large purchase for my family, I deal with a self-service store. Of course, we deal with the little stores around there. In the self-service store, I walk over to a shelf and take whichever package I want. If I wanted the Niagara Falls package, I would pick that up; and, if I wanted the Kellogg package, I would pick that up.

I have seen Kellogg's biscuit in the self-service stores where I deal. In one of those stores, I saw the Niagara Falls or National Biscuit Shredded Wheat. I

have seen the Kellogg's in several stores. I have seen the Niagara Falls biscuit in pretty nearly all of them. I have seen both the Kellogg's and the National Biscuit Shredded Wheat in most of them. They have both been on the shelves in clear view of anybody wanting to serve themselves, I think, although I just cannot recall that right to the detail. I have noticed both of them in the stores.

The practice in these self-service stores is that you go to the shelves and help yourself and then bring it to the proprietor and pay for it. Everything is arranged within convenient reach of the customer. Some of them furnish baskets, and some do not.

RE-DIRECT EXAMINATION.

THE WITNESS: I asked for Shredded Wheat this morning, and I got Shredded Wheat. I saw the package. It was served in a small package, at Leighton's, right down the street. I do not know just which one it was.

RE-CROSS-EXAMINATION.

THE WITNESS: When I speak of a shredded wheat biscuit, I mean one of these pillow-shaped biscuits made out of wheat in shredded form. That is my understanding of a shredded wheat biscuit. It is fair to say that I now understand thoroughly that that type of biscuit is being made by two concerns, the National Biscuit Company, and the Kellogg Company.

RE-DIRECT EXAMINATION.

THE WITNESS: If I ask for a Shredded Wheat Biscuit, I expect to get Shredded Wheat. If I were given a package like Plaintiff's Exhibit 153, it would not fill my order, not so far as I am concerned, because I have always bought and always got the National Biscuit

Shredded Wheat, and I have always known it as that until this other was put on the market.

RE-CROSS-EXAMINATION.

THE WITNESS: When I take one of these Kellogg packages off the shelf, it is fair to say that I know that I am taking down Kellogg's shredded wheat; that is, a shredded wheat biscuit made by the Kellogg Company.

EARL K. BURKNER.

Deposition taken at San Francisco, California, February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a salesman employed by the Stockton Paint Company. I have no connection with the National Biscuit Company.

I recognize the package, Plaintiff's Exhibit 1. It is a Shredded Wheat package. I recognize the contents. I have been familiar with them ten or twelve years, as a consumer of them. I purchase Shredded Wheat once in a while and have it at home. I sometimes buy it in restaurants. At home I sometimes purchase the biscuit, or else my wife does.

When we have a package of Shredded Wheat in our home, it is usually served with cream or milk, sometimes with fruit. The package is kept, as a rule, in the kitchen. The Shredded Wheat is served in a dish.

I have noticed advertising of the Shredded Wheat Company in magazines; usually, a picture of Shredded Wheat in a dish with fresh fruit over it, or something like that. I cannot recall it in newspapers or posters. I have never noticed a picture of the dish on the package of Shredded Wheat. Looking at Plaintiff's Exhibit 10, observing the end panel, I have seen that.

When I see a picture of a dish or saucer with two biscuit in it, that brings to my mind Shredded Wheat. When I purchase the item, I ask for Shredded Wheat.

When I ask for Shredded Wheat in a restaurant, it is usually served in a dish, and without the package, as a rule.

I have had experience recently in ordering Shredded Wheat in a restaurant, at Smithie's Coffee Cup, in Stockton, approximately two months ago or three; some time in the fall. I ordered Shredded Wheat, and the waitress served me with Whole Wheat Biscuit; so I called her attention to it. I said, "Hold on; you are not giving me Shredded Wheat." She said, "Oh, yes; I am." I said, "You are not. You are giving me some Whole Wheat Biscuits." She said, "That is all we have. We sell that for Shredded Wheat right along."

So I took it, and I kept the carton that it came in; also took a menu along with me and put it in my pocket. I think I marked the date on the package or the menu, one or the other. The menu card shown me, Plaintiff's Exhibit 156, is, I think, the menu that I took, one just like it.

The carton, Plaintiff's Exhibit 157, is the one in which the biscuit were delivered to me. The slip of paper pasted on there was not done by me. The date on the package, "11/20/32, 8.30 A. M." is in my handwriting. That is the d te on which I made the purchase and is my means of iden ifying the package.

After the conversation with the waitress, I ate the biscuit. As far as I know, that was the only time I have eaten Kellogg's Whole Wheat Biscuit, unless it was served to me at some other time without the package. Shredded Wheat Biscuit is frequently served to me out of a package in restaurants. From my experience in Smithie's Coffee Cup, if, in response to an order from me, a biscuit we e served me in a dish with-

out my seeing the package, I do not believe I would be able to say whether it was Shredded Wheat or Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: This was not the first time I ever had any breakfast food served to me in a little package. I have frequently had corn flakes and other cereal products served to me in little individual packages. That is, recently, perhaps, a common practice in restaurants. At any rate, I have seen them in a large number of restaurants, small packages of corn flakes, Shredded Wheat, or other cereals. I think they are usually stacked up on shalves in back of the counter. I have seen the little individual cartons on display. I cannot say that I noticed any difference in the taste of the Kellogg's Shredded Wheat Biscuit, as distinguished from the National Shredded Wheat Biscuit. I saw right away, on the carton, when this individual package was put before me, that it was not the Niagara Falls or National Biscuit Shredded Wheat.

It was because I instantly recognized that fact that I spoke to the waitress about it and asked whether it was a shredded wheat product. I understand that, by the expression *shredded wheat* is meant one of these pillow-shaped biscuits made out of wheat in shredded form. That is the only way I have ever bought it. I never have had Shredded Wheat in any form other than the form of a pillow-shaped biscuit with shreds showing in the biscuit, that I know of.

Mr. Wagner, who is connected with the National Biscuit Company at Stockton, I believe, went with me into this restaurant. Mr. Wagner and I go fishing nearly every Sunday, when the weather permits. We usually get up early and have our breakfast uptown. On this particular morning, he asked me to go into

Smithie's Coffee Cup and have breakfast in there. He said, "I believe they are putting one over on us on Shredded Wheat."

So he told me that Kellogg's were putting out a Whole Wheat Biscuit and they are serving it in some restaurants as Shredded Wheat. I says, "Fine. Let us go in there and find out." That is the reason we went in there.

We both ordered Shredded Wheat; and we both were served Kellogg's Whole Wheat Biscuits. I saved my carton. I saw the carton served to him. I do not know whether he saved his or not. I also took a menu.

The carton was cut open when it was brought to the table. Before Mr. Wagner told me about it, I had not heard of the Kellogg Company making a shredded wheat biscuit. This experience in Smithie's Restaurant is the only one I have ever had with the Kellogg product. I make a practice of eating Shredded Wheat Biscuit frequently. I had ordered it in restaurants prior to that time, especially before I was married. This is the only experience I have had with the Kellogg product.

PATRICK S. BAIRD.

Deposition taken at San Francisco, California, February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am an accountant. I am not connected with the National Biscuit Company in any way. I know Mr. McDonough.

I recognize Plaintiff's Exhibit 1. I call it Shredded Wheat, with which I have been familiar for twenty-six years. I recognize the biscuit contained in that package. During the time I have been familiar with it, there has been no change in its shape or size.

I purchase Shredded Wheat. I just ask for Shredded Wheat, and I expect to get Shredded Wheat. I have noticed advertising of the Shredded Wheat Company usually in a plate garnished with fruit, as a breakfast cereal, principally in magazines. I have noticed advertising of the Shredded Wheat Company about ten or fifteen years.

I recognize the panel on Plaintiff's Exhibit 10, with the dish. That is what I had reference to when I spoke of a biscuit in a dish. It is sometimes shown in advertisements with fruit and different things on it. I have noticed that dish with the two biscuit in it possibly five years. I cannot recall it longer than that.

If I see a package not otherwise identified, with a plate on it and two biscuits, as shown on Plaintiff's Exhibit 10, that brings to my mind Shredded Wheat.

Shredded Wheat is served in my home. I use it occasionally for breakfast. I am not a family man, but sometimes I board or batch, myself, and make my own breakfast. I also buy it in restaurants, too. When I order Shredded Wheat in a restaurant, it is served either in the package or in the dish. Sometimes I have had it served in the package a number of years ago; lately, in a dish. At the present time, I could not say what is the practice; because I ate in restaurants very seldom for a number of years. I could not recall what would be the general practice. I imagine the dish now, would be my opinion.

I have ordered Shredded Wheat in a restaurant and had it served to me in a dish without the package. That has happened on more than one occasion, not very many. As I say, I do not eat very often in a restaurant for breakfast.

I have had no recent experience in a restaurant or lunch room recently when I ordered Shredded Wheat, except when I went in to get it in connection with this case. I went to the Foster Lunch System at 366 Geary

Street on November 25th, and asked for Shredded Wheat. They brought out a package that looked different from the other package I had been familiar with. I said I wanted Shredded Wheat. She said, "This is Shredded Wheat." I said, "Have they changed the shape of the package?" She said, "This is the only package I have ever seen it come in." So I said, I want to take it out with me.

Plaintiff's Exhibit 158 is that package or one identical with it. I did not make any mark on it by which I could identify it; but it is identical with the name and the size of the package in every respect.

CROSS-EXAMINATION.

THE WITNESS: Mr. McDonough asked me to make this purchase. He told me to go to that restaurant and ask for Shredded Wheat. That is my usual restaurant for lunch downtown, but never for breakfast. He asked me to take whatever they gave me. He did not ask me to go to any other restaurant; but I personally went to two other places, where I got the Niagara Falls product, which was served in the individual cartons. So, of the only three instances that I remember at the present time, in all three it was served in the carton. In two instances, I got the Niagara Falls Shredded Wheat and in the other I got the Kellogg's shredded wheat. One of them was a grocery store and one was a restaurant. Mr. McDonough did not tell me to go to that grocery store. I went of my own accord. I asked for Shredded Wheat and got the Niagara Falls Shredded Wheat.

Those are the only three instances I recall where I made any effort to get evidence for this case. This one instance, in which I received the Kellogg's shredded wheat product in the little carton, is the only instance I recall, the first instance of any experience with the Kellogg product. That was the first time I had ever heard of the Kellogg Biscuit.

It is safe to say that I now understand thoroughly that there are two makes of shredded wheat on the market; one of them made by the National Biscuit Company, and the other made by the Kellogg Company.

If I wanted the Kellogg Biscuit in the future, I would ask for it by name, as Kellogg's Shredded Wheat. Mr. McDonough was not with me on any of these occasions; but I did this at his request and then reported to him.

RE-DIRECT EXAMINATION.

THE WITNESS: If I were asking for Shredded Wheat and wanted to get Shredded Wheat I would just ask for Shredded Wheat. I would not specify any name unless I wanted this particular make of Kellogg's. If I wanted to get the whole wheat biscuit—well, I do not know the difference. Shredded Wheat is Shredded Wheat, to me.

RE-CROSS-EXAMINATION.

THE WITNESS: If I wanted the Kellogg product, I would now say Kellogg shredded wheat, or Kellogg biscuit. Formerly, I would not. Before talking with Mr. McDonough, I did not know that the Kellogg Company was making a shredded wheat biscuit; but I know it now.

ARNOLD MacCOOL.

Deposition taken at San Francisco, California, February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a 1932 graduate of the University of California. I recognize the package, Plaintiff's Exhibit 1, as a box or carton of Shredded Wheat. I have been familiar with Shredded Wheat ever since I can remember eating anything. I have had it at home all my life, as far as I can remember.

When it is served at home, we usually help ourselves out of the box. It is not brought on the table in a dish without the box. It is our custom to help ourselves when we want it.

I have seen advertisements of Shredded Wheat, usually displaying the biscuit in a plate with fresh, seasonable fruits; on posters, as a rule. I have also seen it on a package. I recognize Plaintiff's Exhibit 10. The dish shown on the end of that package would be the same, without the fruit. I could not say how long I have been familiar with a package like Plaintiff's Exhibit 10, but I remember it. I just took it for granted; that is all. If I see a package or a carton not otherwise identified, with a picture of a dish and two biscuit, that brings to my mind Shredded Wheat.

I buy Shredded Wheat, asking for it by the name, Shredded Wheat. When I ask for Shredded Wheat, I expect to receive Shredded Wheat. When I asked for Shredded Wheat, I expect to get the brand. I happen to know that there are other similar products. I know that Kellogg has a Whole Wheat Biscuit out.

When I asked for Shredded Wheat, if I am handed a package like Exhibit 153, that does not fill my order. I have recently had experience in purchasing Shredded Wheat, asking for Shredded Wheat in a store. I do not remember when it was. I do not remember where

the last time was. We usually trade with the chain stores in the neighborhood.

Last November, about the middle of the month, I went into a grocery in Berkeley, twenty-three hundred and something. I have forgotten the name of the store. I asked for Shredded Wheat, and the man repeated the name Shredded Wheat after me. He went to his shelf where he has packages grouped and handed me a package of Kellogg's Whole Wheat Biscuit. I asked him if they had changed the name recently. He said no, that this was the same article, that he did not handle Shredded Wheat because he could not sell it. He was quite emphatic that this was the same and that I should be just as well satisfied with it. I took the package. Plaintiff's Exhibit 159 is the package.

CROSS-EXAMINATION.

THE WITNESS: I did not buy the Kellogg product at any other store. I asked for Shredded Wheat in other stores and always got Shredded Wheat. I went to half a dozen other stores. In every one I got the Niagara Falls Shredded Wheat like Plaintiff's Exhibit 1. In just the one store I got the Kellogg product. Mr. Dave Gill, the manager of the Oakland agency of the National Biscuit Company, asked me if I would mind going to these six stores and asking for Shredded Wheat.

At the one store where I got Kellogg's biscuit, the man was quite emphatic in telling me that that was the same product or the same kind of product, but made by another manufacturer. He did not mention it was made by Kellogg's until I asked him, until I noticed the name itself. He said it was just the same kind of product but made by somebody else, and he was quite emphatic about that. He said, "It is the same darn thing." He repeated that continuously; he was very slangy in his expression.

Later I opened the package and looked at the contents of it. It was my first experience with it. I knew nothing about it. When I speak of Shredded Wheat Biscuit, I mean a biscuit in pillow-shaped form, made out of wheat drawn into shreds and put into biscuit shape. Except as to size, the Kellogg product looked like a biscuit made out of wheat in shredded form and put into a pillow-shaped biscuit, very similar. I did understand what the grocer meant when he said it was the same kind of a product made by somebody else, "the same darn thing" made by Kellogg's, as I pointed out to him. That was the first experience I had with the Kellogg product.

I do not think Mr. Gill, of the National Biscuit Company, told me anything about the Kellogg product when he asked me to make the purchases. He told me he was going to ask me to testify in this case, and to see if anybody would try to substitute Kellogg's brand for the Shredded Wheat.

It is fair to say, that he had told me about the Kellogg Company having a shredded wheat biscuit on the market before I actually saw one of the packages. He said he wanted me to go to this store to see whether anybody was trying to substitute that for the National Biscuit product. I do not believe he said anything about the case, because I did not know at that time just exactly what he wanted. I knew they were trying to get evidence to the effect that substitution was being done. Other than that, I knew nothing about it, nor did he tell me. I do not think he knew very much about it himself. That was my only experience of any kind with this particular Kellogg product.

It is fair to say that, since that experience, I know and realize perfectly well now that shredded wheat biscuit are being made by two different concerns, the National Biscuit Company and the Kellogg Company. I did not try any of Kellogg's biscuit.

I am working for the National Biscuit Company at present, as bench boy in the packing department, general helper, in the San Francisco plant. I have been there about a month today. The San Francisco plant is a cracker plant of the National Biscuit Company. I do not work in their Shredded Wheat plant. They have a Shredded Wheat plant in Oakland. I have never been in it. The six stores I went to are all independent stores, separately owned, as far as I know.

RE-DIRECT EXAMINATION.

THE WITNESS: In November, 1932, I was not employed by the National Biscuit Company. I started the twelfth of January.

MRS. JESSIE M. FATJO.

Deposition taken at San Francisco, California, February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the real estate and insurance business at Santa Clara and at San Jose. I keep house for the folks and the children. My family consists of my husband's mother and father and my two children and myself. I am not connected with the National Biscuit Company in any way, neither was my husband during his lifetime.

I recognize Plaintiff's Exhibit 1, a package of Shredded Wheat. I recognize the contents. I naturally call it Shredded Wheat. I have been familiar with that item, I would say, about twenty years. When we were in the grocery business, naturally we sold Shredded Wheat, you know. My husband's family have been in the grocery business ever since 1848. They

are not in the business now; but, up until 1926, they continued in the business, one to the other. That is, the family carried on the business from one generation to the other; and Shredded Wheat was carried in their store. I have been in the family fifteen years. The whole time I was there I have seen it.

The expression Shredded Wheat represents to me the National Biscuit Shredded Wheat, which we have for breakfast. I serve it to the youngsters at home almost every day. I try to change the form of it. One morning I heat prunes and put them over the Shredded Wheat. Other mornings I change, possibly, to apricots or whipped cream. We have even tried lately poached eggs on top.

I take the Shredded Wheat out of the package before I serve it. When the youngsters are served separately, when they go to school, I take a couple out of the package and put it on the plate.

I have obtained Shredded Wheat at different times in restaurants, when I have had the children with me. I do not particularly eat it myself. The children always ask for "that box". They get a small box with two in it, one each for them, as a rule, or sometimes they each get a box. At different times the children have had it without the box, in restaurants, whenever I bring them to the city or take them away from home.

I purchase it at stores, also, I just say "Shredded Wheat." Sometimes I ask for it over the telephone. When I ask for Shredded Wheat, I expect to receive Shredded Wheat.

I asked for a package of Shredded Wheat at Miller's Station, Miller's store, which is on the road from Cupertino to Saratoga. They gave me Kellogg's package. It did not look quite familiar to me, so I asked the woman, "Is that Shredded Wheat?" and she said, "Yes." I had never seen the Kellogg package before, so I glanced at it—I have been so accustomed to get-

ting Shredded Wheat—and said, "Is that Shredded Wheat?" and she said, "Yes, it is." So I took the package. When I started home, I noticed it was not. Plaintiff's Exhibit 160 is the package I purchased on that occasion. There was a figure 13 on the package when I got it. The yellow slip clipped to the package is the purchase slip that was given to me at the same time.

This took place on November 25th, in the afternoon. I did not particularly inspect the package at the time I bought it in the store. I just glanced at it and saw a biscuit on it. I have been accustomed to seeing a biscuit on Shredded Wheat, the picture of a biscuit. I said, "Is that Shredded Wheat?" I thought maybe they had changed their package. She said, "Yes," so I took it. When I got out in the machine, I put it in the back, and the youngsters said, "Mama, this is not the kind of Shredded Wheat we have been accustomed to getting." So I looked at it, and then I recognized it was not. That was my first knowledge that it was not Shredded Wheat. I had no idea anyone else had more or less the same package. When I looked at the package in the store, I did not read the name Kellogg on it. I just saw the biscuit, the wheat biscuit, and then I thought that is what it is.

Prior to that time, I had seen advertising of the Shredded Wheat Company. I have helped put up displays at the store quite frequently. I have always noticed on Shredded Wheat the long biscuit at the bottom of the package, the picture on the face of Plaintiff's Exhibit 1. Looking at Plaintiff's Exhibit 10, I had seen the biscuit and the plate. We had some display cards at the store with that. We used to make up our other part of the display. If we had any children in any pictures, we would put it behind that.

Those displays were furnished us by the Shredded Wheat Company or by the National Biscuit Company.

It seems to me that I recall seeing advertising of Shredded Wheat in a dish like that almost the whole time I have been in the store helping.

If I saw any carton not otherwise identified, like Plaintiff's Exhibit 153, with two biscuit and a dish on the outside of it, that would naturally bring Shredded Wheat to my mind; because I know, when I took that package, I just glanced at it and saw the biscuit. I thought I had Shredded Wheat.

We had some relatives living across from the Shredded Wheat factory in Oakland there. I used to visit them. I know it is also made in Niagara Falls, by the Falls on the box.

I just ate a couple of Kellogg Biscuit out of this package I bought that day. We tried them. I noticed there was a little difference in size between the Shredded Wheat biscuit and the Kellogg biscuit, although the biscuit itself is almost the same thing. I do not know whether I could tell them apart by the taste. We have been so familiar with Shredded Wheat, I think I could, because one is a little larger than the other.

CROSS-EXAMINATION.

THE WITNESS: I did not know anything about the Kellogg Company putting out a wheat biscuit at all, until I bought that package. I have always been fond of Shredded Wheat, and we have always eaten it as youngsters. I serve it to the folks quite frequently. I seldom eat breakfast at all. You have to give little children a change of any breakfast cereal. I do not care what it is. They tire of the same appearance every day. We have always done that with all food for the children. We change off, occasionally to mush. We usually stick to Shredded Wheat. We always have it in the house. Sometimes we feed them poached eggs. As to cereals, the only two that we know anything about in our house are Shredded Wheat and mush.

Of course, we have been in business. I know about other cereals from being in business. In our own house, we have never handled anything but mush and Shredded Wheat, particularly.

The only way I have ever heard of Kellogg's Corn Flakes is through the grocery business I was in. The youngsters never seemed to take to Corn Flakes. I know my sister's children have it quite frequently. My children never seemed to take it. We never serve any other cereal but mush and Shredded Wheat. I do not know that the children get tired of either; but we have always tried to give the children a change of food. We change back and forth from Shredded Wheat to mush and mush to Shredded Wheat. Sometimes we serve them eggs or different foods. As far as cereals are concerned, we have not had many cereals.

I have never worked in the grocery store. At night, the folks took care of the children, and my husband and I went down to the store and got it ready for Saturdays and special days, put up displays ourselves, and things of that kind.

XQ. 84. Did you not say, in the beginning of your testimony, that, when this woman handed you the package of Kellogg's Whole Wheat Biscuit, you noticed something different about it and asked her whether it was Shredded Wheat?

A. Well, I just glanced at the package and I saw the biscuits, and I thought—I do not know exactly what I did see. I thought I saw the plate on the front; but I did not pay particular attention, because I was on my way to Saratoga.

XQ. 85. You were led by something about it to ask the woman whether that really was Shredded Wheat?

A. Yes, I said—well, I just noticed a little change, somehow or other; and I says, "Is that Shredded Wheat?" and she said, "Yes," and I thought, well, there is the biscuit; I have it."

THE WITNESS: When I got in the car, the children read it and said that was not the kind, because they saw the whole wheat on it and it was not Shredded Wheat.

I was asked to make that purchase by Mr. Wadwitz, the manager of the National Biscuit Company in San Jose, whom I have known about a year. During all the fifteen years I have known of this shredded wheat product, the name Shredded Wheat has always meant the National Biscuit Shredded Wheat to me. I was familiar with it and I knew it.

Mr. Wadwitz knows that I tried to sell real estate and write insurance. He phoned me and said, "Are you going anywhere near Saratoga?" It just so happened I was the next day. I said, "I have to see Mr. Boyce in Saratoga." He said, "If you will pick me up a package of Shredded Wheat at this station," and he mentioned the station. I said, "I will do that." He said, "Bring it back to me when you get it." That is all I knew about it. I had no idea there was anything more to it. He just asked me to pick up Shredded Wheat at that one place.

The only experience I ever had with Kellogg Whole Wheat Biscuit was just that one place. That is the only place I know of. When I have seen Shredded Wheat in restaurants, it has been served in individual packages, and it has always been the National Biscuit Shredded Wheat. I have never gotten anything different in restaurants, that I know of. When I came back from Saratoga, I took this package to the National Biscuit man.

GEORGE J. BORN.

Deposition taken at San Francisco, California, February 8, 1933.

Direct Examination.

The Witness: I am in the retail grocery business. I own just one store. I have been in the business about thirty-one years and have had this same store all that time. I was connected with the grocery business fifteen years before that, so I have been actively connected with the business for more than forty years.

I recognize Plaintiff's Exhibit 1. It is Shredded Wheat. I have been familiar with that Shredded Wheat about thirty-eight years. I have carried it in my store or in the stores with which I have been connected, all that time. I think that is nearly ever since it was first made. I first became familiar with it at Pittsburgh, Pennsylvania. I was visiting the Pittsburgh Exposition there. The boss brought it home after an evening there. We all thought it was kind of funny to be eating hay or straw, as we called it then; but we soon began to like it. I think we did not stock it in the store for about three months after we became familiar with it. We have had it ever since that time.

The sales of Shredded Wheat have increased since we first put it in. We sell about five dozen a month now. It has become easier to sell all the time, especially where there are children in the family. I like it so well myself that I think adults like it about as well as children do.

I have observed the advertising done by the company. In my opinion as a merchant, I think that advertising has had to do with the increase in the amount that we turn over. I do not think the appearance of the biscuit through the years has changed at all. Sometimes I think there is a slight change in the package, the cut on the package, but not the biscuit itself.

When our customers ask for this product, they ask for a package of Shredded Wheat. When I am asked for that, I give them Shredded Wheat, referring to Plaintiff's Exhibit 1. I never have given them anything else when Shredded Wheat is asked for. I recall seeing in the advertising a picture of a dish on the end of the panel in Plaintiff's Exhibit 10, and I recall the use of that package. Without a change, I think that must be twelve years or more that they have had that. I have seen it, also, in other advertising of the company during that period, on cuts and placards, also in newspaper and magazine advertising.

From my experience in grocery merchandising and dealings with the public, as to whether this expression Shredded Wheat has any particular association or meaning in the minds of the general public, I think that, in most people's minds, there is only one Shredded Wheat. Nothing else will take its place. It is like Palmolive Soap or Dutch Cleanser that we sell. Those names refer to particular makes of soap and cleanser. I regard Shredded Wheat as a trade name. I guess I mean by that, if people ask for Shredded Wheat, they want Shredded Wheat only.

CROSS-EXAMINATION.

THE WITNESS: Besides Shredded Wheat, we carry a general line of cereals, mostly all the advertised cereals. We carry all the wheat flakes and prepared bran and raw bran, and Wheaties and Puffed Wheat. I do not think the newer cereals have affected Shredded Wheat very much, in my observation. I have not noticed any change in the demand for Shredded Wheat in my store. It is true, however, that the customers of a store shift around. Most customers change from one cereal to another; and to some extent it is also true, I think, that, unless a product is constantly advertised, it

would soon lose its old demand; it would soon lose the old customers and not be getting any new customers unless the advertising was kept up.

I do not think we ever have had a demonstration of Shredded Wheat in our store. I am familiar with what is known as a demonstration. We carried Kellogg's Whole Wheat Biscuit at one time. We do not carry it at the present time. I cannot say that I have seen any of the advertisements of the Kellogg product. I may have. I think we first handled Kellogg's shredded wheat around five years ago or less; maybe three or four years ago. It is fair to say that, since that time, I have known that there were two concerns making this product, the Niagara Falls Company and the Kellogg Company.

When I was carrying the Kellogg product, if a customer asked for Kellogg's Shredded Wheat, I would give them the Kellogg product. When most customers ask for Shredded Wheat, they do not usually say Shredded Whole Wheat Biscuit; they usually say Shredded Wheat. Shredded Wheat has no other current name, as far as I know, than the words Shredded Wheat. Uneeda Biscuit is a soda cracker; but I do not know any other name for shredded wheat or shredded wheat biscuit than the words Shredded Wheat or Shredded Wheat Biscuit. I should say Shredded Wheat is only Shredded Wheat. That is all I have calls for. I would understand a shredded wheat biscuit to be the Shredded Wheat Biscuit that we have known so long.

I do not think it is physically possible for any other maker to make that shredded wheat biscuit than just this one concern at Niagara Falls, if he tries to sell it for Shredded Wheat Biscuit. You can make an article similar to it. If you do not use "Shredded Wheat Biscuit," I would think it would be all right.

If a manufacturer made that product, I do not know any other name that would describe it than the words shredded wheat or shredded wheat biscuit. I would not know what else he would call it. If it were made out of wheat shredded and put up in that pillow-shaped form, I do not think it would be a shredded wheat biscuit. It would not be Shredded Wheat, because Shredded Wheat is Shredded Wheat. I could not suggest any other name by which it could be described. I would not know any other name than shredded wheat biscuit. There was one put on the market not so long ago, called Muffetts. That was not called Shredded Wheat. I think Muffetts are shredded, all right. I know some people make it out of a flat pressed wheat berry and call them whole wheat biscuits. I know a product called Triscuit. That is compressed shredded wheat.

RE-DIRECT EXAMINATION.

RDQ. 67. Why did you cease carrying Kellogg's Whole Wheat Biscuit?

A. Well, we could not seem to keep it fresh. We tried to sell it for a while, but were unable to sell it fast enough to keep it fresh. And then the confusion of the people in wanting Shredded Wheat, and they did not know which to take, so we eventually cleared it up by carrying only one brand.

RDQ. 68. Did you find there was confusion on the part of your customers?

A. Yes, there was.

RE-CROSS-EXAMINATION.

THE WITNESS: Ours is not a self-service store. It is arranged for self-service, but we have been a service store so long that people do not help themselves much in our store.

Mr. Vandervoort, a member of the attorneys for the National Biscuit Company here asked me to testify

in this case. I also know the Sacramento distributor, the agency there. I did not know Mr. Vandervoort before he asked me to testify. He is to pay me for my trip. He asked me whether I was still handling Kellogg's Biscuit and I told him I was not. I came over here by myself.

We did not consider the Kellogg brand as Shredded Wheat. We tried to sell it as a cereal, but it did not sell fast enough to keep it fresh. It had rather limited advertising at that time. I do not know just what it has now. We did not associate it in our minds as being Shredded Wheat; and we could hardly persuade our customers that it was the same thing when we tried to sell it.

While I do not know that the matter ever came up during the time we were handling the Kellogg product; if a customer had asked me whether there was any other make or brand of Shredded Wheat besides the Niagara Falls brand, I would say that there was only one Shredded Wheat and we could not conscientiously sell the Whole Wheat Biscuit as Shredded Wheat. If it was put direct to me, I think I would explain that Shredded Wheat was the only Shredded Wheat. I would not use the expression that Kellogg's was another make of shredded wheat. I would not even say that shredded wheat or shredded wheat biscuit were being made by two manufacturers: one at Niagara Falls and the other at Battle Creek. I would simply tell the customer that, as far as I know, there is only one kind of Shredded Wheat on the market, the Niagara Falls product.

If the customers told me they had seen some of the Kellogg product and it looked like Shredded Wheat and tasted like Shredded Wheat, I would not tell them they had not seen it; but I would tell them it was not Shredded Wheat; meaning by that that it was not Shredded Wheat anyway. I have no doubt it is made

of wheat. I do not know whether the Kellogg product is shredded. We do not call it Shredded Wheat. I am familiar with the Kellogg Biscuit. I always thought it was just a trifle finer shreds than the Niagara Falls Biscuit. It is very little smaller; at least, it was when I sold it. I am not sure if it has the same number of biscuit in the carton as the Niagara Falls product. I think it did have a larger number of biscuits.

I have not talked about the case with anybody besides Mr. Vandervoort, except my brother, that I was coming down here. He is my partner.

When I speak of shredded wheat, I mean a product made by the National Biscuit Company at Niagara Falls or at Oakland. It is not impossible for me to conceive that the same product could be made by another company at another place. I do not think I would look at it that way. I think they could make a biscuit if they did not call it whole wheat biscuit or shredded wheat and make it so much alike. The name whole wheat biscuit does not mean to me the same thing as shredded wheat biscuit.

There are not half a dozen different products you could call whole wheat biscuit. I think the Sanitarium Health Food Company made one here some twenty years ago, I guess; and they pressed the whole wheat berry into a flat-like oat flake and baked it. I forget, now, whether it was exactly square; but they did not call it whole wheat biscuit. They called it Sanitarium Biscuit, I think.

This product in Plaintiff's Exhibit 1 is shredded whole wheat biscuit. That is the same thing that we have always associated with the name shredded whole wheat biscuit.

If a customer asked me for whole wheat biscuit, or Kellogg's Whole Wheat Biscuit, I would say I did not have it. I would not sell the other product as the same product. I think I should tell her that we had shredded

whole wheat biscuit. I do not believe I would try to tell her it was the same article as Kellogg's. I might say it was made out of the same material. I think I would say it was made out of wheat and water.

My brother did not come down with me. The Pittsburgh Exposition that I spoke of was always held in the fall; but I could not say whether it was exactly thirty-eight years ago. It was very early in the history of my recollection of Shredded Wheat. I am just guessing about the length of time. I think it was made before I became familiar with it. I thought it was nearer forty years ago that it was made; but Mr. Vandervoort said it was about thirty-eight years. I sold it just as soon as it was introduced in Pittsburgh. It may only have been thirty-seven years.

RE-DIRECT EXAMINATION.

THE WITNESS: At the Pittsburgh Exposition they had a little machine that showed the process. They put in the wheat berry and brought out the shreds, the same as they used for a good many years afterwards, just about the same kind of apparatus. At that time, it was something new. It was quite a long time ago. I remember it as something that was then being newly introduced.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not remember whether, in the beginning, their idea was to sell the machine and have people make the shredded wheat at home or not. From the table it stood on, the machine was probably about two to three feet high. They put the wheat in on top.

I think it was about three months after that time that we began carrying it in regular package form. The man I worked for, Frank Steinberg, brought home a package. I do not know now whether it was a sample package or regular package. They used to put across

the package: "Tell me what you eat and I will tell you what you are." He ridiculed that phrase and said, "I can tell you what you are without eating that stuff." That phrase naturally stuck in my mind. They discontinued it a long time ago. It was on some of the old packages.

I remember seeing the picture of a woman, the Goddess Ceres, with a sheaf of wheat, on the old packages. I think I remember seeing that on packages up to ten or fifteen years or so ago. I strongly associate Niagara Falls with this National Biscuit Shredded Wheat Biscuit. In fact, I thought it was made there first, but it may not have been. Mr. Vandervoort did not say anything about its being made anywhere else. Of course, I knew they had a branch in Berkeley or Oakland. In all their advertising, Niagara Falls has been very prominently featured. I never have had anybody ask for this article, except by the words Shredded Wheat. If anybody asked me for Niagara Falls Shredded Wheat, I would have no doubt what they meant. Then, of course, I should hand out Shredded Wheat. I carry the rest of the National Biscuit line in my store, their cracker line. We handle a great variety of their line. I handle the rest of the Kellogg line, excepting only the shredded wheat biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: If anybody asked me for a package of Shredded Wheat, I would have no doubt in my mind what they would want.

RE-CROSS-EXAMINATION.

THE WITNESS: If they asked for Shredded Wheat, I would never give them anything except the Niagara Falls product.

WILLIAM G. EASTMAN.

Deposition taken at San Francisco, California, February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I operate and own a grocery store in Stockton, known as the Eastman Cash and Carry. I have been in that business thirteen years, always in Stockton.

I recognize the package, Plaintiff's Exhibit 1. I call it Shredded Wheat, original Shredded Wheat. I recognize the contents. I have been familiar with Shredded Wheat like that for some time. The moment I went into the grocery business, I was familiar with it. I used it in my home for quite a few years before that. During my experience with it, it has always been of substantially the same appearance as the biscuit in Plaintiff's Exhibit 1.

I have seen Shredded Wheat advertised a great deal. I do not recall having ever seen a package like Plaintiff's Exhibit 10, with a picture of two biscuit in a dish on the end of the carton. I have seen that dish, however, in advertising of the Shredded Wheat Company. I carry Shredded Wheat in my cash-and-carry self-service store. My customers come in and help themselves to what they want. Sometimes, when strangers come in, we wait on them. Ordinarily, they wait on themselves.

When a customer orders Shredded Wheat, I know she has the original Shredded Wheat in mind, Plaintiff's Exhibit 1. When a customer asks for Shredded Wheat, I supply her with the original Shredded Wheat, the National Biscuit Shredded Wheat. From my experience in dealing with the public, I am able to say whether the expression Shredded Wheat has a definite meaning or association in the minds of the public. When they

ask for Shredded Wheat, they expect to get the original Shredded Wheat, in my mind, by which I mean the Shredded Wheat with the Niagara Falls picture on it. The public feels that way about it through the picture on there and the advertising it has had. I would say that the advertising I have seen done by the Shredded Wheat Company and the National Biscuit Company has had a great effect on the public. They look for that package, the original Shredded Wheat. The name Shredded Wheat has a great influence on the public, the original Shredded Wheat name.

If a customer asked for Shredded Wheat, I would never give her anything else than a package like Plaintiff's Exhibit 1. In my experience and in my opinion, I do not think the public think of any other product or the product of any other person when the expression shredded wheat is used.

I have seen advertising where it was "Shredded Wheat" in large letters, and then "Kellogg's" in small type, in the Stockton paper, within the last three or four months. I think that sort of advertisement is a very misleading thought to the public. It was misleading to me. I read it, and I approached the Shredded Wheat salesman on the price he had it advertised for, which I think was eight and one-half cents. He said it was not advertised. I was so positive about it that he said no, it was not. I said, "I am positive." He looked the paper up and said it was Kellogg's Whole Wheat Shredded Wheat that was advertised. Up to that time, I really thought it was the other. I was so positive about it, and my clerk was also positive; but he looked it up and said it was Kellogg's Shredded Wheat that was advertised.

CROSS-EXAMINATION.

THE WITNESS: I knew that the Kellogg Company did not make the original Shredded Wheat. When I

saw "Shredded Wheat, Kellogg's," I did really think that meant Niagara Falls Shredded Wheat. I did not read far enough down. The "Shredded Wheat" was what confused me and what misled me so much I did not read on down. I took it up with the salesman and he told me the word *Kellogg's* was there. That was the advertisement of the Green Frog Food Emporium in Stockton, which was advertising Kellogg's Shredded Wheat, at eight and one-half cents.

I do not now stock Kellogg's Shredded Wheat. I have stocked it, but I do not any more. Mr. Wagner, the manager of the National Biscuit Company at Stockton, asked me to come down here and testify in this case. I came down on the train. He told me I would be paid for my time in the case. I expect to get a check when I go out of here.

I handle other Kellogg products, the Corn Flakes, and Kellogg's line, a good many of the articles, except Shredded Wheat. My store is operated now as a self-service store. The customer comes in and goes to the shelves and takes down what she wants. It has been self-service for five years, and was service before that.

Up until five years ago, whenever a customer asked for Shredded Wheat, we gave her the Niagara Falls product. Since then, the customer goes to the shelf and takes whatever she wants, if it is there, unless it is a stranger or one of the few who do not prefer to wait on themselves. So far as my store is concerned, for the last five years, with the exception of very few customers, they wait on themselves, do not say anything to me, do not ask for anything; they go and get what they want.

Something I have never done was to substitute. I handled the Kellogg product, and there was very little sale for it. I handled it when it first came out. If a customer asked for Shredded Wheat and I sent her something other than the Niagara Falls product, I

would expect her to send it back, depending on if she was that kind of customer. Sometimes they keep them and sometimes they do not. Sometimes they do not care what they get.

In my store it is the hardest thing in the world to put over something new. They seem to hold to the old. In my particular store, new cereal products do not sell very rapidly. There are some exceptions, I will admit. I believe advertising is a great thing, but it is hard for me to answer as to whether the Shredded Wheat business would die out if they discontinued advertising. I would not like to commit myself on that. I had not thought anything about discontinuing advertising. That they always keep up advertising has, I think, a significance to me.

We have had demonstrators there in the store. Those demonstrators have been trying to introduce new products or introduce old products to new customers. I do not think I would need a demonstrator in there to tell an old customer about Niagara Falls Shredded Wheat. I never had any demonstrators of the Kellogg's Shredded Wheat Biscuit.

I do not know how long ago I stocked Kellogg's Shredded Wheat. I do not know how long it has been on the market. I stocked it, I think, when it was first put on the market. I distinguish one of these products as the original Shredded Wheat and the other as Kellogg's. I have known for about five years that the Kellogg product was on the market in competition with the Niagara Falls product.

I handle Wheaties and Albers Wheat Flakes. The Wheaties are Sperry Wheaties, made by the Sperry Flour Company. They sell very slowly in our store. That is no go.

If a customer asks me for Corn Flakes, I generally understand that as being a particular product or brand, Kellogg's Corn Flakes. If a customer just said "Corn

Flakes," I suppose I would give them Kellogg's. It depends, sometimes, on circumstances. There is only one brand of Corn Flakes, I think. I have Post's, but they are not called Corn Flakes. They are Post Toasties. I think I did handle corn flakes other than Kellogg's or Post Toasties, but it was a good many years ago and I have forgotten the brand. I do not handle it any more.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not carry Kellogg's Whole Wheat Biscuit because the sale was not great enough on them for me to handle them. At that time, we were operating as a self-service store, and the customers just did not take them. I had Shredded Wheat in the store at the same time. I have always had Shredded Wheat, ever since I have been in business.

RE-CROSS-EXAMINATION.

THE WITNESS: In 1927 or 1928, when we had both products, Kellogg's and the Niagara Falls, while we were still a service store, a customer would specify if she wanted Kellogg's. We have not carried Kellogg's biscuit since we became a self-service store.

W. D. VAN ARSDALE.

Deposition taken at San Francisco, California, February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager for L. Hart & Son Company, a department store in San Jose. One of about forty different departments is a grocery department. I have charge of the grocery, the crockery, and the toys. I have been manager of those departments

for seven years. I have been in the grocery line indirectly for about thirty years, and, directly, about nine or ten years in direct charge of groceries. I have been in the crockery and glassware, directly next to the groceries and monkeyed a lot with that, too. It is true that I have been more or less familiar with the grocery line for thirteen years or more.

L. Hart & Son Company is a service store generally, but the grocery department is self-service. I have been connected, indirectly, with the Schaffer Company, at Modesto, who have two departments, service and non-service. L. Hart & Son Company do accept a very few orders over the telephone for groceries.

I recognize Plaintiff's Exhibit 1, and I recognize the contents, as Shredded Wheat. I have known Shredded Wheat since long before 1900. My wife's father was a fiend on Shredded Wheat. He used to eat it with milk and poached egg. I do not remember having it in my home; but that was in my wife's father's home, I saw it and knew about it at that time. It then looked like the present product, as far as I can remember. I do not think there has been any change in shape or appearance.

I recall Shredded Wheat advertising. I think almost every magazine that I have picked up has had a Shredded Wheat in, as far as I can remember. I used to be in the advertising business and have watched advertising a great deal for ideas. When I pick up a magazine, I usually read all the ads, in consequence. I have frequently seen ads of Shredded Wheat. In my opinion as a merchant, I think the effect of the advertising done by the Shredded Wheat Company through the years on the public has been to stimulate the sales of that particular product. The effect on the name Shredded Wheat has been that they come in and ask for Shredded Wheat. My customers ask where

the Shredded Wheat is. We do not serve them there in the store. If they ask where the Shredded Wheat is, we direct them to the section where it is.

When I use the expression Shredded Wheat, I mean only one thing by that. Our cereals are all together; and, if they would ask for any particular cereal, we would direct them to that particular part of the store. If a telephone order comes in for Shredded Wheat, we fill that order with Shredded Wheat. We do not substitute anything in the store.

I recall the package like Plaintiff's Exhibit 10, with the picture on the end. I have seen that dish. I would not be able to say how long I can remember having seen the use of that dish with two biscuit in it, because that package, to my recollection, has been the same ever since I can remember selling Shredded Wheat off the shelf, with the exception of possibly a few little changes in lettering or style.

When a customer asks for Shredded Wheat, he means that particular package. I would certainly say that the public associates the name of Shredded Wheat with this product.

In our grocery department, we set all our cereal products together. All the dry cereals that come to us already cooked ready for eating are kept together, relative to one another. The farinas and cooked mushes are all kept together. We keep corn flakes one right by the side of the other. We keep our farina, cream of wheat, pearls of wheat and Sperry wheat hearts all in one section by themselves. We do that to facilitate the customer in getting what she wants quickly without any confusion.

We carry Kellogg's Whole Wheat Biscuit next to Shredded Wheat, in the same bin, the same part of the store, the same section, with a little partition in between. In the Kellogg's packages we have at present, there is a cellophane display package, just one

in each case. That is our present stock. That package is like Plaintiff's Exhibit 153. That is always kept in the front. We keep all display packages of that nature in the front of our section. The rest of the case consists of packages like Plaintiff's Exhibit 155, with a picture of two biscuit in a dish on each side.

There is one instance I can state exactly. There was a lady sent her twelve-year-old boy for a package of Shredded Wheat. He picked out a package of Kellogg's, with the open face. I do not know that he stopped to read it. He took it home. She called me on the 'phone, told me she was sending him back, that he got the wrong package. We changed it for Shredded Wheat.

I think there have been several other instances. A boy in the store has told me that there have been several other times when packages have come back and been changed. I have noticed sometimes that some of the customers will pick up one of the Kellogg's Shredded Wheat and look at it, talk among themselves, and say no, that is not what they want. Then they pick up the regular Shredded Wheat and take it out. We had an instance just two days ago of a woman who bought both packages and said she was going to try them out and see which was the best.

I think that the cellophane opening feature on Plaintiff's Exhibit 153 is the one that would offer the most confusion, because it resembles the regular Shredded Wheat, the genuine Shredded Wheat. I think the picture of two biscuit also has a tendency to confuse to a certain extent, but not so much as the other one.

CROSS-EXAMINATION.

THE WITNESS: There are very few of the Kellogg packages go out. We sell very, very little Kellogg's biscuit in comparison with Shredded Wheat. We have

carried the Kellogg's, I will say, offhand, about six to eight months.

Mr. Wadwitz, of the National Biscuit Company asked me to come down and testify in this case. He said he would reimburse me just for my expenses. We are very friendly.

Of course, there are lots of times, possibly, when merchandise would come back, that I have no knowledge of, because the cashier has instructions that, if anybody brings anything back, no matter what it is, whether it is their fault or the fault of the merchandise, he is to replace it with whatever they w[redacted]. Those things are not brought to my attention unless there is something radically wrong with it.

I do not think there is anything unfair about the way I have arranged those packages alongside each other. I have no knowledge as to whether people who pick up a package do so because they want that particular package. People who go into a self-service store do pick up one package sometimes when they really want another one that is right alongside of it, if there is a crowd and they are in a hurry. We have many instances in other merchandise when they do that. Rather than wait for the crowd to get away, they take the first one they can get hold of, to get out.

There are two kinds of substitution: one that might be called fraudulent or deceptive, and the other non-fraudulent or non-deceptive. If a customer asks for one kind of baking powder, and the grocer is out of it, some of the grocers will take a chance on sending her another baking powder. We do not. Absolutely every order we fill down there is filled with what they ask for. If it is part of an order and we do not have the article, we immediately telephone them that we do not have it and ask them if we can send something else. We never substitute on our own hook.

If they said they wanted Niagara Falls Shredded Wheat, and I happened to be out of it then and asked them whether they wanted the Kellogg's and sent it along, I would not regard that as substitution. That would be something that the customers picked out themselves. Such practice in the grocery trade is becoming more and more prevalent. That is, grocers are finding out more and more that there is no use sending a woman something she does not want; because, if they do, she will either send it back or quit trading. There are so many places you can get the stuff you want, there is no necessity for substituting. So, to that extent, I think the practice is becoming less and less prevalent all the time, with the legitimate grocers. There are many who are not legitimate, nowadays. Customers very soon get to discriminate between the legitimate grocers and the illegitimate.

If Shredded Wheat advertising were discontinued, I would not expect that business to go on in its present volume; nor would I expect it with any cereal. Practically any business based on advertising requires constant stimulation by advertising. I would not say that the reason for that is customers tiring of Shredded Wheat and advertising bringing in new customers. Demonstration is, to a certain point, for the purpose of recruiting new customers. Advertising is really intended, primarily, to stimulate customers who are new customers. New customers are coming up all the time, because there is a new generation being born every day. You have to educate them. My father-in-law used to eat Shredded Wheat twice a day. I do not know whether they have to advertise to him to keep him buying it. I do not remember. I have never seen any advertisement of Kellogg's shredded wheat product, to my knowledge.

There is still some of the old fraudulent type of substitution, where one package is made to imitate an-

other package so closely that, when the customer gets the imitation package, she really thinks she is getting the original. In that case, there is an actual deception practiced or intended to be practiced on the customer. When the customer gets this imitation package, she actually thinks she has got the thing she ordered and wanted.

I cannot tell you just exactly how long I have known the Kellogg's shredded wheat product, but it was from the first time it was put out. I would not say it was as long as four or five years ago. When it was first put out, the Kellogg salesman approached me. It was ordered and did not come. We did not put it in for some time after that. This Kellogg product is the only other make of shredded wheat besides the Niagara Falls that I know of. Since I was approached by the Kellogg salesman, I have known of these two brands, the Niagara Falls brand and the Kellogg brand of shredded wheat. The salesman who approached me at that time was one of the regular salesmen in that territory, who handled Kellogg's Corn Flakes and the complete line of Kellogg products. He always calls when anything new comes up. Those salesmen, as far as I know, pretty generally travel the trade in that territory. He calls on all the trade down there.

RE-DIRECT EXAMINATION.

THE WITNESS: It is true that there are various grades or degrees in which packages may be deceptive. I think sometimes the packages are put up in a very similar manner because they are possibly made up with the idea of appealing to the customer's eye, when they know the other package has appealed to their eye, and not as a matter of defrauding the customer. At the same time, I think they do defraud them. Any substitute or imitation, I would think, is a fraud.

RDQ. 96. In what category do you put the Kellogg packages, Plaintiff's Exhibits 153 and 155? Do you think that they are calculated to deceive, or that they are——

A. I would judge that that package there, with the open face was calculated to sell shredded wheat biscuit on the strength of the regular Shredded Wheat advertising.

THE WITNESS: In one of my answers I meant to mention still another product, Muffetts. It is a whole wheat biscuit, and I would imagine it is of similar composition to Shredded Wheat. It does not look like Shredded Wheat at all. I never knew of any instances of confusion between that and the Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: I regard Muffetts as a wheat product of similar nature to shredded wheat. I do not know whether it is made of wheat that is shredded. It is a similar-tasting product to the others. That is as far as I can tell. I do not know just how they are made. In fact, I would not be able to tell you how Shredded Wheat Biscuits are made.

I do not know that we have any packages intended for fraudulent substitution for some other package; but we have lots of different products, the labels of which are copied very closely from those of other products.

If somebody brought me a product so nearly like Baker's Chocolate that I could make the customer think she had gotten Baker's Chocolate, with the same lettering, I would not handle it, unless it were a superior product. Even then, if it were a product intended to be fraudulently substituted for another product, our store would not handle it. We will not even practice the non-fraudulent or non-deceptive substitutions. We will not even send out a package where the

customer knows the minute she gets it that it is entirely different from that she asked for, without her permission.

We would call her on the 'phone and say that we did not have Baker's Chocolate but we did have somebody else's. If she said all right, then we would send it along. Our store would not carry a fraudulent product. We would not tolerate it for a minute.

When we stack packages of Kellogg's Whole Wheat Biscuit on the cereal counter, we put them alongside the Niagara Falls or original Shredded Wheat. The reason we do that is that both products are very similar. We do the same thing with all our merchandise down there. We put all the corn flakes together, all the wheat flakes together, all the crackers of different kinds; soda crackers in one place, assorted crackers in another. The same way with the soups. All the fish is in one section. We do that to facilitate the customer in picking out merchandise. For that reason, we would put the Kellogg shredded wheat package right alongside the Niagara Falls Shredded Wheat package. We had Muffetts right along on the other side, when we carried it.

RE-DIRECT EXAMINATION.

RDQ. 116. Mr. Van Arsdale, you were speaking of the package with the display window in it, Plaintiff's Exhibit 153. I now direct your attention to the package, Plaintiff's Exhibit 161 for identification, and particularly to the legends on the ends of it.

On one end it reads: "Shredded Wheat in its most delicious form;" and, on the other end, it reads: "A shredded wheat product."

Compare that with Plaintiff's Exhibit 153 and tell me whether you think that that package, with the wording I have described, and with the somewhat different picture of the biscuit on the reverse side, is a greater or less confusing package.

A. Well, I think that, if a woman was not absolutely familiar with the other box and going to try shredded wheat, and came in and picked up one of these, she would just as naturally pick up this one as she would pick up the other one.

RE-CROSS-EXAMINATION.

THE WITNESS: I would think it is a universal practice of a manufacturer who has any lawful right to make a product, to try to tell, on the outside of the package, what is on the inside of the package. I do not know of any blind package, in which the customer would have to open the package to see what it actually contains, or I would have to say, "Madam, I do not really know, myself, what is in it. You will have to open the package to see what is in it." I do not think I would handle that kind of package. If the manufacturer for any reason wanted to make a product and he had the right to make it, I would think he would show on the outside of the package what was inside the package when it was opened.

RE-DIRECT EXAMINATION.

THE WITNESS: I would not expect him to show on the outside of the package that it was a product made by somebody else.

ELBERT KIRKLAND.

Deposition taken at San Francisco, California, February 8, 1933.

DIRECT EXAMINATION.

My residence is 293 Lowell Street, San Francisco, and my business addresses are 1933 Irving Street and 828 Irving Street. The business is a retail grocery. They are cash-and-carry stores, self-

service. I have been in the grocery business about twelve years. The second store was opened about ten months ago, since last April.

I recognize Plaintiff's Exhibit 1, Shredded Wheat. I have been familiar with Shredded Wheat ever since I can remember; as a youngster. I had it in my home before I was in business. I have carried it in my stores. I have conducted a service store.

I know that the expression Shredded Wheat means to the general public just Shredded Wheat. An experience I had at a service store would probably define it a little better. We carried the original Shredded Wheat, or what people would generally say is Shredded Wheat, and we would give them that.

When Kellogg came out with a product similar to Shredded Wheat some few years ago, maybe four years ago, they came into the store and asked me to try it. I did not like it, because it was apparently confusing.

We had a service store. When people would order a product, we would generally send it out as ordered. If we had to answer a lot of questions, it took up time. We were pretty busy and we did not like to do that. We were trying to keep away from duplications.

After considerable persuasion, we took a case of Kellogg's shredded wheat. We had considerable trouble getting rid of it. They would send for Shredded Wheat, and we would get a package of this to try to shove it and get rid of it. They would take it up and say, "What is this?" We would go on to say it was a new product, that they were coming out with this supposed-to-be improvement, as was suggested to us, over the old product of Shredded Wheat. Kellogg's salesman said it was better than Shredded Wheat.

So we carried it until we got rid of it. I do not think I ordered it a second time. I put it in the first time. We had so much trouble getting rid of it, being sent back, we discontinued it, because of the confusion.

They did not seem to know that one as they did the other one. When they asked for Shredded Wheat, that was the one they seemed to want.

In my experience, I have observed some of the advertising done by the Shredded Wheat Company. As to the effect of that advertising on the expression Shredded Wheat, I would answer as to my own mind, more or less. I think the people have been brought up to recognize Shredded Wheat as one Shredded Wheat in the original.

We never had a call for the Kellogg product, even with the amount of business that we did. We generally advertised Shredded Wheat pretty heavy. I do not remember whether, in the last ad I put out, I stated the kind, whether I put Uneeda on there or not.

As a rule, if Shredded Wheat is on sale, they do not say Kellogg's or Uneeda; they ask for Shredded Wheat and go over and pick up Uneeda Shredded Wheat and are perfectly satisfied.

I regard the name Shredded Wheat as a trade name. If anybody speaks of Shredded Wheat, I do not associate it with anything else but Uneeda. I do not believe the customers do, either, from the way they buy. When the purchasing public speak of Shredded Wheat, they think of Uneeda.

CROSS-EXAMINATION.

THE WITNESS: By the word Uneeda they mean the Shredded Wheat made by the National Biscuit Company. By shoving, I mean, when we had the service store, we had two different pieces of goods on the shelf; If you have something that is not moving we call shoving it getting it out of the way, getting it sold and off your shelves. We would send Kellogg's to some customers who were not too far away if it were returned, or who were more or less easy-going, if they did not spec-

ify Uneeda, until we got rid of it. Some of those customers would keep the product. In the main, there was so much trouble, confusion, and complaint that I stopped handling the Kellogg product. I regarded that shoving as being the same as substitution; but it would not be the same as what might be called fraudulent substitution.

I had not given any thought to whether anybody getting the Kellogg's Whole Wheat Biscuit would think they were getting Uneeda Shredded Wheat. What I was interested in was giving them Shredded Wheat if they asked for Shredded Wheat, if they considered that as Shredded Wheat. The two looked the same. Some would try it and some would send it back without even trying it. If it was close to the store, or if the people were more or less easy-going, we would try to get by until we got rid of it, although we do not make a practice of such things.

I did not tell them to try Kellogg's and, if they liked it, to keep it. We expected them to say they wanted the other but they would keep it this time. I do not remember whether, when they called the next time, they would say they wanted the original Shredded Wheat. Some of them did.

I did not think that a business could be built up in Kellogg's shredded wheat on that kind of shoving. I really had not thought of that. It was a matter of my getting out from underneath of goods that were not going over as they should and confusing in two different lines. That was my reason.

By duplication I mean that I do not like to have two brands of the same kind of product made by different manufacturers, any more than I can help. We have corn flakes and post toasties, very similar; yet, they are two that are pretty generally used. We might have three or four brands of canned peaches; but we do not have two dozen kinds.

The kind of brands in which I do not want duplication is those that do not move or are too many of a kind. For instance, we carry S. & W., Del Monte, and Libby's peaches. The only other peaches we will handle will be some gotten in for a special that we get in and out. They do not find shelf room. Those specials we would sell on price inducements, principally.

There was no demand for the Kellogg shredded wheat product in our store, because I did not keep it long enough, and I simply had one case. If we had kept it longer, possibly there would have been a demand for it. With this one case, there was no such demand as to induce me to buy another case of it. It was something that was not moving. I will say that the fact that we could not handle it by shoving or substitution and that there was so much trouble about it that we could not build up any business that way and just did not want to try it any further was principally the reason. I did not like the idea. I thought that one shredded wheat was plenty and let it go at that. I was not the only one in the store. I did not get all the complaints or hear all the calls. I would say that the practice of shoving is distinctly dying out in all legitimate groceries. They cannot get anywhere by shoving it; but they can induce the customer to buy it. I regard inducing a customer to buy it, saying, "Here is a new product with fifteen biscuit to the package. We would like you to try it. We think it is a good product" as perfectly legitimate. There is no substitution or shoving in that. At least, we regard that as shoving, but not as substitution in any way. If a grocer wishes to take that much trouble, I regard that as a perfectly legitimate thing for him to do, if he tells the customer he has a new make of the old product and asks them to try it.

I do not remember how long I have been familiar with Kellogg's shredded wheat product. I would say

maybe four years. If I took on the Kellogg biscuit again in my self-service store, I would put it right alongside the Niagara Falls product. My reason for doing that would be that I regard those two products as being practically the same kind of product, answering the same demand; to give them a chance to choose which of the shredded wheats they wanted.

I would not put the Kellogg Whole Wheat Biscuit down next to the Corn Flakes or anything of that sort. I would put it in the shredded wheat section of my store. It is fair to say that, for four or five years back, I have known that there were two kinds of wheat biscuit on the market; one made by the Shredded Wheat Company and the other made by the Kellogg Company.

If I were carrrying the Kellogg product and a customer were to say to me that he wanted Kellogg's Shredded Wheat, I would send him the Kellogg product.

I came into the case by a gentleman from the National Biscuit Company ringing me up. He asked me if there would be any expense; and I told him I would have to put a man on for half a day; and, as far as the rest of it was concerned, I did not want anything. He said he would reimburse me for the time. I do not know his name. I did know it, but I cannot recall it. It was somebody connected with the National Biscuit Company.

At the present time, I do not handle the Kellogg product; but, if I had a demand, if I found customers repeatedly asking for Kellogg's Shredded Wheat or Kellogg's Whole Wheat Biscuit, then I would stock it up.

RE-DIRECT EXAMINATION.

THE WITNESS: We find considerable demand for Shredded Wheat Biscuit and sell lots of it. It is pretty hard to say exactly how much I sell a month; but I

imagine it is around twenty-five cases. I buy some directly from the National Biscuit Company, and some we do not. If I am putting in a special, I generally get it through Dunne, the salesman, and have him send them out. Sometimes I ring up the Equitable Cash Grocery and get them from them. As a rule, I buy them direct from the National.

RE-CROSS-EXAMINATION.

THE WITNESS: I handle the other Kellogg products, Corn Flakes, and almost the complete line but I do not handle Kellogg's shredded wheat. The Kellogg salesmen call on me right along. They have not solicited me to buy Kellogg's shredded wheat for a long time. There has been a new man, I think, on the territory since I bought; and they have not even suggested it to me. I have not had one ask me to buy it in, maybe, two years. I have not the slightest idea why that is. I had not thought of it at all. In fact, I had not thought anything about it. They have asked me about the other products, Corn Flakes, and so forth. They come in right along; but they do not ask me about Kellogg's Whole Wheat Biscuit. I had not noticed that particularly until you brought it up. I had not paid any attention to their not asking. I do not think I have had a salesman ask me to buy Kellogg's shredded wheat for at least two years, anyway. They have other products. Two weeks ago, one of the salesmen came in, and I bought some Wheat Flakes, a wheat product. I bought that direct.

Possibly the reason for it is that the Kellogg salesman knows pretty well what Kellogg products I carry. I have no doubt that, if I had been carrying Kellogg's shredded wheat right along, when he came to get my order for corn flakes and bran, he would also ask me about that. They do not come particularly to get my order for different products. They generally come in

and introduce a brand, or sampling, something of the kind. They will come out and offer me samples, occasionally, to sample the trade. When my supply of Corn Flakes runs out, I ring up the wholesale grocer. I do not order through the specialty salesman, unless one happens to come by and I would give him an order.

WALTER JOHNSTON COOPER.

Deposition taken at Los Angeles, California, February 11, 1933.

Direct Examination.

The Witness: My age is twenty-two. I am not employed at the present time. I have never been employed by the National Biscuit Company or by the Kellogg Company. I am acquainted with Mr. Small, manager of the San Diego branch for the National Biscuit Company. I am familiar with a product known as Shredded Wheat.

I recognize Plaintiff's Exhibit 1 as a package of Shredded Wheat. I have been familiar with Shredded Wheat for about seven years, largely as a consumer. While I was at the University as house manager last year, I had control of all purchasing. We stocked quite a bit of dry cereals. In that capacity as house manager, I purchased Shredded Wheat quite often. When I purchased it, I asked for it as Shredded Wheat. When I did so, I expected to receive the Shredded Wheat package that I see before me, Plaintiff's Exhibit 1. I generally received that package.

I am still a purchaser of Shredded Wheat. I am living with my brother and sister. I do most of the marketing at the store, and we get Shredded Wheat about once or twice a week, or three times in two weeks, perhaps. I usually pick it out. I have been buying it at one of these self-service stores. I find it displayed

there. I pick out packages like Plaintiffs Exhibit 1. I have also ordered or purchased Shredded Wheat at restaurants or cafes, probably about fifteen times.

The general practice in restaurants I am familiar with, of serving Shredded Wheat when ordered, is that they bring you Shredded Wheat in a small package that contains two biscuits, I believe, and serve you in that fashion. They open the box before you, or they put the box in the dish and let you open it. I have had Shredded Wheat like the biscuit in Plaintiff's Exhibit 1 served to me in that way, in individual packages. I never have had it served to me out of the package. I had two occasions when I ordered Shredded Wheat Biscuit and did not receive biscuit like that in Plaintiff's Exhibit 1.

Tuesday afternoon, November 15th, I went in Stout's grocery, located at 2548 University Avenue, in San Diego, and asked for a package of Shredded Wheat. The proprietor of the store gave me a package of Kellogg's Whole Wheat Biscuit. I looked at it and said, "Is this Shredded Wheat?" He tapped the package with his hand and said, "Yes, this is Shredded Wheat." At the same time, he gave me a Kellogg's Wheel of Knowledge, for which I paid him ten cents and left. That is, he charged me ten cents for the package. Plaintiff's Exhibit 171 is the carton. I signed it on that date, in longhand. I see my signature on it and identify it. Plaintiff's Exhibit 172 is the Wheel of Knowledge that accompanied it.

I happen to be a personal friend of Mr. Small. We rent the home we are living in from him. I have played golf with him on several occasions, and I know his son. He asked me if I would help him out one afternoon. He merely wanted to find out some facts in a case where they said there was some substitution going on over Shredded Wheat. He dropped me several blocks from Stout's grocery and asked me to go in and get a pack-

age of Shredded Wheat. I did as he requested and received the information I have testified to.

On the same afternoon, I called at the Plaza Cut Rate Drug and Lunch Stand, Fourth and Broadway, San Diego. On this occasion, I went to the lunch counter and asked for a serving of Shredded Wheat. The boy brought forward a small package of Whole Wheat Biscuit. While he was still down the counter, he opened the biscuit, threw the box away, and brought me the Whole Wheat Biscuit in a dish. I could see him open the box and toss it away.

I asked him for a second helping at the same time. He placed the second in front of me with the box right there. I ate the first one and took the box of the second away. I said, "Is this Shredded Wheat?" He touched the box, and he said, "Yes, this is Kellogg's Shredded Wheat." I made no further comment. Plaintiff's Exhibit 173 is the carton he gave me the second time. I signed that one. I identify it. I cannot say that I was directly acquainted previously with the Kellogg's Whole Wheat Biscuit. I had probably seen it on the shelves and various places in stores; but I had never purchased it.

CROSS-EXAMINATION.

THE WITNESS: If the clerk in the store had handed me a package of Corn Flakes and said "That is Shredded Wheat," I would hardly have believed he was telling the truth. When the clerk in the restaurant said, "This is Kellogg's Shredded Wheat," I knew what he meant as far as he went. I did not take any issue with him, as I would have done if he had told me "This is Kellogg's Corn Flakes." Physically speaking, it was not shredded wheat biscuit that was in those cartons. I believe there is a difference. Your whole wheat biscuit is a smaller biscuit, to begin with, and there is a difference in the taste. I would say that it was a smaller

shredded wheat biscuit and of a different taste from the old Shredded Wheat Biscuit. I recognized the difference in taste and the difference in size right away as soon as it was served to me, being quite well acquainted with Shredded Wheat.

Mr. Small asked me to go to both these places, the grocery store and the restaurant. He asked me, also, to go to one other place, a restaurant. I do not know the name or address, because I went there, asked for Shredded Wheat, and received the National Shredded Wheat. So, out of two restaurants I went to, I received National Shredded Wheat in one and Kellogg Shredded Wheat in the other. In the other restaurant, the boy told me the package was Kellogg's Shredded Wheat.

When I bought the large package of Kellogg's Whole Wheat Biscuit in the grocery store, I did not think, when the man handed me the package, that it was National Shredded Wheat. I knew right away that it was a different package from that which I had been accustomed to. I pointed to the package and said, "Is this Shredded Wheat?" He looked at it and said, "This is shredded wheat," and reached out and touched it with his hand.

The man did not direct my attention to the statement on one end of the package: "Kellogg's Whole Wheat Biscuit are made of delicately flavored whole-wheat shreds. These shredded biscuits are a new convenient size. Two just fit the cereal bowl." My attention was not directed to it in the least. Now that my attention has been directed to it by Mr. Clarke, I have no doubt that the biscuit in there are shredded whole wheat biscuit. I believe they are. I did not take issue with the man when he said it was shredded wheat in the package. I did not try to tell him it was not. I had merely been asked to go and get a statement from him of the bare facts and bring out the information. That

was the only grocery store Mr. Small asked me to go to. He drove out there with me and left me a few blocks from the store. I had never dealt at either of these places before. My usual way of buying shredded wheat is to pick it out in self-service stores. In doing that, I have noticed Kellogg's Whole Wheat Biscuit on display in these self-service stores. It is always arranged in the cereal division of the store. In the store where I happen to purchase our provisions, it is located on one shelf a little bit to the side of the Shredded Wheat, and a shelf or so between with other cereals, Wheatena or Grape-Nuts, or something like that.

When Mr. Small dropped me two or three blocks from the grocery store, he stayed there and waited for me to return. That was the only grocery store he asked me to go to. When I was at the Plaza downtown, they served me in the bowl and threw the box away. I understood the box would be necessary as evidence, so I ate the first helping and had the box of the second placed before me, so I could eat it if I desired to.

I noticed a difference in the taste of the Kellogg biscuit, as compared with the National biscuit. My impression at that time was that the Kellogg biscuit did not seem to be quite as crisp as Shredded Wheat. Whether I had eaten some that was old or had been opened, I do not know; but that was the impression I obtained. I did not notice any difference in color. I noticed a difference in size. I have not eaten it since. It did not appeal to me quite as much as the National Shredded Wheat.

I would not go so far as to say that the difference in taste was sufficiently noticeable that, if I were blindfolded, I could tell whether it was National Biscuit I was eating or the Kellogg biscuit. I do not know. I might be able. On the other hand, I might not, depending upon how much milk and sugar and what-not I had on it, whether it was mixed with fruit or what-not. I

would not go so far as to say that I could tell the difference that way, except that, if I were eating it constantly and then changed to the other, I probably would notice it. I would not know whether it was due to a difference in the food or what. In that sense, I was conscious that there was a difference.

Since this experience, I have not noticed any advertising of either the National shredded wheat or Kellogg's. When I was a buyer for this fraternity house, we ordered through what was known as the Students' Cooperative Purchasing Association, and they sent us as many as we ordered, two dozen, or half a dozen, or a dozen. They were merely stacked on the shelves out in the kitchen. I was always in a position to see what came and what did not. During that time I always received the National Shredded Wheat Biscuit.

It is fair to say that, at least since these experiences of my purchasing in the grocery and the restaurants for Mr. Small, I realize that there are two different biscuits manufactured by two different people. I know that.

RE-DIRECT EXAMINATION.

THE WITNESS: When we had these packages of Shredded Wheat on the shelf in the fraternity house, you served yourself there. It was only eaten for breakfast, and the boys served themselves out in the kitchen. They would go out and take as much as they wanted and break it up or not break it up, and put it in the cereal bowl. They helped themselves from the package.

The Kellogg's Whole Wheat Biscuit I ate in the restaurant did not have any different effect on me from anything else, aside from the fact that I had eaten lunch a while before, and I ate too much of that stuff during the afternoon. The other place I went to I had to eat Shredded Wheat. I was not very hungry.

In the self-service store from which I now purchase, Shredded Wheat is now ten cents. Whole Wheat Biscuit happens to be the same, ten cents. I asked the manager how it was that there was a difference of one cent or two cents, because, in the majority of places I have seen, Kellogg's or the Shredded Wheat made by the National Biscuit Company sells for either eleven or twelve. He said they were both the same price at his store. In other places where I have observed these two packages, they are offered for different prices. Kellogg's is offered for ten cents, every place I have seen it offered. I observed the difference at Canfield's Market, where we do our shopping, known as the Home Food Store. Then, the price I paid over at Stout's Grocery, when I called there, and at the Gem Market, which is cater-cornered across the street from where we do our shopping. I have been in there. Naturally, after doing that for three or four months, you get so you know the prices of about everything you look at in there and where they are located. I have noticed that Kellogg's Whole Wheat Biscuit was always ten cents. Shredded Wheat was the same price in the store where we shop. Other places, there was a cent or two difference.

When the grocer handed me Kellogg's Whole Wheat Biscuit in the package I have identified here and told me it was Shredded Wheat, I did not believe he was telling me the truth.

RE-CROSS-EXAMINATION.

THE WITNESS: I did not believe, I mean, that he was handing me Shredded Wheat made by the National Biscuit Company. I could read on the box that it was Kellogg's Whole Wheat Biscuit. I could see the name, and I was satisfied he was handing me not Shredded Wheat as made by the National Biscuit Company, but

either the same thing made by another company or a suitable substitute for that. That is, in my own mind, I knew that must be the case.

I never tried to get the individual cartons for this fraternity house. I had been individual cartons in restaurants previous to that time, and I had eaten them previously to that time. The practice in the fraternity house was to open up the large package of the National Shredded Wheat and leave that in the kitchen. The boys just went out and picked the biscuit out themselves. Offhand, I could not say how long it took to consume a box. There were a number of cereals on the shelf, different kinds, and the boys would vary. One day it would be one; another day, it might be another kind. We always had hot cereal of one or two kinds. It would be hard to say. I think we consumed an average of about half a dozen packages a week, pretty close to that, nearly a package a day.

The afternoon I went to the two restaurants I ate some of Kellogg's biscuit at one restaurant and some of the National Biscuit at the other. I did not notice any distress from mixing those two biscuits, except, as I said before, that I had eaten too much of everything.

MRS. DOROTHY McFARLAND.

Deposition taken at Los Angeles, California, February 11, 1933.

Direct Examination.

The Witness: I am a housewife and keep house with my husband. I am not connected with the National Biscuit Company in any way. I know someone connected with the company, the agent at Long Beach, Mr. B. N. Aspergren, who is a personal friend of mine. I am acquainted with a product known as Shredded Wheat.

I recognize Plaintiff's Exhibit 1. I have been familiar with it for ten years, perhaps more, as a purchaser of it. I still purchase it. I usually just buy it in the neighborhood stores; perhaps, at just a little store; sometimes at a self-service store; any of them in the neighborhood. I never have occasion, to my knowledge, to order it by telephone. When I buy it at a service store, I ask for Shredded Wheat, and I expect to get the National Biscuit Company's Shredded Wheat.

In my experience, the expression Shredded Wheat has, I think, denoted to me another product than that in Plaintiff's Exhibit 1. If I understand the question correctly, there are several products similar to Shredded Wheat in the cereal line. They are sometimes called Shredded Wheat.

One experience is the instance at the time I bought this shredded wheat. On November the twenty-first, I bought shredded wheat at Walter's Market, 1050 East Anaheim, Long Beach. I asked for Shredded Wheat, and I got Kellogg's Wheat Biscuit. Plaintiff's Exhibit 174 is the package I got at that time.

I asked the grocer for Shredded Wheat, and he gave me that package. I did not think that was the kind I wanted. It was not the kind I had been buying. I asked him if it was Shredded Wheat; and he insisted it was; that it was the original Shredded Wheat; that the Kelloggs were the first people that made the Shredded Wheat and they made the Shredded Wheat, and that was what it was. So I bought it. The grocer told me that Kellogg's were the first people that made Shredded Wheat, that they made the original Shredded Wheat.

That was about the first time I had paid very much attention to the Kellogg's Whole Wheat package. I would not say that I had not seen it before.

I keep Shredded Wheat in the house. When I serve it to my husband, I usually just toast it and serve it with cream. I do not put the package on the table. I usually toast the biscuit in the oven or warm it up. I take the biscuit out of the package and toast it and serve it on the table in a dish.

CROSS-EXAMINATION.

THE WITNESS: I toast the biscuit because I prefer almost any cereal heated a little bit. I just kind of like it that way. I do not think I knew that the Kellogg's biscuit was double toasted, top and bottom. In the self-service stores, I could not say that I have paid very much attention to Kellogg's Whole Wheat Biscuit on the shelves. It was a Kellogg's package. I thought you meant if I took any particular interest in it. I took enough notice to know that it was there on the shelves.

I believe I have noticed packages having cellophane or transparent windows in them. That was a Kellogg's package, I think. Mr. Aspergren asked me to go to this store at which this purchase was made of the Kellogg biscuit. I had bought things there several times. He asked me to go and buy a package of Shredded Wheat.

When the grocer told me that the Kellogg Company were the makers of the original Shredded Wheat, I told him I did not think that was the kind of Shredded Wheat I had been buying. He insisted that they were the makers of it, that that was the original Shredded Wheat. I was looking for the box with the Niagara Falls on it, which was what I expected to get, Plaintiff's Exhibit 1.

I have always or most of the time associated Niagara Falls with the Shredded Wheat I have been used to buying. I told the grocer that I was looking for the other kind, and he said that was the original

Shredded Wheat. So I said, "All right, I will take it and try it." He said that was the original Shredded Wheat. He did not mention the other kind of Shredded Wheat; but I mentioned it to him. I think this was the only kind he had in the store. I did not see any more on the shelves. I had never bought cereal or anything there before. Mr. Aspergren asked me to go to just this one store only. He did not go with me. I took the package to him afterward. He was out at the Biscuit Company when I took it to him. This is the only experience I have ever had of asking for Shredded Wheat and getting the Kellogg product. I have, however, been buying Shredded Wheat right along for some years. I ate some of the Kellogg's Shredded Wheat. It did not taste like the Niagara Falls Shredded Wheat that I have been used to having. I cannot say that I think it is exactly the same. It is not exactly the same size as the other. The National is the larger biscuit. I think I noticed a difference in taste between them. I have not eaten any of the Kellogg biscuit since that time.

I usually buy at self-service stores. It is either the New Way Market or Ralph's Market, or something like that. I just go in in the usual procedure and get my groceries at the different counters. I usually buy a number of groceries. I just go to the different counters and select them, pick the goods off the shelves into a basket and take it up and have it checked. After the man has checked it, I pay for the contents of the basket. I really serve myself. No clerk waits on me.

I do not know of other kinds of Shredded Wheat besides National and Kellogg's. I did not mean, when I mentioned several different kinds, to refer to Shredded Wheat. I meant different kinds of breakfast food that were rather along that line. I guess I did not make myself very clear. I know only the two kinds of Shredded Wheat, Kellogg's and the National.

MISS ADELE MacDUFFIE.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have no particular occupation. I am a mother's helper in a home. I live with Mrs. Arthur Lalond, who is not my mother. I help her take care of her family. She has children. I have been with her since March seventeenth, last year. I am not connected in any way with the National Biscuit Company. Mrs. Lalond's brother-in-law, Mr. Malkus, is connected with the National Biscuit Company, I think as a salesman. I would not be sure, because I do not know him personally.

I recognize the package, Plaintiff's Exhibit 1. I have seen those packages before. I have been familiar with that picture about sixteen years. I know what the package contains. I call it Shredded Wheat. I have been familiar with Shredded Wheat for sixteen years or about that time, as a user. I have used it very extensively. I have not had much occasion to buy Shredded Wheat. I come in contact with it at my home and at the residence where I stay. It is served at breakfast. When it is served at home or where I now live, the package is not brought on the table. The biscuit are served by me in dishes. I take it from the package in the pantry and serve it to members of the family, including the children and their parents.

Mr. Malkus asked me to go to some stores and make purchases of Shredded Wheat. I do not remember the exact dates. It was sometime before last Christmas. It is so long ago that I do not recollect if it was in November or not. I went to the Cohen store on San Pedro Street in Los Angeles. I did not know the store. He just drove me there, and I went in.

I said I would like to purchase a package of Shredded Wheat. They brought me Kellogg's. I said, "This is not Shredded Wheat." She said, "Oh, yes, it is." I said, "Is there any difference?" She said, "None, except in price. One is ten and one is twelve. National Biscuit is twelve."

I asked her what the difference in price could be, and she said that they were a large company and they did more advertising and took advantage of the public. I purchased the package. I did not keep it. They took it up to the National Biscuit, and they did not do it the right way. They just took the lids. They had me go back to the store again on a later date, which I do not remember either.

I went back and I went in and asked for Shredded Wheat. She brought Kellogg's. I said, "This is not Shredded Wheat." She said, "Oh, yes, it is." I said, "What is the difference?" She said, "One is ten and one is twelve." She would not say any more. I purchased the package and left the store. I kept that package and put my name and address on it. Plaintiff's Exhibit 175 is the package.

I went to several other stores during my tour of the stores, where I received the National Biscuit Shredded Wheat. I went to the I. M. Silver Store, on San Pedro, also. I went in and asked for a package of Shredded Wheat, and they brought me Kellogg's. I said, "This is not Shredded Wheat." They said, "Yes, it is; see?" He showed me the shredded wheat in the little cellophane window, and he showed me the name on the package, and he said, "One is ten and one is twelve." I purchased the package and left the store. Plaintiff's Exhibit 176 is the package I bought there.

In each instance, I paid ten cents for the package. The dealer told me that Shredded Wheat was twelve cents. These were not my first experiences. I had seen Kellogg's Whole Wheat Biscuits previously. We

had some of it in our house. We had purchased it. We had used both shredded wheat biscuit, made by the National Biscuit Company, and Kellogg's Whole Wheat Biscuit. We are familiar with all Kellogg's products, Corn Flakes and all those other products. We carry them in our house, a mixture of products. We have carried and used Kellogg's products almost as much as we have those of the National Biscuit Company.

CROSS-EXAMINATION.

THE WITNESS: I like the Kellogg products. I like the Kellogg Corn Flakes very much. When I first saw the Kellogg biscuit, I noticed, I think, that the Kellogg biscuit is a little smaller, quite a bit smaller than the National. I noticed that right away. When I saw the Kellogg Whole Wheat package, I saw that it was a different package from that of the National Biscuit Company. I liked the Kellogg biscuit, but I preferred the National, as I have used them much longer than I have Kellogg's, because that new package has just come out recently. I have used this other for so long.

When I first tried Kellogg Whole Wheat Biscuit, I did not think it was Corn Flakes or Wheat Flakes, or anything of that sort. I knew it was shredded wheat, all right. When the grocer in the Silver Store said that one of these shredded wheats was ten cents and one was twelve cents, I understood he was referring to the Kellogg Biscuit and the National Biscuit, because he had the Kellogg one on the counter and the other one was up on the shelf. He pointed to it. He said, "This is ten and the other one is twelve." I knew by that that he was referring to shredded wheat made by two different concerns, the Kellogg's and the National Biscuit. I have bought goods from self-service stores, but not in Los Angeles. I do not believe I have bothered with self-service stores in Los

Angeles. I could not say that, either, as to whether there are many of them here. I do not do any shopping, at all.

At the other stores where the grocer referred to the big concern, I understood he was talking about the National Biscuit Company. It was Mrs. Lalond's brother-in-law, Mr. Malkus, who asked me to go to these two stores and make the purchases. He took me in his automobile to several stores down where he sells his products. I think he is a salesman, because he talks about going to those stores. He took me there, and I purchased the package. He took me to several stores, but they handled the National biscuit, and that is what they gave me. He spoke of being acquainted with a few of these grocers, as a salesman. I believe he took me to about five or six stores. I got the Kellogg product at two stores, and the National biscuit at the rest of the stores. I did not know these stores before Mr. Malkus drove me to them. I had never purchased anything at either one of the stores before.

As soon as the clerks at these stores brought out the Kellogg packages, I knew right away it was not the National Biscuit package; and I said right away, "This is not Shredded Wheat." By that I meant that it was not the National Biscuit Company's Shredded Wheat. I did recognize it, however, as Kellogg's Shredded Wheat.

I have never purchased any packages that had the cellophane window in them. We had one package at home that had a cellophane window in it. She went to the grocery store and got the shredded wheat. When we got home, we noticed the cellophane window. She did not want that. I do not recall, but I believe it was Ralph's Grocery Store she went to. We spoke about the cellophane window. I do not remember exactly, but the little boy wanted the window out of it. That is all I remember. He argued about the package.

He wanted the package with the cellophane window in it.

RE-DIRECT EXAMINATION.

THE WITNESS: Mr. Malkus is not related to me in any way. Mrs. Lalond's sister is his wife. I only work for her. That is the way I happen to know Mr. Malkus. He is not related to me in any way.

When I referred to the package with the window as not being what Mrs. Lalond wanted, I meant she had never had it before. When she got it home, she noticed it was not the whole wheat package without the window that she had expected to get. She had gotten a Kellogg package without the window, before that; and, when she noticed the window, she knew it was not what she had been used to having.

MRS. R. E. ANDERSON.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. I have three children, two, four, and six years of age. I am not related in any way to anyone connected with the National Biscuit Company. My husband is not employed by the National Biscuit Company. I know the matter we are engaged with here is litigation between the Kellogg Company and the National Biscuit Company. I have no bias or prejudice for or against either side of that litigation.

I recognize the package, Plaintiff's Exhibit 1. I call it Shredded Wheat. I am familiar with the contents of the package. I have known Shredded Wheat, as close as I can say, around twenty-five years; a long while. During that period, I would say that the prod-

uct contained in Plaintiff's Exhibit 1, which I have known as Shredded Wheat, has been just the same.

Shredded Wheat was served at home, I know, when we were children. We always liked to eat it, because it had the picture of Niagara Falls on it. We thought Niagara Falls was quite the proper place to go on honeymoons and such things. We always had it served in the home. I associated Niagara Falls with Shredded Wheat Biscuit. That has been true since I was a child. The expression Shredded Wheat had a definite meaning to me at that time. It meant the Shredded Wheat Biscuit. It did not mean any other product. Shredded Wheat was simply Shredded Wheat to me. We serve Shredded Wheat in our home at the present time. We purchase it at different stores, mostly the self-service stores. I do my own shopping, go in and help myself. I do not believe I ever have had occasion to order it by telephone.

When I serve it in the home, I do not bring the package on the table. I serve it in the dish. I warm it in the oven and bring it in in the dish. My husband uses it. I usually keep a supply of breakfast foods on hand. I usually try to buy two or three packages at a time, so we will have it on hand.

I have noticed the advertising done by the Shredded Wheat Company. I do not know exactly how long I have been familiar with that, but it has been a long while. I remember Shredded Wheat was advertised in the *Saturday Evening Post* for a long while. That is the only one I have time at present to read. I read practically all the *Saturday Evening Post*. That takes a great deal of time.

Looking at Plaintiff's Exhibit 10, I recognize one of the end panels on which is a picture of a dish with two biscuit in it. I have purchased Shredded Wheat in a carton like that from time to time. I would say I have been familiar with that dish with two biscuit

in it for practically the length of time we have been using it. That picture suggests to me Shredded Wheat and nothing else. If I were to see a package not otherwise identified, having on it a picture of a saucer with two biscuit in it similar to that, it would suggest to me Shredded Wheat.

I have never used Kellogg's Whole Wheat Biscuit. I obtained it in a store on November 14, 1932, at Edward's Grocery, on Glen Oaks Boulevard in Burbank. I went to the store, which is not a self-service store, although, perhaps, it could have been. I was the only one in the store. I went to the counter and asked the man for a loaf of bread, a can of milk, and a package of Shredded Wheat Biscuit. I walked around the store a few moments to see if there was anything else I needed. There was not, so I came back. When I returned to the counter, there was a package of Kellogg's Whole Wheat Biscuit on the counter. I said, "Oh, I want the Shredded Wheat Biscuit, the one that is made in Niagara Falls." He said, "That is just the same, and I am sure you will like it just as well." I said, "I think I prefer the other if you have it." He said, "No, we do not have it in stock." He said it was more profitable to handle, and that there were fifteen biscuits, I believe, in the package. It was just the same as Shredded Wheat. Then he said, "Having a cellophane window, you can see what you are getting."

I finally took the package. Plaintiff's Exhibit 177 is that package. I recognize it by my having put my name and address on it and "Edward's Grocery, Glen Oak Boulevard." The biscuit in the package were visible through the cellophane, and when I saw them through the cellophane window, they suggested to my mind Shredded Wheat. They looked like Shredded Wheat.

I did that at the request of Mr. Harper, one of the salesmen of the National Biscuit Company. He is

an acquaintance of mine. I think I paid fifteen cents for the package. The mark "fifteen cents," in a circle written in pencil near the window on the package was not on there when I got it. I believe Mr. Harper put it on.

I have been paying ten cents for Shredded Wheat. The grocer from whom I bought Plaintiff's Exhibit 177 said he did not have Shredded Wheat. I never paid attention to notice what the price asked at other stores for Kellogg's Whole Wheat Biscuit was. This was my first experience with Kellogg's Whole Wheat Biscuit. I use a lot of other Kellogg products: but this happened to be the first time I had ever purchased Whole Wheat Biscuit. I knew there was such a product. I had seen it on the shelf. I had never purchased it.

CROSS-EXAMINATION.

THE WITNESS: Mr. Harper did not ask me to go in any other stores besides this one store. If I had known the Kellogg shredded wheat was selling for less than fifteen cents at other stores, I would not have said anything to this grocer about his price being out of line. I do not usually do that. I usually pay the price they ask. At the time, I did not know whether fifteen cents was either the right price or out of line at all. I paid it without any question. That was the only store that Mr. Harper asked me to go to and make this purchase. He took me there and waited outside. At that time, there was no one else in the store except me. I could, I rather think, have waited on myself if I had wanted to. They had a counter as you enter. I suppose, if the man was not busy, he would have helped you. Otherwise, it could have been self-service. They were not behind counters. They were easily accessible.

I have known these other Kellogg products for some years, used them, and liked them. I think the company has a very good reputation. It is, also, a wide advertiser.

I gave this package with the cellophane window to Mr. Harper. My children had never seen any of the cellophane windows of the Kellogg's. They are not old enough to have any argument between themselves, as to who would get a package of that sort, if it came into the home. If, as Mr. Clarke says, some other lady testified that her child became much excited and demanded that he have the cellophane package when it was brought into the home, that would be a very good idea. I suppose my little girl might have done that, if she were a little bit older, for her doll house, or something. I did not get one of the Wheel-of-Knowledge Charts like Plaintiff's Exhibit 172, with the package. They did not give me that. I will go back and get it. I do not think my children are old enough to think about the geographical part of it. They would be more interested in just knowing that it goes around.

When I looked through the cellophane window in this package, I saw it was shredded wheat. In other words, I did not think for a minute that it was corn flakes or oatmeal or anything of that sort. I knew that it was the cereal I know as shredded wheat.

I knew before that time that the Kellogg Company was making shredded wheat, as well as the National Biscuit Company. I had known that fact from seeing the Kellogg Company packages on the shelves of self-service stores. When the grocer said to me he had no other shredded wheat in stock except Kellogg's, I understood he did not have any of the National Biscuit Company Shredded Wheat. I do not know of any other concerns making shredded wheat besides the National Biscuit Company and the Kellogg Company. I do, how-

ever, understand that those two concerns are both engaged in the manufacture of shredded wheat.

Looking again at Plaintiff's Exhibit 10, the package with the plate, showing the biscuit in the plate, as distinguished from the picture of Niagara Falls, this one, Plantiff's Exhibit 1, is uppermost in my mind, because I can remember that Niagara Falls and the picture of the factory. The one with the plate is used a great deal in the advertising. I remember seeing it, of course, on the carton, but this picture on the end of Plaintiff's Exhibit 1 stands out more in my mind than the other. I know they use the other with fruit over the Shredded Wheat Biscuit, in advertising.

I have met Mr. Rodda of the National Biscuit Company. I met him here in this office just recently, sometime in December, in connection with this National Biscuit or Kellogg purchase. I did not take the package out to the plant.

RE-DIRECT EXAMINATION.

RDQ. 109. Mrs. Anderson, I think you said, in responce to a question that Mr. Clarke asked you, that you knew that two companies were making shredded wheat. Let me ask you this: If you asked for a package of Shredded Wheat and you received one like the package that you did receive, would you regard that as having filled your order?

A. No; it would not be the Shredded Wheat that I had asked for; but it would be the shape of the Shredded Wheat that I had asked for. It would be the shape of the Shredded Wheat Biscuit, but not exactly like it.

RDQ. 110. When you ask for Shredded Wheat, do you have something definite in mind that you expect to get?

A. Yes.

RDQ. 111. Can you tell us why that is, Mrs. Anderson?

A. Why, Shredded Wheat seems to fill our wants as far as shredded wheat is concerned; and I have never thought of changing. The Kellogg biscuit has more of a toasted look and a coarser grain. The Shredded Wheat biscuit we have been using has a fine grain, and we have never had any complaint to find with it; so I never thought of changing that product.

RDQ. 112. Has there been any definite association in your mind, during the long period of time you tell us you have known of this product, between the name and the product itself?

A. I have never given it any consideration at all, but always have gotten Shredded Wheat and used it. I never thought of anything else, or purchased anything else along that line, except Shredded Wheat. I have always called it Shredded Wheat. That has been true for twenty-five years.

RE-CROSS-EXAMINATION:

THE WITNESS: When I buy Corn Flakes, the food is usually taken off shelves. I usually buy in self-service stores, so I do not have occasion to ask for things by name. In my household, I tend to experiment with new foods or new products or new makes of old products, when they come on the market, if I am not satisfied with what I have been using. If I am satisfied, I do not change, even if some new and different product is advertised. I do not try it. I am not very experimental, because I have the children. If I find anything they like, that agrees with them perfectly, I usually stick to the same product. The children like the National Shredded Wheat. I have only given it to the four- and six-year-old. I try to vary their diet. I usually give Shredded Wheat to them once or twice

a week. They take it and eat it all. I or they have never tried the Kellogg biscuit. I just bought it and gave it to Mr. Harper. No doubt I will try the Kellogg biscuit, after all this, to prove to myself the difference, if any.

Looking at a cellophane package of Kellogg's Whole Wheat Biscuit, the biscuit shown through there does look darker in color than the Shredded Wheat of the National Biscuit Company, also coarser grained than the National Shredded Wheat.

CLARENCE E. LIERLEY.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a window trimmer and card writer. I have no connection with the National Biscuit Company or with the Kellogg Company. I am forty years old.

I recognize Plaintiff's Exhibit 1. It is Shredded Wheat. I am familiar with the appearance of the biscuit in that package. I have been familiar with Shredded Wheat more than twenty-five years, principally as a consumer. I have been a user of Shredded Wheat in my home and elsewhere, during that period. I purchase it occasionally in stores. My wife does almost all the marketing. When I buy it, I ask for Shredded Wheat, and I have something definite in my mind that I expect to receive. I usually go by the carton that they hand me. I look at the carton. I expect to get Shredded Wheat. By that I mean that I expect to get the carton that I am familiar with. Then, if it is in a different carton and I take it home, I expect it to taste like it did before.

When Shredded Wheat is served to me in my home, it is served from a dish. The carton is not brought on the table. I have had occasion to purchase it in restaurants. When I buy it in restaurants, it is served in a dish. I have never had it served to me out of a small carton. I very seldom buy it in restaurants.

I have recently purchased it in a restaurant, when it was served to me out of the carton. That was November 21, 1932, at Byron's Coffee Shop, Long Beach, California. I asked for Shredded Wheat, and the waitress brought the serving in a dish. I noticed the difference in the shape of it. It was not as long as the regular Shredded Wheat. Then, it seemed rounder. I did not say anything about that until I started to eat. I noticed the difference in the taste of it. It did not taste the way I had been accustomed to notice. I asked the waitress: "Is this Shredded Wheat?" She said, "Yes. That was what you asked for, was it not?". I said, "Yes,"—but it did not taste like the Shredded Wheat I was accustomed to eating. Then I asked her if she would mind giving me the carton. So she went and got the carton. As she handed it to me, she said, "This is the Whole Wheat Biscuit." I told her I did not think it was Shredded Wheat. I then asked her if I might have the carton to take home with me. She said, "Sure," so she gave me the carton. Plaintiff's Exhibit 178 is the carton.

There was a menu at that restaurant, one large menu and several small detachable menus attached to the menu. On a menu about three by six inches they had the breakfast foods. It was all attached to this one large menu, and on the bottom, it said, "Shredded Wheat with cream, fifteen cents." It had other cereals listed.

Mr. Aspergren asked me to go to this restaurant. He is an agent of the National Biscuit Company. He went with me, and we had lunch there together. The

biscuit served to me in the dish, except that they were smaller, resembled Shredded Wheat. If I had not been a long-time user of Shredded Wheat, I would have accepted those biscuit as Shredded Wheat.

I have had occasion to notice advertising of the Shredded Wheat Company. I have not noticed any recently; but I remember they used to advertise a dish of Shredded Wheat with strawberries on top, and a picture of a carton with Niagara Falls was the principal thing that stuck out in my mind, that I have always looked for. Niagara Falls was connected with the advertising. I associate Niagara Falls with Shredded Wheat. Ever since I have known it, the Niagara Falls was the part that I remember. When I hear the expression shredded wheat, it has a definite association or meaning for me. It is my favorite breakfast food. It is not the only one I eat; but it is my favorite. The expression brings to my mind the picture of the advertising that I have seen, of the Niagara Falls, and of the Shredded Wheat itself. I recall seeing a picture of a saucer or dish or bowl with two Shredded Wheat Biscuit in it. I can remember seeing that in advertising several years.

If I were to see a picture on a package not otherwise identified, of a saucer containing two Shredded Wheat Biscuit or two biscuit of the type we have been talking about, that would suggest Shredded Wheat to me.

CROSS-EXAMINATION.

THE WITNESS: I would say that corn flakes, oatmeal, and shredded wheat are all different types or kinds of dry cereals. Oatmeal is somewhat of a moist cereal, but corn flakes, wheat flakes, and shredded wheat are different kinds or types of cereal foods. Shredded wheat means to me a certain kind of cereal food. I have not known for more than six months that

the Kellogg Company was making shredded wheat. In fact, I did not know that the National Biscuit Company had any connection with Shredded Wheat until recently. I supposed it was made in Niagara Falls because they had Niagara Falls on it. I do not know whether it is made somewhere else now. I was only interested in it so far as eating is concerned; not in the manufacture. I know now, however, that two different manufacturers are making the cereal which I all shredded wheat. I never had bought any of the Kellogg product before this time I received it. I knew right away that the Kellogg carton was a different carton from the old Shredded Wheat carton. Mr. Aspergren asked me to go to the store. He did not take me to any other store, We went to lunch together. It was not my customary place for lunch. I have eaten there before. Mr. Aspergren seemed acquainted with the place. I judged he had been there before. He did not speak to the waitress. I did not notice whether individual packages of the Kellogg product were in sight. We sat at a table. There was a counter in the restaurant. I did not notice what was on the counter. We did not watch the waitress take the biscuit out of the carton. We were talking and we were away from the counter. When I asked the waitress for the carton, she went right back, got it, and brought it to me. She said she would get it if they had not thrown it out.

I very seldom buy groceries in stores. I have noticed the different kinds of food products, their cartons, in a way. I familiarize myself with anything like that by either the name or something. I have seen many food containers with pictures of plates containing some of the product; plates of spinach, peas, or baked beans. That is a very common practice with food products, showing the product itself in a dish in a satisfying or edible form.

When I speak of recognizing shredded wheat in a plate, I mean that I recognize it is not corn flakes or oatmeal, but that it is the cereal, shredded wheat.

WILLIAM C. RUCH.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have been a merchant all my life. I am now a salesman of Real Silk hosiery. I have been in the clothing business. I have never been connected with the grocery business. I am not connected with the National Biscuit Company in any way. I have owned my own store, at times, a haberdashery in Hollywood. I was eight years in Hollywood and sixteen years in Freeport, Illinois.

I recognize Plaintiff's Exhibit 1. I am familiar with the biscuit contained therein. I have known this item twenty to twenty-five years, as Shredded Wheat. I consume a great deal of Shredded Wheat and have it in my family all the time. I have three boys; five in the family. We almost brought the boys up on Shredded Wheat. All they have for breakfast is Shredded Wheat and eggs, or something like that. The oldest boy is thirty-two, so I practically raised him on it. It is safe to say that I have Shredded Wheat in the house and have had it continuously in my home about thirty years.

The expression Shredded Wheat in my family means a whole lot. During all the time I have been familiar with it, I have had occasion to notice the advertising of the company, and the pictures of the factory. I saw their big, double-page ad not long ago in the *Saturday Evening Post*. I always notice those things. I have noticed a considerable amount of adver-

tising throughout the years by the company. When I see the Shredded Wheat ad, I usually notice the factory, then the package, because that appeals to me. That is what we like. My wife would not buy anything but the large Shredded Wheat. She prefers that. She has tried the smaller one and did not like it. If I were to ask for a package of Shredded Wheat and were given some other package, not like Plaintiff's Exhibit 1, I would not consider I had gotten what I asked for. I would pass it up. I had an experience of that kind, with a fellow named Sam Tucker, in the grocery business.

I asked for a bottle of milk and a package of Shredded Wheat. He brought me the Kellogg package. "No," I told him. "That is not what I want." He put out the Kellogg package and said, "This is much better." I said, "That is not what I want." It was a package like Plaintiff's Exhibit 168, with a window in it. I could see the biscuit on the inside. He said, "This is much better." I took the package because he did not have anything else at the time, but I preferred the other. I took it home and used it.

I made that purchase at the request of Mr. Hornsby, of the National Biscuit Company, who happened to be with me. I gave it to him, and he gave me the shredded wheats, which I took home and used. Plaintiff's Exhibit 179 is the package. The piece of paper with pencil writing is the receipt for the cash paid, written by the groceryman, Sam Tucker. This happened November 22, 1932. I was there after that a couple of times. The second time I received the same. He said, "This is much better." I said, "I hope, the next time I come around, you will have what I want." I have not been there since. I went back the second time because I happened to be down that way. I thought I would pick up another package.

I remember cartons like Plaintiff's Exhibit 10, with a picture of a dish on the end of it very well, because that is the way you usually see them in the advertising in all the leading magazines. My wife prefers that Shredded Wheat, anyway. She will use the other, if she has nothing else; but that is what she prefers. Shredded Wheat means a lot to us.

I have seen Shredded Wheat with dishes in advertising in different magazines, recently. I have seen the dish occasionally on billboards and in the *Saturday Evening Post* and *Good Housekeeping*. I do not remember how long. For some time back. The last I really took particular notice of was a double-page ad. I happened to see that very recently. I would say I have seen the use of this dish with two biscuit in it in advertising in prior years, for a considerable time. That is what draws our attention.

CROSS-EXAMINATION.

THE WITNESS: I do not know any other Kellogg product we have used. My wife usually does the buying. All I remember is just the shredded wheat. She has had Kellogg's when they did not have anything else at the Safeway and other stores. She has bought it before the time I made the purchases for the Shredded Wheat Company. She tried it when it first came out, but she did not like it as well as the real Shredded Wheat. I have used it myself and fixed them with poached eggs. I usually fix my own breakfast, and I like the larger shredded wheat. As soon as I saw Kellogg's, I recognized right away that it was a different size shredded wheat and it was not what I wanted. I went into the kitchen and took the biscuit out of the carton in fixing my breakfast. It is safe to say that my wife always knows what brands of products are coming into the house. My wife would not try

to substitute any different brand without speaking to me. I could tell. Then, she would not buy it. She usually buys a good advertised line.

If my wife had bought the Kellogg's shredded wheat without telling me anything about it and had put some of them into a plate and served me in the dining room, I would have seen right away that I was getting a different shredded wheat than I had had. If I did not like it, I would notice it and speak to her. I do not think any substitution could be practiced on me by my wife with the small shredded wheat in our home. I noticed it was darker in color than the Shredded Wheat. It tasted just a little bit burned to me. It was toasted a little bit more; that is all.

My family is rather particular about Shredded Wheat. That is practically their complete cereal. They use poached eggs and Shredded Wheat. We use very little other cereal; once in a while, oatmeal or something like that. That is usually Quaker.

I have known, from the time it first came to my attention, that there was another concern besides the Niagara Falls concern making shredded wheat. When the grocer handed me the Kellogg package, I knew right away that that was not the Niagara Falls product. Mr. Tucker said it was much better. I told him I did not think so. I said, "Next time I call, I wish you would have what I want," meaning the Niagara Falls Shredded Wheat. He said, I believe, there were fifteen biscuit in the package, a couple more in the package, of Kellogg's. Our family does not, when new food comes on the market, go out and buy it. We will try it out. We are not as prejudiced as not to try it. We tried the Kellogg product, because that was all they had in the Safeway Store that happened to be near us at the time. If we had happened to like it better with the dark toasting, we would have stuck to it.

If a new product from a responsible concern was left at our house, we would try it. If the Kellogg Company left a sample at our house of a new product, we would try that. I believe I would, because we have lots of different things of Kellogg's. We have used other products of the Kellogg Company. I regard the Kellogg Company as a responsible concern with a good reputation, a long time in the food business. I have known the Kellogg Company just about the same length of time as I have known the National Biscuit Company. I know them as large advertisers of their food products. I have seen their advertisements.

SIDNEY W. RODDA.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am district sales manager of the National Biscuit Company in Southern California and Arizona, with headquarters in Los Angeles. I have jurisdiction over the branches in southern California and in Arizona; the Central Los Angeles agency, the Pacific Los Angeles agency, the Long Beach agency, the Riverside agency, the San Diego agency and the Phoenix, Arizona, agency. My duties are of a general supervisory nature over all those agencies. As district sales manager, my immediate superior is Mr. Warner, in San Francisco, who is the regional sales manager.

In connection with my duties, I have occasion to visit the trade very often. Usually, when I visit one of the branches, we clean up the few necessary details and immediately go out to call on the trade. I accompany the manager or special salesmen, usually. The agencies over which I have jurisdiction handle

Shredded Wheat along with other products manufactured by the National Biscuit Company.

We have had very close to a 100 per cent. distribution of Shredded Wheat in our territory. By that I mean that the product is found in all or nearly all the retail stores I visit in this territory. The sales of Shredded Wheat have diminished in this territory in the last three or four years. One good reason I assign for that is Kellogg's Whole Wheat Biscuit, which sells in competition with Shredded Wheat.

I have known Shredded Wheat for many years, particularly since 1922 or 1923. We had Shredded Wheat at that time in my home, before we had anything to do with Shredded Wheat, before the National Biscuit Company acquired it. Shredded Wheat is considered a household word. Shredded Wheat means the original Shredded Wheat Biscuit that is now made by the National Biscuit Company. The name Shredded Wheat means Shredded Wheat. It means the Shredded Wheat Biscuit that we have always known as Shredded Wheat Biscuit. It is known as such in the household and in the home. I have asked the questions of my wife. She says that it is known as the Shredded Wheat, that Shredded Wheat is a household name. She knows Shredded Wheat in the home as Shredded Wheat. When she thinks of Shredded Wheat, she thinks of the original Shredded Wheat. That is her statement to me in our discussions. I do not believe that is peculiar to her, because she is not particularly inclined to shop around. She usually shops at certain stores. She knows what she wants, and she buys what she wants.

As I have circulated among the trade, I have noticed the presence of the Kellogg Whole Wheat Biscuit in the stores, and I have had occasion to notice the prices of Kellogg's Whole Wheat Biscuit and

Shredded Wheat in the retail stores. To a considerable extent, there is a difference in the retail prices in the stores. Shredded Wheat is the higher. I have observed in many stores that there is a difference in price, in many instances, of one cent a package. In a good many instances I have observed, Kellogg's Whole Wheat Biscuit is ten cents and Shredded Wheat is eleven cents. In some instances, Whole Wheat Biscuit is ten and some Shredded Wheat twelve. My general impression is that the differential in price in the stores is the rule, not the exception.

In connection with my duties, I make it my business to know what the two products are sold for by jobbers to retailers. I have information as to the relative prices at which the retailer can obtain Shredded Wheat and Kellogg's Whole Wheat Biscuit. I know of one particular instance where I saw a cost book, which indicated that this dealer was buying Kellogg's Whole Wheat for $1.89 per case of twenty-four, which would be on a basis of $2.83½ for thirty-six, as compared with the price this man was paying for Shredded Wheat, $3.34 per case of thirty-six. That is what I have generally observed. There is a difference in the price from jobber to retailer.

We have also requested information as to the prices from manufacturer to jobber and find there is a differential there. In one instance, we found that Kellogg's Whole Wheat Biscuit was $1.80 for a case of twenty-four. We received that quotation from the jobber. That would be equivalent to a price of $2.70 per case of thirty-six. His net price on National Biscuit Company Shredded Wheat is $3.30 for a case of thirty-six. I would say that this differential has a great effect on the distribution of Shredded Wheat.

In the self-service stores, Shredded Wheat is stacked on what they call island displays in the center of the store, and Kellogg's Whole Wheat Biscuit

nearby, with the prices on the stacks, indicating to the consumer what the retail price is. In others, Shredded Wheat is on the shelves and Kellogg's Whole Wheat Biscuit is on shelves, with their prices.

From the standpoint of profit and from evidence we have heard, the retailer pushes one in preference to the other. The fact is that the dealer does make more profit on the Kellogg package, in those cases I have investigated.

CROSS-EXAMINATION.

THE WITNESS: The National Biscuit Company has not put on special sales to the trade recently, on Shredded Wheat, not since last May. As far as I know, the National Biscuit Company has permanently abandoned the policy of giving special sales and special prices to the trade. There is no indication that it is going to happen. We have a regular list price, and then we have a scale of discounts, which extends from ten per cent. direct to an individual, all the way up to seventeen and a half per cent., which is the maximum discount to a retailer, based on quantity.

The National Biscuit Company never makes any allowance from those prices for advertising done by the retailer on Shredded Wheat. We never give the retailers any special prices to cover advertising done by the retailer, never give them checks, or never make them any allowances, directly or indirectly. My duties as district sales manager give me access to the cost sheets of my branches, which are consolidated here. We know exactly what is issued, so far as this group is concerned.

The dealers do advertise National Shredded Wheat. Very often, they do it themselves, without any solicitation. Very often we suggest that they advertise Shredded Wheat as a leader. They do it simply

on our suggestion. There is no other inducement. There is no other service we give them in connection with their advertising sales, unless we have a salesman go in on a Saturday for a sales promotion and conduct a sales promotion. In that event, all he does is sample to the consumer. I do not know of any instance where Shredded Wheat was sampled. It is just crackers I am speaking of. Insofar as their advertising is concerned, all we do to induce the retail grocers to advertise our National Shredded Wheat is just to suggest they put on a sale. Many times, however, our salesman will be present in the store on a Saturday and sell Shredded Wheat, together with other products. I do not regard this as an inducement to the grocer to advertise for us. I would regard it as co-operation on developing sales on our line; because there is more involved than Shredded Wheat right there. That costs us something, but we usually make money on it, because we make greater sales. We absolutely do not give a better discount when those sales are on than we do ordinarily. The only advantage to the retailer when we put the salesmen into the store is that he gets the volume discount in the larger range. They usually earn the discount in the respective classes of discount In most cases where our salesmen go, they go where there is volume. Usually they earn the discount, anyway. All our discounts are based on quantity purchases, on volume.

The presence of our salesman in the store helps the retailer increase volume so that he gets into a larger discount range; but, in the situation that exists today in this field, most of the stores in which we demonstrate are the stores where there is the larger volume. Usually they earn the discount, whether the salesman is in there or not. In other words, the presence of the salesman does not help the grocer from one class of discount into another class of discount, to my knowledge,

because, in most instances where the salesmen go in, the salesman is interested in increasing sales. He is interested in that, because it increases his commissions. So he will naturally pick out the volume store in order to hold a sale. He increases the volume of that store over what it was if he did not go in there. In most instances, that does not make any difference in the discount to those particular stores. He cannot earn any commissions without also increasing the profits of the retailer correspondingly. I do not say that none of that is sufficient to put the retailer from one range of discounts into a higher range. In most instances, however, our salesmen select the volume stores, which usually earn the maximum discount without that help.

We give no inducement to the retailer, whatever, to do any advertising at the dealer's expense. Wholly aside from whether that is true from Mr. Clarke's view or from the standpoint of bookkeeping or figures, my opinion, as I read the figures, is that the National Biscuit Company does not give and does not intend to give any inducement, whatever, to carry an advertisement of Shredded Wheat at the retailer's expense. Usually a reduced retail price at a sale is not suggested by us. We more often suggest that they advertise certain varieties. We do not say particularly Shredded Wheat. In most instances the advertising on the part of Shredded Wheat has been done voluntarily.

When we suggest that he advertise, that means usually that he advertises at a lower price. No one puts an advertisement in the paper to say that he is selling Shredded Wheat the regular price, usually. That suggested advertising price is not made by us. It usually depends upon the competitive condition that exists in that territory. Usually, there is a price on the merchandise that is advertised, just like everything else. They do not usually advertise the merchandise at the high price. Although I have known of par-

ticular instances where they have advertised Shredded Wheat at the regular retail sale price that it was selling in their store. They did that to increase their volume. This particular sale price I have reference to was advertising Shredded Wheat at ten cents a package. The net to that particular dealer is $3.30 a case of thirty-six. It is an unusual case; but he has done that before. His competitors in that neighborhood have advertised that they sold the regular National Shredded Wheat for less than ten cents; yet, he has maintained that price. I do not recall that those advertisements appeared at the same time.

I do not think he would be apt to do it if he knew it. Usually, they do not know what the other fellow is going to advertise, and we do not make it a practice to go from one to the other, indicating what one dealer is going to advertise it for over the other. In other words, my point is that we do not make it a practice to go from one dealer to another and indicate what the resale price is going to be or just what an advertised price is going to be. There have been advertised sales where the price has been lower than ten cents. I mean to say that price competition exists and has affected our sales.

I have been with the National Biscuit Company twenty-four years. I would not say that the National Biscuit Company have been one of the leaders in having their goods advertised at special low prices. I would say that the retailers have advertised National Biscuit Company's products extensively, but there are other brands that they have advertised at lower prices. Retailers have done some cutting of National Biscuit Company brands as price leaders or bait lures, or whatever you want to call them, trying to get people into their stores to buy the National line; but, when they do that, we rather encourage them not to cut under cost. We have not, however, tried to dis-

courage them from using it as a leader. We encourage them to feature National Biscuit Company's crackers, but not at a loss, not as loss leaders; but as attractive price leaders. I do not know that that has been the general policy of the National Biscuit Company since I have been with it; but, as field men, we encourage the featuring of National Biscuit Company's brands at a fair price. We do not encourage going down to cost; we rather discourage that. That is the only point at which the discouragement of the National Biscuit Company is applied to price cutting on its products, so far as we are concerned here. The only discouragement that we put on price-cutting on Niagara Falls Shredded Wheat is that they do not sell at a loss. We encourage that they do not sell at a loss. By that I mean that they should not sell for less than they pay for the product. We still encourage them to sell at a little more than cost. I would not say definitely what that figure should be, because individual cases are different. I do not mean to say that they should not sell at a loss, so far as donating their services and time and money that may be invested in the product is concerned. In suggestions that are made by dealers to our salesmen, in discussing possible sales or prospective sales, I believe it does not get to the point of just saying "Do not sell for a loss," or anything like that. I mean that, in many instances, the dealer discusses with our salesman and asks him, "What will we advertise?" Usually there is a discussion and the profit is figured, insofar as their resale price is concerned, when compared to their cost price. If a retailer were to say, "Suppose I advertise Shredded Wheat for less than it cost me," I do not know what our man would say. I would say that our salesman would rather discourage that practice.

I was with the National Biscuit Company when the Shredded Wheat Company was taken over by them.

The sales of the National Shredded Wheat were not taken over by the sales force of the National Biscuit Company right away. As soon as it could be done; some time after the amalgamation, it was taken over by the regular sales force of the National Biscuit Company. Those were men who, before that time, had been engaged in the sale of National Biscuit Company products, principally the cracker line. With those men, they had this added product, the Shredded Wheat, as an addition to the cracker line, to be sold by them. We distributed Shredded Wheat on a similar basis to the Shredded Wheat Company, the first year. Then it was turned over to our salesmen. We began to distribute Shredded Wheat in the same way that we distributed the rest of the National Biscuit Company's cracker line, with our products. That involved our distributing it predominantly through our own force, direct to the retailer, rather than predominantly through wholesalers; but we maintained sales through wholesalers and do today. Wholesalers carry it today. When the Shredded Wheat Company was in charge of the business, however, the sales of Shredded Wheat were made through wholesalers practically exclusively.

Since the National Biscuit Company got its system into operation, orders are taken by our salesmen, and we deliver the merchandise to the retailer. The wholesalers naturally only get such orders for Shredded Wheat as are not supplied in the regular way direct by the National Biscuit Company. The volume of Shredded Wheat distributed through wholesalers has been diminished at least by the amount which is now distributed direct by the National Biscuit Company.

We do not expect the same sales co-operation from the salesmen of wholesale houses now, as the Shredded Wheat Company had when all its product was distributed through wholesalers; except that many of the wholesalers are so tied up right now with voluntary

chains that considerable of the merchandise is billed direct through those voluntary chains in this territory. That has had a big effect on the jobber. We call and give the direct service to the retailer and bill through organization headquarters. They do not need to move it. In those instances, I would say that it would not make any particular difference.

However, as to the wholesalers whose business is sharply cut down in National Shredded Wheat by the fact that the National Biscuit Company has taken over the distribution, I would not, it is true, expect the same sales efforts from those wholesalers that they used to give to Shredded Wheat through their salesmen when the exclusive distribution was through wholesalers; except that, in recent years, there has been quite a change in the distribution of food products in this territory, and practically all those old-line jobbers are now accepting a billing of the manufacturer through their headquarters, where the delivery and contact is direct with the retailer, who is a member of the organization that is sponsored by the jobber.

It is difficult to say how many individual products there are in the National Biscuit cracker line. We class them as sponge goods and sweet goods. There are many different items of sponge goods, of sweet goods, and of cracker goods.

We have a regular sales force solely for contacting retail trade. When the National Biscuit salesman calls on the retailer, he will go from store to store, where the buying is done by independents, and he will take orders in that store for everything we have in the National line, through sponge goods, sweet goods, cracker goods and the cereal.

Where a particular store carries the general line of National goods, including not only Shredded Wheat, but the crackers, sweet goods, sponge goods, and so forth, the salesman gets quite a substantial order. If

he went to a store across the street which handled only Shredded Wheat, I do not know whether he would simply get a Shredded Wheat order. We endeavor to sell them all. I was quite astonished to find one store that did not handle any National line except Shredded Wheat, here, yesterday. I do not mean to try to create the impression that they all carry the whole National line, but I was quite astonished. What I mean to say is that they did not have the National cracker line in what, apparently, was a representative store. In that store, our salesman, if he spent any time there, would not have an order for anything except, perhaps, National Shredded Wheat, unless he succeeded in selling them the rest of the line. That would be equally true of all stores which handle nothing of the National line except Shredded Wheat. Usually, when a new product is introduced, it is sold to the headquarters of the chain or the independent, and displays are usually arranged for; attractive displays are made. We, and I know practically all manufacturers would encourage the trade to feature an absolutely new variety, a new product. Kellogg's shredded wheat, to my knowledge, has been, I would say, featured and brought to the attention of the consuming public in the various ways mentioned. It has been advertised to the public by the dealers, also by the manufacturer; and the manufacturer has supplied selling helps to the trade, wherever they could get them to put in cards referring to whole wheat. In other words, I believe the Kellogg Company has used all the ordinary and best known, most effective methods of introducing a new product to the consuming public through the retail trade, referring to Kellogg's Whole Wheat Biscuit. There is no indication in the stores that the Kellogg Company was trying to conceal the fact that it was in the market with a whole wheat biscuit.

I would not say that the self-service type of store is on the decline; it is rather on the increase.

I am familiar with the Kellogg biscuit. It is a shredded biscuit, a shredded whole wheat biscuit. I would not attempt to say that it is just as much of a whole wheat biscuit as the product of the National Biscuit Company; but it is a shredded whole wheat biscuit, as far as I can see. It is so advertised and stated on the cartons. I have no idea whether our gross price to the Safeway headquarters is different from Kellogg's. I know our price to them is the same as to other large accounts. There is no special price. The net price to Safeway outlets, with all discounts off, on Shredded Wheat, is $3.30 net; which is $4.05, less seventeen and a half and one; seventeen and a half being trade discount and one being cash discount. That price is public and known to the trade and everybody, as far as I know.

Assuming that the sale of Wheaties in this market in 1932 was 150,000 cases, with the tremendous number of cereals in the stores, I do not know it would affect Shredded Wheat a great deal. I do recognize that other wheat cereals would come in competition with Shredded Wheat or Whole Wheat Biscuit; but, in my opinion, with the tremendous line of cereals in the grocery stores, the effect on any one particular variety would be small, compared to the total. All cereals are competitive.

I would not concede, however, that, if a wheat user who had formerly used Shredded Wheat were to find wheat in a more attractive form to him, he would stop using Shredded Wheat. I believe that all cereals are competitive to a certain extent; but I believe that Shredded Wheat would be a lesser competitive item than corn flakes or All-Bran, or something like that. I do not know about the Kellogg product, but I know there are many who have been users of ours for many

years. Undoubtedly people shift around some. There are several cereals on the shelf in our home; but we constantly have Shredded Wheat. I think that is true of every home that uses cereals. It is my opinion that that pretty much exists. I do not mean every home has Shredded Wheat; but I mean, from evidence I have heard and discussions I have had, it seems to me that anyone who used Shredded Wheat regularly would have it in the home all the time, even though other cereals came in. I took home some last night. I saw some cereals on display; and I was particularly interested in knowing what that cereal was, but that did not replace Shredded Wheat on our shelves.

In this territory, we have an excellent distribution of Shredded Wheat. I do not know anything about the territory back East. I do not know anything about Shredded Wheat outside of this terrritory, because I have been in this territory entirely since we have had Shredded Wheat. Our advertising, our sampling, and our demonstration certainly reached people who were not already customers of our company. We do not regard all the sales work as done merely to hold in line the army of National Shredded Wheat users we already have. We are constantly featuring Shredded Wheat, in order to increase our volume. When I say *distribution,* I mean distribution to the retail stores, not to the consumer. I do not think that our Shredded Wheat makes our customers immortal in any way. We lose some of our customers by death. As one user goes out, we do hope that more will come in.

My statement was with regard to the distribution to the retailer. There is a field, we believe, among the customers, for increasing sales, surely. We hope to increase the number of consumer customers faster than we lose them by death or by change of appetite or by their getting tired of Shredded Wheat. If we did not

hope, by all our new sales efforts, to always recruit more public customers than we are losing, I do not believe we would advance the sales efforts. Those sales efforts are obviously directed to the end of increasing consumption and getting new people.

If we did not expect to increase our sales, we certainly would not continue it, or to maintain our present volume. There is a constant effort on our part, right now, to maintain our present volume. That is out battle right now. I would not say that a consumer eats Shredded Wheat three hundred and sixty-five days in the year, if that is what you want me to say. We have found, however, consumers who have not only made the statement that they did that, but that they conveyed that to their family.

When the National Biscuit Company took over Shredded Wheat, I am not familiar with any guarantee against price decline or guarantee of sales. When we changed from distributing through the jobber to direct by us through our selling force, the list price, I believe, was set at a figure that was practically the same as the net price to the jobber before the National Biscuit Company started to distribute Shredded Wheat direct.

The procedure is a little hazy in my mind, as to whether jobbers were notified beforehand that the change was about to be made; but I believe we gave them sufficient time, to let them cut down on their orders of National Shredded Wheat, so they would not be loaded up with a lot of it when we took over the direct distribution. I believe that was done. I am a little hazy on that. I do not remember any difficulties in this territory with wholesalers about stocks. My territory includes southern California, but not San Francisco.

I have tasted Kellogg's shredded wheat. I notice a difference in taste; and I have noticed the difference

in size and in the packages. I have noticed some difference in the toasting. I do not know whether it is more toasted than Shredded Wheat, but I know it has a darker color. I could not say whether there is any difference in the shreds. There is a difference in the size of the biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: Without giving figures, just estimating, my impression is that about 45 per cent. of the jobbers in my territory are affiliated, in one way or another, with retail outlets, such as voluntary chains. Practically all the large jobbers in this territory are either sponsoring voluntary chains or are sponsoring some sort of organization whereby they accept drop shipments of our line through the retailers. That is generally true in southern California. In other words, although the method of distribution of Shredded Wheat has changed from the jobber directly to the retailer, the jobber is still participating in that business, as a sort of purchasing agent for those voluntary chains. He gets some part of the purchase price. He figures on retaining a profit.

I noticed, in some newspaper advertising that has the co-operation of the newspaper with the manufacturer, they were advertising Kellogg's as the new shredded biscuit. It looked like Kellogg-sponsored advertising in the papers. I would not say that I recall having seen a display of Kellogg's Whole Wheat Biscuit marked Shredded Wheat, on cards, or anything of that sort.

I know that this Shredded Wheat Biscuit that is now put out by our company, from my own observation, when it was introduced was a new form of food product, away back in the beginning. My opinion is that, when it was started, it was something entirely

new to the public. I do not remember that, because it was quite some time back; but I do know that the Shredded Wheat Company, throughout a long period of years, use a great many methods to introduction, to teach the public to use this cereal. That has gone on to such an extent that Shredded Wheat has become a household word.

RDQ. 269. Let me ask you this: Do you think that it is as difficult a problem for the Kellogg Company to introduced their Whole Wheat Biscuit as a new product, as it would be if the Shredded Wheat Company had not done all this prior work?

A. Why, there is no question in my mind but what they are cashing in on that prior work done by the National Biscuit Company or by the Shredded Wheat Company.

THE WITNESS: By that I mean that, a Shredded Wheat Biscuit being a well-known product, it is less difficult to introduce something that is like it.

Shredded Wheat is not used generally as a loss leader, by retailers. We do not encourage that.

RE-CROSS-EXAMINATION.

THE WITNESS: I could not determine what volume of grocery business the voluntary chains do in my district. I can only estimate from my own knowledge of the cracker business. I would have no way of determining the total volume of grocery business. I believe I said that was from around 30 to 40 per cent. That is an estimate, without referring to my records or figures.

I have no idea what per cent. of the business the super-markets do, but a lot of them buy through voluntary chains. Therefore in my estimate, the voluntary chain figures would include those super-markets that are billed through voluntary chains.

HENRY BEEMAN RICKARD.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. I own the real estate and operate the grocery department of the La Manda Park Public Market, at 2526 East Colorado Street, Pasadena. I also lease concessions for the other branches of the market to others. I have been connected with the grocery business close to twenty years, working at it for five and in business for myself fifteen years, always in southern California.

I am familiar with Plaintiff's Exhibit 1. I call it Shredded Wheat Biscuit. I am familiar with the product itself, as found in that package. I have been familiar with Shredded Wheat ever since I have been connected with the grocery business. I have always carried it in stock. During my familiarity with it, the biscuit has always been of the same general shape and appearance. I do not believe there has been any change in it, that I know of.

I know what Shredded Wheat is. I have tried it, but I do not eat it. I do not care for it. Our store is a self-service store and we deliver orders, also. We receive orders over the telephone. We carry Shredded Wheat in the store now and find that it sells readily. It is a good seller, one of the best sellers, I believe, of the breakfast foods.

I have noticed, in my experience that the Shredded Wheat Company has extensively advertised its products. I have noticed their advertisements quite a bit. When our customers ask for Shredded Wheat, we always give them the Shredded Wheat Biscuit, that package, Plaintiff's Exhibit 1.

I think the expression Shredded Wheat has a definite meaning to the general buying public. It has been

on the market so long that it should have. I know it has to me, and I judge that the average person has the same mind. When a person thinks or speaks of Shredded Wheat, to his mind is meant, naturally, the Shredded Wheat that has been on the market all these years.

We receive occasional telephone orders for Shredded Wheat, and we supply Shredded Wheat. I know the Kellogg's Whole Wheat Biscuit. We carry that. When a customer asks for Shredded Wheat Biscuit, I have never supplied the Kellogg's biscuit, unless they specially ask for Kellogg's. We always send them Shredded Wheat.

Q. 33. Have you ever observed customers in your store pick up either Kellogg's or the Shredded Wheat?

A. We have, more lately since the Kellogg puts a window in there. We have had them ask, "Well, are the Shredded Wheat people putting out a new biscuit?" And we told them, "No; that is put out by Kellogg's; they are putting out one that is similar."

Q. 34. Do you mean that they ask that question with reference to the Kellogg package?

A. Yes.

THE WITNESS: I have reference to Plaintiff's Exhibit 168. We have had them for the past two months with the window in. We have not always had them so. I would say that the presence of the window shows that it is a shredded wheat biscuit. It is very similar to the other. I think Kellogg's Whole Wheat Biscuit could be sold as Shredded Wheat biscuit. I have noticed our customers pick up the Kellogg package and then "I do not believe this is what I want," and they will go back and change it, or vice-versa.

I have had some experience in observing the introduction of new products, by advertising and by sampling. The way they introduced Kellogg's Whole

Wheat Biscuit to us was by price. If I remember right, the reason we put it in there was on a price concession. I think it was a little cheaper than Shredded Wheat; and we put it in for that reason, because everything Kellogg has is a good seller, and we naturally figured the whole wheat biscuit would sell along with the others. I think the Kellogg's Whole Wheat biscuit would be introduced more easily because it is like a well-known product. It is shredded wheat. In other words, it could be sold, because it is a form of shredded wheat.

Our retail price on both Shredded Wheat and Kellogg's Whole Wheat Biscuit is ten cents. We get the Kellogg's biscuit a little bit cheaper than the Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: I appeared here today to testify at the invitation of the National Biscuit Company. They said they would look after my expenses and time for me. My store is one of the regular self-service stores in which the customer waits on himself. Our store is arranged that way inside. We have our delivery and telephone service in the back; but our store proper is where people wait on themselves. In the store I think we give better display to the National Shredded Wheat than to the Kellogg Whole Wheat Biscuit; but we give a good display to the Kellogg shredded wheat, because we have quite a sale for all the line, and we give it a good display. I recognize that both those products are shredded whole wheat biscuit. You would call the Kellogg's that, because it is similar to the other; and, to me, it would be a whole wheat biscuit, looking at it, yes. If they advertise it as a whole wheat biscuit, I think it would have to be whole wheat. It is just as much of a shredded biscuit as the National Biscuit product is. It has been three or four years since we

have stocked Kellogg's; but I believe it was out sometime before we stocked it. I do not know.

I should think it should be pretty common and general knowledge in the trade by now that the Kellogg Company has put out a shredded whole wheat biscuit, because they are very active about introducing all their lines. Their shredded whole wheat biscuit has been introduced in the regular ways a new product is introduced, by sampling it, inducing some of the dealers to advertise; and they have had displays in the stores.

I do not believe the Kellogg biscuit is the same size as the National biscuit. I believe it is a smaller biscuit, as you can see it there in the cellophane window in the Kellogg package. I do not know whether it is as long a biscuit. I do not use it. I have not opened up the packages. I have seen it opened, but I do not know.

Putting one of the Kellogg packages end-ways on top of the National package, I should judge from that that the Shredded Wheat was a substantially longer biscuit than the Kellogg's. Corn flakes, oatmeal, and shredded wheat, I would say, are three different kinds of cereals.

XQ. 69. By the name Shredded Whole Wheat Biscuit, do you mean a dry cereal, made of shredded wheat?

A. It would naturally, to my mind, be the old Shredded Wheat; but I realize that the other is a shredded wheat, too; but it would naturally bring to my mind the old Shredded Wheat. For instance, if a lady came in and asked for a package of Shredded Wheat, I should hand her the package of old Shredded Wheat.

THE WITNESS: If the lady asked for Kellogg's Shredded Wheat, I would give her Kellogg's; and, in that case, I would regard her as getting shredded wheat made by the Kellogg Company. If she asked for

Shredded Wheat and I gave her the Kellogg product, she would be getting shredded wheat made by the Kellogg Company.

I would say that the Kellogg's Whole Wheat package was a familiar Kellogg package, as to the color and the color of the lettering. I would recognize that as one of the family of packages of the Kellogg Company, their familiar red, green, and white color scheme.

As I said, since the cellophane window packages came in, a lady had said the Shredded Wheat people were putting up a better, a different shredded wheat, a smaller shredded wheat. I said, "Well, that is put out by Kellogg's." One lady said that to me.

Until the cellophane window was put in the Kellogg package, the grocer would have no doubt as to just what was meant by a whole wheat biscuit, because it had been shown to him. I suppose you could have seven or eight or ten kinds of whole wheat biscuit. If this window were not put in there, anybody who had not already seen one of the packages would not know just what was in Kellogg's Whole Wheat, if they just called it Whole Wheat Biscuit. The grocer would know, naturally. After the cellophane window was put in, the people would see what kind of whole wheat biscuit it was that the Kellogg people were marketing. I would not say that this looks like a much darker biscuit than the National product. It looks to me just like it, very similar. Not having seen either one of them opened in recent years, I would not say without seeing them together. I would not express an opinion.

If I were told that Mr. Rodda, the representative of the National Biscuit Company, stated that, to him, these biscuit looked darker than the National biscuit, that would not surprise me, because he probably knows a lot more about it than I do. To me, that would look just like a Shredded Wheat Biscuit, figuring that the other shredded wheat could be browner than theirs.

I do not know that they always get them just the same bake. From my observation as a grocer, I would say that the Kellogg Company is trying all the well-known ways of introducing its shredded wheat biscuit to the attention of the public. They are advertising it and merchandising it, and such as that. Those methods Mr. Clarke mentioned: manufacturer's advertising, dealer advertising, sampling, demonstrating, store displays, are the generally practiced and best-known methods of introducing a new product to the attention of the consumer. The cellophane window would also tend to attract attention to the Kellogg package. It is rather a novel form of cereal display, not adopted by very many of them. I have never seen a window like that in any of the National Biscuit Shredded Wheat packages. It is possible that it would also appeal to children, that they would like to get hold of empty packages with the window, for playhouses and things of that sort. In my store, premiums like the Wheel of Knowledge have been distributed with the Kellogg's product. The distribution of a novelty of that sort would tend to attract attention to that package, naturally.

Our store is self-service. They are right there on the shelves. The consumers or customers go to the shelves and get what they want.

RE-DIRECT EXAMINATION.

THE WITNESS: While it is sometimes done, I would not say that one of the well-known ways of introducing a product is to make it look like a product already on the market. The Kellogg's Whole Wheat Biscuit does look like a Shredded Wheat Biscuit. In fact, I would call it one, just after looking at the two, simply because I have known the Shredded Wheat for so long.

Before the window was introduced, they used a package like Plaintiff's Exhibit 155, on which I see a

picture of a dish with two biscuit in it. Seeing that, without noticing any of the other printed matter on the package, I would think it was Shredded Wheat. So it is not quite correct to say, as Mr. Clarke induced me to say, that, without the window in the back, I could not tell what was in it, if they had that picture. They did have that picture on before they used the window, and they have the picture of it on with the window.

I have seen advertising of the Shredded Wheat Company that featured a dish with two biscuit in it; and I also believe it has been advertised in connection with fruits or berries. I have seen it both ways.

RE-CROSS-EXAMINATION.

THE WITNESS: I have seen Jersey Corn Flakes, but I have not handled it. That is a corn flake. Generally speaking, I imagine it looks like the toasted corn flakes that the Kellogg people put out. I have never seen the Jersey Corn Flakes opened. I have seen Post Toasties opened. Generally speaking that is a toasted corn flake. It is very similar to the toasted corn flakes put out by the Kellogg Company. There are more than one concern putting out Oatmeal in the grocery trade; a number of them. The oatmeal put out by one concern looks generally like the oatmeal of another concern, unless there is some difference; as, I believe, the H. O. is possibly different from the others. Some of them may be specially processed; but mostly the oatmeal of one manufacturer looks like the oatmeal of another. Heinz tomato catsup looks like any other general brand of catsup. There might be some slight difference in color; but they are all tomato catsup. There are many brands of catsup on the market.

On some of the products in my store, you could find packages with pictures of a dish with some of the product in it. I know you could with beans or such as that.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not regard Shredded Wheat in the same class as catsup or beans. Shredded Wheat comes under the head of cereal or breakfast food. The original Shredded Wheat was the first thing of its kind. It was a new food product.

I know that a Kodak is something they take pictures with, a camera. Eastman is the best-known maker of it. I do not recall having seen any Kodak made by anybody else. I understood Kodak was a copyrighted word. It has become very common usage to refer to almost any small camera as a kodak, although, as a matter of fact, it is a trade name that belongs to the Eastman Company.

From my experience of more than twenty years, I should imagine that the old Shredded Wheat, the original Shredded Wheat is what the average customer would want. In fact, that is all a lot of them know, just the original Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: They would ask for it as Shredded Wheat, not for the original. They would just say, "A package of Shredded Wheat." If they wanted Kellogg's, they would say, "Kellogg's shredded wheat."

If people began buying Wheat Flakes in large quantities in my store, I do not believe it would cut down on the sales of Shredded Wheat, which is different. It would probably cut down on a similar line, similar products to the wheat flake; but I do not believe it would on a cereal as different as Shredded Wheat.

I do not find that there has been any material falling off in the sale of National Shredded Wheat in our store. That is because we pushed the National Shredded Wheat. We give it every advantage that we can. I do not know why; it is just a kind of feeling I have. It was first on the market, and it should have that preference.

I have a friendly feeling toward both concerns, because we think Kellogg's is a wonderful line. We have a big turnover on all their merchandise; but there is just the same kind of feeling about the old Shredded Wheat. Wherever I could give any advantage in display or anything of that sort to the National Shredded Wheat over the Kellogg's, I would do that. I would give the original Shredded Wheat the advantage. That is a sort of individual feeling in my own store. That is just my own personal feeling. The National Biscuit people deliver us our supplies of National Shredded Wheat. We get our supplies of Kellogg's Whole Wheat Biscuit through the jobbers.

We have, pretty generally a complete National Biscuit line. When a National Biscuit Company salesman calls on me, he takes orders for the whole line, including Shredded Wheat and the cracker line. Similarly, when a Kellogg salesman calls on me, he takes orders for the whole Kellogg line, including the Whole Wheat Biscuit. The Kellogg orders are supplied through the jobber; but, of course, we do not always wait for the Kellogg salesman, because I can always order anything they have through the jobber. If we are out of any item of Kellogg's, we call on the jobber and order it, because they all have it.

RE-DIRECT EXAMINATION.

RDQ. 158. Tell me why you feel that way about Shredded Wheat?

A. Oh, I do not know, unless it has just been so long on the market that we just figure that it is the real Shredded Wheat, is all.

RE-CROSS-EXAMINATION.

THE WITNESS: I would say that it is conceivable that other grocers would have that same feeling about the Kellogg Company as I have about the National and would prefer to push the Kellogg line.

P. F. McCARTHY.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the public market business, embracing meats, groceries, fruits, and vegetables. Our partnership is McCarthy & Meyer, called the M. & M. Public Market, located at 1351 West Seventh Street, corner of Valencia. It is just a medium-sized business, not a super-market. It is about forty feet front. I have had it about twelve years. I have been connected with the grocery business all my life; over forty years, nearly half a century, all that time associated with the grocery business in some form. During that time, I have been, of course, familiar with cereals.

Our present store is rather a semi-service. We wait on trade, and they have the privilege of helping themselves, also. We deliver some goods, but very little. We have delivered heretofore, but very little during the last two years. We sometimes receive telephone orders and deliver.

I recognize the package, Plaintiff's Exhibit 1. I call it Shredded Wheat Biscuit. I am also familiar with the contents. I have known Shredded Wheat during the entire period of its existence on the market as a cereal. That is thirty-five or thirty-eight years. I cannot tell accurately the date. I remember when it first came on the market. It was a good seller. It has always been a very acceptable cereal. The Shredded Wheat Company or the proprietor of that Shredded Wheat Biscuit advertised it when it was introduced. The advertising of Shredded Wheat has continued throughout my recollection. I think I remember the shape and appearance of the biscuit when it first came out. I do not know that I could state that accurately.

It seems about the same. I do not think it has changed any. I think it is the same today as it was then.

I would say that the general purchasing public has always been familiar with that shape and form of biscuit. The public have asked for that biscuit as Shredded Wheat Biscuit, of course. That was the name it was known by; and it had no competitive article for a period of a quarter of a century. They did not have to distinguish it by any other name, and it was always asked for by that name. When a customer asked for Shredded Wheat, I knew what they wanted.

I remember a carton like Plaintiff's Exhibit 10, with the picture of a dish on the end of it. I would say it was used for quite a period of time by the Shredded Wheat Company. I have seen that dish and the biscuit in it used in other forms of advertising by the company.

I know the Kellogg Whole Wheat Biscuit as an advertised product. I have known of it from four to six years. It has only been on the market a brief period of years. I have carried that out at the Hollywood, and the other stores have also carried it. I do not carry it now.

Q. 36. What can you say about the Kellogg Whole Wheat Biscuit? Why is it you do not carry it?

A. I cannot say anything against the quality of it; but it has offered some demand resistance by putting it out for Shredded Wheat Biscuit; because the other product is what they expect to get.

Q. 37. In other words, have you ever had any customers——

A. Yes, sir.

Q. 38. —that showed some confusion about this biscuit?

A. Yes, sir; they bought the other in preference to it.

THE WITNESS: I think the Kellogg biscuit was sold to the grocer a trifle cheaper than the Shredded Wheat

Biscuit. I could not say that as a positive fact; but that is my impression.

I think I have seen a Kellogg package like Plaintiff's Exhibit 168, with a window in it. I have not had them in my store. Just looking at this package, supposing I could not see the name of it, of course, I would naturally presume it was Shredded Wheat Biscuits in there, by looking at it at a distance here. The similarity between that and the Shredded Wheat Biscuit that preceded it on the market is very noticeable. These are a little smaller biscuits. It is a different-sized package. The customers readily perceive the difference. They see there is a difference in the package, and they realize that it is not the package that they have been accustomed to receive for so many years. Looking in the window, I see the ends of the biscuits. I think there is some confusion of the public by the appearance of that package with the window in it, showing the biscuit. They are both sold as a similar product, of course; and one is sold as a Whole Wheat Biscuit. I believe it was sold as Shredded Wheat Biscuit at one time. Of course, merchants, during these days of small profits, are influenced to put out the merchandise that produces the best revenue. I presume that article was frequently put out where Shredded Wheat Biscuit was called for, without any additional qualifications to the package.

I think it would be easier for the Kellogg Company to introduce a product like that, now, under present circumstances, than if it were a brand new article; because a cereal of similar character preceded it on the market so much longer. It has already been well known to the public.

CROSS-EXAMINATION.

THE WITNESS: I remember Kellogg's Pep and Rice Krispies. Those products of Kellogg have really gone on the market a lot easier than Kellogg's shredded wheat. They have got a very good sale. They were

new products. They were not products that were like some other product that was on the market; yet they were introduced more quickly and easily than Kellogg's Whole Wheat Biscuit. Those goods sell very readily. Kellogg's Rice Krispies and all of Kellogg's products are very good products. I think I remember when the Toasted Corn Flakes first came on the market, generally, around the beginning of the turn of the century. I think I remember that the Kellogg corn product was first known just as Toasted Corn Flakes. There were a number of other corn flakes that came on the market under the name *Toasted Corn Flakes*. Then I remember that the Kellogg people applied the name of *Kellogg's* to their products.

Now that there are two shredded wheat biscuits on the market, I do not know whether there would be confusion between the two names Niagara Shredded Wheat and Kellogg's Shredded Wheat. I do not know that that would eliminate confusion. Of course, they could distinguish one from the other. That would, to some extent, do that. There is no doubt about it. I have not seen any effort on the part of the National Biscuit Company to avoid any confusion by calling their product anything else except just Shredded Wheat.

If I want to describe the product itself, it is Shredded Wheat. Shredded Whole Wheat Biscuit is the only name that would describe it, I think. I presume it is correct to say that Whole Wheat Biscuit is not as descriptive a name as Shredded Whole Wheat Biscuit. Whole Wheat Biscuit does not say that it is not shredded. There might be ten or fifteen kinds of biscuit that would be all whole wheat biscuits. The other is shredded. I do not know whether that term could be ambiguous or not. I suppose it is all correct.

Looking at these products of Kellogg and the National, they are both advertised as whole wheat; they are both shredded; they are both biscuits.

One of the National Biscuit men asked me to come down here today. They said they would look after my time and expense. I said I lived close by and it would not entail any expense. Of course, that is all right. I did not anticipate consuming very much time.

If I begin to have consumer call for Kellogg's Whole Wheat Biscuit, I will put it back into stock. I have no hostility at all toward any of Kellogg's products. I have regard for them, rather. I presume the Kellogg product has a very general distribution among the grocery stores in this market. I could not say as to that. I am just giving you my personal observations and experience. I found that it did not sell in competition with Shredded Wheat that had so long preceded it on the market. It was a very slow-moving item with me, so slow that I discontinued it. If it begins to move faster later on, I will put it back in the store. You have to equip your stock with merchandise that the public demands, if you want to live in business.

I advertise to the public. I put out a circular every week. I did some newspaper advertising, but not lately. It would not do me very much good. I am not a supermarket. If I were out where I could associate my business with the automobile traffic, I would advertise in newspapers. I would say that, where a market advertises Kellogg's Whole Wheat Biscuit in their newspaper advertisements, and so forth, it would help to create consumer demand in their stores for that product. So, if I did run newspaper advertisements and mention Kellogg's Whole Wheat Biscuit in those advertisements, I would have a consumer response, no doubt, to that.

The price differential between the Kellogg's Whole Wheat Biscuit and the National Whole Wheat Biscuit was just a slight one, but the motive for discontinuing the Kellogg product was simply lack of demand. I was selling the other whole wheat biscuits. As I said a

while ago, there was a little confusion. The amount of Kellogg's Whole Wheat Biscuit I sold was inconsequential, so I discontinued it. We are stocking all the Kellogg line except that.

When I speak of confusion, I have had several instances where they stated "I want the whole wheat biscuit." It was not a great deal of confusion; but, during this age of rapid transit, you do not want to have any confusion in serving the trade. You want an age of non-substitution and give them direct service, while putting out the goods called for. I do not think you could build up any real business for the Kellogg product by offering to substitute it for the National Biscuit Shredded Wheat. I think substitution is bad business. I do not think you are doing that. Substitution is not in conformity with good modern business today. Up-to-date business goes to the man who has got the supply that the trade requires. It is policy for him to put out and give them what they call for. I do not know about all instances, but I think substitution is a sort of dying institution in the trade. It would be, in our business. Those who are running a large business, such as supermarkets, can probably carry non-advertised lines and put out goods as substitutes for more specific goods; but they would be similar in quality and afford the dealer a bigger profit. I do not know whether they would meet the same trade resistance that I spoke of or not. I am just giving my own experience. I could not appropriate the experience of others and deliver it to you as facts. What I referred to as confusion in my store was that some customers said "We want the other Shredded Wheat." In that case, I gave them the other shredded wheat. That was not the reason I discontinued handling the Kellogg product. It was simply lack of demand in my store, in which I did not push or advertise it in any way. There was a lack of demand.

If the consumer asked for Kellogg's shredded wheat and I were carrying the whole wheat biscuit, I would certainly give him the Kellogg biscuit. If they said they wanted a package of Shredded Wheat, I would give them Shredded Wheat. If they said they wanted Niagara Shredded Wheat, I would give them the National Biscuit Company's product, because the National Biscuit Company product was the direct follower of the firm that preceded them, and they would enjoy the same confidence with the consuming public that they did; and I would put out the same product. I never heard anybody ask for Niagara Shredded Wheat. They just ask for Shredded Wheat.

I have never heard of Niagara Falls being associated with the National Biscuit product. The public calls for Shredded Wheat. I do not think of Niagara Falls in any way, in connection with the National Biscuit Company's product. I do not know whether where it is made enters into it or not. They call for Shredded Wheat. They never ask for Niagara Falls or anything. I have never noticed Niagara Falls in connection with the National biscuit, at all; never had any association with the demand, anyway. If anybody said they wanted the Niagara Shredded Wheat, however, I would know, certainly right away what they wanted, from the fact that the National are controlling Shredded Wheat.

I have the National Biscuit line. We have some other lines in there, too. We carry the Pasadena line; but our business is principally National products, in the cracker line. We never carry any of the National products as price leaders. We hardly ever cut on them or violate the regular price. There is quite a stability of uniformity in the prices of National products. They sell for about the same price. Even the super-markets do not cut on them very much. I do not conduct much of a cut-price store. I run some loss-leaders. I have to

do it. But I do not have any of the National products as loss-leaders, or hardly ever. We sell Kellogg's Corn Flakes at seven cents, sometimes, which would be a loss-leader, as far as adding the cost of doing business to the price we pay for it is concerned. We pay about that price for it, or a little less than that price. As far as the cost of doing business is concerned, that is a straight loss on Kellogg's at seven cents. On all those loss-leaders we are losing the cost of doing business, because they are selling at cost or some below. Competition sometimes drives them below. That is the popular method of doing business now. If you want to bring business, feature loss-leaders.

Our National line is purchased direct from the National Biscuit Company. From time to time, their salesmen call on me and take orders for the whole line, where we have business for the whole line. Included in that, they take orders for Shredded Wheat. Those orders are sold direct by the National Biscuit Company. Kellogg is selling through the jobbers, and the National deliver direct. Kellogg salesmen call on me occasionally. I have jobber salesmen call on me, also, and they would take orders for the Kellogg line, if I were out of any of it. That is the only way I can buy the Kellogg line, through the jobbers. Kellogg does not deliver direct. Under the plan adopted by the National Biscuit Company, I believe they deliver all that way. We get all our goods direct.

SIDNEY A. NELSON.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, located at 4368 Lime Street, Riverside. I have had that stand nine years.

I recognize Plaintiff's Exhibit 1. I call it Shredded Wheat, with which I have been familiar, I daresay, ever since I can remember; twenty-four years or so. During all that time I have been a consumer of it. We use Shredded Wheat all the time. We have it in our house all the time on the shelf. When Shredded Wheat is served in our home it is usually steamed; at times, with fruit of cream over it. It is not usually served in the package on the table. It is prepared in the kitchen and then served. It is brought in in dishes.

During the time I have known Shredded Wheat, both in my store and in my home, the biscuit, as I remember, has always been of the same shape and general texture.

My store is a combination of service and self-service. It is more or less a serve yourself. We accommodate the immediate neighborhood with service. We make some deliveries. We accept orders by telephone.

Our customers occasionally ask for Shredded Wheat, as in Plaintiff's Exhibit 1. That is the only way I have ever heard it asked for, Shredded Wheat. Whenever Shredded Wheat is asked for, they have always gotten what is exhibited as Plaintiff's Exhibit 1.

Shredded Wheat, in my mind, has been a recognized commodity, and such trade name given it that it is the product that, in my mind, should always be served to the public as Shredded Wheat Biscuit when it is asked for, just from, as I would say, a common law time of being on the market. I regard Shredded Wheat as a proprietary name.

I know Kellogg's Whole Wheat Biscuit. I do not carry it. I have handled the shredded wheat as put out by the Kellogg people, and I found a little confusion, at times, with the trade. Whenever they would ask for Shredded Wheat, I would give them Plaintiff's

Exhibit 1. If they saw the other package, they would ask what that was. If I would say shredded wheat, immediately it caused confusion, and they did not know, offhand, exactly what they had been accustomed to getting. They probably would ask me and depend upon my honesty to give them what they had been accustomed to getting. I would tell them that the shredded wheat in the package there was the one that had always been on the market and they had been accustomed to purchase. I carried the Kellogg product at the time when it was called Shredded Whole Wheat Biscuit. That is the time I referred to as to there being some confusion. I have carried it under the name Kellogg's Whole Wheat Biscuit. I did not notice any confusion at that time, because I never would hand it to them unless it was asked for by the proper name.

I had a conversation with the Kellogg salesman over the Kellogg biscuit. That is one reason and the main reason I discontinued the Kellogg biscuit, because of sales tactics that were not, in my mind, ethical or good business, asking not that we substitute but that we hand out Kellogg's biscuit for Shredded Wheat and that the customer would find it just as good and be satisfied. The Kellogg salesman suggested that practice to me. I do not remember his name. His face is familiar to me. He works the Riverside territory for the Kellogg people. I would know his face. I do not know that I ever heard his name. He was a man standing, probably, close to six feet, a slender face. Probably four or five years back, I think he handled your sampling crews out there, and later was promoted to sales work. His tactics in coming to the store and suggesting that manner of substituting Kellogg's biscuit for Shredded Wheat to help them get their biscuit on the market was one of my main reasons for dropping the Kellogg product.

I had my customers try the Kellogg biscuit. Such a small percentage favored it that popular demand did not warrant its staying on the shelf. The Kellogg biscuit looks like Shredded Wheat Biscuit. The tactics they are using now, that open-face package, is, in my mind, another scheme of encroaching upon the appearance of the National Biscuit Company's Shredded Wheat.

If there never had been a Shredded Wheat Biscuit and the Kellogg Company had come out with this Whole Wheat Biscuit, it would be a brand new product. It would take considerable effort to introduce it and make it popular, like any other new commodity. I am familiar with the fact that the Shredded Wheat Company has extensively advertised Shredded Wheat. I have seen its advertisements over a long period of years. The effect of those many years of effort on the part of the Shredded Wheat Company would be an advantage to the Kellogg Company in enabling it to market its biscuit. That is, they could gain by advertising that has been done by the Shredded Wheat Company in marketing their biscuit.

In my way of believing, I do not think their Whole Wheat Biscuit could be sold as a shredded wheat biscuit; but it is similar and answers a similar call.

CROSS-EXAMINATION.

THE WITNESS: The conversation with the Kellogg salesman occurred while I had Kellogg's Whole Wheat Biscuit in stock. When he told me to sell them, I believe he said to call the attention of the public to the fifteen biscuit in the cartons. I do not remember that he said anything about double toasting. He brought out the fifteen biscuit feature as one of his sales talks. He brought out that he wanted me to talk up the Kellogg biscuit, to tell people that I had a new shredded

wheat biscuit on the market; that the Kellogg Company was putting out a shredded wheat biscuit, along with this other statement.

I do not think that any business could be successfully built up in that Kellogg product by just bare substitution. I do not think there are enough merchants who would want to jeopardize their own business with methods of substitution. My opinion is that the grocer would immediately be in a quarrel with his customers. They would say that was not the biscuit they had been getting.

A customer would probably recognize the Kellogg's Whole Wheat Biscuit package as a different package than he had had before. I have used the Kellogg biscuit in my home. I recognized a difference in size. I do not know that I noticed that it was darker or more toasted than the other. I am familiar with the Kellogg Krispies and Pep. The Krispies product went into public demand very quickly. It was a follow-up of Heinz Rice-Crisps which were out first. It was a similar proposition to the Kellogg product. There is a Rice Crisp on the market, as well as Kellogg's Rice Krispies. I think it is a Heinz product, but I will not say for sure. I do not know what Heinz call theirs now. They have never sold well enough to continue to carry it in stock.

Kellogg's All-Bran was an easy product to introduce. It was a new product in the Kellogg line. Kellogg All-Bran was on the market when I started in the grocery business. The Campbell Soup line is a well established line. As to whether the existence of that line would help a competitor to get into business with a competing line of soups or retard the other man, I would say yes and no. It might temporarily. I recognize that, when a leader is properly entrenched in the business, it really does work against a new man getting into that line, rather than with him.

Kellogg's Whole Wheat Biscuit is a shredded whole wheat biscuit. I have no doubt that it is made out of whole wheat, as advertised. Assuming that the product is a shredded whole wheat biscuit, I would say that the Kellogg product was just as much a shredded whole wheat biscuit as the National product is.

I handled some of Kellogg's Whole Wheat Biscuit since the cellophane front was put in the carton. Since then I have discontinued the sale of it. When they first came out, they had one or two cartons that way packed in a case.

My store never advertises in the newspapers. I know that a number of stores do carry private store advertising. If those stores features Kellogg's Whole Wheat extensively in their newspaper advertising, that would tend to create consumer demand for that product in those stores. My store does not do any advertising of that kind.

After handling the Kellogg Whole Wheat Biscuit for a while, I discontinued it. If there were enough demand from my customers for Kellogg's shredded wheat, however, I would put the Kellogg biscuit back into stock. In that event, if customers asked for Kellogg's Whole Wheat Biscuit, I would give them Kellogg's Whole Wheat Biscuit. If they asked for Kellogg's shredded wheat, they would have to explain the difference before I would hand out a package. If a customer came into my store and said, "I want Kellogg's shredded wheat," I would tell them there was no Kellogg's shredded wheat. I would tell them there was a Kellogg's Whole Wheat Biscuit or the National Shredded Wheat Biscuit. I am quite serious in that testimony. There is a personal angle, too, underneath that; because there are customers who have traded with me such a long time that I am quite accustomed to what they want. They would say they want Shredded Wheat, if they wanted the National product.

After a customer had been saying "I want Shredded Wheat" to me for four or five years and suddenly came to me and said, "I want Kellogg's shredded wheat," I would immediately know he had misspoken or wanted a different product. I would ask him if it was this Kellogg's Whole Wheat Biscuit he wanted. I would tell them that there was no Kellogg's shredded wheat on the market.

Let me cite an instance. In the course of business, I have old customers come in for a brand you will probably recognize, Danish butter. They will come in constantly and ask me for Dane's butter. I say, "You mean Danish butter?" I know most of the customers well enough to talk pretty well with them. I would not criticize the customer for calling it Dane's butter if what she really wants is Danish butter. I would correct her in a smiling way.

If a customer came into my store and said she wanted Kellogg's shredded wheat, for some reason I do not know, it would not bring to my mind instantly that she wanted Kellogg's Whole Wheat Biscuit. I would explain to them that there are two products that are conflicting in their mind. There is a Shredded Wheat product and there is a Kellogg Whole Wheat product. They are different in size, and in the number in a package.

If they said they wanted Kellogg's shredded wheat, I would explain to them that there was the Shredded Wheat Biscuit by National and the Kellogg Whole Wheat Biscuit. Whichever one they specified, I would give them. I do not think I would finally get educated to the fact that, when they said Kellogg's shredded wheat, they wanted Kellogg's Whole Wheat Biscuit. If you had personal experience yourself in sales work in a grocery store, there is a way of getting around it. When you get a conflicting request like that, you are just as likely to take down the wrong package and

make a dissatisfied customer, as you are to get the right package.

If a customer called, and said he wanted shredded wheat, Shredded Wheat is what they would get. If a customer wanted Kellogg's Whole Wheat Biscuit and called for it as Kellogg's Shredded Wheat, and if I sent them the National Shredded Wheat and they called me and said, "You have made a mistake and given me the kind I do not want. When I called for shredded wheat, I want you to send me Kellogg's," I would explain that there were two different kinds.

I will cite you another instance. A customer keeps calling for table cream, and I keep sending it out. Suddenly she will ask for a bottle of cream. If I sent her another bottle of table cream, she would call me up and bawl me out, so to speak, for not sending her whipping cream. My customers and I seem to understand each other better than you and I understand each other.

If a well-known customer of mine would say to me, "I have tried Kellogg's shredded wheat, and I like Kellogg's shredded wheat, when I call up and say I want shredded wheat, I want you to send Kellogg's," I would say, "Yes, I can send you Kellogg's Whole Wheat Biscuit."

The next day, if that well-known customer called me and said she wanted shredded wheat, after that explanation, I would send her Kellogg's, and I would correct her again, too.

RE-DIRECT EXAMINATION.

THE WITNESS: The gist of all this examination is that I know one Shredded Wheat, one thing as Shredded Wheat. I do not recognize the right or power of the Kellogg Company to call their product shredded wheat.

It is a common thing, when a product has been for years on the market and obtained recognition through advertising and service to the public, for others to come in and attempt to sell a similar product. It is quite a common thing. The intent and effect of that proceeding is generally to bring out some ideas that are similar to the good points of the well-intrenched item.

Taking the resemblance between these two biscuits, surely, if I and most of my customers saw the two packages side by side, we would have no doubt that they are different products of different companies. It is very true that all customers are not as careful and designing as some. Frequently children are sent to the store to purchase articles. Also, a product like Shredded Wheat or Whole Wheat Biscuit frequently may be served in a dish on the table, as I have testified is the case in my home.

If two of Kellogg's Whole Wheat Biscuit were put in a plain dish and set on the table in front of the average householder or person who uses these cereals, they would know at once that they had gotten something different than Shredded Wheat. They would immediately notice it was a different product. I do not believe, however, that many would notice the difference if only one were put in a dish, because, like most people, they have certain dishes for serving certain commodities, and they would see immediately that there would be a different-sized biscuit. They would notice the different size of the biscuit. There would probably be questions the next time they came to the store, as to what it was all about.

RE-CROSS-EXAMINATION.

THE WITNESS: I came here by myself. The sales-manager for the National Biscuit Company in Riverside asked to to come down. His name is Mr. Nordlund. I drove down by myself. He said my time and my

expenses would be looked after by the National Biscuit Company. I know all the National Biscuit Company salesmen who call on me. The case was not discussed, as to trying to coach or instruct me in any way. After I was asked my opinion on it, before I knew what it was all about or that there was even a case being tried, we talked about the fairness and the viewpoints on the subject. I stated what my opinion was as to the fairness of the Kellogg Company using these cellophane windows in the package. My opinion was that the use of that cellophane window is not a fair thing on the part of the Kellogg Company. I think it is unfair on the part of the manufacturer, assuming that he has a right to make a product, to put a window in it and show what the product is; because they are encroaching by getting the appearance. The end appearance of the biscuit is similar in appearance to the Shredded Wheat.

If the Kellogg Company did not put out this shredded wheat, there would be only one concern, the National Biscuit Company, to my knowledge, making that type of shredded wheat. They would have a complete monopoly of that particular type of biscuit. There would be a complete monopoly in the National Biscuit Company of what I would call a shredded whole wheat biscuit.

My feeling toward the Kellogg people is that, if they had stayed with the original biscuit when it was a round biscuit, I think they would have done more toward getting on the market than they have by trying to mimic the National Biscuit Shredded Wheat. I believe that, if they had stayed with the round biscuit, assuming that they made a round biscuit they would have gotten along better than they have by putting this pillow-shaped biscuit out.

RXQ. 164. If we assume that, under the law—and that has to be determined by the Court—the Kellogg Company has a right to make this biscuit, would you

still think it was unfair for them to make it, to take advantage of their legal rights?

A. I think it would be encroaching deliberately upon the advertised pictures or the advertising that Shredded Wheat Biscuit has spent so much money on, in advertising their biscuit.

THE WITNESS: During all the time I have been in business, I knew that the Kellogg Company has had all kinds of competition with its corn flakes. In a straight quality corn flake, I do not know of any other than Kellogg's. I have known the Jersey Corn Flakes, Post Toasties call theirs a double-thick corn flake. It is corn flake just the same, a thicker corn flake.

The common things are all in a highly competitive market. I think it is unfair to have a little competition in the manufacture of shredded wheat biscuit, inasmuch as it has just newly started, and one detriment to business today is the fact that the merchant is being practically compelled to carry so many duplicate lines. I think that, from the standpoint of the merchant, it would be to his advantage if he could just have one kind of each product.

If he had one corn flake made by one manufacturer and one wheat flake, that would be convenient to the grocer, if it could be eliminated. Apparently, however, those companies seem to have gotten enough difference in their products so that they do not object to one another's coming on the market. The ideal grocery store would be one in which we did not have to carry any duplicates to most commodities, and in which we could have one well-established product in each line. I never expect to reach that ideal, but I think it would be a pleasant ideal.

When I say I think the Kellogg Company is unfair, I mean it is unfair where they come in and take a similar design. I think it would have been nice business if they had stayed with the round biscuit. In other

words, it is fair to say that the National Shredded Wheat Biscuit was the one line in my store where this ideal had been reached, where there was a complete monopoly and I only had to carry one Shredded Wheat Biscuit, and the Kellogg Company has now come in and even destroyed that little ideal and given me two lines to carry; and I think it is unfair.

RE-DIRECT EXAMINATION.

THE WITNESS: There is no confusion in the trade between Kellogg's Corn Flakes and Post Toasties, although they are both corn flakes. The point I am trying to make is that there is confusion between the two articles known as Shredded Wheat and Kellogg's Whole Wheat Biscuit, because they are alike and because there is no great differentiation in their appearance.

RE-CROSS-EXAMINATION.

THE WITNESS: If my customers begin to ask for Kellogg's Whole Wheat Biscuit, I do not believe I will put it back in stock. If a substantial number of our customers were to keep saying "I want the Kellogg's Whole Wheat Biscuit," it would take a long time before I would want to put it back in stock. If a third of my customers said "We do not want the National; we want Kellogg's shredded wheat," if I got that percentage, I would put it in. It is just a matter of percentage of demand.

R. L. WAUGH.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. My store is self-service and delivery. It is one of the large markets in Long Beach, part of the Orange and Wardlow Drive-

in Market. I have been in that market two years. I have been in Long Beach ten years. I have been in the grocery business thirty years. For the last two years, I have had self-service. Prior to that, my stores were service stores. Besides Long Beach, I have been in the grocery business in Winnipeg, Canada, Medicine Hat, Alberta, and then Long Beach. My present store is self-service with delivery. We take orders on the telephone and deliver. I would not call it a Class A store, but it is a fair-sized grocery store. We have a very nice class of trade, among middle-class people.

I recognize the box, Plaintiff's Exhibit 1. I call that Shredded Wheat. I have known it for thirty years, all the time I have been in business, but no longer than that. I am not a user of Shredded Wheat myself, lately. We have it in the household. We have four children, two of whom eat Shredded Wheat. The package is placed on the table and we mostly help ourselves out of the package and eat it with milk or cream over it in the morning. Personally, I eat Pep.

I move about two cases of Shredded Wheat a month through my store. It is a steady seller. On the telephone, my customers ask for it as Shredded Wheat. When they self-service, they pick it up themselves. They have always asked for Shredded Wheat. That is a regular term with them. Ever since I can remember, they always asked for Shredded Wheat. I have always supplied them with the regular package of Shredded Wheat, like Plaintiff's Exhibit 1.

I know the Kellogg Whole Wheat Biscuit. We carry it. It does not move so fast. We do not get telephone orders for it. I do not remember ever getting any telephone orders for Kellogg's Shredded Wheat. We have had orders for Shredded Wheat, and I have sent them Kellogg's, and I have had it returned.

Q. 42. Have you observed, in addition to what you just said, any confusion between the two products?

A. Yes, occasionally we have a party who will bring up a package of Shredded Wheat, and I have asked them if they thought that was the Shredded Wheat. They said, "Is that not Shredded Wheat," and I said, "That is Kellogg's Whole Wheat Biscuit." "Oh, I thought that was Shredded Wheat," and they would point to the window package and then walk back and get the other package, and they said, "This is what I want," meaning Plaintiff's Exhibit 1.

THE WITNESS: That has occurred several times, in connection with the package with the window in it, Plaintiff's Exhibit 168, the package of Kellogg Whole Wheat Biscuit that shows the biscuit through a cellophane window. The customers have picked that up in my store, under the impression that it was Shredded Wheat.

Q. 48. What have you to say about the expression Shredded Wheat? Has it acquired any definite meaning in the minds of the public, in your opinion?

A. Well, the word Shredded Wheat is a household word, and it really—referring, always, to the original Shredded Wheat.

Q. 49. When you call it a household word, do you mean by that that it has become attached to that particular product in the minds of the public?

A. Absolutely.

Q. 50. Do you believe that to be the case?

A. I do.

Q. 51. From your thirty years' experience?

A. Yes, sir.

THE WITNESS: I have seen a package like Plaintiff's Exhibit 167. I have noticed the language on each end of the package, "a shredded wheat product." I have had those in my store. I should say that, when the public see the words Shredded Wheat on there, they naturally think they are getting the original package of Shredded Wheat.

I do not think that is a usual and proper method of introducing a product on the market. I, personally, would not like to have anybody put up a package like that and call it Shredded Wheat. I would say it is an infringement on the original package of Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: The Kellogg product is actually shredded wheat. I would say I have no doubt, not merely that it looks like Shredded Wheat, but that it is actually shredded wheat. I am referring to the product in the Kellogg's Whole Wheat Biscuit carton with the cellophane front. Shredded wheat is a descriptive name for that product.

I know that many grocers who handle the Kellogg product have dealer advertisements in which they mention it by the name that is on the package, Kellogg's Whole Wheat Biscuit. I would think that name is unfair. I do not know what name the Kellogg Company could give that product which would be a fair name for them to use. That would be a hard one. I would have to think that over. If you would give me some time, I might be able to suggest a name for that; but I really could not do it on the spur of the moment, not offhand, as quick as that. It would take a lot of careful study. Kellogg's Wheat Flakes would not be a good name. It is not a flake. I think it is unfair for the Kellogg Company to show, by means of a cellophane window, what they are making. I would not go as far as to say that it is unfair for them to make the product at all; but I think that, by the window package, if you were a woman in a store, and you were picking up a package of this biscuit, you would naturally think you were getting Shredded Wheat. You are not getting identically the same article but a little smaller. It is made by a different company.

If the customer wants to get a shredded wheat biscuit made by the Kellogg Company, the company ought to show her that that is what she is going to get; but, if she thinks she is getting the original Shredded Wheat, she is not. My customers or one of them picked up Kellogg's Whole Wheat Biscuit off the shelf and came to my checker to pay for it. I do my own checking-out, mostly. I would say to the customer, "What do you think you have got in this package here?" She would say, "Is that not Shredded Wheat," and I would say, "No, that is not Shredded Wheat." She said, "What is this, then?" I said, "This is Kellogg's. That is the new product that is put out by Kellogg's." I may have told her it was Kellogg's shredded wheat, and she said, "Oh, well, that is not the package I wanted. I wanted this package here," when, probably, she thought that the Shredded Wheat Company had put in this window package. The package with the name *Kellogg's* was right there. I am continuing to do that. I did it this morning. I would not say that that was rather severe pushing or switching of those customers to the National Biscuit product. I would not regard that as pushing. I just did not want the party to get hold of the wrong package. That is the only impression I would do it for. Sometimes, they have said, "Yes; well, I will try this one." Sometimes I do not succeed in getting them to put the Kellogg package back. I have no objection. They can have whichever they like, as far as I am concerned. I do not want them to take that package home thinking they are taking the other package. When they bring me the package, it is not wrapped; it is in the basket.

I think they are more likely to find out when they get home that this package is not what they wanted, than they would in my store. When they take it off the shelf, they may think it is one thing. When they get

home and think about it, they finally realize that it is not what they intended taking. This process of realization by my customers is not a slow process. It is handled pretty quickly. Both products are on the same rack, not right alongside of each other. I think there is a little something between them. I do not think I keep Kellogg's right next to Shredded Wheat. I put the Pep or All-Bran in between, so that they will not get confused. After I have done all that, so they will not be confused, I still assume they are confused when they come to the checking counter and quite often straighten them out. This is the new product, and the other is the old product. Naturally, what they have in their minds is the old product. I have only handled the Kellogg product, I think, about two years. It would have to move a lot faster than it is doing before I would consider it "grown up." After five years, if the volume went out, I would say that it had attained a "majority" in my store. It is fair to say that I put a double check on confusion. In the first place, I separate Kellogg's Shredded Wheat from the National Shredded Wheat, by putting a lot of Kellogg's products in between. Then, I check her again at the door by saying, "Are you sure that this is the package you want?" Some of the customers say "I will try this this time." I think the cellophane front in there has a lot to do with increasing sales of the Kellogg package. I would say that the cellophane front has the effect of suggesting the other, the old Shredded Wheat package. In other words, in my mind, the old Shredded Wheat package looms up as though it had a cellophane front in it. That is the idea. I have never seen one of the National packages that had a cellophane front. I get that into my mind because lately they are using so much cellophane; and, naturally, the people might think that the Shredded Wheat Company are putting up this glass front.

I think it might occur to some of my customers that this was the Kellogg Company that was putting up the glass-front package, because their name is on the package; but, when the woman is buying groceries, she does not stop to consider all those things. She just simply picks up a package of Shredded Wheat. Almost all people buy today by the eyes. I do not think a person with good eyes could tell that that was Kellogg's Whole Wheat Biscuit, not the way they buy groceries. They buy them so quick. They just simply grab a package of Shredded Wheat and away they go with it.

I do not think that any of my customers really take Davis' Baking Powder when they really want Royal Baking Powder. They distinguish them because there are two features in the can entirely different: the name and the color of the label.

With the Kellogg package and the National Biscuit package, I do not think they stop to look at the name. They just simply see the Shredded Wheat through the package, and they grab it and go.

That being so, it would be fair to say that Plaintiff's Exhibit 1 has never registered itself on the memory of the general public in any way; but, as I told you, there are so many new cellophane packages coming out nowadays that the women today buy by eyesight more than anything else. They would take the cellophane package in preference.

Assuming that the public had had photographed on its mind and memory Plaintiff's Exhibit 1 as the package they had been buying for thirty years, I do not think that they would walk up to my shelves and pick up Plaintiff's Exhibit 155, the Kellogg Whole Wheat Biscuit carton without cellophane, and think they had gotten Shredded Wheat, as much. But, the minute Kellogg puts cellophane on the front, those customers think they are getting the old package they

have been buying for thirty years, with the cellophane front in it.

I find it necessary to correct the customers at the door, because I do not want them to get home and find that they have not got what they intended to buy. I think that realization will come to them at home rather than in my store, because, on the opening of the package, they will discover the biscuit is a little different. They will see there is a different kind of biscuit in there. What they started out to purchase was Shredded Wheat, and they will find out they have taken home a package of Kellogg's Whole Wheat Biscuit.

I have had an instance on the telephone, where I have had the lady order "Send me a package of Shredded Wheat," and I have sent the cellophane package of Kellogg's out and it has been returned. They called up and said it was not what they wanted.

I have had cases where customers have taken the cellophane-front package home and have come back to me the next day and said they did not get the product they wanted. The second time they came, they said, "That is the one I took last time. I want the original Shredded Wheat. I took that home last time. I just want the other one." I have had several cases of that sort.

I never had the experience of a customer who ordered shredded wheat and got the National Shredded Wheat calling me and telling me they really wanted the other kind with the cellophane front. It is not true that most of the customers who take the cellophane-front package keep on buying it.

There has not been very much consumer demand for the Kellogg's Whole Wheat Biscuit in my store. I should think I probably sell a case every two months. That demand is a constant slow demand for that much. I do not advertise Kellogg's Whole Wheat Biscuit in

newspapers; I have advertised it on handbills. If I advertise Kellogg's Shredded Wheat, I find it creates the wrong impression. I do not know for sure whether I called it Kellogg's shredded wheat or Kellogg's Whole Wheat Biscuit. I would have to look back on my record. I think I may have called it Kellogg's shredded wheat. It is not the regular Shredded Wheat. I will allow that it is Kellogg's Shredded Wheat.

We handle the National Biscuit line and the Sunshine. I do not like carrying two brands of the same product in the particular line of shredded wheat biscuit. It would save a lot of confusion if I could pinch out this little demand for one case in two months and just have one kind of shredded wheat in my store.

I am usually the one who asks the customer whether that is really what she wants. Then, nine times out of ten, she wants the other one. I do not want her to go away with the impression that she is getting one article, when she should be getting the other. So, in nine cases out of ten, when a customer picks up Kellogg's Whole Wheat Biscuit, if she leaves my store with it, she is only one out of ten that goes out with the Kellogg product. I do not know about the demand. We sell about a case of Kellogg's Whole Wheat Biscuit every two months. It is sold to us and we have got to get the stock turned over. I will not say that I stop a customer in every case, you know. I do not stop every one that comes out with Kellogg's, because I am anxious to get rid of my stock. I do not want it to get stale on my hands.

I have recently stopped customers coming up to me with the cellophane package and asked them if they are sure that it what they want. Not just since this case came up, or since I heard I was going to testify; but, since the party got the wrong package on the telephone. I then changed my plan.

I should say that, when a woman calls me on the telephone and says "I want Shredded Wheat," and I send her Kellogg's and she sends it back, that is the same kind of thing as a woman picking up Kellogg's Whole Wheat Biscuit off my shelves and seeing it there in her own hands. You must remember, when you are in a grocery store, we have other people who will come in. Just changing once is nothing. When a man will come in, he will simply pick it up: "No, I do not want that." "Haven't you got the other Shredded Wheat?" Then you begin to think they want the other shredded wheat. There is no use fooling them on it. The other shedded wheat is right there. I do not think I would stop all that confusion by putting the two products right alongside each other; because I will tell you, sometimes you can have a thing right in front of a customer's eyes, and she cannot see it. I do not know what you are going to do in that case. You know what it is in a grocery store. Sometimes you will be looking right at the object you want, and it is not there. That is true; you can send a woman down to look at the counter, and she cannot find it. They sometimes send children into a self-service store. I would say that nine out of ten that pick up this package would think they are getting the other package.

It is true that, out of every ten customers who come to my checking counter with one of these packages of Kellogg's Whole Wheat Biscuit in their hands, when I ask them if that is really what they want, I find that none of them do not want it, and that package goes back on the shelf and those nine people take the National Biscuit package. That will stand a check-up in my store. If an investigator is sent there to spend a week, that will stand up as true; if you will let me do the questioning as they are checking out. Nine out of ten will think they are getting the original package.

My testimony was that, in the past, out of every ten people I spoke to, nine of them said, "Oh, this is wrong. I did not want this," and went back and took the other.

I am not sure, but I think I sell about a case a month of National Biscuit Shredded Wheat, thirty-six packages to the case. I have to push this other one out and get rid of it. Roughly, I should say I sell a case of the Kellogg product every two months. I have testified that, out of every ten people who come to my checking counter with Kellogg's Whole Wheat Biscuit, I turn nine of them back to the other biscuit. There are twenty-four packages to a case of Kellogg's and thirty-six to a case of Shredded Wheat. There is a difference there. If I said on the National Shredded Wheat that I sell a case, thirty-six packages, a month, it may be more than that. Of course, I would have to look up my records. It may be more than that. It does not strike me that there is anything mathematically wrong about my testimony. I think it may be two cases a month of Shredded Wheat that we sell.

I told Mr. Clarke that I sell about twelve packages of Kellogg's a month. If the rest of my testimony is true and, out of ten customers who take the package off the shelf, I turn nine customers back, then, in a month's time, one hundred and twenty packages of the Kellogg product will have been taken off the shelves and only twelve get through. That would be about right, if you get down to final figures. Nine out of ten packages that the customers try to get out of my store every month and I succeed in preventing them from taking is right.

Mr. Aspergren of the National Biscuit Company asked me to come down here. He drove down with me. I have known him about two years. He is not a close friend, just a business acquaintance. We drove down in his car. He is not looking after my time and

expenses in the case. I do not expect any compensation for my time today. I do not expect to have a check handed to me when I walk out. I do not expect anything like that.

Most products like shredded wheat are bought by the housewife, sometimes by children. I do not believe that the practice of substitution is profitable. I do not like substitution. I would not care to be sending the Kellogg product to people who order and want the National and have them in most cases send it right back, causing friction and loss of customers all the time. I only do it occasionally, if I want to get rid of an extra package. If she is not a very particular customer, I do not think the customer will care which she gets, as long as it is shredded wheat. I would not try that as a general practice, to be followed year in and year out with all kinds of goods. I would not substitute, anyway, if I could get away from it. A grocer does not get very far by substituting.

I would say that, mostly, the housewife has control of the goods that come into the house and decided what package is going to be bought. Substitution or switching has been done by housewives. Sometimes, a housewife will buy a cheaper kind of coffee and try to put it over on her husband. Sometimes she gets away with it. As to size, a housewife could get away with substitution of Kellogg's biscuit for the National biscuit on the average child or father, all right. There is no doubt about that. I do feel, I should say, that the courts should be called on to intervene by injunction to prevent housewives substituting coffee. I agree with Mr. Clarke that the United States District Courts should be called on to enjoin the housewife from switching coffee on her husband. I will agree with Mr. Clarke, that, in the main, the housewife, as the purchasing agent for the family, tries to give the family what she

thinks is the best value and what she thinks the family wants. If the practice of substitution can be stopped, as between housewife and grocer, there will not be very much trouble about the substitution as between housewife and family, I would not think.

The self-service type of store is growing in popularity in my territory. There are more self-service stores going in today than ever. It seems to be the trend of the times to go into the self-service stores.

I used to eat Shredded Wheat in my early days. I use Pep now instead. So far as younger people are concerned, it is true that there is a great deal of shifting around from time to time in demand among the cereals, as far as particular customers are concerned. A person who eats shredded wheat once does not go on forty years eating it. They change around. They get tired of one thing and they go to another. Then they go back to the first one; or, if something new comes on the market, they try it. That is not true, however, of the older people. Where it becomes a health propoition, where somebody's health depends on a certain food, the younger ones will switch around.

HENRY L. DINGEE.

Deposition taken at Fort Worth, Texas, February 15, 1933.

Direct Examination.

The Witness: I am in the retail grocery business, operating just one service store. We are the oldest grocery store in Fort Worth, being in business since 1878. I have been connected with it since 1904 or 1905, continuously. I have not been in charge of the store all that time, but I have been a partner. My father was a partner and interested in the store before me. Since 1878, my father and I have conducted the store.

We still do a service business, with credit, telephone orders and so forth. We moved to our present location in 1924. Up to that time, we had been at 502 Houston Street.

I recognize Plaintiff's Exhibit 1 as shredded wheat, with which I have been familiar as long as I can remember, since I have been in the grocery business and before. I cannot tell exactly how long Shredded Wheat has been handled in our store, but I think I have heard father say we shipped the first Shredded Wheat into Fort Worth. No jobbers handled it at that time. It was shipped in by express a long time ago. My father died last February. Our store has carried Shredded Wheat continuously since that first shipment.

In my estimation, when the purchasing public ask for shredded wheat, that is what I think of. It is Shredded Wheat, made by the Niagara Falls Shredded Wheat Company and now by the National Biscuit Company. That has been true all the time I have handled it. It is asked for as Shredded Wheat. When they ask for that I give them this package, Plaintiff's Exhibit 1.

Q. 32. Can you tell me whether or not that name Shredded Wheat has a definite meaning in the mind of the public that purchases it?

A. In my opinion, there is only one Shredded Wheat. When a customer comes in and asks for Shredded Wheat, that is the first thing I think of, the only thing. To me, just Shredded Wheat is the name of a product, like saying the Cadillac made by General Motors. I think Shredded Wheat is made by this Uneeda Biscuit Company, or whatever you want to call it.

THE WITNESS: I regard it as a proprietary name, a trade name. I think Shredded Wheat is the name of the product.

I do not think I am familiar with Kellogg's Whole Wheat Biscuit. We did handle it, but, at present, we do not handle it, because there was not much demand for it. We put it in there, but we did not have much luck with it. I do not remember and I cannot recall handling it when it was called Kellogg's Shredded Whole Wheat Biscuit. Plaintiff's Exhibit 161, with the window in it, is the first package of that kind I recall seeing. When I see that product back of the window, it looks to me like a package of Shredded Wheat. The package looks to me like an imitation of Shredded Wheat. I believe that, with this package on the shelf, there might be confusion in the public mind.

I think the Kellogg package, like Plaintiff's Exhibit 161, might and would be sold as Shredded Wheat. Looking at the printing on one end, it says, "Shredded Wheat in its most delicious form," and, on the other end, "A shredded wheat product." It looks to me as if they are trying to sell it as Shredded Wheat. I think Kellogg's Whole Wheat Biscuit could be sold more readily as a shredded wheat biscuit than as a new product.

We use Shredded Wheat in our home. It is prepared in the kitchen and brought on the table in a bowl. We mash it up and put cream and sugar on it. There are five in the family. If, without my knowledge, a package of Kellogg's Whole Wheat Biscuit were opened in the kitchen and served on the table, I believe the members of my family would believe it was Shredded Wheat. I do not believe they could tell the difference in appearance.

CROSS-EXAMINATION.

THE WITNESS: I believe I could tell the difference. I do not know about the difference in taste. I recognize the difference in size. I believe I would recognize the difference in size of the Kellogg product.

If the Kellogg Company tell me on their package that it is Kellogg's Whole Wheat Biscuit shredded, I know it would be a whole wheat biscuit; but I do not believe it would be a shredded wheat biscuit. I believe I could tell the difference, in spite of the fact that it says on this side that it is shredded wheat biscuit. I do not believe the Kellogg Company is lying when it says it is shredded wheat biscuit. I did not mean to imply that. I said that I do not believe it is shredded wheat biscuit. I think the National Biscuit Company is the only one that makes Shredded Wheat, the trade name of Shredded Wheat. I do not think the Kellogg Company calls it shredded wheat. They do call it, on this package, very prominently, Kellogg's Whole Wheat Biscuit. That is the only name I have known it by. I believe that is the first time I have ever seen that package. Mr. Vilas asked me whether this did not look like Shredded Wheat, and I said it did. They are not shredded wheat. They are made out of wheat. They are shredded, all right. I do not think they are Shredded Whole Wheat Biscuit.

The Kellogg Company at Battle Creek, Michigan, could make shredded whole wheat biscuit, all right. If they made it, I suppose it would be a shredded whole wheat biscuit, physically speaking. I suppose they could make something similar to that, all right, and call it the same thing.

I do not remember eating or tasting some of Kellogg's biscuit. I do not believe I have. In fact, I hardly ever eat Shredded Wheat. I very seldom eat either product; just once in a while.

I handled the Kellogg product for a while but discontinued it, because I did not find there was any demand. We do run advertisements. I never advertised Kellogg's Whole Wheat Biscuit, to my certain knowledge. I do not recollect it. I have advertised

the National Shredded Wheat, Plaintiff's Exhibit 1, because we handle that and sell it. I surely think that my advertisement of it would tend to create a demand for it. I know that advertising tends to create a demand among consumers. I am sure that, if I advertised Kellogg's Whole Wheat Biscuit in the same way I have advertised the National Shredded Wheat Biscuit, it would create a demand for the Kellogg product. We did not drop the Kellogg product because we did not advertise it but because there was no demand for it.

Our store is located in Fort Worth, and there are quite a few self-service stores in that Fort Worth market, more than there are service stores, many more. I have never considered turning my store into a self-service store. It is such an old organization that we are going on from now on in the old way. There are no self-service features whatever to my store. Of course, there are some people who come back behind the counters, some old-time customers, who come behind the counter and help themselves, once in a while. The new-time customers, although used to waiting on themselves in other stores, do not do that. I think it is just the old-time customers. It seems to me that the table and counter in front of our shelves kind of bar them and they do not go behind them. Just the old-timers do. People who are used to the new self-service stores stay on the other side of the counter. They do not ask whether we have Kellogg's, or any other name that it could have been known by.

When we handled it, if a customer asked me for Kellogg's shredded wheat, I would give her that product, the Kellogg's Whole Wheat Biscuit. Plaintiff's Exhibit 161 is a very nice package. It looks more modern than Plaintiff's Exhibit 1, but this Niagara Falls package has been the same ever since I can remember. I do not know whether there has been any change in it.

I know what the National biscuit is. I have seen them made. If somebody asked me what it was, I would say it was an oblong, kind of pillow-shaped biscuit, made with long threads. We had a demonstration in our own store long years ago, and I saw it made.

XQ. 121. Oh, you call those shreds threads?

A. Threads.

XQ. 122. You would not call them shreds?

A. No, I would call them long threads the way, if I remember right, they came out.

XQ. 123. So that you would really call it threaded biscuit instead of shredded wheat?

A. Well, of course, I probably would not call it that; but that is what it looked like. In my mind, it was kind of cut up, like shredded cocoanut or shredded codfish, or something like that. I do not know whether I ever heard of shredded cabbage or not. I would expect shredded cabbage to be in long strings, as long as you could get it out, in cabbage. Shredded cocoanut is cut up in little bitty pieces, like that.

Noticing on the individual Shredded Wheat package, Defendant's Exhibit 1, a phrase in quotations on the side, "As made since 1893. It's all in the shreds," I understand the word shreds there to refer to those long threads of wheat. I have no doubt of that.

If I were asked by somebody, "Just what is shredded wheat?" and I said, "It is a biscuit made out of wheat that is shredded," that would, I think, describe it.

I know the Piggly Wiggly stores. They are self-service stores. I believe they started in Memphis and scattered pretty much among the southwest territory. I understand some of the self-service stores are coming into the east. I believe that type of store is on the increase, that that is the present trend, service stores being changed to self-service.

My father was very well acquainted with Mr. C. W. Post. Mr. Post, I believe, started his business in this section, at Fort Worth. Our store stocked Post Toasties, and I believe we were the only dealer in the United States buying them direct. We do not still buy them direct, but we were doing so at a time when others could not get them direct. I understand Post Toasties are toasted corn flakes. We also handle Kellogg's Corn Flakes. We handle Kellogg's Krumbles and a few other things. I do not know whether we handle the complete Kellogg line. Post Toasties outsell the Kellogg Corn Flakes in my store. We do not now push the Post product more than Kellogg's Corn Flakes. We used to. It was kind of a personal matter. There used to be a personal feeling there. My father and Mr. Post were great friends. We bought Post Toasties direct just through that friendship. We never had any hard feelings against the Kellogg's corn flakes. It was to our interest to push the Post product more. I have absolutely no feeling against the Kellogg Company now. We stocked the Kellogg's Whole Wheat Biscuit right away and continued to stock it until we found there was not sufficient demand for it. I do not recall advertising Kellogg's Whole Wheat Biscuit. My father may have done so. If there should be a demand in my store, customers coming in and asking for Kellogg's Whole Wheat Biscuit or for Kellogg's shredded wheat biscuit, I would stock it up again. I do not know, of my own knowledge, one way or the other, whether Kellogg's Whole Wheat Biscuit is pretty generally stocked by other stores.

I would say, however, that advertising of Kellogg's Whole Wheat Biscuit by other stores around me and the sampling of that product to the consumer naturally would tend, in the long run, to create a demand for Kellogg's Whole Wheat Biscuit. As soon

as they did create a demand for it, I would stock up with it again.

I do not believe I would say that it is generally and widely known in our market that there are now two concerns making this shredded wheat biscuit. I do not think the Kellogg product is well known as a whole wheat biscuit. I would be surprised if men who are in a position to know would tell me it has a distribution of as high as 75 or 80 per cent. in other stores. I am not really familiar with conditions in other stores. I have not gone through self-service stores. I do not know that practically all those stores carry the whole wheat biscuit. I could not say whether they did or not. So my opinion that the Kellogg product is not well known in this market is based just on my knowledge from the customers who come in. They will ask for a package of Shredded Wheat; they will not say Kellogg's. They want Shredded Wheat, and they seem to know what they want; so it must be pretty well known there is just one Shredded Wheat. That is the way it seems to me.

It is true that that statement is based just on conditions in my one store.

RE-DIRECT EXAMINATION.

THE WITNESS: I think the proper description of this product, Shredded Wheat, is threads of wheat, and the term shredded is more or less erroneously applied to it. So, by the application of this fanciful name to it, he has given a designation to his own product.

As far as I can remember, the package, Plaintiff's Exhibit 1, has had the same general appearance for a great many years. I do not know whether these letters used to be black or not; but it was in the same size package, I know.

Looking at Plaintiff's Exhibit 10, I recall that package with a picture of a dish on the end of it. I would say that package, with the dish on one end and Niagara Falls on the other, was used for a long time. I associate this picture of a dish with two biscuit in it with Shredded Wheat, and I think the purchasing public does, also.

I see a picture of a dish with two biscuit in it on the reverse of Plaintiff's Exhibit 161. If a person saw that picture on that package, the name being obscured for one reason or another, I think they would think that it was Shredded Wheat. I think that, aside from modernizing the package, as Mr. Clarke has suggested to me, there is value in the old, well-known package and that it has a distinct good-will value in the trade. It is that old established package, as I remember it; and, every time you have that up, you think of shredded wheat. It has been sold for a great many years, to my knowledge.

My father's friendship for Mr. Post is a thing of the past. I do not know whether Mr. Post is dead or not; but I believe he is. So far as that had any influence on our merchandising, that is all a thing of the past, absolutely. I have no prejudiced feeling against Kellogg or for the National Biscuit Company or against them in this matter. I really do not know what this case is all about.

RE-CROSS-EXAMINATION.

THE WITNESS: I recognize the Whole Wheat Biscuit package as one of the family line of Kellogg's packages. I recognize Kellogg's name on there. I believe that is on all their packages. I think the consumers would recognize the Kellogg name. Their name is on there just as prominently as it is on all their packages, Corn Flakes, and all. I do not mean to say that I would

confuse this package; but I believe I would this part of it with the dish. When I see it, I see the whole package. I do not mean to say that my attention is so clouded that I just see the plate and do not see anything else on there. If I look at the Kellogg package, I think of Shredded Wheat. I think the Kellogg product is threaded wheat; but I do not think it is the threaded wheat I have had in my mind. I think of just this one package there, Plaintiff's Exhibit 1.

The picture of the plate with the biscuit in it would make me think it would be a package of Shredded Wheat. I think that is shredded wheat, all right. If I arrived home with that package and found it was whole wheat in biscuit form, shredded, I would not bring it back to tell them I thought I was going to get shredded wheat and I had gotten oat flakes, or oatmeal, or something of that sort; but I would not think I had gotten what I called for. I would not think I had gotten shredded wheat biscuit. I would think I had gotten something else, like shredded wheat, probably made out of wheat. I would think it would be Kellogg's Whole Wheat Biscuit. It is on the package. That is what it would be.

Our store would like to get down, of course, to one brand of each article, if we could; but, you know, we cannot have that. I have no prejudice against duplicate brands, so far as there is a demand for both products. It is a fact that almost everything we have in the store has some companion brand. If we have one brand of ketchup, you will have another. We generally have Blue Label. It is true, however, that almost every brand of product has some companion product that is made by some competitive concern.

I would not say that the Kellogg product is a competitive product to the Shredded Wheat, I do not believe; because, in my mind, that is the only Shredded

Wheat. I do not like to say it, but I think the Kellogg biscuit is an imitation, but not a competitive imitation. By imitation, I mean it looks like Shredded Wheat and is called Shredded Wheat on the side; that it tastes like Shredded Wheat and I have no doubt it is made out of wheat shredded and put into the pillow-shaped biscuit form. It could be a real shredded wheat, but I mean I think it is copied after this other one. I do not mean anything in the nature of a fake; I mean just a product made like this one, probably the same thing.

RXQ. 226. Yes, probably the same thing. Is it not a sort of companionate or competitive product, just like the two brands of ketchup? They do not always just taste alike, do they?

A. Well, I kind of feel like if a concern would make a car, a Ford, and another concern would make a car and call it a Ford, it would not be a Ford. That is just the way I feel about it.

THE WITNESS: They have got Shredded Wheat on the end of the Kellogg package; but they call it Whole Wheat Biscuit on there. If the National Biscuit Company called their product in small type whole wheat biscuit, I do not think that would make it unfair competition with Whole Wheat Biscuit. It is shredded whole wheat biscuit. It is surely a whole wheat biscuit. It is whole wheat biscuit; but it is not prominently advertised on the package as whole wheat biscuit. The Kellogg product is so advertised. The main prominent features on the package are the words Kellogg's Whole Wheat Biscuit.

The machine demonstration in our store that I spoke of referred to small machines that actually made shredded wheat biscuit. They shredded out the wheat and formed the biscuit, too. I do not remember now whether they baked the biscuit or not, it has been so

long ago. I never heard anything about Mr. Perky, the inventor of the biscuit, originally intending to make little machines for making it in the homes. I never had any demonstration in my store on Kellogg's Whole Wheat Biscuit. I do not remember having put any sales effort behind Kellogg's biscuit. I never had my salesmen explain that there were more biscuit and smaller biscuit in the package, and that it was made by a new concern. I just put it on the shelf, without putting any advertising behind it. We advertised Kellogg's Corn Flakes, so you see we do not have anything against Kellogg's. We did not put any sales efforts behind Kellogg's Whole Wheat Biscuit to advertise it. If they call for Kellogg's Whole Wheat Biscuit in my store, I will stock it up again.

RE-DIRECT EXAMINATION.

THE WITNESS: The old Shredded Wheat Company put a lot of effort into pushing this product. It was a brand new departure in cereal products and required a great deal of educational propaganda to get people to use it. I know there must have been a great deal of money spent on this little machine, and so on, pushing it. As I remember, they put out all sorts of pamphlets and literature telling the public how to use it. I feel that all that sort of effort has had the result of making it a sort of household word. I feel that way about it. When I told Mr. Clarke I thought the Kellogg product was an imitation of shredded wheat, those were the considerations I had in mind. I did not mean any hard feelings or anything like that.

RE-CROSS-EXAMINATION.

THE WITNESS: It is generally like the biscuit, I am sure, made of whole wheat and shredded and put up into pillow-shaped form. There is no doubt about

that. It looks like Shredded Wheat and can be used as Shredded Wheat. This biscuit, I concede, is whole wheat, shredded and put up in pillow-shaped form.

RE-DIRECT EXAMINATION.

THE WITNESS: A man might make an automobile that looked exactly like Mr. Ford's product, but it would not be a Ford; and a man might make a Kodak, but, not being an Eastman, it would not be a Kodak. That is what I had in mind. It might be exactly the same product as the original, but I do not think it would be fair to call it that. That is the sum and substance of what we have been talking about. That is what I have been trying to tell you.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not remember instances where a man like William H. Baker put out a Baker's Chocolate, in the shape and form of the original Baker's Chocolate, to be put off on people who would think they were getting the original Baker's Chocolate. I do not remember any of those fraudul nt imitations. They have not been as frequent in recent years, since the courts have been enjoining fraudulent imitations of that kind. I do not mean to say that consumers cannot tell the Kellogg package and the National package apart. The packages are similar.

RE-DIRECT EXAMINATION.

THE WITNESS: I can tell the packages apart when I see them. Some of my customers might be confused if they would see one package without the other.

RE-CROSS-EXAMINATION.

THE WITNESS: They might and they might not; that is true. There are people who might be confused about it. I will concede that this Kellogg Whole Wheat

package is just as distinctive as any other Kellogg package. Anyone who might take that as one of the Shredded Wheat packages might also pick up a package of Kellogg's Corn Flakes and think they were getting a package of Shredded Wheat, I think.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not attempt to pass opinion upon the legal aspects of the case, as to whether fraud exists or does not exist.

RE-CROSS-EXAMINATION.

THE WITNESS: I have not heard of fraudulent imitations in recent years. I did not hear that there were imitations of Royal Baking Powder, Baker's Chocolate, or Rogers Silverware. I did not hear of a man named Frank Royal who put out Frank Royal's Baking Powder. In my experience as a grocer, I never heard of that kind of imitation. I do not remember any.

ALVIN J. LEE.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, with a service store, no self-service feature. I have been in the grocery business about twenty-five years, always in Forth Worth. I am the owner of the store. I have owned the store twenty-five to thirty years. I cannot remember that far back.

I recognize the package, Plaintiff's Exhibit 1. I call it Shredded Wheat. I am familiar with the biscuit inside it. I have known it since at least twenty-eight years ago. I have been married that long. I was then working for Pittman, and I used to buy it

by the dozen packages then. At that time, it was a well-known product. Then and since, I have carried it in my store at all times. I have never been without it. There is a demand in the trade for that product. My customers ask for it as Shredded Wheat. When a customer asks for Shredded Wheat, she gets Plaintiff's Exhibit 1.

The reputation of shredded wheat in the public mind is excellent. When my customers hear the expression shredded wheat it means to them that package, and quality. I never had a package returned yet, except that, once in a while, you get a buggy package in hot weather.

I know Kellogg's Whole Wheat Biscuit, and I carry that in my store. We have handled a few in about the last year or so.

I use Shredded Wheat some in my home. When it is served there, my wife does not bring the package on the table. It is usually served in a dish with cream.

When I see a package like Plaintiff's Exhibit 161, with a window in it and biscuit, seeing those articles through the window, it has the semblance to my mind of Shredded Wheat.

I know of Shredded Wheat in a package like Plaintiff's Exhibit 10, with a picture of a dish on the end of it. I would say I have been familiar with that package for a very considerable length of time.

Noticing the picture of a dish on Plaintiff's Exhibit 161, supposing I or one of my customers would see that package, with the name obscured, that would suggest Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: I still carry Kellogg's Whole Wheat Biscuit. That product is now known in my store as whole wheat biscuit. It is a little smaller biscuit than

the regular Shredded Wheat. I would not call it shredded wheat. It is a similar biscuit. If any of my customers asked for Kellogg's shredded wheat, I would give them Kellogg's Whole Wheat Biscuit. If they asked for Kellogg's shredded wheat, I would ask them if they wanted Kellogg's Whole Wheat Biscuit, and I would expect them to say yes. If they would come in and ask for Shredded Wheat, I would not give them Kellogg's. If that is substitution, I would not substitute.

I recognize the Kellogg Whole Wheat Biscuit package as one of the general family of Kellogg packages, by the red and green colors, and it says "Kellogg's." With the name on it, I would recognize it as one of the family of Kellogg packages. I do not remember seeing any of the whole wheat packages that did not have the Kellogg name on it in big red letters. I am rather inclined to think the Kellogg biscuit is smaller in size than the National Shredded Wheat. I do not know whether it has the same number of biscuit in the package.

It has been some time since I advertised Shredded Wheat like Plaintiff's Exhibit 1. My store does advertise certain products. We have advertised the Niagara Falls Shredded Wheat. We have never advertised Kellogg's Shredded Wheat. There is no particular reason why we have not, or why we did advertise Shredded Wheat.

I do not know whether we have had any demonstrators of Kellogg's shredded wheat in our store. There are so many of those things that I do not remember. I do not believe we have. I remember their having a demonstration of corn flakes, about 1920, before they came out with the whole wheat biscuit. We have advertised their Corn Flakes and other products but not Kellogg's Whole Wheat Biscuit. I do not know

any reason why I would not advertise Kellogg's Whole Wheat Biscuit, if I thought conditions were ripe for it.

Piggly Wiggly is a self-service type of store. If I remember correctly, there are about seven hundred and eighty-five food establishments in Fort Worth. Piggly Wiggly has about twenty. Help Yourself had seventeen, I believe, before they began to cut down. The A. & P. is about fifteen or twenty. There is one Safeway store there. That is the same as the Piggly Wiggly. I have made a study of the situation and I know that it is not a fact that the trend is more and more toward the self-service store. If other witnesses have testified that the trend was toward the self-service store, I would say they do not know what they are talking about. The statistics do not show it.

If I were told that the Handy Andy Stores management say they have changed over sixty-five per cent. of their stores and are changing others as rapidly as possible, I would say that they did not know what they were talking about, in Forth Worth. I do not know about the country outside Fort Worth. I would say service stores are doing sixty-five per cent. of the business in Fort Worth. It is easier for me to get a customer from a chain store now than it was before. The new stores going in have all been service type. Self-service stores are going out instead of in. They are closing up stores. Hardly a week goes by that A. & P. or Piggly Wiggly does not close a store. I think the pendulum is swinging back to the service store.

I do not know about conditions outside Fort Worth, except what I read. The new stores in Fort Worth are all self-service stores. I have seen the several new stores. My own store has no self-service features. We will permit them to pick out what they want but we prefer to wait on them. I can sell Mrs. Murphy twenty-five per cent. more than she will buy, if her credit is good. That is why I like the service feature.

I made no particular effort to sell them Kellogg's Whole Wheat Biscuit. I could sell them if I wanted to. My present store is twenty-five by eighty, but I need fifty by eighty.

I know the Wyatt store and I have been in it. It takes some time to sell customers twenty-five per cent. more than they want. Ninety per cent. of my business is over the telephone. I can increase the demand over the telephone, surely, by suggestion. If your wife called up and ordered Shredded Wheat, I would immediately ask her if she wanted cream. If she ordered lettuce, I would ask her if she needed mayonnaise. In that way I increase sales. I would call it salesmanship. In such a store as Wyatt's, a woman walks around and takes what she wants; but they follow them around and even carry baskets. You used to carry your own sack. Now, they even make deliveries, I suppose, here. In Fort Worth, practically all chain stores make deliveries. Managers even carry accounts. That is a result of depressed conditions. They are not so independent now and a little more anxious for business. The A. & P., Help Yourself, and Piggly Wiggly are in the same block with me. I do not know what business they do; but I have been in business a long time. I watch them and I believe I am doing as much business as all three of them.

If they have merit, I introduce new products into my line from time to time. My custom would be to tell customers I have a new product, the merits of it, and the price. I will cut the package. If she asks me how many pears are in a can and I do not know, I will dump a can and count them. I regard that as good business and a service to the customers, if it has merit. Those methods are a legitimate means of bringing a new product to the attention of customers. It is the only way you can do it.

Sometimes, a manufacturer samples a new product from house to house or advertises it, as well as having dealers advertise. Very few of them ever give a dealer anything for advertising. Most of them encourage the dealer to advertise for them. The manufacturer is always trying to get the retailer to build his business for him. When I advertise Shredded Wheat, that is at my own expense. The Shredded Wheat Company did not tell me to do that, that I know of. I believed we did football it, at one time. That does not do much good. It would not help it with me. When they begin to football it with me, I knock it out. I will not tell them it is no good; but I will try to sell them something else just as good. There is nothing illegitimate about that, if it is true. If a customer asks me for any specific item, I never try to change her. If she asks for Shredded Wheat, Beard's Bread, or Heinz's Pickles, I give her what she wants. If she insisted she wanted Heinz's pickles, I would not argue with her; but, if I could make more money on another brand, I would not keep quiet about it. I do not work for nothing; my health is pretty good. If I had the same margin of profit, I would see no advantage in changing them. If I had a bigger margin of profits on Campbell's Pickles, I would try to sell them. The profit is about the same on Shredded Wheat and Whole Wheat Biscuit.

The first time we had Kellogg's biscuit, Mr. Strong, a personal lifelong friend of mine, asked me to try to sell it. I ordered two or three cases of it. It sat on the shelf for quite a while, and I quit it. We just carried a few to accommodate those who demanded it. We have it in stock now, probably half a dozen on the shelf. We have no objection to profit competition between manufacturers. That is their fight. They all do it. The Kellogg Company, on Whole Wheat Biscuit never gave me anything.

Mr. Mays, manager of the National Biscuit Company, invited me here today. I have handled their entire line for several years. Before theirs, I handled Brown's cracker line, but I do not now. I have handled Morton's Salt ever since I have been in the grocery business. I never change. I can get other salt cheaper. I can get five per cent. on other lines, but it would cost me more to sell it. Sometimes there is an advantage in price, but I would not change. I have the same matches, snaps, macaroni, salt, and toilet paper I have handled ever since I have been in business. I might change or ease into another product, if there were every kind of advantage to it, if the sales resistance were not too strong, and I could put it over on the housewife. I have never been able to get anything from the National Biscuit Company except just the standard discount. They have made no special inducement to me to put in their line. Just the regular seventeen and a half per cent. discount. I would like to know if they have anything lower. I have never been offered better by anybody. I have tried to get a better discount but could not get it. I still think they give the chains more. I am satisfied but not contented with the situation.

RE-DIRECT EXAMINATION.

THE WITNESS: I get fifteen cents for Shredded Wheat. I do not remember what we get for Whole Wheat Biscuit. With about thirty-five thousand dollars tied up in the grocery business, I naturally study it and inform myself of conditions. What I have said about conditions in Fort Worth are correct. I get my statistics from jobbers. I make observations for myself and know about the volume of business. I think the self-service fad is running its course and is going back. There is still a fertile field for the service grocery.

I think the manufacturers, as well as jobbers, are beginning to realize they erred in making the chain-

store possible. Ninety per cent. of the jobbers are broke. They are quitting business. They made the chain stores, running after them and giving them everything they had to start with, getting down to where they could not pay their bills. Then the chain stores put in their own stores. I think the manufacturers have been giving them special discounts. They are getting sick of it. There is nowhere for them to go, except the service store. Service is really the backbone of the grocery business, I think. Ninety per cent. of the people would buy from a service store, if the price were equal. I have about four hundred people who buy from my service store and do pay the price.

My first impression of the Whole Wheat Biscuit was that, when Mr. Strong sold it, just by looking at it, I drew the conclusion that it was shredded wheat. Afterwards, I found out it was a whole wheat. I do not remember if he told me it was a shredded wheat biscuit. It is possible he did. I do not think he would intentionally, because he would know I would know better.

RE-CROSS-EXAMINATION.

THE WITNESS: Kellogg's biscuit looks as if it were shredded. Very few self-service stores in Fort Worth are independently owned. I would not call the Wyatt store in Dallas anything else but a chain store. He has been associated with chain stores ever since he has been in the business. I do not know of any other Wyatt stores. I would not call it a chain system if he had only one store. The self-service type of store, I am sure has passed its peak and is going the other way. There may be a few individually owned, but most of them are chain stores.

I think the big chains are on the decline. It is not my observation that the National Biscuit Company's products have been used notoriously as price leaders or loss leaders in recent years. I do not see Uneeda Crack-

ers or other National items advertised a great deal. I know the A. & P. sold them pretty scant. The best we can figure is they take their discount without the profit.

I would not be surprised if the National did not object to price cutting if it did not go below trade cost. They might not like it, but I do not believe they would say much about it. My experience with manufacturers is that distribution is about all they want.

I have not been giving stuff away in my own store. I am going to get a profit every time it goes out of there. You can gamble on that. I do not accommodate with anybody. That sort of price-cutting wipes out profit. Loss-leaders are a method of getting people into a store; but I do not cut anything below its cost. I always make some profit on it. If I make an attractive price it is not particularly to bring them but to keep those I have satisfied. If I have three or four specials advertised, it might not attract one more person to the store, but it leaves a better taste in the customer's mouth.

I think I am in a good competitive price range of the market. Just by advertising something, you will stimulate the sale of it. Advertising Morton's salt, one day, at regular price, we sold twenty-five times as much as we would ordinarily.

I do not know which is the most modern packages, Plaintiff's Exhibit 1 or Plaintiff's Exhibit 161. I do not think the cellophane-window feature is old-fashioned. They seem all to be going cellophane crazy. That is a modern, up-to-date package.

I have seen Plaintiff's Exhibit 1, ever since I have been in business. It has not been modernized in the sense of having glassine in it.

RE-DIRECT EXAMINATION.

THE WITNESS: The old package of Shredded Wheat seems to have some value. There is something that

makes it sell; I do not know what it is, whether it is the package or what is in the package. It just seems that it is instilled in the minds of the public. Shredded Wheat is what they know and what they ask for. We will sell a hundred times as much Shredded Wheat as we do the Whole Wheat Biscuit, in spite of the fact that the Kellogg package is a modern package and Shredded Wheat is an old package.

MRS. IMA BULLOCK.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

I am a housewife, living in Fort Worth. I am familiar with Shredded Wheat. I suppose I have been using it practically all my life. I have purchased it often. I patronize independent service groceries. I do not order by telephone. I ask for Shredded Wheat. I always picture a package like Plaintiff's Exhibit 1. I have seen that all my life, and I always think of Shredded Wheat in that form.

I have ordered Shredded Wheat and gotten something else, at Donnelly & Walker's, in Fort Worth. It is not a store I am used to going to. Mr. Gordon Pittman, a salesman of the National Biscuit Company, asked me to go there. I asked for a box of Shredded Wheat. He brought a package. I looked at it and said, "Is that the regular Shredded Wheat?" He said, "No, this is Kellogg's." Then I asked him if it was the same thing. He said, "Yes, the same thing"—only that there was more of it. I took the package, paying fifteen cents, the same as I usually pay for Shredded Wheat. Plaintiff's Exhibit 182 is the package I got there on February 1st. That is the only experience I have had with the Kellogg product.

CROSS-EXAMINATION.

THE WITNESS: That is the only store Mr. Pittman asked me to go to. I went there alone. I brought the package back and gave it to Mr. Pittman with the contents. I had the full package until just a little while ago. It was bothersome to carry, so I took out the biscuit. I gave them to the porter in the hotel. He took them.

I have never tasted the Kellogg Biscuit. That is the first time I heard of it. As soon as the Kellogg package was produced, I know it was not the package I had been getting for years. That is why I asked him. He did not say it was different, but I understood it was. He said it was made by the Kellogg Company. I had heard of Kellogg's before then. I use the bran and maybe other products, not corn flakes. I know the name of Kellogg. I met Mr. Savage, one of the attorneys for the National Biscuit Company, today for the first time. I talked with him about this case.

That is my only experience with Kellogg's Whole Wheat Biscuit. I have never tasted it. I cannot see anything in it.

I only deal with service stores, never with self-service. I have been in self-service stores, but I do not trade with them. My husband is in the bread business, Mrs. Beard's Bakery, in Fort Worth, and I believe in trading with home institutions, if I can, because he wants people to deal with the home bakeries. My store, across the street from my home, is a service store. He carries Shredded Wheat. He carries other Kellogg products but not the Whole Wheat Biscuit. The store Mr. Pittman sent me to does carry it. I do not know whether it carries Shredded Wheat. He did not offer it to me when I asked for it. When I asked for it, I thought that, if he had it, he would give it to me; but he did not.

HOWARD P. BURKE.

Deposition taken at Dallas, Texas, February 15, 1933.

Direct Examination.

The Witness: I am not connected with the National Biscuit Company in any way. I am familiar with the product known as Shredded Wheat. I have been a user of it. I could not say offhand how many years; but I can remember eating it as a child. I have known it as Shredded Wheat, which term has not meant anything else to me but this product.

I have purchased Shredded Wheat at restaurants sometimes. I ask for Shredded Wheat. In one instance, when I did that, the young lady brought me a box of Kellogg's Whole Wheat Biscuit. I had asked for Shredded Wheat, so I asked her, "Is that Shredded Wheat?" She said, "Yes, sir." I looked at the box. I said, "It says 'Kellogg's Whole Wheat Biscuit.'" She said, "It is the same thing." I said, "Is it?" She said, "Yes, sir," and I ate it. This occurred yesterday at the Texas Hotel Coffee Shop, Fort Worth. That is the only experience of that kind I have had, to my knowledge, when I was looking for that product. I was always under the impression I was getting Shredded Wheat when I bought it.

I remember Kellogg's Whole Wheat Biscuit having been served me for Shredded Wheat a number of times. I am often on the road, traveling. I know that the product has been known as and bought for Shredded Wheat for many years. I have with me and produce the particular package served me yesterday, which is Plaintiff's Exhibit 183. Someone connected with the National Biscuit Company asked me to get this. I would say that, although this may have happened to me before, this was the first time I realized I was not getting the Shredded Wheat I asked for. When I got

it, I recalled that I had previously had the biscuit served to me in the small package.

I was familiar with the large package of Shredded Wheat before. I had had occasion to purchase it in store. I have never seen an individual service package of Shredded Wheat, that I know of.

CROSS-EXAMINATION.

THE WITNESS: Yesterday was the first time I was ever conscious at the time of getting Kellogg's biscuit. After getting it yesterday, I knew that I had gotten the Kellogg biscuit a number of times before but had not realized it. I have always had it served in the same way, in the individual cartons. I have noticed it before, because I have had business to do with a firm connected with Kellogg's. I am in the garment business, and I have made uniforms for men who are distributing Kellogg's products. Naturally I remembered the name "Kellogg's." I asked for Shredded Wheat in restaurants, but, although I did not realize it at the time, I know now that, in those instances, they brought me Kellogg's carton. I only just had occasion to notice. I am pretty observant. I had never noticed Shredded Wheat in the small box before. I think that is one of the reasons I may have been conscious of the fact it was Kellogg's. From the time I have been served with the small carton, it has been a carton like the one shown me, the Kellogg carton, as far as I remember. I have never been served with any other kind of carton for Shredded Wheat except this red-and-green carton. I have had Kellogg's products, like Rice Krispies, but not Shredded Wheat. I could not say that I have ever had Shredded Wheat served to me in a carton like Defendant's Exhibit 60. I do not remember ever having any like that. I do remember having had other servings in the Kellogg carton, like Plaintiff's' Exhibit 183. I can remember Plaintiff's Exhibit 1 when I was a young-

ster, being served at home. The reason I remember Kellogg's is that it was prominent on that package. I did not pay any particular attention.

XQ. 46. This is your package of Kellogg's Whole Wheat Biscuit. That is the package that you remember being served to you; is that right?

A. No, sir; that is Shredded Wheat.

THE WITNESS: Each time Kellogg's Whole Wheat Biscuit has been served to me, I have eaten it. I ate it for shredded wheat. It looked like shredded wheat biscuit, and it tasted like it. I called for Shredded Wheat. That is what I thought I was getting, because I did not look at the package. I was buying Shredded Wheat. I bought it as Shredded Wheat. On this particular occasion yesterday, it was served to me as Shredded Wheat. I should imagine Shredded Wheat would be a product by itself. That is what I mean. I do not know. Shredded Wheat seems to me the picture on that package right there. Looking at Plaintiff's Exhibit 161, if I should see the biscuits down there that look like Shredded Wheat, I should imagine that would be Shredded Wheat. I see "Kellogg's" down there. If I did not, I would take it to be whole wheat biscuit, if I saw that picture. If you would put it on a plate, I do not think I could tell the difference between Whole Wheat Biscuit and Shredded Wheat.

I am familiar with the old biscuit, such as are contained in Plaintiff's Exhibit 1. There is a difference in the size of the Kellogg's biscuit, I imagine. I noticed the Kellogg biscuit is a smaller biscuit than the other.

I could not say whether it is physically impossible for anybody other than the National Biscuit Company to make or manufacture that product that is in Plaintiff's Exhibit 1. I think that anybody can duplicate anything anybody else does. If they did, it would be

the same thing, in the product itself. If they duplicated it and it were made of whole wheat, shredded, and put into biscuit form, I imagine you would call it shredded whole wheat biscuit. It says on the bottom, "Shredded Whole Wheat." I think that is a true statement.

I do not know any other way to describe the biscuit in that package except shredded whole wheat. To be frank with you, I never thought about its being a biscuit. I only thought of it as Shredded Wheat. In describing that biscuit, I would say it was an oblong shredded wheat. I would say the Kellogg's biscuit physically is an oblong shape. It could be termed that. I think it is that. I cannot give any better description than that. I think that description would suit all right.

The way I was served this biscuit in a restaurant, I would say is the customary way of serving a biscuit in a restaurant, in a little package, also of serving other cereals, such as corn flakes and bran. They just bring a carton and let me dump it out myself. They do not dump it out for me.

I came here at the invitation of Mr. D. A. Mays, of the National Biscuit Company, a personal friend of mine. I am not connected in any way with the business. I am in the garment business. I talked with Mr. Mays about the case. I did not talk with Mr. Savage about it. I was willing to sacrifice a few hours of my time through friendship.

RE-DIRECT EXAMINATION.

THE WITNESS: In my travels, I have had Shredded Wheat served to me outside the package, in a restaurant, without the production of the package. That has occurred several times. I could not say whether I was served Kellogg's Whole Wheat Biscuit on those occasions, because I am not well enough acquainted with the product, outside of what I called for. I was served with

a biscuit that seemed like Shredded Wheat, on those occasions, and I used it. It may have been Shredded Wheat or the other product.

Prior to yesterday, I ordered it and thought I was getting what I ordered, although I now know I did not, on every occasion, get Shredded Wheat. In my conversation with Mr. Clarke just now, I used the expression shredded wheat as a name for a product, which I have applied to that product for a long time. He was using it as a descriptive term. That is the reason for his questions and my answers.

MRS. W. A. MAHAFFEY.

Deposition taken at Dallas, Texas, February 15, 1933.

Direct Examination.

The Witness: I keep house for my husband and myself. I am familiar with Shredded Wheat and have been ever since I have been married, about thirty-five years. I have purchased it at stores at different places, and in Fort Worth. I have used it in my home all that time. I recognize Plaintiff's Exhibit 1, which is the package or one similar to the package with which I have been familiar. Shredded Wheat has always been put up in a package something like that.

When I go into a store, I usually ask the salesman for a package of Shredded Wheat Biscuit. Naturally, I have the National Biscuit Shredded Wheat in mind, because I have used that until just the last few years, when I have been given the other, several different times in stores where I trade. I have been accepting the Kellogg product under protest, because we have used and liked the National Shredded Wheat Biscuit, and we knew what it was. When you get used to a thing, you know that thing and like it. When I pro-

tested, the answers have been varied. Some had said it is just as good as the other brand. Some have said it is cheaper. I recently bought a package.

I went into a small store on Evans Avenue, in Fort Worth, and asked for Shredded Wheat Biscuit. He said, "Yes, we have it." He went over and handed me a package. I said, "No, I want the National." He said, "We do not have the National brand, but we carry this, which is just as good and is cheaper." He said, "It has a little cellophane front, so you can see it is exactly the same thing." I said, "I used the other, and I prefer the other," but I was in a hurry, accepted the package, and went along home with it. Plaintiff's Exhibit 184 is the package to which I refer. The box, as I got it, looked like Plaintiff's Exhibit 161. When I bought it, it was filled with biscuit and I could see the biscuit through the window. They looked just like this biscuit on Plaintiff's Exhibit 1. When I saw those biscuit through the window first, they looked similar to Shredded Wheat, of the National Biscuit Company.

It seems to, although I am not definite about it, that I was given Kellogg's biscuit maybe eight or ten years ago. I also had another one given me, but that was neither. It was wheat done in a round biscuit. I believe they call them Muffetts. That was offered to me as being as good as Shredded Wheat. I did not receive a package with a window in it as long as ten years ago. Prior to that time, however, the only package I had given to me as Shredded Wheat was the one with the Niagara Falls picture on it. When I say Shredded Wheat, that is the kind of package I mean. If the store has it, I get that in preference to any other biscuit.

CROSS-EXAMINATION.

THE WITNESS: I do not eat either kind very much, myself. My husband is the one who eats the cereals at

our home, mostly. I served him Kellogg's biscuit. He did not think he was getting the same biscuit. He wanted to know why I did not get the other kind of biscuit. He always does that when I get a different kind of biscuit than Shredded Wheat. He always sees the difference right away. He is quite fond of fruit and wheat cereal. He always wants fruits and cereals of some kind for his breakfast. I have, on occasion, served him Kellogg's from time to time. The first time Kellogg's biscuit was handed to me in the store, I recognized right away that it was not the National Biscuit package, because it is in a different box, and a different size.

The National Biscuit Company put out Shredded Wheat like Plaintiff's Exhibit 1, as far as I know. It has a picture of Niagara Falls on it. In other words, it is something we have been consuming and using for many years. I know it is good.

I have known for some years this National brand of Shredded Wheat. I have also known for some years back that there was this Kellogg brand of Shredded Wheat. I would not say that most of the stores with which I deal now carry the Kellogg shredded wheat. Most of them that I deal with do carry the National brand of Shredded Wheat. I do not believe they both carry the same brand at the same time. I was asked to make this purchase of the Kellogg product just the one time; but I have purchased the Kellogg brand before. I shop around at many different stores. I pay cash for my groceries, and I go wherever I want to buy them. I sometimes deal in stores where I help myself. I cannot tell you whether I have seen the Kellogg biscuit in those stores, because I look for the other. When I go into the stores, I have in mind what I want. So I list just what I want to buy. I know how to get around to where each article is kept. If I see it, it is just a matter of seeing it and passing it by. I deal at a few

service stores. I have asked for Shredded Wheat and received Kellogg's biscuit a number of times, at the independent stores. I would ask for National, and they would bring me Kellogg's or some other, did not have the National. I would buy it because I was in a hurry and did not want to go somewhere else to get it. I would use it as a substitute, for the time being; but I would go back and get my National Shredded Wheat when it was convenient to get it. Absolutely every time I got Kellogg's, it was because they did not have the other. When I got Muffetts, the grocer said they were just as good as Shredded Wheat. I think I bought them here in town, at Oak Cliff. I do not eat things like that myself, but my husband ate them. He does not care for anything else like the National Biscuit Shredded Wheat, because he just likes them. They are lighter. My husband has stated that he likes the National the better of the three. He prefers that I get it. I try to get what he wants. I have not very often tried to slip anything over on him by way of substitute. He catches me sometimes. I have never been able to substitute any shredded wheat on him. As a rule, when I get Kellogg's, the grocer tells me they have this brand, and that it is just as good as the other brand. I take it and go on, because I do not want to go somewhere else at that particular time. That is my only reason for taking any substitute.

If I did that often enough, I do not know whether my husband would get to like the Kellogg product. I just said he likes the other better.

PAUL W. SIEBERT.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. I have been in the grocery line twenty-odd years, and about thirteen years of that for myself. I operate a service store, make deliveries, receive telephone orders, and carry credit accounts. About ninety per cent. of our business is done by telephone.

I recognize Plaintiff's Exhibit No. 1. It is Shredded Wheat. I am familiar with the biscuit in it. I have known about that for twenty-five years. My first experience was with the Reliable Grocery, and that has been at least twenty to twenty-two years ago. I have carried it in stock continuously in all that time. It has never been off the shelf. It is a commodity that sells regularly. There is a demand for it. Customers ask for Shredded Wheat. I presume they know what they want when they ask for Shredded Wheat. They never ask for anything else. I fill the orders with this particular package, Plaintiff's Exhibit 1.

The name shredded wheat has acquired a reputation among the purchasing public. I have hardly ever known anything but Shredded Wheat until some few other brands came out, imitations, you might say, or in competition with it; such as Triscuit and Muffetts, and Kellogg's put out one. They called them Whole Wheat Biscuit or something like that.

I recognize Plaintiff's Exhibit 161. I did carry that; but I discontinued it, because, first, we did not have any sale on it to amount to anything. They had extensive advertising which peeved us a little. It was not exactly in line with our method of selling goods; so we did not try to push it any more. A few customers—two in particular—told me they were selling

Shredded Wheat, and, when they bought two packages, they would give them one. I had to do what I could, taking the package off the shelf and showing the lady that it was not Shredded Wheat.

A lady came and said, "Will you sell me two packages of Shredded Wheat and give me one? They are selling them off the wagon that way." I said, "I am sure it is not Shredded Wheat." She said, "I am sure it is." So she went so far as to look on my shelf and go and look at her package and came back and apologized to me. She was getting Kellogg's and thought she was getting Shredded Wheat. She came to me and asked me to sell her Shredded Wheat at the same price. In fact, she did not buy it that day, because she said she did not know anything about it. She said the man told her that, if she had milk bottles, she would take the milk bottles. A few days later they had a piece in the paper about milk bottles being as good as currency anywhere. We had that feeling, and, of course, we did not then and do not now stock them much, because I do not think we have ever had more than two dozen packages on the shelf. When people ask for Shredded Wheat, there never was, in our mind, anything but the one Shredded Wheat. There was a Whole Wheat Biscuit.

Looking at Plaintiff's Exhibit 161, I now see something about Shredded Wheat on the end of it. I also see the words on the other end. I do not know that I ever took particular notice of that before. I do not think you could ever put out that package for Shredded Wheat. If a customer wanted Shredded Wheat, in my estimation she would want that one Shredded Wheat, because I never knew anything else but the one Shredded Wheat. If it was something else, it would have somebody else's name on, like Kellogg's Whole Wheat Biscuit. They have always had so many items that a customer would not know what they would want. They have caused our service men more trips, because a lady

might want Pep. If she wanted cooked bran, we might send her some other kind of bran. I do not know whether other grocery men are like that or not, but it has always confused us. We usually have one brand of one article. We have more than one kind of corn flakes. We sell very little Kellogg's. I like Post Toasties, myself, and have always pushed it, because they are, in my estimation, a better piece of goods. They do not mush up like other brands.

CROSS-EXAMINATION.

THE WITNESS: I think National Biscuit is the only concern in the country that knows how to make Shredded Wheat. If it would be something on the order of it, it would be somebody else's shredded wheat, or somebody else's Wheat Biscuit. I do not think they could put it out as Shredded Wheat. By Shredded Wheat is meant not only the item that is in it, but the brand of it. In my mind it is not just like oats, whole wheat or hominy. In hominy, you get Quaker Hominy or different kinds of brands of hominy. In grits, you get Quaker Grits, Aunt Jemima Grits, and various others.

If you asked me what Shredded Wheat was, as a physical product, as near as I can describe it, it is a rolled-up biscuit, because, in my early days, it was what it seemed to us, because it looked to me like little shreds coming out of the package, formed into biscuit, and baked. That would be my description of it. I do not think shredded wheat biscuit is a short name for what I have just said, when it comes to the brand or the package. I do not know that that would just exactly mean shredded wheat, shredding it.

If I were asked what a Shredded Whole Wheat Biscuit is, the only thing I would say is that shredded wheat was Shredded Wheat, this one. I have not had any experience with the other one. I do not know what

it would be. I have tasted the Kellogg product. I do not think I saw it when it was called Kellogg's Shredded Whole Wheat biscuit.

If I were told that was a package that had been on the market for some time before Kellogg called it Whole Wheat Biscuit, I would not think they were lying when they said the product in that package was called shredded whole wheat biscuit. I do not think that would be any misrepresentation, to say that that physical product was a shredded whole wheat biscuit. If the product in Plaintiff's Exhibit 161 is shredded, I do not know what shredded would mean. In my estimation, I have always considered it as much a brand as it would be a biscuit.

I think the word shreds has a meaning to a certain extent in the English language. I do not think it means threads or strings. I would have to go and see it scientifically made and see whether it is shredded or not.

Referring to Defendant's Exhibit 1, package of National Shredded Wheat Biscuit, I do not know that I am qualified to say what the word shreds refers to in the phrase: It's All In The Shreds. I do not know that it would have any relation to the biscuit inside. I do not know that we paid that much attention to the package. That phrase does not mean anything in particular to me. I presume there are shreds in this package of shredded wheat. The way it is laid out, for them to call them shreds, it would have to have a definition of what shreds means.

I have heard of shredded coconut. I do not know what it is. I have no idea that that is called shredded. I think they call it grated coconut. If they said grated coconut, I would not expect to find whole coconut instead. I think most of the packages say grated coconut. I would know what that meant. If it said shredded, I think I would classify them both the same. If I had a package of sauerkraut that was marked shredded, I

would expect to find the cabbage torn up into little pieces. I do not mean to imply that the word shredded is any misrepresentation on this package. It is more the brand. It is partly the package, as much as it is what is in it. That is my view of it.

If the wheat grains in Plaintiff's Exhibit 1 were whole wheat grains, and they put the word shredded on the outside, I would not know what they would mean by that. I know what shredded means, as applied to sauerkraut, coconut, and cabbage; but I do not think that applies to this. It really means wheat, shredded; but when a customer comes in and asks me for shredded wheat, that is and has been for years, the only meaning I have had in mind for shredded wheat. Shredded, I suppose, means the same as grated. This might be shredded wheat biscuit, but I do not think it is.

If the Kellogg Company puts on the side of the package this little phrase which I did not notice before, in which it is called a shredded wheat product, I think it is a lie, in this way, because it is not a shredded wheat product, in my opinion; because a shredded wheat product would mean a product from this particular company, in my estimation. Shredded Wheat means a biscuit made by the Shredded Wheat Company. I should think there could be a shredded wheat biscuit made by the Kellogg Company. It would be possible for them to make them. That is Shredded Wheat Company, unless they changed the name on it. That would be a Shredded Wheat product from the Shredded Wheat Company.

Looking at Defendant's Exhibit 5, I think that is a whole wheat biscuit. It comes nearer to this; but I would not consider it a shredded wheat product. I would call it a whole wheat biscuit or shredded whole wheat biscuit. I would have to answer Kellogg's, of course, because it is there, the same as I would say about somebody's grits; but to use the words shredded

whole wheat without Kellogg's would be, to my mind, a product which is neither.

If I had a package of Kellogg's Whole Wheat Biscuit with shredded wheat biscuit in it in my store and somebody asked me for Kellogg's Shredded Wheat, I would not tell them that this was not Shredded Wheat in this package, if they put it on the package that way. If they put it on the package that this is shredded whole wheat, that is true enough for me, as far as that is concerned; because we do not analyze what is in the package, any more than to try them once in a while. The names by which goods go are the large names on the front face of the package. The little stuff on the end is to misrepresent you. For instance, as you buy an automobile for $675, f. o. b., the $675 is big and the f. o. b. is small.

I do not know why the Kellogg Company put on the end of the package shredded wheat in its most delicious form. It may be dodging of a certain infringement or skipping over something. I do not know. That is the way I figure the f. o. b. part. The phrase might mean that the Kellogg people had shredded wheat in this package; but ninety-nine out of every hundred would never read that.

We advertise the products in our store very little. We have had circulars once in a while. We have not found them successful of late, so we discontinued them. I have owned the business thirteen or fourteen years. We did not carry Whole Wheat Biscuit until the sampling methods started. I do not believe we had it at that time, because they were selling the product all over town. They had the stuff on trucks. Nobody had consulted us about putting on these exhibits. We feel that, on deals like that, they should come to us. Lipton's Tea people, for instance, will sell them two pounds of coffee and give them one pound; and they will get that stock out of your store and show you a profit. In

the Kellogg instance, we were not consulted. We were peeved because we were getting knocked out of our sale. For that reason, we did not even stock it.

It is customary to buy it from the stock of the neighborhood grocer, so he can make a profit. At that particular time I was peeved, because they did not. We stocked it only twice before that, because the sale was never great enough. I do not turn down business. If they came to us and asked me, I would go out and get it, so the customer would be pleased. If the demand does not come, I will not stock Kellogg's or any other item. If I would get a demand for it, I would put it back in stock. I would just as soon sell one item as another, as long as we can make a profit on it.

As far as my store is concerned, I have never done anything by way of advertising the Kellogg product or explaining it to the customers as a new product. I have never done anything to create a demand for that product. We carry every other item of Kellogg's. This particular item we do not have.

I do recognize the various methods of promotion, telling customers I have a new product, and permitting demonstrators to show them, as legitimate ways of creating a demand for that product. A great many of them ask to put on demonstrations; but we do not encourage it, because we do not have a drop-in trade. Our business is ninety per cent. over the telephone, and there is no reason for demonstrations in our store. Demonstrations are usually held in big stores where there is a big drop-in trade to sample it. I would not have objected to the Kellogg method of sampling if they had bought it at my store. I would have welcomed that means of creating a demand. I would not object to stocking it right now, if there were a demand. I do not think we had a demand for it, even during that sampling. The theory on which others have bought

their samples from me is that it is my territory that is being sold and I ought to have a profit on it.

I handle most of the National line. We ordinarily buy Shredded Wheat through Western States or some other jobber, wherever we can get it cheaper. We also have Brown's cracker line, of which we probably sell more than we do the National, which may be due to prejudice in favor of the home article. We are trying to buy and sell Dallas products.

My orders sometimes go in for Shredded Wheat through the cracker salesman. In fact, they are sometimes somewhat insistent in selling Shredded Wheat with the crackers, to pad their orders. They do not necessarily want me to take Shredded Wheat to get the cracker line. If they give me a price, I would just as soon give it to them as to the other fellow.

Until the National Biscuit bought them up, Shredded Wheat, to me, has always been this Shredded Wheat Company. I was rather surprised to see that they were owned by the National. I was thinking they must have been taken over by the Shredded Wheat Company. But Shredded Wheat was just Shredded Wheat, just like a sack of flour, you know. The National Biscuit salesman is polite in asking for orders. They have a very nice man out there. He has been coming out there a long time. I know he went out of there many a time without my even getting any crackers. I think the records might show I bought Shredded Wheat when I did not buy crackers.

CLARA M. TUTT.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I keep house, cooking for seven. I know Shredded Wheat. I recognize Plaintiff's Exhibit 1, which I have known all my life. We have eaten it as long as I can remember. My mother used it before me. I have always used it in our home.

When I go to a store, I ask for Shredded Wheat. That is all I know. Shredded Wheat, to me, means just a very healthful breakfast package. That is the way I have always considered it. We have always used it, are always partial to it. That is what we think is best for us. We serve it in our home every morning. Sometimes we poach an egg and put it on the biscuit; sometimes we have it with bananas and cream. I do not bring the package on the table. I warm it in the oven before I serve it in a dish on the table.

If I served something different from but similar to that, I am sure my family would know it. We purchase it in a cash service store right close to us. I go there and ask for Shredded Wheat.

Recently, I went into the store of Phipps, on the north side, a store at which I do not regularly trade, and asked for Shredded Wheat. They brought me this package. I was asked to do that by somebody connected with the National Biscuit Company. I said, "This is not the original Shredded Wheat." He said, "Oh, yes, it is." He called a manager and said, "Mr. Phipps, is that the original Shredded Wheat?" He said, "Yes." I said, "This is not what I have been buying." He said, "This is the original Shredded Wheat." I took it and paid for it. This happened yesterday. The box they gave me was Plaintiff's Exhibit 185. I did not even know there was a Kellogg's on the

market, until I saw this package. That is the first time I ever saw it. I never heard of it before. When I look through that little glassine window in the package, I admit it is a good imitation. It certainly looks like Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: It is not as fine a product. I have never tasted it. I just said, "This does not look like the package I have been getting." They said, "No; it is the original Shredded Wheat." I did not believe them, of course, because I know well enough, after I have been using it so long, the Niagara Falls building there. Having seen that Niagara Falls building, you would not doubt in the least you were getting the wrong package. I did not argue with them or try to put them straight. They seemed to be very sincere. I do not know whether they were sincere that the Kellogg package was the original Shredded Wheat. They seemed to believe what they were saying. The man said he would call the boss. He said, "Is this not the original Shredded Wheat?" He said, "Yes."

Mr. Nipp asked me to go to that store. He did not go there with me. He told me just to go to that particular store and to bring him the package. I had never dealt in that store before and had never seen the Kellogg biscuit before. I have asked for Shredded Wheat in other stores. We get it all the time in the store we trade in. My experience with Shredded Wheat has practically been confined to the store where I deal. I do not know whether it carries Kellogg's biscuit. It is the Stop-Six Grocery, on the Dallas pike. I have never eaten Kellogg's biscuit and never had any experience with it until yesterday.

MAXINE REYNOLDS.

Deposition taken at Dallas, Texas, February 15, 1933.

Direct Examination.

The Witness: I am familiar with Plaintiff's Exhibit 1. I know it as Shredded Wheat, and have known it all my life. I use it frequently. I purchase it most of the time, when I go for things myself. I have bought it in restaurants on several occasions. When I ask for it, I ask for Shredded Wheat. I have in mind definitely that I expect to receive Shredded Wheat Biscuit, which is known as Shredded Wheat and is put out by the National Biscuit Company. I have never called it a National Biscuit product; but I have always taken for granted that it was their product, in asking for it. Shredded Wheat means that particular product to me.

On one occasion, February 1st, I went in the Blackstone Coffee Shop in Fort Worth and ordered Shredded Wheat. When the girl was ready to serve me, she brought out Whole Wheat Biscuit. I told her I had ordered Shredded Wheat. She said, "This is exactly the same thing." She brought the biscuit out in the package, which I saw. I have it. I took the package. That was all the conversation. When she told me that, I went ahead and took it. This is the carton, Plaintiff's Exhibit 186. Before that experience I had never seen or eaten Kellogg's biscuit before. That is the only experience of that kind I had had.

Cross-Examination.

The Witness: Mr. Mays, of the National Biscuit Company, asked me to go to this restaurant and order Shredded Wheat. They told me it was exactly the same thing. When I tasted it, I thought they had misinformed me. I knew it was not exactly the same thing. It is a coarser shred, has a tendency to be more doughy

after it is covered with cream. It has a tendency to be thicker and not quite as long as Shredded Wheat Biscuit. In the restaurant, I recognized right away that it was not the National Biscuit Company's product, but it was served to me for it. I did not think it was corn flakes or anything of that sort. I recognized that I was eating a shredded wheat, but a different kind from any I had ever known. That is the first time that happened to me. I have been using Shredded Wheat of the National Biscuit Company twice a week for as long as I can remember. I like it much better than the Kellogg brand. I never paid any attention to Kellogg's, because I always had ordered Shredded Wheat, and this was just recently they had ever given me anything except that, as a substitute.

I do not know anything about any of the other Kellogg products. I suppose I have eaten them, but not to pay any attention to them. I have heard of the Kellogg Company. I have a home. I have had a few food products sampled to my home. It is a relatively common form of merchandising to create an interest in new products.

MRS. R. K. STALCUP.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housekeeper and live in Dallas. I am familiar with the product known as Shredded Wheat and have known it practically all my life, it seems to me. At least eight years. I have never known it by any other name than Shredded Wheat. I purchase it from time to time. I ask for Shredded Wheat, and I expect to get Shredded Wheat.

I recognize Plaintiff's Exhibit 1, which is the package I associate with Shredded Wheat. I have recently,

at the request of a representative of the National Biscuit Company, asked for Shredded Wheat in a store, at the Franklin Grocery, in Fairview Street, Dallas. I went in the store and asked him if he had some Shredded Wheat. He said, "Yes, ma'am, I do have." We both glanced at the same time up to the shelf. He said, "I have the Kellogg's shredded wheat." I said, "Is this the original shredded wheat?" He said, "Yes, ma'am." I said, "I want to be sure. I am buying this for someone else." He said, "Yes, they will never know the difference. This is the original Shredded Wheat." I asked him if he would make me a bill for it. He said he would, and he made out a bill, this one. I paid him and took the package. There was no further conversation. The sales slip, Plaintiff's Exhibit 187, and the package, Plaintiff's Exhibit 188, are the slip and package I received. I think I usually pay nine cents for Shredded Wheat at the Tea Company.

CROSS-EXAMINATION.

THE WITNESS: Neither I nor anybody connected with me has had occasion to deal with the National Biscuit Company. I know Mr. Wilson of that company. He asked me to make this purchase and told me to go to this store, where I had never dealt before. He did not ask me to go to any other store. This man did not look as if he was expecting me when I came in; but he did say that Kellogg's was the original Shredded Wheat. Besides me and the clerk, there was another lady and another man in the store, whom I did not know. They did not hear the conversation I had with the clerk. I did not argue with him or try to put him straight. I just told him I wanted the original Shredded Wheat. It did not occur to me to ask him to put "Original Shredded Wheat" on the bill of sale. I just asked him for a bill of sale. I have heard of Kellogg's biscuit

before. They carry it in our grocery store, where I deal regularly. It has been there for the last few months. They have never offered me Kellogg's biscuit in my own store, A. & P. No. 30, but I have seen them in that store. I have seen the package with the cellophane window like Plaintiff's Exhibit 161. They were on display on the shelves of my A. & P. store. The National Shredded Wheat is on the same shelf, but it was down quite a ways. The package like Plaintiff's Exhibit 161 is very attractive; but I knew the other, and I have always bought the other. I knew what it was. It registered enough on my attention so I knew I had seen this Kellogg's Whole Wheat before the man gave me the package I brought here today. Mr. Wilson kept the package for me until today. He did not go to the store with me. I saw him later. I do not know how far away from my home the store is, but it is some distance. I drove over there in a car. I just went to that one store, following his directions. I have had samples of food products delivered at my door. I do not remember them selling two packages of cereal and giving one free. I have just had samples delivered. That is a method of bringing new food products to my attention as a housewife. I have had a service grocer tell me he had something new and ask me to try it. I have had demonstrations in stores, where the demonstrator tried to get me to try new food products. I do not take advantage of special sales of food products very much. I do not notice or hear that they have specials. I do not shop around. I stay with my own grocery store.

MARY HUNSAKER.

Deposition taken at Kansas City, Missouri, February 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am employed by the Kennedy Grocery Company, in St. Joseph, Missouri, at present. I am not right now connected in any way with the National Biscuit Company. I certainly am familiar with the product known as Shredded Wheat. I have eaten it all my life. I recognize Plaintiff's Exhibit 1. I have known it all my life, as a consumer. My mother has fed it to me. She made me eat it when I was young. Now I want to eat it and still eat it. I live at home with mother and daddy. I do all the buying in my house. I usually purchase Shredded Wheat at Kennedy's, where I work at the present time. I do all my buying at Kennedy's, or at the neighborhood grocery store. Some are service stores, where they wait on me. I always ask for a package or two of Shredded Wheat. Grocers usually know what I mean, and they give me Shredded Wheat, Plaintiff's Exhibit 1.

Shredded Wheat at my home is usually heated in the oven a little, then hot milk over it. Sometimes I just have it heated a little and eat it with butter. We do not bring the package on the table usually. We take the biscuit out of the package.

Prior to this year, I have eaten in restaurants a good deal. I have traveled. It is usually served to me in restaurants in the package, a small, individual package. I ask for Shredded Wheat. Several times I did not get Shredded Wheat, and I would fuss. Once, down at the Rogers store, 234 South Fourth Street, I walked into the store and around to my right. A boy who looked like a senior in high school asked what I wanted. I told him I wanted a package of Shredded Wheat. He walked over to the shelf and took down this package.

I said "I want Shredded Wheat." He said, "This is shredded wheat." I asked him again, "Are you sure this is Shredded Wheat?" He said, "Yes, ma'am, it is." I said, "Will you write it down"—on a piece of paper what I had asked for, because I was getting it for someone else. He said yes, and he wrote on this little piece of paper, "One Shredded Wheat"; and then a very elderly man—his father, I presume—came from behind the living room of the store and asked if I had received what I wanted. The young man said, "Yes, she wanted Shredded Wheat and she has it." I then paid for it and walked out. That was the G. M. Rogers store, 234 South Fourth Street, some time in December. I was asked to make the purchase by someone connected with the National Biscuit Company. The date was the 13th of December. Plaintiff's Exhibit 190 is the box that was given me at that time; and Plaintiff's Exhibit 189 is the slip the young man wrote out for me.

CROSS-EXAMINATION.

THE WITNESS: I made a written statement of the occurrence at the request of someone connected with the National Biscuit Company, which Mr. Clarke may have. I was formerly employed to make several demonstrations for the National Biscuit Company's Wheatsworth, in St. Joseph; but that was all. I have an arrangement where I go to retail stores. I usually have a grill and serve a couple of pancakes to people and sell them Wheatsworth flour, already mixed. I make pancakes out of the flour and try to get them to taste it. They usually do and buy it, and it is wonderful. There was nothing especially unique in that, that I can think of, as compared with the demonstrations usually practiced by other ordinary food demonstrators. Any food that is demonstrated in stores is demonstrated along those broad lines. Demonstrators try to get people to taste it and use it, the purpose being

to introduce the product to new customers or consumers. I find, with Wheatsworth, that there are an astonishing number of people who have never tasted it before. I think housewives are usually very practical and sensible. When you can reach her and get her to taste the product, if she likes it and uses that sort of thing, nine times in ten she will buy it. My experience has almost invariably been that people have, apparently, never tasted it. The Wheatsworth demonstrations have been the most wonderful I have had. We have been doing nothing but demonstrating for four or six months. I have had demonstrations for several other companies.

I am sorry to say I have never demonstrated Shredded Wheat. I never worked for the Kellogg Company at any time. I have been employed during the last three weeks at the Kennedy Grocery Company, St. Joseph. I have two demonstrations a week there. On other days, I just see that everything is running smoothly on the floor. When the young man told his father, "Yes, she wanted Shredded Wheat, and she has got it," I did not say anything, and I did not contradict him. There was no need to argue with him. I wanted them to know I wanted Shredded Wheat; but I did not think it was worth while to argue about it. I took the Shredded Wheat as it was. The elderly man came out and asked whether I had gotten what I wanted, and I said "Yes."

Out on the road I have asked for Shredded Wheat and gotten Kellogg's, several times. I had not known of Kellogg's Whole Wheat Biscuit so very long. I have not the least idea even how long you have had this on the market as a product. I cannot mention the places on the road where I have gotten Kellogg's, because I think I have been in five hundred different places. I could not possibly remember. Of those five hundred, I have asked for Shredded Wheat in a good many. I eat

it once a week or twice a week, for breakfast. I would not just remember. I do not remember the proportion of times I got Shredded Wheat, as compared with the times I got Kellogg's. It did not happen a great many times that I got Kellogg's. I cannot recall the first time. The first time, I knew right away that the Kellogg's Whole Wheat Biscuit was not the Niagara Falls biscuit; because I had been getting it in the little box, and the girl did not bring it that way. She brought it in a plate, and I asked her what it was. She told me it was Kellogg's. I guess I asked her because I am always suspicious of restaurants. I had eaten it for so long, and I was so mad that they did not bring it to me in this little box and that everything was so unsanitary, so unclean. I always hated having it served to me outside the little box, when it could be in it. If the manufacturer is going to the trouble to put that up into a sanitary box or container, the very least the restaurant could do would be to bring it to me in that box, let me pick up the box and turn the biscuit out myself. Previous to that, I had been living on the road for a year; and I was just perfectly sick of the filthy restaurants.

The way they usually do with all dry breakfast foods, such as Grape Nuts, is to bring the box to me and I turn it out myself. The first time Kellogg's biscuit was served to me outside the carton, I asked right away what it was, and the waitress said it was Kellogg's Shredded Wheat. That is the only way I could know it, because I had not started to eat it yet.

Each time I ordered Shredded Wheat and the waitress brought me Kellogg's, I knew that, in the physical sense, I was getting shredded wheat, or thought so; but I wondered why she did not bring it the other way. Physically speaking, it was just as much shredded wheat, being made of wheat and drawn out into shreds.

I have never measured the National and the Kellogg's biscuit, but, according to my eyes, I think they are smaller. I do not know whether it was a difference in their color or size that made me ask about the difference. I was furious. I became a very cross girl on the road, because I was furious about things of that sort. I had not done any demonstrating then. I have never demonstrated until within the last few months. It was not a customer reaction, either; it was just a very critical woman. I was cross about being out on the road. If, after living at home, you go on the road for five years, after being home where everything was the way I wanted it, and then having to go out and live in small and large towns, almost any girl would become very critical. Every time the National Shredded Wheat has been served to me, I am pretty sure it was served in an individual carton containing two biscuit. I may have seen National Shredded Wheat about the size of or a little smaller than Kellogg's Whole Wheat Biscuit, if that was the sample they gave out at the pure food shows. I am of the opinion that there are two sizes of Shredded Wheat Biscuit; one large or regular, and one a little smaller. They would give samples at the pure food shows. I have always gone to the shows, here at St. Joseph. I cannot remember whether I got any or not. Shredded Wheat is Shredded Wheat.

Except for the one time or two when I received Kellogg's product, I have had no discussion with them when they served me Kellogg's. I do not think it was more than two or three times I was troubled that way. In small towns, they have foods around on shelves. If I did not see what I wanted, I got so that I would not ask for it, because I got so cross about it when I did not get it. Since I have been home I have been able to get what I wanted.

I never eat corn flakes, although I know people who do. I never eat any kind of flaked food. I eat Grape Nuts and Shredded Wheat; that is all. I used to eat cooked cereals, but no more.

I do not deal at Rogers Grocery all the time. Mr. Clarence Carolus asked me to go there. He asked me to go, also, to other stores, which I did. Several of them were completely out. I asked them to describe what sort of box they were going to sell me for Shredded Wheat, and they described Kellogg's. Of the others, about eight or ten had Shredded Wheat. I just simply stated I was doing survey work for the National Biscuit. I went to ten stores, I should think. Of those, I actually got the Kellogg product in one store. Three, at least, had the Kellogg product in stock. I asked them if it had a picture of Shredded Wheat and the plant, and they told me no. I said, "Oh, do you mean Kellogg's Whole Wheat Biscuit"; and he said, "No, Kellogg's shredded wheat." That happened in a store on Gavell Boulevard, I believe, and another away down in the Ohio valley, near St. Joseph.

I presume that, out of these ten stores, about five handled Kellogg's and the other five handled National Shredded Wheat. That was a fair survey, as far as I know, of the territory that I operated in at Mr. Carolus' request. That was just practically all. I then became employed and I was eating uptown. I did ask in several places where I ate. Two places were out. Another had been serving Whole Wheat Biscuit, because one of my girl friends had gotten it there. Most of those places served it in a carton, the way I like it, and I did not say any more about it. The only time I eat out now is at noon. I do not eat that sort of food then. I had not eaten Shredded Wheat for two weeks, but tomorrow I am starting in again. I do

love Shredded Wheat; there are so many ways of serving it, with fruit, and so on.

I can only think of three restaurants in St. Joseph and I did not get Kellogg's biscuit in any. It happened, I would say, at least two or three times when I was on the road. I have asked for Shredded Wheat and gotten National Shredded Wheat hundreds of times. I do not remember where I got the Kellogg Biscuit. That is my impression, that that is all. I was on the road five years and ate breakfast every morning. On the road I eat breakfast food more often than at home, because on the road I cannot have the things I want. I was on the road from 1917 until a few months ago. I was in hotel coffee shops, small-town restaurants, very exclusive little places and sometimes just little dumps, from Chicago to Canada and from the coast to Memphis. I have been to every small town in Idaho, Utah, Colorado, Nebraska, Kansas, Missouri, and most of them in Illinois and Indiana. For me to go back and say that, at a certain time and on a certain date, I ate so and so, is impossible. I am testifying from my impression. If it were shown to me by testimony of actual Kellogg men who service the restaurant trade that the Kellogg product has as high as 70 to 80 per cent. distribution in the territories I was in, I would believe it, certainly. I have no fuss with Kellogg's, only I am very mad at them right now, the way they do in St. Joseph. When a customer comes in and asks for Shredded Wheat, and they have not got it but have the Whole Wheat Biscuit, what makes me more angry than anything else is when they say, "You will surely like it. You will not know the difference." That is not what they say. They sell you Whole Wheat and you think you are getting Shredded Wheat. The product made by the National Biscuit Company is Shredded Wheat. I do not mean to say that the Kellogg Company does not

know how to make shredded wheat. I do not mean to say that the National is the only one that can make shredded wheat; it is just like my baking a cake. I mean Shredded Wheat made by the National Biscuit Company. The Kellogg product is not Shredded Wheat; it is Whole Wheat. It is not Shredded Wheat to anyone. I do not assume the grocers were liars when they said it was shredded wheat. They just have a wrong assumption.

If I went in a store and they tried to hand me Grape Nuts or corn flakes, I would say right away, "You are crazy. That is not Shredded Wheat." I wanted to say that when they gave me Kellogg's Shredded Wheat.

XQ. 153. I suppose that all the National Biscuit organization wants to tell everybody that the shredded wheat of the Kellogg Company is not shredded wheat at all.

A. Well, it really is not.

XQ. 154. It is not shredded wheat made by the National Biscuit Company. Is that not what you mean?

A. Yes, on account of the name being patented, and so forth.

MR. VILAS: You are trying to tell Mr. Clarke, are you not, that Shredded Wheat is a trade name?

THE WITNESS: Why, indeed, it is.

MR. VILAS: That is what it means to you, is it?

THE WITNESS: Why it does. It is, is it not?

XQ. 155. In that case, it is marked right here on this package, "Trade-mark Registered U. S. Patent Office, Shredded Wheat." Is that not what you understand it to mean?

A. Yes.

XQ. 156. And that is an absolutely definite statement to you that that is a trade-mark and it is registered in the patent office, is it not?

A. And there should not be any other Shredded Wheat.

THE WITNESS: There should not have been any other shredded wheat, to my mind. This is what Rogers Store should have said to me: "Madam, we do not have Shredded Wheat. You are asking for Shredded Wheat, but we have not got it. We have something, however, which is just as good: Kellogg's Whole Wheat Biscuit. You can use it in place of Shredded Wheat." But he handed it to me and I said, "Is this Shredded Wheat?" and he said "Yes, it is Shredded Wheat." I say it is not Shredded Wheat. All my life I have gone to the store and bought Shredded Wheat. When I was a little girl and could just say Shredded Wheat, my mother would send me to the store to get it. I went in the store and said I wanted Shredded Wheat. Everybody else wants that, I think, if they have any convictions at all. I am not employed by the National Biscuit Company. I was, just for demonstrations. I had probably three or four demonstrations for Mr. Carolus, one for Mr. Turner, who has the Y Park District, one at the store of Turner and Snow, for Mr. Gibbons, wheatsworth pancake flour, and one out at Jackson Street for Mr. Turner, wheatsworth. I had one at Packer's Market, before it burned, for fig bars. I had one at the Kennedy grocery for fig bars. It seems to me I had one in there for cookies, at some place. Those were all the National demonstrations I had, but not for the National Biscuit Company. I am no employee of that company. I was employed just for the demonstrations, the same as I have been employed by lots of other companies. The National Biscuit Company has not paid me five cents.

The salesmen, instead of putting on those demonstrations themselves, paid me out of their own pockets to put them on. Those were National Biscuit salesmen, but the National Biscuit Company has not paid me five cents. I do not know whether they were paid. I suppose the company paid them their salary. I had nothing to do with that. It has nothing to do with this case. It is a lot of work for a man to fry a lot of pancakes for a hundred or more people and to serve them. These boys hired me just to do that. I just helped them out so they could go on and see their customers and have their regular Saturdays out. I do not know whether the money they paid me was reimbursed to them. I never asked them. Except for these demonstrations, I have never been in the employ of the National Biscuit Company. I have never been in the office, and I do not even know who is in the office, or anything. I have never been to their building. When the grocers told me the Kellogg product was shredded wheat, I would not say they were all wrong. There was never any chance for an argument. I would say the Kellogg product is not, physically speaking, shredded wheat. Shredded Wheat does not mean Kellogg's. It means Shredded Wheat. It is a biscuit, and it is a nice little something. There are not two shredded wheats. That is Kellogg's Whole Wheat Biscuit. It says so right on the box. I can conceive that, when a grocer says there are now two concerns making this little biscuit in pillow-shaped form, it is true; because your wife may make a cake, and so can I; but my cake might be different than hers. I can understand that, when the grocer says "This is shredded wheat," he is talking about the product itself, the little pillow-shaped biscuit. Nevertheless, I think I am right when I say there is only one Shredded Wheat, and that the grocers are indeed wrong when they say there are two kinds. I could not admit the

possibility of my being wrong and their being right about Shredded Wheat. There is only one brand of shredded wheat on the market. Kellogg's biscuit is Whole Wheat Biscuit. If I were asked to tell what whole wheat biscuit was, I would not know.

I would describe the product I see through the cellophane window in that package as a biscuit. It looks very much like shredded wheat biscuit. Why does it not say it is? I have no doubt it is a shredded wheat biscuit. "Whole Wheat Biscuit" would not give me any idea what it was; but, if you said it was shredded whole wheat biscuit, I would immediately think it was shredded wheat, as in Plaintiff's Exhibit 1. Then I would find that, instead of its being Plaintiff's Exhibit 1, it was a Kellogg package.

RE-DIRECT EXAMINATION.

THE WITNESS: The gist of my debate with Mr. Clarke is that I believe that Shredded Wheat is a product name, the name of a product, peculiar to the product I have known so long; and that no one else should call their product by that name. That is only honest and right. The people with whom I associate, when they ask for Shredded Wheat, want Shredded Wheat. If they want Kellogg's, they ask for it.

RE-CROSS-EXAMINATION.

THE WITNESS: I tried to tell you in the beginning that your salesmen should explain the fact that the process is shredded wheat, but that it cannot and should not be called Shredded Wheat. When people ask for Shredded Wheat, you should tell them you do not have the original Shredded Wheat but that this is similar. For instance, if I would go downtown and ask for a dress and find, when I got home, I had a pair of pajamas, it would be the same idea, to me, or if I asked for

Shredded Wheat and found I had gotten some corn flakes. I would be furious. If I asked for Shredded Wheat, meaning one shredded wheat, and a grocer handed me another shredded wheat, I would have the obligation to tell him, "I want the other kind," because that is all I want. I would say, "I want Shredded Wheat." He should then, in my opinion, say: "This is not Shredded Wheat, but it is very similar to Shredded Wheat." If he does not give me oatmeal or corn flakes when I ask for Shredded Wheat, I can conceive the idea that he thinks he is giving me shredded wheat. If I would say, "I do not want that shredded wheat; I want the other kind," there would still be confusion. I have been in Kennedy's store the past few weeks. If a woman came in and asked me for Baker's Cocoa, and I would slip it in a sack and hand it to her; and, after she got home, she found it was Baker's Cocoa when she wanted Hershey's Chocolate, she will not like it. They will come back the next day.

To me, it is the same when I ask for Shredded Wheat. When I go home, I want Shredded Wheat for breakfast. I do not like it if I am going to have Kellogg's. If I said, "I want a package of cocoa," and found, when I got home, that it was chocolate, I could not complain. There is a difference between cocoa and chocolate. There is also a difference between Kellogg's product and the National Shredded Wheat. I think there is as much difference as between cocoa and chocolate.

Some of the Kellogg salesmen do the same thing here in town they do home. They go around on house-to-house canvass, selling a package of Kellogg's and giving a package free. They do not even come to Kennedy's store. If I were Mr. Kennedy, I would throw Kellogg's products out the door.

When I went home one day, mother said, "I wish you would call Mr. Carolus and tell him what happened.

A young man came to the door and wanted me to take a package of something of Kellogg's. He said he would give me a package if I bought one." My mother is certainly very truthful. She said she thought that was terrible, that it spoiled the groceries' trade. My mother did not take the free sample. Her feeling and mine was that it is unfair for the Kellogg Company to be selling stuff from door to door, taking customers away to that extent from the grocers, and trying to get you to buy one package and giving one free. We disapproved of that.

I mean I disapproved of it as a demonstrator or as somebody who is interested in the sale of products. As an ordinary consumer, however, I would be afraid of it, if somebody came to my door with dresses and offered one free if I would buy one. I would be afraid they were shopworn.

It was not my mother's feeling that they were not full-value packages. I did not think it had any bugs in it or anything of that sort. I did not think the Kellogg Company would demonstrate moth-eaten goods to their new customers. My mother thinks it is very unfair to the store. She does not have any professional feeling just because I am temporarily at Kennedy's. My profession is teaching. I just happen to be in this position this year. She is only interested in Kennedy's store because we do a great part of our buying there and we have known them for years and years. So far as worrying about whether Mr. Kennedy will make money or not is concerned, that is not in her mind. In talking to at least six people about the same thing, in St. Joseph, they said it was terrible. If all the packages sold and given away were bought at the stores, out of their regular retail stocks, of the grocers in that neighborhood, I do not know whether that would be unfair to the grocers. They were not advised about it in advance.

Mr. Kennedy did not know anything about it. He said, "What are they doing a thing like that for?"

Mr. Kennedy carries Kellogg's. He has a lighted Kellogg display sign in his window. Ever since I was a little girl, I can remember eating Shredded Wheat. That has all been outraged by the Kellogg Company putting out this Whole Wheat Biscuit. My feeling about Shredded Wheat is certainly outraged by the fact that the Kellogg Company also made a product of shredded wheat. I believe in honest competition.

HENRY F. STEEN.

Deposition taken at Kansas City, Missouri, February 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am vice-president of the United States Air-Ways, carrying mail, express, and passengers by air between Kansas City and Denver. I have occupied that position a little more than two years.

Ever since I left school, I had experience in the food business. When I left school, I went with the National Biscuit Company in Chicago and went to California, then back to Kansas City. In 1926, I think, I left the company and bought an interest in the Piggly-Wiggly Stores here with a man by the name of Byrd. I had been at least twenty-five years with the National Biscuit Company. I left them permanently in 1926, and I have not been associated with them since. This is the first time I have been in here since I left the company. I then bought an interest in the Piggly-Wiggly Stores in Kansas City and became vice-president of that concern. When I went in, we had fifty-six stores; when we sold out to Safeway a few years later, we had two hundred and thirty-one. I had other business connection before I became connected with my present concern.

I recognize Plaintiff's Exhibit 1. I have been familiar with the product known as Shredded Wheat about as long as I can remember. We used Shredded Wheat in our home. Later, we bought a good deal of it and sold a great deal of it, long before it was taken over by the National Biscuit Company, in the Piggly-Wiggly Stores. If the National Biscuit Company took it over in 1929, I had three years' experience buying it, prior to 1929, from the original Shredded Wheat Company at Niagara Falls. Prior to being in the grocery business, I used to use Shredded Wheat, about as long as I can remember. I remember the form of the biscuit during all that time. I cannot remember any difference in it. It seems to me the biscuit has been the same since the first time I saw it. One indelible fact standing out in my mind that I recall is that, when I was a very young boy, I saw them make it in the World's Fair in Chicago. No, I believe they had a plant in the San Francisco Fair in 1914. I guess it was not Chicago. I have a faint recollection of it; but whether it was San Francisco or not I do not know. That was the first time I saw them make it, in a small plant they had set up at the World's Fair at San Francisco. That is the first time I saw it manufactured. Shredded Wheat is the only name I ever knew for it.

I think I know what the general reputation of Shredded Wheat is with the public, from my own experience of it. A few years ago, when I was in the grocery business, there was a little difficulty in getting Shredded Wheat at a certain time. Whether it was lack of production or what, I do not know. This was prior to the National Biscuit Company taking it over. They used to carry a stock in one of the warehouses here. If a car did not get in, there would sometimes be a little lack of delivery.

At one time, we bought some of the Kellogg biscuit and tried to sell it to the customers for Shredded

Wheat, to the consuming public, with no success whatever. They absolutely criticised us for staying with the substitute. We discontinued it, due to the complaints from the consuming public. The public said it wanted the original Shredded Wheat, not something that we wanted to sell them in place of it. They meant they wanted the Shredded Wheat, Niagara Falls Shredded Wheat, the original package that has been on the market as long as they could remember. I would say that it is fair to say, in my opinion, at least, that the term shredded wheat is entirely connected with the Niagara Falls product. I would regard it as a trade name and as the descriptive name of the original Shredded Wheat Biscuit.

I am familiar with Plaintiff's Exhibit 161, the window package. I have seen them. Looking through the window at the contents of the package, I would say it was an imitation of the original Shredded Wheat Biscuit. In my opinion, it is possible for the grocery trade to use that as a substitute for Shredded Wheat, certainly, if you can get away with it.

CROSS-EXAMINATION.

THE WITNESS: Mr. Clarke is a better judge of whether they could get away with it in their sales than I am. The building up of a sound, solid, lasting business on substitution has been done. I do not say it has in Shredded Wheat Biscuit; but there have been other items on the market imitated. We did not have that success. Our own experience was that it could not be done successfully and have satisfied customers. If customers want one particular brand, they might take the other. Such things have been done; but, as my experience has shown, it is not a satisfying package, which might have been due to the fact that Kellogg is substituting it for the old original Shredded Wheat Biscuit.

When we carried Kellogg's shredded wheat, I cannot recall whether I advertised it; but we did in the stores. We operated self-service stores. When you are in the grocery business, you want to sell all the merchandise you possibly can. Usually, with a new product, we would put it on the checking counter where customers check out. A customer would come there, and the clerk would attempt to sell her Kellogg's biscuit. In fact, while we have told them not to substitute, I understand the clerk, when they brought Plaintiff's Exhibit 1 out, would try to take out the package the customer had in the package and substitute Kellogg's package for it. There was a business reason for that. We had a temporary better profit on it. There was a deal on it. Our store managers work on a salary, a thirty per cent. cut in the profits. We got seventy and they got thirty of their own store. We furnished every week a list of long-profit items to the store managers. Naturally, they would go after the items that would give them the greatest profit. I was the first one to buy Kellogg's biscuit over there. The company was a little bit opposed to it; but there was a reason at that time for putting it in. Another chain store in town cut all the profit out of the Niagara Falls package of Shredded Wheat, Plaintiff's Exhibit 1, which at that time was not owned by the National Biscuit Company. We could not make a penny out of it. We used to get twelve cents at that time. I think we paid eleven. They cut it to ten cents a package. We attempted to push the Kellogg product; but we did not continue to do so when we found there was objection to it. So we cut ourselves down to ten cents. We made about eight per cent. on it. It cost eighteen per cent. to run the store. We lost something on it. You are not losing on the actual transaction; but, when you count your overhead, you are losing money. When you are in the grocery business, you are trying to find some way of competing. We attempted

to do it with Kellogg's biscuit. When I say there was a deal on, I mean the manufacturers gave us a special price for a temporary period of time, to introduce it. We never got any deals on Shredded Wheat. I cannot remember any at that time. It was not necessary.

We did, from the National Biscuit Company, go on to other products, any new item. That was customary at that time with any manufacturer. The method was not unique with the Kellogg Company.

When a customer would come to the checking counter with Niagara Falls Shredded Wheat, the clerk would try to exchange the package for Kellogg's package. He would just say, "Here is a package I would like to have you try." I do not remember what else he said. He attempted to substitute Kellogg's package for Plaintiff's Exhibit 1, and he found it was not good business. I had always built up our business on high-quality merchandise without any substitution whatever. We had a splendid reputation here for integrity in a business way, and we did not want any substitution. We were trying to substitute something that was a substitute for the original, and we were afraid there would be a reaction. We thought it was not good merchandising, but it was not unethical, because that is done every day in the grocery business.

Another firm here, Quaker Oats, I believe, had a similar biscuit they called Muffetts. I believe, if Kellogg had used another name than whole wheat, the men could have sold it more conscientiously. If they could have said that here is something known as Muffetts, or something else, not using the term shredded wheat. I believe their success would have been greater, because there are scores of items on the market today which are similar, but which are sold, under different names. Both companies are enjoying a good business. It is not considered an imitation. Muffetts was shredded. They were round, I think. I

would not say that it would be unethical for a clerk to explain what Muffetts were by saying it was a whole wheat, shredded, if that was the fact. It is his business to explain.

It is true that the Kellogg Company has and did have at that time a predominant position in the market on the sale of corn flakes. It is customary to ask what brand you want. If a customer asks for corn flakes, if a clerk is waiting on the trade, he asks, "Which one do you want?" We operated a self-service store. They did not ask for anything.

If a customer came into a service grocery and asked for a package of toasted corn flakes, there being more than one brand handled, if the grocer took his favorite brand and handed it to the customer and the customer took it and walked out, I would not assume she was satisfied until she got home and found out whether it was the kind she was using and whether the quality was satisfactory. If she then kept it and used it, and came back and got more, he could believe she was satisfied, if she did not complain.

Piggly-Wiggly sold the rights to use the name in various parts of the country. You could buy the rights for a state, and all those stores would be considered Piggly-Wiggly Stores. They were all over the United States, but not very much in the east. I believe they predominated the country from Ohio on west. They never invaded the eastern market. They are now opening Piggly-Wiggly stores in Philadelphia, I believe, and in Pittsburgh and other places. I have not been back there recently.

It is true that self-service stores are coming into existence more than the old style of service store and that some service stores are being converted into self-service stores. There are a great many stores going into self-service. It is a growing type of store around the country.

Any new manufacturer of even an old product has a certain amount of resistance to encounter in the demand on any new item, if it is a similar item to what you are already selling and the other item has given perfect satisfaction. There is naturally more sales resistance.

It is true that I would not expect a product like toasted corn flakes to be very long on the market as primary brand, the Kellogg brand, before there would be a secondary brand of corn flakes to compete with it, like Jersey. For instance, for Heinz Ketchup, we would find another competing ketchup on the market made by different manufacturers, and that some grocers would carry the first brand and some would handle the second.

As to Worcestershire sauce, most of those except Lee & Perrin's are sold under different names. It is not the original Lee & Perrin's sauce. I guess practically every brand, generally speaking, has a competitor. It is true that Shredded Wheat was practically a unique article and did not have any competing brands for many years, until the Ross Biscuit came in. Then, later on, came the Kellogg biscuit.

I would not expect the Kellogg Company to meet a great deal of resistance in the trade on the new product. I want to qualify my statement in this way. I did not say anything against the quality of Kellogg's biscuit; but the fact that you were substituting it for a biscuit that has been known for generations as Shredded Wheat Biscuit is where the trade resistance came up. If Kellogg's had used another name--Whole Wheat Biscuit may be the name we have there now; but not at the time I am talking about, when they were selling it as Shredded Wheat. I do not think the name Whole Wheat is the same as Shredded Wheat. What I want to convey to you is the fact that we were substituting biscuit back at that time, which you called

Shredded Wheat Biscuit, for the original Shredded Wheat Biscuit. That is where the objection came from, even from some of our clerks, in addition to the public. In fact, the sales resistance was such that we discontinued it entirely in our stores.

I have too much experience in selling merchandise to say that one cannot create a demand for anything, even though it is an imitation of something else. What I am testifying is that the demand did not exist when I was back in the business, two years before. It has only been two years since I was in the grocery business. In those stores, at that time, there was no large consumer demand for the Kellogg product. We carried it for a while and then discontinued it. We bulletined the Kellogg biscuit to the store manager and gave him his profit on it and tried to sell it. We then decided it was bad business to let him bring it to the attention of the consumer as a whole wheat biscuit, as a substitute for the other.

Physically speaking, I have no doubt the Kellogg Company is able to make a biscuit like the National product. I would not say I think it is any trade secret to manufacture Shredded Wheat.

XQ. 127. My question is this: Suppose that somebody heard that Kellogg was putting out a whole wheat biscuit and never had seen one of them and you had, and this person said, "What kind of biscuit is whole wheat biscuit?" how would you describe it to them? What would you say? Would you simply say that whole wheat biscuit is a whole wheat biscuit?

A. If I were in the grocery business I would say it is an imitation of Shredded Wheat.

THE WITNESS: Just as a man, not a grocer, I would say it was an imitation of Shredded Wheat Biscuit, made at Niagara Falls by the National Biscuit Company. If Kellogg said it is whole wheat biscuit, made out of shreds of whole wheat, just as much

whole wheat shredded as the Niagara Falls product, I would still say it was an imitation. I call the same thing an imitation. I do not use the word imitation as meaning a fake copy of something else. I mean it is an imitation of the original Shredded Wheat Biscuit. That is what I will say; that is what it is. It is nothing else but that.

If I were asked whether Kellogg was manufacturing a shredded whole wheat biscuit, I believe I would say no, that they are just manufacturing an imitation of it. It is nothing else but an imitation of the original Shredded Wheat Biscuit.

The Post Company do not call their Post Toasties corn flakes. They call them Post Toasties. If they have the words corn flakes on their package, I suppose they get away with it. You could probably say they were making toasted corn flakes under another name. The Kellogg Company is not making its shredded wheat biscuit under another name.

It is physically possible for the Kellogg Company to make a biscuit like the one made at Niagara Falls, of different products, anyway. Assuming it is made exactly the same as the other, out of shredded wheat, and the same way, except as to size and color, in the same shape, I believe I would say it was an imitation biscuit. When I say imitation, I mean I think two things can be identical and yet one of them would be an imitation of the other. What I am trying to convey to you is that any item put on the market to be substituted and to use the original name for the package is not fair to the consuming public or to the grocer who is expected to sell it. That is my opinion. It was customary for us to hold meetings once a week, so we could get the reaction of the managers as to what the public thought. When the Kellogg biscuit was put out, we would get complaints from those men. We would ask the question again next week. After a

while, we began to think there was a certain objection to it, and we discontinued the biscuit entirely, went back to Shredded Wheat on an 8 per cent. profit. The matter finally adjusted itself.

After we discontinued the Kellogg biscuit, our competitor raised his price. We discontinued the other biscuit before the competitor changed his price. We just went on, buying them when we saw that they were selling them at ten cents, and we saw they got seven. We attempted to handle this Kellogg product as a competitive product long before the price was put on, not as against the customer but for his preservation. We wanted to make a little profit on our sales, which we were not doing at the time the National Biscuit Company took it over. When the Shredded Wheat Company were advertising the shredded wheat as a loss leader, we were advertising Kellogg against it. That was one reason. There was another. We were handling the Kellogg products. If a man is a good salesman, he will come around and attempt to sell you something, whether you can dispose of it or not. If you were selling the National Biscuit Company products here today and somebody else wanted to get out a new biscuit that might be similar in some respects, although an entirely different name, you naturally would add another item. That is customary in all stores. Any grocer will do that.

If a manufacturer established the name toasted corn flakes, so when people asked for them they meant his product, and other manufacturers then made them and called them toasted corn flakes, I would say they capitalized on the original product. I cannot say that it was an imitation corn flake. I say that they capitalized on another man's product. They would be, maybe, making toasted corn flakes. There are various kinds of products. The first man making corn flakes is the one who sells it originally. If someone else comes

along and uses that name, he is capitalizing on the other man's past efforts. I would have to see the product to know whether he was making genuine toasted corn flakes. They might possibly be identical in manufacture. That is an imitation of the original. In reality it is true that the Kellogg Company is making an imitation of the original shredded wheat. It is about the same product. It is an imitation, even though it is the same thing, and capitalizing on the other man's name. The first man who put out corn flakes might use a name. If another man came in and used the name, he is capitalizing on the other man's past efforts in building up that business, and he got away with it. I suppose nobody ever interfered with him.

If somebody asked me to describe the National Biscuit Company Shredded Wheat, I would state that it was a biscuit that was made of shredded wheat, properly manufactured, through toasting or baking, or whatever their process is, put into the form of a biscuit, and sold. In my definition, I have said it was made of wheat shredded, which is shredded wheat, that it is made out of whole wheat, and it is made into a pillow-shaped biscuit. If you say, boiling down my description, that it is a shredded whole wheat biscuit, I would say that that is an exact description of this National Biscuit Shredded Wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: The gist of the discussion is that I have known the original Shredded Wheat, the old name, as Shredded Wheat, for many, many years; that it has acquired a reputation with the public, and that the expression Shredded Wheat is attached to the National product in the minds of the public. That is why I say that the Kellogg product is an imitation of it.

Examining Plaintiff's Exhibit 161, I see the cellophane window in front, showing the biscuit. Those biscuit look like Shredded Wheat Biscuit. On the reverse side, I see the picture of two biscuit in a dish. I have seen, quite a little time back, advertising of a carton of the Shredded Wheat Company, which had two biscuit in a dish. Sometimes they also showed strawberries in the dish, like Defendant's Exhibit 6. That was used for many years.

I saw the ends of the Kellogg biscuit carton a little while ago, which says shredded wheat in one way or another, on both ends. Checking all those features of the package to which you have directed my attention, I think that package is designed and can be sold as imitation shredded wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not think it could be sold as genuine shredded wheat, because it is not genuine shredded wheat biscuit. I do not think it could be sold as shredded wheat made out of wood or paper or anything of that sort.

RE-DIRECT EXAMINATION.

THE WITNESS: When Mr. Clarke asks me if it is not genuine shredded wheat, he is using shredded wheat as a common noun. When I use the term shredded wheat, I use it as a trade name. That is the difference between me and Mr. Clarke in the debate we just had. So it is not like two kinds of beans or tomato catsup.

FRED A. TYLER.

Deposition taken at Kansas City, Missouri, February 16, 1933.

Direct Examination.

The Witness: I am a retail grocer, operating my own store in Kansas City. I have been in the grocery business twelve years the first day of this coming April. That is my entire experience with the grocery business. This is a service store. I receive orders on the telephone, which is 75 per cent. of our business.

I recognize the package, Plaintiff's Exhibit 1, as Shredded Wheat. I have been familiar with it since I have been in business and as a consumer before that. We have used it in the home and carry it in our store. Our customers ask for Shredded Wheat when they want that product, and we supply them Shredded Wheat, meaning the product in Plaintiff's Exhibit 1.

The expression shredded wheat has a definite meaning in the minds of my customers. They ask for Shredded Wheat. What I mean by that is that we used to carry Kellogg's Whole Wheat Biscuit. We do not carry it any more, because, when we were out of Shredded Wheat Biscuit, we would substitute it, and we have had some returns of Kellogg's shredded wheat biscuits. When I sent Kellogg's biscuit in answer to a call for Shredded Wheat, it was not always accepted, but it was sometimes and no complaints made about it. I did find it possible to send the Kellogg product, sometimes, in answer to a call for Shredded Wheat.

Cross-Examination.

The Witness: I found that substitution would not work in all cases. When a customer asked for Shredded Wheat, I could not tell from the tone of her voice whether she was using the words with capital

letters or small. If she asked for shredded wheat in a note, spelled with small letters, we have been told to send National Shredded Wheat and not Kellogg's shredded wheat. I do not mean to say at all that I am satisfied that nobody in the United States really wants the Kellogg kind of shredded wheat. I do not know whether they do or not.

It would be impossible for me to say what percentage of customers who asked for shredded wheat and received the Kellogg product returned it to us. I recall an incident where we did have to pick up Kellogg's and send the original Shredded Wheat. There have been some. I do not remember how many. I suppose, if people order Shredded Wheat, that is what they want. When I sent Kellogg's product to those ordering Shredded Wheat, some have sent it back and others have kept it. I do not have any Kellogg's shredded wheat biscuit in stock now. I leave the question of stocking products up to my son, principally. I am outside most of the time and he is inside. I instruct him what to do, of course. We do not intend to carry any line of merchandise that does not move. If I find any non-movers in the store, I put a sale on them, put them down, and sell them regardless. I do not stock Kellogg's biscuit any more. I know we have not had it in the store.

I am president of the Retail Merchants' Association of the State of Missouri and the Retail Grocers' Association of Kansas City, Missouri. I go out and organize associations over the country in different towns. It keeps me pretty busy. All those associations are of large store owners of independently owned stores, opposed to the chain type of doing business; or not opposed. We just want them to be taxed along with us. That is what we are trying to do, to put taxes on the chain organizations. I have just one service store I own, and my son operates it. It re-

ceives a good many telephone orders. We do not exactly have self-service features. We do have displays where the customers can pick for themselves. We have merchandise there, and they come in and pick it up if they want to. We do not have the type of counters they used to have.

I do not recall whether or not we ever tried to create any demand for the Kellogg biscuit by demonstrating, advertising or sampling. It has been some time since we put in Kellogg's. I do not recall just what method we did use. I have not worked in the store very much lately; but every Saturday I was there, and we did a big telephone message business. I got a return myself. That is why I said we had some kick backs on Kellogg's Whole Wheat Biscuit, where they wanted Shredded Wheat. I still take some of those telephone calls, but not so much.

If, every time shredded wheat was ordered, I sent out National Shredded Wheat and about half the customers sent it back and asked for Kellogg's, I guess it would educate me to ask which one they wanted, when they asked for Shredded Wheat; but we have never gone into that. The customers have not gone into it so thoroughly, except on certain occasions. If you were my customer and told me once you did not want Kellogg's but wanted Shredded Wheat, I would recall that incident and would not send Kellogg's to you. Vice versa, I would understand what you meant and would send you Kellogg's even if you said shredded wheat, if that was what you wanted. If you wanted Kellogg's and I had it, I would send it. You would get Shredded Wheat Biscuits if you wanted them and I had them. People get acquainted with an article like Kellogg's or Shredded Wheat after it is on the market a short time, and they tell you what they want. They say "Send me a package of Shredded Wheat." After you have had it in your store, you

know better than to send something else. You would know it would be a mistake. If somebody after that, in ordering the Kellogg product said, "I want shredded wheat," I would know they meant the Kellogg product and I would send it to them. Judging by my experience with substitution, it is not a very successful practice. It is a good way to get myself into arguments and quarrels with my customers if I do not give them what they want. In my own case, I found it was not good practice to use with my customers.

RE-DIRECT EXAMINATION.

THE WITNESS: The condition assumed by Mr. Clarke has never arisen in my store. My customers have not divided themselves, with some of them wanting Shredded Wheat and some of them wanting Kellogg's Whole Wheat Biscuit. Shredded Wheat is the order, from the way I get it. My customers know and ask for Shredded Wheat. When they ask for it, I know what they mean.

RE-CROSS-EXAMINATION.

THE WITNESS: I belong to the Associated Grocers, and they do their own advertising. I do not recall whether they ever advertised Kellogg's Whole Wheat Biscuit or not. It has been a long while since we stopped Kellogg's. I do not recall ever having seen any dealer's advertisement of Kellogg's Whole Wheat Biscuit. If some dealers did advertise it to their trade, that would be, of course, one way of creating demand for that product. Sampling from house to house is a way to create a demand for a product.

If the Kellogg Company advertises to consumers that they have Whole Wheat Biscuit on the market and think it is better than the other biscuit, that would help create demand, advertising by manufacturers,

and by dealers, and sampling from house to house and store demonstrations. That is the way they usually try to create a demand. I never approved of them. I suppose they are legitimate; but I never approved of house-to-house canvassing. I did not think there was anything unlawful about it, but, as a grocer, I would rather not have it done. It takes away the profit you are entitled to. If you take a package of biscuits or any other product to the housewife and give it to her, it takes the profit the merchants are entitled to on that article.

I have had manufacturers buy the sample packages they gave away from me at the regular price. I had them make those propositions; but I always got hooked every time I did it. If both the sold package and the free package were bought from me at the regular retail price, I guess I would feel a little differently about it; but I do not believe in giving free goods to a customer. I fight it all the time. I fight premiums and everything of that kind. I do not believe in that method of merchandising. We have to create a demand in some other way, I believe, than by going out and giving them to the consumer. I do not fight the advertising of that, just the sampling.

I appeared here today to testify at the suggestion of Mr. Neighbor, the sales agent here. He did not ask whether I was handling Kellogg's Biscuit. He was in my store, and he just asked me if I would come down and testify. I do not think he knew I had discontinued handling Kellogg's biscuit. He could see whether I had it on my shelf, I guess. I do not handle the entire National Biscuit cracker line, only a very small proportion, because the A. G. organization advertises mostly Loose Wiles. I am mostly a Loose Wiles dealer.

LESTER S. GUTHRIE.

Deposition taken at Kansas City, Missouri, February 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the farm machinery business at Wichita, Kansas. I am not connected with the National Biscuit Company. I am familiar with the product known as Shredded Wheat and have known it about twenty-five years. I recognize the package, Plaintiff's Exhibit 1, as Shredded Wheat. It is a cereal that my mother always had for me. I never did like bran, and she always gave me that with cream and sugar. I liked it better than I did bran or oatmeal. I have eaten it at home a great many times. Mother usually brought it on the table in the box, opened the box, and take it out. Then she puts it back in the bread box.

I have had occasion to purchase Shredded Wheat. I ask for Shredded Wheat, and I have in mind that I would like to get the Niagara Falls brand of Shredded Wheat; but I often get the Kellogg brand of Whole Wheat, lately.

I remember especially September 7th, in Wichita, at P. O. Weltner's, 3060 East Douglas Street, a grocery store. I bought some other groceries and asked for some Shredded Wheat Biscuit. He gave me a box of Kellogg's Whole Wheat Biscuit. I told him it was not what I wanted. He said, "That is just the same thing. One time they come marked one way, and one time they come marked another." He said it was all one and the same. I told him I did not think they were; but I would take a box home and try them, which I did. Plaintiff's Exhibit 191 is that package. I ate the biscuit. It did not seem to me that it was as firm as Shredded Wheat. It was more porous and open and smaller biscuit.

This first purchase was not made at the request of anybody. Afterwards, I found out, through a friend of mine who is manager of the National Biscuit there. I kidded him why he did not go out and sell old man Weltner some Shredded Wheat, so he would not be fooling the public. I just mentioned this fact to him: that I thought they were selling somebody else's product under the National trade name, and I thought they ought to get down there. They were selling something under the name Shredded Wheat that was not Shredded Wheat. I regard the name Shredded Wheat as a trade name, of course.

I went down there again last night, February fifteenth. I bought a ten-pound sack of sugar, and I told him I wanted a box of Shredded Wheat. He handed me a box of Kellogg's. I called his attention to it. He said, "I have the Niagara brand over here, if you would rather have it, but it costs a cent more a package. It has fewer biscuits in the package. It is all the same thing." I took a box of Shredded Wheat last night; but he offered me the Whole Wheat Biscuits with the conversation I have just related.

I sometimes eat Shredded Wheat in restaurants. I did last night, afterwards. I went down to the Alice Hotel, the Pup Lunch, which is a cafe at the leading hotel there; and I looked down the menu for Shredded Wheat. It was on there. I ordered Shredded Wheat, and they handed me Whole Wheat Biscuits, the Kellogg product in the box right there. So I told the girl to give me another one. She started to tear one of them open, and I told her to give me another one and not to open it. I did not eat either one. I just told her to put them in a sack, that I would take them home with me. She said that is all they had ever sold for Shredded Wheat. I took the menu from that restaurant, and that had Shredded Wheat listed on it. It was there last night. Plaintiff's Exhibit 193 is the menu. I did not eat

Shredded Wheat there. I had already eaten, so I just took doughnuts and coffee. My wife took a regular supper. Plaintiff's Exhibit 192 is the carton the girl did not start to cut open. That was the only time I had that experience in a restaurant. I do not eat in a restaurant very often.

The newspaper I have produced, called the *Wichita Independent,* is delivered to our front porch every week. It is a regular weekly paper, regularly printed in Wichita and distributed to subscribers.

MR. VILAS: I offer particularly the eighth page, carrying the advertisement of T. A. H. Grocers, with particular attention to the advertisement of Shredded Wheat, Kellogg's, twelve biscuit in each package, nine cents.

(The page of the *Wichita Independent* referred to was received in evidence and was marked "Plaintiff's Exhibit 194.")

CROSS-EXAMINATION.

THE WITNESS: I noticed the ad in the *Wichita Independent* after I had bought the package of Kellogg's. I bought it on December 7th the first time. The paper came out after that. My attention as a consumer was attracted to the ad. I noticed it, because I had had that set-to with Mr. Weltner. I felt that he was trying to put something over on me, trying to tell me it was all the same, and I did not think it was. What riled me was that he was trying to give me something else under somebody else's trade name. He did not tell me he was trying to gyp me; but, generally, it was the same thing. He did not use very good judgment, for a business man, because he got kind of hot about it. I did not think that was right, because I tried to convince him he was lying to me. He did not like me to imply he was lying. I do not know what shredded wheat is made of. It

might be made out of glue; but I know I like it. I do not like your Kellogg's Whole Wheat Biscuit as well as I do the other. The Kellogg Company says on there that is made of Whole Wheat Biscuit. He turned it over on the end and showed me where it said "a shredded wheat product." Shredded Wheat is Shredded Wheat. It does not make any difference what it says on the box. When he said it was shredded wheat, I do not think he was sincere in that statement. I said, "Do you know what wheat would look like when it was run through a shredder?" And he did not even know what a shredder was. I do. I sell shredders. I sell farm machinery, to shred wheat, corn, and everything else, as far as that is concerned. He did not know what he was talking about. He said, "I do not even know whether there is any wheat in them or not." He said, "They might not have any wheat in them."

He was trying to sell me something I did not want, because I ordered one thing and he was trying to give me something else. It is not possible that he said shredded wheat in one sense and I meant shredded wheat in another sense. He did not have what I wanted in his store. I wanted Shredded Wheat as in Plaintiff's Exhibit 1. I did not say that to him. I told him I wanted a package of Shredded Wheat. I wanted it that it said Shredded Wheat on the side of the box. He got around to the end of it to try to show me that it did.

I did not understand that he was trying to say it was the same kind of breakfast food as Shredded Wheat Biscuit. He was trying to sell me something I did not want. That was all that conversation. He tried to sell me shredded wheat, but under another name; and I took the strange stuff back with me and said that, if I liked it, I would buy it. I fed it to my dogs. I think it was good for them. I tried some of it myself. I did not, for a fact, like it as much as Shredded Wheat. I have eaten Shredded Wheat practically all my life,

always the Niagara Falls brand. I recognized there was a difference in size between that and the Niagara Falls biscuit. I noticed there was a difference in the looks of it. After I tried it, the dogs were standing there begging, and I said "Come on" and gave it to them. My dogs have begged for National shredded wheat. They beg for everything. There was nothing unique about their conduct. I have some nice dogs.

It is fair to say that, when I asked for shredded wheat, if this man had tried to hand me some toasted corn flakes or oatmeal, I would have said he was crazy, which was the same thing I told him when he handed me this whole wheat biscuit. I told him I wanted Shredded Wheat Biscuit and he was not going to put off some Kellogg's Whole Wheat Biscuit on me. He began to heat up, and he got sort of hostile. I told him I would take them home and try them. I traded there at that store right along. I am not still trading there. I had no break in my friendship with the man over the Kellogg product. Last night, he had some Shredded Wheat and he tried to put off Kellogg's Whole Wheat Biscuit on me under the Shredded Wheat trade name. That is where they are doing wrong. Why do they not advertise Whole Wheat Biscuit and get a name for themselves?

Mr. Ash Paine is the name of my friend in the Shredded Wheat Biscuit Company organization. I went to him and spoke to him about it. I suppose he had called on them before. They worked the town pretty hard. My wife had ordered some from that store before that, and we had bought some Shredded Wheat from Ratcliffe's Grocery. We got some Shredded Wheat last night. His wife tried to sell me Kellogg's. She told me it was the same number of biscuit in the box and it was all the same thing. I took a box of Shredded Wheat and a ten-pound sack of sugar and went home.

RE-DIRECT EXAMINATION.

THE WITNESS: A corn shredder tears corn up and separates the kernels from the cobs, and most generally will blow it off into a loft or a pile. It tears it apart. That is what I understand by shredding. That is what a corn shredder does to corn. I imagine a wheat shredder or oat shredder would do that same thing to wheat or oats.

RE-CROSS-EXAMINATION.

THE WITNESS: If it did not, I would not think it was a shredder. I have not been to Niagara Falls. If I went there and saw the machines that make Shredded Wheat and they were referred to as wheat-shredding machines, I would not think they were shredding machines if they would not shred. They would not be shredding at all. They would be shredding a kernel after it has been—I understand what you mean: something that tears it up as a shredder and cuts it into shreds. By shreds, I assume is meant strings. When you run corn through a shredder, the fodder comes out shredded, and the corn comes out shelled. Speaking of shredded wheat, I think the shredding has reference to shreds. It is all in strings or shreds, as mentioned on Plaintiff's Exhibit 10, "It's All In The Shreds." In my estimation it looks as if they ought to be called strings instead of shreds. It looks like it, if they are going to mix it up with farm machinery. Shredded fodder is where they got the idea. Evidently, the first they made must have run out in a place, and it came out in shreds. The bottom of my pants legs is going to be shredded pretty soon, if things do not change.

My friend Paine was playing bridge at my house. When I spoke to him, he said, "I will have to see about that." That was the comment he made when I razzed him about it. I have known him all my life, practically.

He talks machinery business over with me, and I talk biscuit business over with him.

I left Wichita last night and got here this morning on the sleeper. I think they pull out about one o'clock. I came over here to see Mr. Chadwick of the J. I. Case Machine Company. The National Biscuit Company have not said anything about paying my expenses over here. I imagine they will, though. I would not refuse it if they offered it.

JES C. BRANSON.

Deposition taken at Kansas City, Missouri, February 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a salesman in the advertising line, for no one at the present time. I am not a National Biscuit Company man or connected with them. I have a friend with them. I am familiar with a product known as Shredded Wheat and have been for several years. I have known Mr. Watrous, a Shredded Wheat representative, for about ten years. We lived across the street from each other. He is now cereal representative of the National Biscuit Company.

I have been using Shredded Wheat all that time. We used it in my home years before we knew Mr. Watrous. I knew it by the name of Shredded Wheat. We always bought it as Shredded Wheat. The advertising of Shredded Wheat caused us to use it. I think the first I ever used Shredded Wheat was when I was in the grocery business for a number of years in Iowa. I think the first Shredded Wheat I ever used was off my own shelves. I carried it in the store there, and I used it for years, above every other cereal except oats. I had customers come in my store and ask for it. They called it Shredded Wheat. That is the only name I ever knew it by. I never knew anything else by that name.

At the request of Mr. Watrous, some time this month, I went into a store on Troost Avenue, in the Troost Arms Building, a hotel building, in Kansas City, alone. I purchased several articles. I told him I wanted some eggs, Shredded Wheat, and some oranges. He was waiting on three boys. I waited until he had finished with them. I went over and got six oranges and put them on the counter. He asked me what else I wanted. I told him I wanted a package of Shredded Wheat and a half-dozen eggs. He reached over and got the eggs and put them in a bag. He then walked over and brought me a package of Kellogg's and set it down. I told him I wanted a ticket for those articles. As he was going to make out one, I said, "That is not Shredded Wheat." He said, "That is shredded wheat; it is five cents cheaper." I said, "I never saw Shredded Wheat under Kellogg's name." He repeated the statement and said, "Yes, that is shredded wheat, and it costs you five cents less." I picked up the ticket and package and walked out. I identify Plaintiff's Exhibit 195 as the package I bought. Plaintiff's Exhibit 196 is the cash slip on which I paid the bill. He charged me ten cents for the Shredded Wheat. I told him I was getting it for another party and to make me out a ticket. I do not know what I have been paying for Shredded Wheat. My wife does all the purchasing. She usually has Shredded Wheat at home all the time. We occasionally have Triscuit. I do not even know what she pays for oatmeal any more.

My wife serves Shredded Wheat with cream, sometimes with bananas or sliced oranges. She does not bring it to us. The package is always up in the cupboard. If we do not have oatmeal and want Shredded Wheat, we go and get it. I help myself. I always have the habit of serving Shredded Wheat. I just take it and roll it up, and sometimes we heat it. My daughter will eat it if we heat it.

CROSS-EXAMINATION.

THE WITNESS: Mr. Watrous asked me to go to the Troost store. He did not ask me to go to any other. I knew right away when it was put down in front of me, it was not the Niagara Falls Shredded Wheat. I understood the grocer to mean that it cost five cents less than the regular Shredded Wheat Biscuit. I never had anything happen to me anywhere else like this. Mr. Watrous did not tell me to go to any other store but just there and make the purchase.

JAMES F. BELL.

Deposition taken at New York, N. Y., March 24, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am president of General Mills, Inc., milling. I have been in that business about thirty years. General Mills manufacture a general line of cereal products. In the course of my business experience I have had occasion to be connected with the production and sale of cereal products, included among which are some sold under trade name, such as Wheaties, Bisquick, and Gold Medal Flour. Bisquick is one of the proprietary items of General Mills. Gold Medal Flour is a well-known name of one of the products of my company.

I recognize Plaintiff's Exhibit 1 as a product of the National Biscuit Company. I know it by the trade name of Shredded Wheat. I recognize the biscuit taken from the box. My earliest recollection of that biscuit, that I can fix, is 1897. I happened to be in Lawrenceville at school at that time, and it was one of the products served to us for breakfast. It was at that time of the same general appearance it is now.

It was then called by the trade name Shredded Wheat. I have been familiar with that article ever since that time. It has been known by the name of Shredded Wheat. I am not much of a breakfast eater now; but it is used extensively in my home, today, and always has been.

From my experience with the cereal business and my knowledge of the history of this product, I regard the expression Shredded Wheat as a trade-name. It was introduced under the name of Shredded Wheat, and it became known in the minds of the public as a specific product of a specific company. In my opinion, this name is known generally very well to the public as the name of a particular product.

I think the form and appearance of the product, which I have stated remained the same to my knowledge since 1897, have decidedly something to do with the association in the public mind of the name and the product.

I saw the product known as Kellogg's Whole Wheat Biscuit a few weeks ago for the first time. I saw it in a package something like Plaintiff's Exhibit 161. My recollection is not definite as to whether it had a window in it. Looking at the reverse side of the exhibit, that is more like what I saw.

I have seen Shredded Wheat sold in a package like Plaintiff's Exhibit 10, with the picture of a dish on the end of it. I recall that dish. I could not say how long I remember the use of that dish by the Shredded Wheat Company. It was for a considerable period of time, some years.

If I were to see a package like Plaintiff's Exhibit 147, with nothing visible on it except the dish, assuming the product name was covered up, that would suggest to me the Shredded Wheat of the National Biscuit Company or its predecessor company. If I were to

see it with the window package, the window displaying the goods inside, I would make the same answer.

It is the practice among manufacturers of cereals to employ trade names for their products. In my opinion, from my knowledge of the cereal business, I would say that this expression Shredded Wheat is a true trade name. (Question and answer were objected to as incompetent. To be continued against all similar questions.)

Assuming I had knowledge that it was a wheat product, if a Shredded Wheat Biscuit were put under my eyes, without any knowledge beforehand, I would say it was a drawn product of wheat, or a vermicelli-formed product of wheat; and that, as a descriptive name, Shredded Wheat was a poor choice, I would say. If the original people wanted to use the words Shredded Wheat as a descriptive term, I think they picked a poor descriptive term. I would never describe it in that way. If it were put in front of me without my previous knowledge of it, I would never say it was a shredded product.

Referring again to Plaintiff's Exhibit 147, examining the front end of the package and seeing the words A shredded wheat product, I would make the same comment I made before: that I would say that Shredded Wheat meant a product of the National Biscuit Company or its predecessor company. I would not call it descriptive, any more than I would in the sense that I would not describe the product as a Shredded Wheat product. I have never seen this product in any other form than this pillow-shaped biscuit.

It has been suggested to me to make it in another form. I was approached, some years ago, to engage in a wheat product of this character; but the form in which it was shown was round. It was a man from Chicago. His name might have been Williams. He

came to us some years ago and endeavored to interest us in the manufacture of the product. He showed us this globular or semi-globular formed biscuit.

I know no other biscuit made of similar materials on the market today. Triscuit, as I recall it, is a flat, cracker-like product. It is made, however, by the National Biscuit Company, of the same material of which Shredded Wheat is made. Triscuit is a trade name and a fanciful name.

CROSS-EXAMINATION.

THE WITNESS: I do not think corn flakes has been held to be a trade name. Corn flakes or wheat flakes or anything of that sort is the result of a flaking process. As far as I know, it can only be made in that way, in that form, mechanically. For that reason, I would not call corn flakes a trade name, in the sense in which I have called shredded wheat a trade name.

If these machines were known as shredding machines, that would make no difference to me. My idea of a shredding machine is one that tears things up, rips them to pieces. My idea of a shred physically is small fragments of original material torn apart.

Noting the phrase on the bottom of Defendant's Exhibit 81, "It's All In The Shreds," that would not mean anything to me personally. It would not mean anything on that box. What is in the shreds? As you show it to me, that phrase conveys nothing to me. The words Shredded Wheat on that package identify it as the proprietary product. I take the word shredded to mean things torn into fine pieces. As a noun, the word shred would mean one of the particles that resulted from shredding. It would not be a flake. It is the form into which a thing is ripped into shreds.

I have heard of shredded codfish. The word shredded there means a thing torn to pieces. I would

think it was codfish torn into shreds. I cannot imagine wheat in shreds. You would take the wheat and put it through a machine with a lot of knives that tear and rip it, and the wheat would be shredded, yes. I think, if the term Shredded Wheat was meant to describe the product of wheat, it was but a very poor choice. If it was put out as a trade name and the public accepted it as such, it being a wheat product, what difference would the form particularly make? I have a good deal of respect for the opinions of courts.

If I were told the Shredded Wheat Company tried to register this product as Shredded Wheat under a trade-mark, under the Act of 1905, which is the act under which a fanciful or non-descriptive trade-mark is registered; that the Patent Department refused to so register it; and that they went all the way to the Court of Appeals of the District of Columbia and failed to secure such registration, that would not affect my opinion. I would not want to answer a question like that unless I had read all that testimony; but I do not think it would be persuasive. I would not call vermicelli or macaroni or spaghetti shreds. I never heard of shredded cabbage. I would not call sauerkraut in shredded form a shredded product; I would call it sliced. Seeing a piece of cabbage, not knowing whether it had been sliced or squeezed through a hole, the word shredded might not be wildly mis-descriptive of that product; but I would say it was a sliver of lettuce or slice of lettuce or slice of cabbage. You see, I am familiar with the making of sauerkraut.

I am not connected with any other organization besides General Mills. That is a substantial business. I have no connection with the Red Owl organization at all. I am a stockholder in the Red Owl, but I have no connection with it. I am neither an officer nor a director nor anything else. I am a stockholder in it. It is a chain organization. I am a stockholder in

quite a number of chain organizations. I own quite a number of shares in the Red Owl. I think maybe you are getting me mixed with my son, who bears the same name. I believe he is secretary and treasurer of the Red Owl. I think he is. I know he was an officer. Whether he has been changed into some other position or what the exact situation is, I do not know. He very seldom discusses that subject with me.

The Red Owl chain stores are in the middle northwest section of the country. I do not know that they are quite good customers of the Kellogg Company. I do not know anything about their policies.

I would not know whether they stock a product before there is a demand for it. I suppose their object is to perform services to their customers and give them what they call for. That is what we all have to do. I did not know that that chain are very large users of Kellogg's Whole Wheat Biscuit. I would not have the slightest feeling in the matter if you tell it to me. I have no objection if any of your dividends come in part from earnings on Kellogg's Whole Wheat Biscuit. It is not for me to question that. That is their business, not mine.

Noting again the name Whole Wheat Biscuit, as it is placed on Kellogg's package, since you say it is made out of whole wheat, I would not say that that was a trade name. I have seen the Kellogg biscuit. I would say it was an imitation of Shredded Wheat. Since my testimony stated that I thought Shredded Wheat was a product of the National Biscuit Company or its predecessor company, I could not, unless you told me who made the product, say it was not an imitation. My definition of shredded wheat is a biscuit of that kind made by the National Biscuit Company or the old company. I have already testified what I consider in respect to shredded wheat. I would say shredded wheat is a pillow-shaped vermicelli-

formed wheat product. I would not say it was a shredded whole wheat biscuit. I would say that, if it was a shredded wheat biscuit, it would either be made by the National Biscuit Company or its predecessor company, or it would be an imitation. If it were genuine whole wheat biscuit put through a shredding machine, I would not say it was a shredded wheat biscuit. Shredded wheat, as I have already testified, is a product of the National Biscuit Company or its predecessors. I identified that in three ways: as a name, a product, and a shape. Apparently, they have erected in the minds of the public this product in the most desirable ways of coverage that I can conceive of, being in the cereal business; because they have a three-way coverage, as far as the public mind is concerned: name, product and form. No one else has any right, in my opinion, to use either the name or the shape. I think those rights would be exclusive. They have promoted all those three phases over a long period of time; and they have so identified them in the public mind that I think it would not be fair if they did not have proper protection in all three of them. By that I mean the complete exclusion of anyone else, in the name, shape, or form of the biscuit. That would not be a complete monopoly, in my opinion. As long as the patents have run out, if you made other products of wheat, assuming the right existed in the expiration of the patents to use this vermicelli form of product, it could be put into other shapes.

I did not know the shape itself was the subject of a design patent. I am not familiar with the patents on it at all. I am really just basing my testimony on my opinions at the present time. I do not know anything about the history of the business. Of course, I am basing my testimony as well on my experience in the business.

I do not know that the Shredded Wheat product was the subject of litigation with the Ross Biscuit Company, and that the courts held the Ross Company had the right to make the identical biscuit in that identical form. I did not know that the courts had ruled on the trade name Shredded Wheat. I only know it from the trade standpoint. The trade know that shaped biscuit.

If no one else used the words Whole Wheat or Whole Wheat Biscuit for such a period of years that a customer saying, "I want Whole Wheat Biscuit," would immediately mean Kellogg's Whole Wheat Biscuit to the public mind, I would call that the trade name of it if they had come out and firmly fixed it into the minds of a public over a period of time. In that event, one would think they were entitled to it. Our experience has been, however, that they will not, because it is Whole Wheat, and, therefore, thoroughly descriptive. Our own experiences have been, as you might say, along another line. We thought we had certain things covered and they were not covered. Here is a product of which all three features have been covered from a very good standpoint, as far as the trade is concerned. My mind is definitely fixed that the National Biscuit Company would have the exclusive right to the name and the form of its biscuit. So far as making Whole Wheat Biscuits is concerned, of course they would not have it or Whole Wheat products covered. That product, however, I know as Shredded Wheat Biscuit, I assume no one has any right to make except the National Biscuit Company.

As I said before, the flake is the natural result of a flaking process; but I do not think that Shredded Wheat, in the form of the National Biscuit Company product, would be the natural result of a shredding process. I think you could use shredding machines, and, whatever those machines produced, you would

call them vermicelli or tubular, or string-like, spun or drawn results. It is rather a drawn or spun product. I might call them filaments, but I would not call them shreds. I would be very much surprised if, through all the early patents on those products, they were called filaments or shreds. If, in some of the patents and trade-marks, the product of those machines was referred to as shredded wheat, I would be surprised that they called it a shred. I would not call it a shred. It would not mean that to me.

Shreds, as described there, would not represent such a product as the National Biscuit Company product. I would call the Kellogg product an imitation of Shredded Wheat. I would not say that, in the generic sense, it was shredded. When I say imitation, I mean something that looks like something else, but is not really the same thing. I think it is physically an impossibility for the Kellogg Company to reproduce the thing that the National Biscuit Company are making, leaving legal and trade-mark considerations out of the question. As a physical fact, they have made it, and it is an imitation of the original product. This Kellogg product, as it stands, is an imitation of Shredded Wheat. It looks exactly the same as the National Biscuit product. You tell me it is made from wheat, and I assume all the wheat is in it. It is a vermicelli-formed product. I would describe the other product as a vermicelli-formed product. I will assume that Kellogg can turn out a product that looks exactly like the product turned out by the National Biscuit Company. Unless you put them in front of me, alongside each other, I could not tell which was the real one and which the imitation. Unless you told me both were made by the National Biscuit Company, I could not tell you which was Shredded Wheat and which was the imitation.

If you made up a papier-mache car that looked like a Cadillac, I would not call it an imitation Cadillac. If

it was a copy, I would say it was a papier-mache replica of an automobile. It is not an automobile. It does not operate. I think you would have to use the word imitation in a wholly different sense here. I might say that you could make an automobile which looked like a Cadillac and was made to deceive the eye of the observer into thinking it actually was a Cadillac. If you made a papier-mache replica of a Cadillac, he would not say it was an automobile.

I would say that the Kellogg Company is a thoroughly responsible concern. I never examined into its affairs; but I think we can accept it, in the general sense, as a large and responsible company. Referring to Kellogg's Shredded Whole Wheat Biscuit, Plaintiff's Exhibit 165, if Kellogg put a product on the market represented in that way, the matter of whether it was misrepresenting that product, physically, would be for the courts to decide; but, if they put out a shredded whole wheat, even though they made it to resemble shredded biscuit, I would say it was another product. I would say that this term, Shredded Whole Wheat is, in my opinion, deceptive. It would be deceptive; and they would be practicing a deception on the public by telling them they were giving them Shredded Wheat Biscuit when they were not. It is quite a matter for them if they want to make it read Kellogg's vermicelli whole wheat. It is a drawn product or spun product of wheat. They could call it anything they wanted to except shredded. I would think that shredded, originally, had the sense of something being torn, rather than squeezed into a strip. Even if the trade and the public by universal usage had decided it was shredded, what they do decide would not change the psychology of the people or the acceptance of the public with respect to it.

I have not seen Rippled Wheat. That is a new one. Looking at Defendant's Exhibit 88, that is quite differ-

ent. It has not as much vermicelli form to it as the other. It looks more like Muffetts, a product made in a ribbon and wound around. They tried to sell that to us. The fine spaghetti of the market known as vermicelli is a very fine, thread-like thing that you can spin, undoubtedly. It is just like a string or thread. It is done with wheat. Vermicelli is formed from wheat. I have not heard the term vermicelli-form used in connection with wheat processes. I have only used it in my mind for some decriptive term. Let us say a wire or a thread. A thread we conceive of as being actually spun and a wire is drawn.

If it is a fact that, all through the patents for making Shredded Wheat Biscuit, those machines are known as shredding machines, that would not have any meaning to me. It would not affect the term. I regard that seriously as a misconception of those machines. What does a jig mean in machinery? It has now a very definite meaning to me; but, if I were without any knowledge of it and it were put before me, I would not call it a jig; I would say it was a guide. Shredding machines, as I have seen shredding machines, have been a series of knives that tore the product up. I have never seen Shredded Wheat made; but shredding machines would be machines with knives that ripped and tore. Rippled Wheat cannot be made the same as Shredded Wheat. It does not look drawn, if you would take it as you would draw a wire out.

I was down here at this time on the Farm Board Bill and happened to be in the city. The National Biscuit Company interviewed me in Minneapolis at my home. They had arranged to take my testimony there. I happened to call them up when I was East and said I was here in the city, if they wanted to examine me. I was East on account of the Agricultural Bill.

I would not attempt to read the minds of these people; and I would not attempt to say what my own

mind would be if I were faced with that same situation. I do not know how to answer that. I think Shredded Wheat was a very poor choice, if they wanted to use a descriptive name. The originators of this may have thought it was a descriptive name, although it does not seem descriptive to me. At any rate, they had it in the minds of the people, the name, the product, and the form. To my mind, they had an ideal situation, which any cereal manufacturer would like to aspire to when he puts out a product. I think decidedly that they could have gotten a much better term to describe their product. If they wanted a descriptive name, it was a poor choice. I will not go so far as to say the words shredded wheat are actually misdescriptive or deceptive; but I think they have gotten an acceptance of it into the public mind in connection with that product in that form.

RE-DIRECT EXAMINATION.

THE WITNESS: If the originator of this product had wanted to pick out a fancy name for it, I would not criticize his choice in the slightest. If he liked Shredded Wheat, or Rippled Wheat, or Spun Wheat, or anything else like that and wanted to use it, it was up to him. He could have called it anything he liked in a fanciful way, a bird's nest, or anything.

Having had my attention directed to the description of the product by the originator of it, in his Letters Patent 548086, October 15, 1895: "A food or bread, composed of superposed or massed layers or deposits of dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat," I would say that was a description of this product, shredded whole wheat—threads, or filaments, or wire; anything except shreds. It would not mean shreds to me. I cannot tell what was behind the interpretation of the phrase, "It's all In the Shreds."

My trip East was in connection with the Farm Board Emergency Bill, so called. I did not come here at the request of the Biscuit Company to testify here in New York. It happened to suit my convenience and yours. I am cooling my heels around here, waiting for this Congress to take action. I am awaiting action that is to take place today.

Vermicelli is a wheat product, made of hard Durum Wheat, and from other hard wheats.

The Shredded Wheat Company has extensively advertised its product under this name and shape. In view of my knowledge of the extensive advertising of the Shredded Wheat Company, I would say that, in my opinion, Kellogg's Whole Wheat Biscuit, such as I have before me, could be introduced to the public more readily by reason of that. I would say the Kellogg Company was getting out the same kind of product the National Biscuit Company are: that is to say, an imitation of it.

I would not think it was strange if I were told that a witness testified that, in talking to a dealer, he was told he was under the impression the Kellogg Company owned the Shredded Wheat Company. That might easily be possible. There might be a hundred other interpretations.

RE-CROSS-EXAMINATION.

THE WITNESS: As to whether the Kellogg Company has done anything wilfully to create that impression, there is the product itself. It speaks for itself. I do not think the Kellogg Company would have put out a product of this kind or would have had it suggested to them, had the other product not been on the market. As to whether the packages could be taken one for the other, I do not know how well people look at it. They have been familiar with the product and have known it for a long time.

If I went into a store and asked for a package of shredded wheat, I would expect to get the National Biscuit Company's product. If they sent me something else, then I would have said there was an opportunity to substitute for what I had desired. If I looked at the bottom of the Kellogg package carelessly, I could readily be deceived into thinking it was a Shredded Wheat package. If I examined it and saw Kellogg's on it, I would say Kellogg was making an imitation of Shredded Wheat. Am I going to get the same thing or not? I do not know, except by trial. It looks the same.

I would not say that the man who designed the Kellogg package was trying to imitate the other. I have seen the Kellogg biscuit. I was shown one outside the carton. I can see from the depth of the cartons that there is quite a difference in the length of the biscuit, if you see it this way. As they set on the shelves, you would not see that. If you went in the store and saw them as they are set on the shelves, you would not know how deep it was. I would very quickly, however, find that out when I took them out of the package and put them in the plate. If I went in the store and asked for Kellogg's Whole Wheat Biscuit or for Whole Wheat Biscuit, I do not know which product I would expect to get. I do not know about trade conditions. I do not know how far you have gone in your advertising of Whole Wheat Biscuit in this form. If I went in and asked for Whole Wheat Biscuit and did not specify some particular one, I might get Triscuit. I might get any one in the category of whole wheat biscuit, because there are biscuits and biscuits, as we know; and any biscuit that was made of whole wheat would answer the order.

I hope my son is not an unfair merchandiser. I am not familiar with that organization's affairs. I do not know what kind of reputation they have among manufacturers. I hope it is a good one. I preach the

general principles of being fair to all; but how far it sinks into the youthful mind and how hard-boiled they are, I could not tell you. I think General Mills is a direct competitor of the Kellogg Company. I think we were in the wheat flake line before you were. In that sense, we are. Otherwise, I have no particular feeling, one way or the other. I have no personal friends in the National Biscuit Company. I have known some people a long time, as I know other people in the trade.

RICHARD H. MALONE.

Deposition taken at Denver, Colorado, April 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have been in Denver since sixty years ago the first day of last February, at two-thirty in the morning. I will be seventy-six on the twenty-third day of March. I am a realtor. I am taking care of the hotel and some other property I have.

During the 1890's, I was a partner of F. W. Crocker, at the cracker factory, on Nineteenth and Blake, which is still in existence. We sold it out in May, 1890, to the American Biscuit Manufacturing Company, and then they afterwards consolidated. So the factory to which I refer is still in existence as one of the National Biscuit Company's factories.

At that time, the factory was equipped with the usual cracker-baking machinery. I came here in 1876, and it was equipped then. It had three Reel Ovens.

I recognize the document shown me, Plaintiff's Exhibit 234 for identification, in which we agreed to consolidate with the biscuit folks on the Missouri River and out this way. That is Mr. Crocker's signature, my signature, and my typewriting. It is dated May 19, 1890, and has reference to the selling out, to which I referred in my testimony.

The F. W. Crocker named therein was my brother-in-law, and at that time my partner. I met a man named Henry D. Perky. I have seen him a good many times. It was between 1888 and 1892 or 1893, I think. I met him many times. He was interested in the Circle Railroad here, which the Santa Fe afterwards had. My brother was interesting in trying to promote it. My recollection is that it came along in 1888 or 1889, when I first met him. He was interested in the railroad I speak of during those years. I met him in connection, also, with the manufacture of shredded wheat. I have been thinking about it, and I would say it was 1889, but it might not have been until after 1890. I will tell you why I remember it. My partner, Mr. Crocker, went to Europe. I had a stenographer, because I did not know how to spell to write him, so she was there along in those years. I did not have much to do with Perky. Harry James was interested with him and Milo Smith, a man who had an addition out here, and they came in and asked me about backing them. They said Perky had only baked them in the kitchen stove, by hand. He asked me if I would take them over and bake them in the plant. They were then located in what was then called Market Street, the third store from Eighteenth, going toward Nineteenth. That is when I first had anything to do with this shredded biscuit. They did not have much of any plant. They did not have much money. Harry James, whom we all loved, was financing it. He called me over and showed it to me. It was a machine run by hand, as I remember. It ran in rows, with a little space between each one. I said I would cook it for him. We talked it over, and they went to my factory to see what we could do. We had high racks that we put pans in between. I told them we could fix it over here or they could bring it over and we would cook it for them. We sent the racks over to them. The foreman and I built a fire and heated the oven. We

asked them what heat they wanted. They did not know anything. We tried out one or two of them. Then, we ran about four of those racks full. They baked them and took them off.

I said, "What are you going to do with them?" Perky said, "I am going to sell them." I said, "Harry James, don't I ever get one for cooking them?" So they gave me a little pop box full and I took it up to the house to see if my folks wanted to eat it.

What makes me remember those things is that Crocker was in Europe then, also the fact that we sold out to the National Biscuit Company in 1890, Mr. Crocker and I. After we sold out, the question came up whether I had a right to bake. I did not give a darn if I did not. I baked it for nothing, because I did not care. So it must have been about that time; because I would probably have disobeyed the order, if some friend has asked me to bake some for him. I figured it was in those days. I do not remember my partner being there at the time; but I do remember seeing the biscuit there in the row, after being sort of spread out. They were cut off, just about the same length that you are running them.

I recognize a biscuit out of Plaintiff's Exhibit 1. I think the biscuit at that time were perfect in that way. I do not think it has ever been changed. Perky called them shredded wheat biscuit, and I asked him what he was going to do with the ones I baked for him. He said he was going to sell them. I baked them on two occasions.

My stenographer at that time was Mrs. A. M. Nickerson. She is living here in town now, working at the State Capitol. She was with me nine years. Harry James and Milo Smith were interested. Harry said, "Dick, do you want to go in with it? Do you think it is a profitable thing?" I said, "I will put in some money with you"; but I did not. I never saw Perky after

that. The last time I cooked it was the last time I saw him. He never came near enough to give me an opportunity. I do not remember anything about where they baked them after that. He may have come down once or twice. I do not remember. They told me they had been baking them in their kitchen stove.

Another means I have of fixing the time is that my son was born in 1887. He was very sick for three or four years and I had my teamster's wife go over to the house to take care of him and my wife. The name of the teamster who was working for me at that time was Washington Sturns.

CROSS-EXAMINATION.

THE WITNESS: I stayed with the factory after it was sold to the American Biscuit Manufacturing Company, until they went in with the National Biscuit Company, eight years. I was manager. It would have been physically possible for me to have baked this biscuit just as well after the sale as before. The ovens were all there. I am quite certain this biscuit was baked after Mr. James became interested; because I would not have done it for anybody but James.

I know Mr. Harry Lindsley, after he got into politics. I do not know that Mr. Lindsley was solicited to become interested, and refused but got his partner, James, to go into it. I never heard him mentioned in my life on that subject. If he stated that, after he turned it down, about 1893, Mr. James took an interest in it, I doubt him. I do not think his statement is correct. I do not know anything about it. I never knew before this week that Lindsley had anything to do with it. I would doubt the statement because I have known him in politics for years. I have fought with him and worked with him. You can draw your own conclusions. I would not believe all of it. I will tell Harry that this afternoon when I see him. There is no question that

James did take an interest in it, because James asked me to cook it for him. James died a year or two ago. There is no question that whatever I did was after James was interested, because he came over and told me about it. They had kind of a little hand machine that you might call a sort of coffee grinder, if you wanted to. My recollection is that it had a handle. It was on a small table of some kind. I recall how the wheat came out of that machine. It started up here. They put the wet wheat in the hopper. I think they said they had steamed it. At any rate, I ate some of it. It ran out in a row, something like that, and then there was, as I remember it, a little space between them so they would not touch each other. I do not mean each string or shred was separate. Each one of those shreds was strung out. They were all so close together that they made a unit something like that biscuit Mr. Vilas has.

Those I cooked were not piled up on top of each other. They ran like across, right across there, we will say, and then put on to my iron pans, about two and a half feet wide. I have forgotten just what length those iron pans were that we had. At any rate, those threads in there were about two and a half feet in length as they were baked in the pans. If that iron pan is not that wide, you know, it would not be. The shreds were as long as the pan. I think the pans were approximately two and a half feet long. That is the way they were cooked. My recollection is that there were three or four of those long shreds, run close together. Then here would be another and here another. Then they would run those out and cut them off and then run some more. There would always be a little crease between those layers of wheat, showing there was a division on the machine. I have drawn on this piece of paper four long shreds. There would not be four more shreds come on top of them, that I know of, so as to leave

spaces between them. I never saw them on top of each other. I should say they were about half an inch thick, each of the threads that went out, about half an inch thick. That is a continuous thread, and those ran big enough so that they ran together. When one would come out, it would be right close to the next one, and so on, right all the way through. They came out the whole three or four threads at one time. They were noticeably apart from each other. I described each one as about half an inch in thickness. I cannot be sure about that. As far as I can remember, they were about like that one there when they came out of the machine. When the wet wheat was in here, it was not more than half an inch square. When you cooked them, they swelled up. Each one of these threads in here was half an inch thick, about. There were four of them right close together. When we cooked them, they were together just like Plaintiff's Exhibit 1, ribbon-shaped threads, right close to each other, right next to each other. I never cut any or saw any cut in cross-section. There were three or four of them as we have drawn it here, as I remember. None of them were lying on top of each other. They ran together before we even touched them. When they came out, the wet ones would be so close together that they would stick together.

(Mr. Clarke's sketch was marked "Defendant's Exhibit 106.")

Making my own drawing, now, this is the way they were when they came out on the pan, on Defendant's Exhibit 107, but there was a decrease, an impression between each of those. It was not a space. They were already closed when they ran out. But it was a depression. They would run in this way, and then those would all come through with a depression in there like that. They were stuck together and you could pull them apart on those lines. I do not remember about that slight

depression, only as it was out in a row. By the time we got them over from their place, which was about a block and a half from where they made them to where we baked them, they were all one. They went into a solid mass or sheet, with no layers on layers, whatsoever.

It was not like is shown in perspective on the sketch you now show me, because the ridges between them showed on top. They called this product Shredded Whole Wheat Biscuit at that time. I did not pay much attention to the machine. It was the finished product I was interested in. I did not know Mr. Perky very well at that time. I do not know anything about his work in Denver in connection with the Circle Railway, any more than if he went away and never came back. I did not say Lindsley was a liar. I doubt some statements of almost every politician. I see no reason why Perky should not go away from here after the Circle Railway time and go down to Texas. I will not make any expression of opinion, one way or the other. It is a matter of indifference to me, what he is and what he does. We are good friends yet. We have been working in politics lately. We were both in politics lately. I do not believe he would say as much about me as I have about him. I do not think he would have any right to, and I would call him a liar if he did. I will fight with him if he wants it. He has no cause of complaint of me.

I think I saw the little machines work, but I do not remember much about that. I was only on the baking part. I am sure I saw a little machine; but I knew nothing about it or about any of the machines that made them. My impression was that it was a little hand machine, operated by a crank. My recollection is that the only bakings I did were the two I have described. Those pans were about that long, and there would be about twenty-eight or twenty-four of those wide, as I remember. I have not been there for twenty-one years. Those were put on a shelf in a row,

like that. That was a ten-shelf oven. I am guessing, but I think there were about eight of those pans on the shelf, and I cooked two ovens full. That would make a complete baking of, I should say, about a hundred and fifty pans. Only a few days elapsed between those two bakings. I cannot remember anything that went on before or after that. They did not want my money. I told them I would go in with them. They did not come back to get my money. I would like to have done it. It is my understanding that James went in with Perky. I never heard of any litigation afterward occurring between Perky and James.

I kept some of the biscuit. I ate them and my babies ate them. We liked them. We kept those we did not eat around for a month or so in a paper box. It might have been longer. At any rate, I had a box full of them. I ate some of them. I would not eat them all. I still quite often eat Shredded Wheat of the National Biscuit Company. I never have eaten any of Kellogg's shredded wheat, and I am not going to, because they had no business to bring it on. I like their corn flakes. I will not eat any of their shredded wheat if I can get the National Shredded Wheat. I do not remember eating the Kellogg biscuit. You give us too little for our money, on the size of them. I noticed the difference in the size right away. I thought we had been skinned on the same thing for the same amount of money, so I did not buy it. I have seen the Kellogg biscuit packages in the stores, I think on the shelves, and I have seen them in the windows. I thought they were so much less than I had been getting. I do not remember having tasted them. I do not give a darn whether I taste them. I can get more for my money on the National Shredded Wheat, so I am not going to work for either one of you. I am going to work for Dick Malone. I do not

want the Kellogg product if it is soggy and heavy. I do not know whether it is. I have not eaten any of it. When I saw it, I had no difficulty in knowing it was Kellogg's. I knew it was cut off. There is a little of it, sure, but darned little of it.

I never met Doctor John Harvey Kellogg at that time. I do not remember whether the corn flakes came out before or after the shredded wheat. I use corn flakes. I like them, and I always insist on Kellogg's. I would not be prepared to dispute a man like James, if he were alive. If Harry James said that Perky only came back about 1893 or 1894 from Texas, I would believe him anywhere. Perky I do not know anything about. That is a matter of indifference to me. I was right there in this cracker bakery from 1876 to 1898. I would place the time of the baking this way: that we sold out to the American Biscuit Company in May, 1890; and it was before that time. Even if other men told me they had records to show Perky got back from Texas in 1893 or 1894, I would not take back what I said. I would stand hitched. I would testify just the same that Perky was not in Texas at that time. I would doubt him if he said that Perky had been down in Texas for several years and only came back in 1893, because I would stand hitched on what I said. Perky used to have opinions about having railroads and other things, and real estate, varied, some opinions between him and other folks, and maybe between me and other folks. I could not get him to the point where he would change. I would not attempt it. I absolutely baked these two bakings for Mr. James. My sole ground for placing this before 1890 is this sale that took place to the American Biscuit Manufacturing Company. My duties as manager continued on just the same after that sale as before. Mr. Crocker was manager for the American Biscuit Company from 1890 until he went to manage a biscuit factory in New

York. I was assistant, and then from that up. I was in the plant all the time from 1876 to 1898. This physically could have taken place, as far as I was concerned, at a later date. I was there and the plant was there. If Harry James had asked me to, I think I would have baked them up to the last day I was there, in 1898. Whether the National Biscuit Company liked it or not, I would have done it. I do not remember whether Milo Smith was there with James; but he talked to me about the proposition. I think that either he got James in it or James got him in it. They were friends. We were all three nice friends. I do not know that Smith was interested in any shredded wheat company at Colorado Springs. He was a real estate man out at Montclair, put on an addition out there. Mrs. Nickerson, my secretary, knew about this baking. She was with me from I think 1885 up to 1902. I called her up on the telephone this morning and asked her if she was dead or alive; I had not seen her for so long. If these men wanted her down here, I asked her if she would come, and she said yes. I got her the job she has, under a darned old Republican. I am a Democrat.

I know nothing about Perky whatever. They always told me they steamed the wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: As I told you, the biscuit I baked for Perky or James looked like the biscuit Mr. Vilas has in his hand. I notice the rather small thread-like pieces of wheat. I do not remember the details, but they were that size and baked up that way. In my drawing, I made this along that way, simply meaning it this way; but then, when the heat got on them, they all ran along in one solid bunch. Perky attempted to get up a biscuit of the size I see here now, before

baking. So, when we got through, we had a biscuit like this one. You realize that is the fact, but that is a darned long time. He was not making another product at that time. He was making this same biscuit.

My recollection is that we took what we call a half-sized cracker box, about six or eight inches high and packed them in, loose. I told Harry that, if he wanted to take them, he could take them. I did not want to run the trays back over yonder, because it jolted them too much to run them back and forth too much, so I gave him the boxes.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not mean to change my sketch, Defendant's Exhibit 107, in any way, as covering my recollection of how the threads looked. They looked as though they were longer. They came out longer threads. That is the way I remember it.

WASHINGTON STURNS.

Deposition taken in Denver, Colorado, April 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am not at present employed. I am a pensioned employee of the National Biscuit Company. I first went to work in the biscuit business in 1887, for Mr. Crocker and Mr. Malone, in the bakery down here on Blake Street, the same place it is now, but a different building. I drove the delivery wagon. I always did for the whole company. I never did anything else. I worked for them all, including the National Biscuit Company, thirty-two years, exactly. Then I was pensioned. I have been living home here in Denver since that time.

I did not really have anything to do with the baking of some shredded wheat that was baked in the bakery, but I saw what they did, a part of it. I saw them fetching it over to the National Biscuit Company—whether it was National Biscuit Company then or not I do not know; but it might have been the American. I remember the Crocker Company sold out to the American at some time. I saw them taking the biscuit over there to bake them. I cannot remember exactly just when it was. I did not pay very much attention to it, but I saw them bringing them over, and I saw them there. I saw them wheel it home, after it was cooked. I saw the biscuit.

I have been familiar with shredded wheat biscuit since that time and used it. I use it now. That biscuit was not very different from the shredded wheat biscuit I use now. It was about the same, I think.

It was my wife who went over to take care of Mr. Malone's son. I remember that circumstance. I spoke to my wife last night, but she does not know the time. It strikes me it was somewhere along in 1891. I do not know, though; I could not tell. It has been so long ago, and I did not pay much attention to it. That is the best I can do about fixing the time, somewheres along about then.

CROSS-EXAMINATION.

THE WITNESS: I did not hear anything about shredded cereal coffee. I do not recall eating any of this biscuit that was baked at that time. I do not believe I did. I kind of did not like the looks of it; and I did not pay much attention to it then, although I saw them coming with it. I talked with my wife last night and she could not help me fix any date. I could not fix it myself.

WILLIAM S. HURD.

Deposition taken at Denver, Colorado, April 21, 1933.

Direct Examination.

The Witness: I was a merchandise broker. I have not been in any business for the past three years. I have lived in Denver sixty years, next September. I came here in 1873.

I have heard about Shredded Wheat. When is something I cannot tell you exactly. Mr. Harry James married a niece of mine. He was a young man just out of school, and his father was one of the big stockholders in the Denver Gas Company. He worked for them but in the office there. He came down to me one day and wanted me to come up and see a machine. The party wanted to buy a gas engine and operate it. He said, "It is in your line. It is cereal. I want you to see it." I said all right, and we went up. I do not want to be too positive on the location, but I think it was Seventeenth and Glenarm. Things have changed a little up there. It was not Arapahoe Street. It was in the basement. I saw a couple of cylinders, with the help around it. They put in some wheat, and it turned out this cereal, a long shred. It took me right way, kind of, the novelty of it. He came down afterwards. He said, "You have a chance to get in on that. This fellow is hard up. Do you want any of it?" I said, "Yes, Harry, I would like some of it." He said, "How much do you want?" I said, "I will take what you do not want." He said, "I just wanted to let you in." I said, "Just forget it, then, because I have my business to attend to. Things have got to be developed." He said, "I am going to declare you in." To what extent I was in I do not remember. I do not think I ever put up any money, but I think he did put

in five thousand dollars for a quarter interest. That is my recollection. That was Mr. James.

The time of this transaction was sometime in the summer of 1893. I fix that date by the time of the World's Columbian Exposition, which was scheduled for 1892, but they did not get the buildings done, and they postponed it a year. They had gotten this Shredded Wheat up so that they made some biscuit like that, but we we could not do anything with it. We could not get Perky to do anything. It was just a hopeless case. I told Harry, "If we could get Perky to promise to turn them over to Douglass & Stewart" who were manufacturers of oatmeal and rolled oats in Cedar Rapids, I would go to Chicago and meet Mr. Mower and get an engagement to meet him there. He got Perky to do that. He said, if they would take half of it, he would turn it over to them. I went to meet Mr. Mower very much elated. I was used to meeting him. He came out very often. I got him up to my room at the Palmer House in Chicago, and I showed him the article, along in 1893, in the summer sometime. What queered the deal was that the wheat was roasted by somebody here, I do not know who. When he opened it up, it was green with mold inside. He said, "There you are; you can never make a commercial article out of it." I could not talk him out of it. The wheat part had not been evaporated properly, and it was roasted too quickly. That was it. He said, "No, you could not put that on." That was the way they turned down the biggest thing they had ever had a chance to get.

The biscuit I had at that time in Chicago had a very close resemblance to the biscuit lying on the table here, except that that might be a little smaller. I do not remember just about that; but it was supposed to be one portion. I would say this was smaller than the Chicago one. They are of the same shape. Perky

called it Shredded Wheat. The name of the company was, I think, the Cereal Machine Company. When they reincorporated it and changed it to Shredded Wheat Company, I do not know. I had no further connection with Perky and his company, only in the way of advertising the thing. Mr. James was a rollicking kind of fellow. He used to get up parties to go and hear Perky lecture on Shredded Wheat. It was quite a joke when we were around with his friends in the evening. They would joke him about Shredded Wheat. One of Perky's favorite statements was that it was the whole wheat berry, denuded of its silicious—meaning glassy—tar coating. They would say, "Is that denuded of its *salacious* tar coating? Do not touch it."

I did not go into Shredded Wheat as an investment. I had it just as a flyer; that is all. We got out, after we sold an interest to somebody in Long Island, I believe, some clique there. They had a big factory there, and Harry made me come down with him and attend a stockholders' meeting. We had to wait for people around there, nearby, who had not yet gotten in. I have forgotten the man's name. He was the bookkeeper who used to be out here with him. He was engaged in balancing the books, and I offered to help him. I said, "I will go crazy in this little town, if I do not get something to do." That was Worcester, Massachusetts. I offered, and I went over the books with him. Of course, that has nothing to do with it. I found enough about it in the books, though, to convince me we did not want to spend much time or money on it. It was just the way he went after Perky. He did not say that if people would eat Shredded Wheat, it would make musicians out of them. I did not know Mr. Perky before that, at all. I did not know him in connection with the Denver Circle Railroad. I do not know how long before I saw him he had been making this Shredded Wheat. It must have been a few months be-

fore. Anyhow, that is my recollection, because, as I say, we were jollying Harry about it all that time. It was quite a joke, until they got in shape so we thought we might get somebody to manage it.

CROSS-EXAMINATION.

THE WITNESS: When I say Harry, I mean Harry James. At the time he took me to see the machine, he went over to look at it in the Gas Company's place. He had not yet put anything in it, I think. It was after 1892 or just about that time that James put his money in and declared me in, also. I could not say if some of James' money went into Perk's restaurant. It seems to me I have some recollection of his starting a restaurant. I was never in it, and I do not know. I do not know anything about Perky getting any money in regard to Shredded Wheat from anybody except James, at that time. He never got me to put any money in. I never heard of litigation between James and Perky, a few years after that, in which James got it. James did not buy Perky out. He sold the interest, as I understand it, to some people in New England. Then that money he gave bought his interest to get his money back. How much it was, I do not know. He knew Mr. Lindsley, the lawyer here. I never heard of a Western Union telegram in the way of a bill of complaint Perky wanted him to file against James. About that time, however, James sold out his interest to Perky or someone. It was after we came back from Worcester; but I do not know what year that was. I think, if there had been any lawsuit about it, we would have heard about it.

XQ. 42. I show you this photostat of an advertisement which appeared in the *Denver Republican,* Sunday morning, March 11, 1894, containing at the left-hand side, running the whole length, a picture of this Goddess Ceres, with the prominent words *trade-mark*

at the base, where she is standing on the world. (Reading.) Have you ever heard of any advertisement of that sort?

A. If I had, I had forgotten it.

XQ. 43. That sounds a good deal like Perky, does it not?

A. Very much, except that he has not got in there his ability to develop the brain and to develop any natural talents you have got and bring them out.

(A photostatic copy of the ad referred to was received in evidence and was marked "Defendant's Exhibit 108.")

THE WITNESS: He did not say it would make a musician of you there, but it would. He says "The reconstruction of your physical form." That is fine. Maybe that is what is the matter with me. I have eaten it all the time. I have just commenced to gain flesh today, after about twenty-five years.

The rather broad statement that "Absolutely pure food is manufactured only by the Cereal Food Company, 1632 Arapahoe Street" sounds very much like Perky. That is a sample of the lectures we used to listen to. Every once in a while, Harry would get up a group, among his friends, to go to a lecture. I never went to them. Mr. Perky was a very peculiar man, very headstrong. His own brother could not get along with him. He was very domineering. His brother told Mr. James, I understand, that there was no use trying to get along with him. He would not give up an inch; and it was a very discouraging thing to have a minor interest in. I never heard anything about this Shredded Cereal Coffee, referred to in the advertisement. No doubt that is correct, because it would make ice cream. You could put it in ice cream. They probably took shredded wheat and made some sort of decoction out of it, being a cereal coffee. There was hardly anything

it would not do, and he believed it, I think; because I think the fellow was not all there.

I do not remember going to the Arapahoe Restaurant. I do not think I ever did go in it. I have heard folks talk about it; but I never went in it. Perky was a lawyer. He claimed to have been the inventor, at that time, of this whole wheat product; and he told me how he invented it. He had the flu, and it left him in a condition where he could not keep anything on his stomach. He went into a sanitarium and he could only eat whole wheat. It was all he had to live on. The way he discovered this was by experimenting with the different forms he could put the wheat berry in so as to make it palatable. That is how he discovered this. I do not know about his being away in Texas. He was promoter of the Circle Railroad and the extension they built here. I did not know him then. I understood he was in this district. He built the railroad away back of Cherry Creek, back to where Montgomery-Ward is now, called the Circle Railroad. If he had any money in it, he lost it. Everybody else did. He was not looking for money from James when I met him. James was simply a young fellow the Gas Company sent over. He did not know him. I understood that five thousand dollars of James' money went into it. Mr. James was also connected with the Denver National Bank. His father was one of the promoters of that. When he came over to get that gas thing, Mr. James was quite elated and came down for me. If he had known it before that, he would have come back and said something. Mr. Perky was considered a very peculiar man. We took this bookkeeper of his, whose name I do not remember, down to Worcester. He knew Perky's eccentricities and shortcomings, and knew all about him. Perky managed the Shredded Wheat Company at Worcester. I do not know what sanitarium Mr. Perky was in when he was experimenting with the shredded wheat or making

wheat into different shapes. They called his trouble the flue, now; but we called it grippe then. I could not tell you if he was in a sanitarium in Texas.

I understood the shredded wheat biscuit I had down in Chicago in 1893 to show Mr. Mower were just gotten up for a sample. I do not think those were baked at the American Biscuit plant; because I do not think they would have monkeyed with it. I do not think they would have gone to the trouble of making them for him. It must have been some little bake-shop. I do not know whether Mr. Malone put them through the ovens or not. It was the first item I had ever seen in that shape. I am quite certain that, if Mr. James was connected with it and asked him to bake them for him, he would do it; but James did not have anything to do with the matter until around 1893.

The biscuit broken open at Chicago were found to be moldy inside, which spoiled any deal with Mower. They had not been properly baked, and it was hot weather. I had them in my grip; it was very hot; and they were moldy. As to the deal conducted by correspondence with Mr. Mower up to then, the idea was to get the Douglas & Stewart people to take the patent over and run the business. They were cereal manufacturers at Cedar Rapids. I do not think they were given to me as good representative samples of the biscuit. They were just gotten up as a sample of what they were making then. I had them in my grip probably forty-eight hours. I do not know if Mr. Mower is still alive. My impression is that he passed away a good number of years ago. I was not personally acquainted with Milo Smith. I knew of him. I do not think, when James was in there, they tried to make any deal with Milo Smith. He was, of course, with Milo Smith's son, Mr. Salisbury Smith.

I knew Ben Brewer by sight. I had no personal acquaintance with him. I do not recall H. C. Davis. I

would not know anything about the certificate of incorporation of the Colorado Shredded Wheat Company, Defendant's Exhibit 109.

I think Harry James and E. Salisbury Smith were schoolmates together. They were boys together. I guess they went together to the public schools here. I do not know whether they went to the same college or not. They would be in the same classes. I have no recollection of the incorporation of any company. I had no stock in any of it. I never had any stock issued to me. Mr. James had, and he was holding it for me.

I never met John Harvey Kellogg, of Battle Creek, Michigan. I do not know of any other activities of James in a business way, in connection with Shredded Wheat. I really do not know much about his activities prior to the time he took hold of it, until he went out. My understanding was that he went out after we were at Worcester and found things in such bad shape that I advised him not to continue. He wanted him to go down to the Genesee Valley and buy wheat. I said, "Harry, I have been over these books, and the thing is hopelessly insolvent. You do not want to go down there and contract for white wheat for a fellow who has no money to pay the freight on it. Do not even think about it. If there is a grain broker in Worcester, he can get all the white wheat he wants, and you do not have to go down there." Harry suggested that to Perky, and that was all right. He could get it through the broker, so we came home. As far as I know, that was the last time Harry had anything to do with it, except they got others to go to Niagara Falls probably and make a deal with Harry. They took over the Shredded Wheat. I do not think he got very much out of it. I cannot fix the approximate date when I was in Worcester with James. It was quite a while after this day in 1893 I spoke about. Perky wanted James to buy white wheat in the Genesee Valley for him, and my

judgment was they were hopelessly insolvent then. The bookkeeper told me the machine he had in there cost thirty thousand dollars. It was a long roll with six parts. I said, "My God, how is he going to pay for it?" He said, "I do not know, but he has two more on contract." He said he was in comm rcial production at that time; but, in going over the books, I found a number of firms who were very good, just like a bank, who never left a minute go by without paying a bill. They would always get one and two per cent. discount. They had bills against Frank Sprague and Warner. My recollection is they were so far overdue that, regardless of Perky's statement, they were not sales. They could not have been. They must have been on consignment; otherwise, they would have been paid for long ago. They were regularly in business, had a place of business, a factory, a bookkeeper, and were doing business. They were preparing for a much larger business; but I could not see how they were going to run it through.

They wanted James to go from farm to farm through the Genesee Valley and buy up white wheat. It never was necessary to do that. The broker in Worcester could do it. He would smother him with white wheat, if he gave him an order.

(A duly certified photostat copy of the certificate of incorporation of the Cereal Machine Company, with three certificates of amendment, was received in evidence and was marked "Plaintiff's Exhibit 235.")

MR. VILAS: Mr. Clarke, I have in my hand and have already shown you a letter from the division passenger agent of the Atchison, Topeka & Santa Fe Railway Company, dated April 13, 1933, addressed to Mr. Brace, our manager, with reference to the connection of Mr. H. D. Perky with the Denver Circle Railroad. Owing to the difficulty

and expense of making legal proof of the facts stated therein, I am going to ask you to permit the letter to be copied on the record, with the stipulation that the witness, if called, would testify to the facts set forth in the letter.

MR. CLARKE: Yes, that is perfectly agreeable to me. It is so stipulated that, if called as a witness, he would testify to the facts stated in this letter, and I will ask the reporter to copy that at length into the record.

MR. VILAS: It should be marked as an exhibit and copied at length into the record.

MR. CLARKE: Yes.

(The letter referred to was received in evidence and was marked "Plaintiff's Exhibit No. 236.") (Reading.)

LEWIS H. BRAKEL.

Deposition taken at Denver, Colorado, April 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have lived in Denver fifty years, this fall. I am a machinist, with The Denver Machine Shop. I was employed by several companies in the early nineties. I have been a free lance, never married a job in my life, have changed quite often.

I have seen shredded wheat. I recognize the biscuit on the table as some of it. I guess I have been familiar with that forty or forty-one years. I was running a shop of my own. At that time, I was a blacksmith. Since, I have switched my trade, and I have run a shop facing Fifteenth Street, George Leyner. The two come close together at the row. I did work in that

shop on machines for Leyner to make those biscuits. To the best of my recollection, that was about 1892. I did work on part of the machine. I hardened the rolls, some of the rolls. I also remember making an arm attached to the machine, to slide these tables back and forth over a cam; but it was not a success. The function of the table was to build up that biscuit. It was underneath the rolls and was to catch the shreds that came through the rolls, just like my finger would come through rolls, and they would fall like this on this table, but this table would move back and forth, and it would build them up, not zig-zag, but straight in a line, one on top of another. It was sent back and forth in a plane, this way, under the rolls, and piled them up. This lever did not work. Later on, we designed something that did work. We later had a rack and pinion, and that worked fine. I did that work for Leyner. Later I hardened some of the rolls. I can give you an exact drawing of the rolls, in lead pencil. The rolls on the upper machine were this way. I would say this was seven inches in diameter, as near as I can remember. The collar on here is just simply to keep the oil on this bearing from getting on this roll and staining the product. A shaft went right through here. One roll was plain, ground smooth; the other roll was grooved, twenty grooves to the inch, straight grooves around, not like a thread to convey, but straight curved around, twenty to the inch. I remember that distinctly. Those rolls were close together. I expect, under extreme pressure, they would be in contact. That I am not in a position to state. Those rolls crushed the wheat. I saw lots of biscuit made in those machines. They looked like the biscuit that is lying on the table here, after they were baked. Before they were baked is the only way I liked it. The wheat, I understood was cooked in a boiler before it went through the rolls. I believe the time was fifty-five minutes, as I remember

on that. They were very fussy about that time. It had to be a certain length of time to get the wheat at a certain texture before they could dare to put it in, before it would go through the rolls; and then it was put through the rolls and cut and baked. This was at Arapahoe Street, between Sixteenth and Seventeenth, the first I really remember seeing the machines working. They had a restaurant there, and the machines were in the basement. They were selling their shredded wheat in the restaurant. They called it at that time shredded whole wheat.

CROSS-EXAMINATION.

THE WITNESS: When I saw the machines, I do not know whether it was shortly after they were completed. Mr. Berky was his name, if I remember right, though some pronounced it Perky. He was a promoter, and he took a whole bunch of us up there to dinner one day, in the restaurant at Arapahoe Street. I had been in there, possibly two or three times. The machine in the basement had this reciprocating table for piling the biscuit up.

FURTHER DIRECT EXAMINATION.

THE WITNESS: I do not remember delivering the machine to the place of Mr. Perky. I remember installing some machines over here on Seventeenth Street. To the best of my recollection, that was after the restaurant, although I have been informed it was before. We installed the machines. We did not deliver them. They were the power machines for making that biscuit. They had to have the reciprocating table to make the biscuit. I installed those machines for Leyner. That was in 1893.

FURTHER CROSS-EXAMINATION.

THE WITNESS: I had an occurrence at that time that kind of made it a little more prominent, so it would be fixed in my own mind. 1893 was the year of the panic. Two Denver banks, I believe, proved

stable. The rest of them, quite a few, went broke. I had some money in the City National Bank, then at Sixteenth and Larimer Streets, now the Nassau Building. I got scared of this money and took it out. My wife would not keep it in the house, and I said I would carry it. The night we installed this shafting and these machines on Seventeenth Street, we finished about two or three o'clock in the morning. There were no street cars in those days. The horse cars quit at eleven or twelve o'clock. I lived all the way up at Thirty-third Street. I hunted me up a clean piece of pipe, and I got my things ready, and Clarence said, "What are you getting that for?" I said, "Well, Clarence, I have a thousand dollars in my clothes, and, if anybody gets it, they are going to get it the way I got it." I trusted him. I knew him. That panic did not last nearly as long as this one did. We had a Republican in office. It made a Democrat out of me. They had to put Roosevelt in to stop this one.

I would certainly be surprised to find that the machine I am talking about was made after the first of the year 1894. We could not install them unless they were built. I could not have put them in before they were made. If the first little machine was started after 1894, of course, I could not have put them in two years before that.

Seeing the first advertisement of Arapahoe Restaurant on March 11, 1894, I still would be convinced that I put in those machines even two years before they started to be made. Some of the others tell me this was previous to the restaurant. My recollection is that this was after the restaurant.

My recollection is quite clear and it is my belief that it was a machine made by Leyner. I could not swear to it, because, previous to the time Leyner built these machines, I knew nothing about them at all. All I know is that, sometime during that panic that ran

from 1893 for some years, I carried a pipe and a thousand dollars in my pocket. That was when I came home from putting the Leyner machine in. It was set up for more than one machine. They had a lot of trouble with the rolls of the Leyner machines. They would become elliptic. They would bend over or bust or crack, and everything else. We even sent them to Browne & Sharpe, in Providence, Rhode Island, and asked them to make four or six, and they could not make them, although they are considered the best in that line in the United States. We got the steel from their place. Leyner had some little hand machines. I would not want to say they did not have any hand machines in the restaurant, but they had power machines there. This was sometime after the power machines were constructed and completed. The trouble with the Leyner machines and the rolls took two or three years after they started making these machines, before they got the difficulty with the rolls ironed out. In those days they did not have the carburizing furnace. There was no carburizing furnace in the City of Denver. In fact, it was not known. We tried to make them out of cast iron and out of mild steel and cast iron. It was not satisfactory. After that, we tried tool steel. Every once in a while you strike a little pebble in the wheat, which is generally flint. Unless your roll is glass-hard, it punches a hole right into it. It may ruin the roll; otherwise you will ruin your stomach. It will do it, anyway. I would not eat the stuff. Nowadays, they call it roughage. It is fine for cows and sheep and hogs; but that stuff is no good for humans. Some of the rolls would break and some would go elliptical. We got some steel from Brown & Sharpe. Then, we got some from a company in Pittsburgh. We got it from a Moore Company. You might get some data there. We took it over to show them how it busted in the hardening, just a piece, and the next day the piece let go and

busted, just lying on the desk. It was the strain on the metal, and it finally let go, just let go, the next day, lying right on top of the desk. You fellows laugh at that, but I am telling you what happened.

That was a problem. Even when we moved to the other building, we tried to harden it. At that, we had as good success as Brown & Sharpe had. I do not think I was interested in this roller business after they moved to Worcester, Massachusetts. I do not remember about that. The trouble with the rolls ran over several years from the time Leyner first started to make the first machine. Later on, another plant took it on. They thought they were equipped to harden the rolls. Nobody had any success with it. It was too hard to obtain the steel they hardened, without pestering them. Sometimes they would go elliptical. Nowadays, with the carburizing process, they would be a snap. They had grooves, twenty to the inch, half round and half grooved. They were sixty degrees, as I remember and V-shaped in cross-section. They were a little deeper than they were wide, just like a thread would be, exactly, only it was not a thread. It was straight around the roll. By thread, there, I mean a screw-thread, a spiral. They were like that thread, only not spiral. They went straight around. I was working with them off and on, during the whole time they were having trouble with the rolls. I never married a job in my life. I never had one place for a very long period. Since I am older, I have cut that out.

I can go further than that ad, referring to shredded whole wheat bread and shredded cereal coffee. My recollection is that everything they had was shredded: turkey, lobsters, oysters, anything that you ordered was shredded. Everything went through these machines. Of course, I do not know about that. I do not know what they did. I do not know whether they ever saw the machine or not, but everything was

shredded. It was a shredded restaurant. It seems, by that ad, they even shredded their coffee; but I would not swear to that. I remember eating up there and having everything I ate shredded.

When they mention Shredded Whole Wheat Bread in the advertisement, that is what they called the biscuit. I do not know what the Shredded Cereal Coffee was. I knew Mr. Perky then. That was all. I do not know whether he was the inventor of this. He was the promoter. I do not know whether Perky was a machinist or not. I just knew him as a promoter.

CLAYTON K. BRACE.

Deposition taken at Denver, Colorado, April 21, 1923.

DIRECT EXAMINATION.

THE WITNESS: I am manager in the Denver sales department of the National Biscuit Company and have been with the company twenty-six years. I have been in Denver nine years. My territory covers the Black Hills of South Dakota, Wyoming, Colorado, and New Mexico. I personally cover all that territory from time to time. I carry shredded wheat among the products I sell.

We have practically a 100 per cent. distribution of shredded wheat in my territory. Possibly, around 95 to 98 per cent., including retail stores, chain stores, and restaurants and hotels. Taking restaurants and hotels as a class, we do not have the distribution there that we do in the general retail stores.

We encounter competition from Kellogg's Whole Wheat Biscuit. We find more competition among the restaurants and hotels, in proportion, than we do from the retail trade. For one thing, there is the price [illegible]

nation. Generally, once or twice a year, there is a lower price, including, perhaps, free goods. My experience has been that the product does not repeat in stores in this territory. The dealers will put the merchandise in and many of them will discontinue it after their initial deal of merchandise is disposed of. Theirs is a trifle cheaper than ours.

The institutional, government, and State business in this territory is generally handled by bids; but a quantity of that business is done through the jobber. We are given bids, and we bid on the items. Most generally, the bids are awarded to jobbers, and we find we do not get even half the bids on institutional business. I have yet to recall one bid from institutions designating anything but shredded wheat.

I have eaten Shredded Wheat for probably fifteen years. When I travel, I eat it in restaurants. Generally, Shredded Wheat is not served in a package in restaurants, but in a bowl. I was in Albuquerque last fall, and again in February. The first case, I was served the Kellogg product. I asked for Shredded Wheat. It was served in a bowl.

I spoke to the lady who served it and told her I would like to have what I asked for, Shredded Wheat. She informed me they did not have Shredded Wheat. Later in the day, the salesman I was accompanying succeeded in selling this place, the Franciscan Hotel, two cases of our individual-size package. The following morning I again asked for Shredded Wheat and was again served with the other product. It was served in the package by another waitress. I finally succeeded in getting Shredded Wheat. I told the lady we had delivered a package to them some hours before, and, if she would search in the wareroom, she would find it. She finally came back with Shredded Wheat.

When I went down in February, the same process was repeated. If I would take the time to recall, I am sure I would recall many cases where the other product has been served. I can recall one specific instance in Omaha, sometime last summer, when we had a district meeting there. I remember particularly Mr. Thoms having breakfast with me and three or four other men. In that case, I particularly asked the girl if she had Shredded Wheat, the original Shredded Wheat, and she said she had. I told her I would take it. When she delivered it to me in the bowl, not in the package, it was the Kellogg product. I recall that instance, because Mr. Thoms became quite excited and called over the manager of the restaurant. He merely stated to the manager in my hearing that I had asked and designated the kind of breakfast I wanted and had specified that I wanted the National Biscuit Company's Shredded Wheat, and the girl had brought the other product, and he thought that was unfair. The manager gave him an order for Shredded Wheat, that came out that afternoon.

CROSS-EXAMINATION.

THE WITNESS: I do not recall any instances in which I had told waitresses that the Kellogg product is not shredded wheat, or in which my men have tried to tell them so. I do not recollect that that argument ever came up at all. My men do not, to my knowledge, hold to that in my district. What Mr. Thoms said was that I had ordered National Shredded Wheat and they gave me the Kellogg product and we did not think that was fair. Then, they got an order for National Biscuit Shredded Wheat, from this Omaha hotel.

In regard to the Kellogg Company pushing its product, generally; once or twice a year, there is a campaign on, and, I think, such things as giving away

premiums. In those drives, there is considerable of the Kellogg products placed on the market. I do not remember their using coupons redeemable in free packages. I remember something about dishes.

Right here in Denver, has been quite a strong National Shredded Wheat center, extremely so. I do not mean to say that the Kellogg product has no distribution in this territory, or in this district. I was asked if there was general distribution. I answered that, in this district, there were drives put on once or twice a year, and, about that time, considerable quantities of their products were put on the market.

A year ago, last May, the National Biscuit Company had a drive, at which time they offered the value of one case with twelve. That is all I recall in the way of any special sales effort behind the National Shredded Wheat. The Kellogg Company has put a sales effort and push behind its product and in the restaurant trade right along. They have had campaigns and we have campaigns. I was merely bringing out the point that there is greater distribution when they have put on their campaigns, and the distribution dies out immediately thereafter. It does not repeat to the consumers, not in this territory.

I cannot give you the name of any grocery which carried the Kellogg product and discontinued it, offhand, but I know it is a fact. I cannot recall the names of any stores. If I were told that Mr. Clarke went into a Skaggs Store and found National shredded wheat selling at ten cents and Kellogg's Whole Wheat Biscuit at twelve cents, and the manager stated he sold almost as many of the Kellogg at twelve as of the National at ten, if they were both equally displayed, I would be surprised to know it. I would be inclined to think the grocer would have to give some personal effort with it. It is a self-service store; but, if you stayed around in some of them, you would find there

is considerable service goes on. I have been with the National Biscuit Company since the shredded wheat business was taken over. They did sampling, which we have continued to do, house-to-house, but we do not do that with wagons. We have crews hired to go out and distribute samples. That has been continued on the same scale as the Shredded Wheat Company did, and we had a very complete sampling in this entire territory last summer. We did not have any the year before that. We came into direct sales of shredded wheat, I believe, two years ago last January. The only free sampling since then was this last summer. It is not true that substantially all shredded wheat salesmen and specialty men were dropped when the National Biscuit Company took them over, that is, in this territory. We operated with a force, maybe not the same men. We have a cereal man here now who operates with the same function the former manager here did. We have had that man since about last June. I only know about my territory. The man in charge was dropped, but another man was put on last June.

We dropped the jobber for a while, and we are still selling direct. We had no particular difficulty with the jobbers in this territory, because of the sale of the product and the demand for it. We found very fine co-operation from the jobbers. We have that co-operation now. I did not say we had no complaints from jobbers. I said we enjoyed a very fine co-operation from the jobbers; but we did have complaints.

I could not say whether the jobbers are pushing our product as hard as any other in that line. I will state one case I recall about a year ago or a year and a half ago. I called on one jobber, the Morey Mercantile Company. I was asked to come to their office. They showed me an order from their cereal branch for

ten cases Kellogg's shredded wheat. The buyer said to me, "We are not handling the Kellogg product. We do not want to handle it. Have your man see our man in Sterling and get him straightened out." That jobber did not handle our cracker line; yet, he specifically stated he did not handle the Kellogg product and he did not want to fill an order for it, because, in his opinion, there was no demand for it. He had an order from the Sterling manager to this buyer to get for him ten cases of Kellogg's. He did not fill it; he gave me the order. He asked me to have our salesmen see the manager in Sterling, and sell him Shredded Wheat, which I wrote him to do and he succeeded in doing. He sold him twenty-five cases of Shredded Wheat. That business was switched to the National Biscuit Company. I have not had that sort of thing happen in other instances. You mentioned the fact we were not getting co-operation, I cited that instance to indicate that was co-operation, which I believe it was. You can draw your own conclusions.

We have used the small individuals in the restaurant and hotel trade. The sale has practically dropped in volume. We put on a drive about a year ago with the smaller package you are referring to, but we have almost eliminated it. The sales dropped off.

The only instance of either shredded wheat product being furnished to me in a restaurant outside the package are those down in Albuquerque. I am sure that was not our own small-sized biscuit, because the waitress came back and told me. In Omaha, I asked for the empty package and she brought it to me. I knew it was not the original Shredded Wheat, because I can tell from the appearance and color of the cakes. These were a little browner. I asked for the National package and I got the Kellogg package. If they were served me outside the cartons, I believe I could tell

which was which. I do not believe an ordinary customer could.

In New Mexico, I sold them two cases of individuals. I do not recall particularly why I did not sell them the big cartons, only that they handled them in that manner, in the individuals, but they took them out of the individuals in the kitchen, to me. I could not answer whether they did that for any improper purpose. It did not strike me as curious that they were taking the individuals instead of the larger packages, if they were serving them outside the package; because, in a carton, there are twelve biscuit which have to be served when the big package is opened. When they are kept in the package, there is a certain degree of protection to the biscuit in the little individual packages, even though not served on the table. It is a cleaner way to handle it. We do not encourage them in any way to serve our biscuit outside the individual cartons. We have never used any serious program in the way of getting the restaurants to open the individual cartons in the kitchen. We just sell the individuals to them and let them do as they please. As a company policy we have never tried to encourage them to use the individual carton by bringing that right out on the table and letting the customer dump his own biscuit out. They have never been told to by our company.

We have had institutional business, army camps, hospitals, and so forth, in the shredded wheat during the time we have been selling it. I have already testified I do not recall a case where they have designated the Whole Wheat Biscuit. I do not recall any case where shredded wheat, twelve and a half ounces to the package, was referred to. If we got a bid calling for a product other than ours, we would contact the institution that sent out the bid, and ask them if shredded wheat, twelve ounces to the package, would be satis-

factory. Then we would submit a bid twelve ounces to the package, thirty-six packages to the case, provided they said it would be satisfactory.

I might say our cereal man mentioned one case here by the City General Hospital, where the buyer had the Kellogg product. When he asked him why, he said he did not know why, but that is what he got. I recall that incident; but I do not recall any case similar to that, of my own personal experience.

If I got a request for a bid that specified, by the number of ounces per package and number of packages per case, the Kellogg product the person had in mind before making up those specifications, I would request permission to bid on my own product. If they gave me permission, I would put in a bid for shredded wheat, twelve ounces to the package and thirty-six packages to the case. I would not automatically change the bid.

We have seventeen salesmen in the territory. The bulk of their profit is on the cracker and cookie business. Our discount system is on an entirely quantity basis. Shredded wheat is just one of several hundred items.

A grocer who buys only shredded wheat and would not buy enough in a month to make more than a relatively small discount, would get a smaller discount than if he bought shredded wheat and the cracker line, if he was an independent dealer. He would have to buy a great deal shredded wheat, one hundred dollars' worth to get 15 per cent. discount. He does get into a better discount differential if he carries the whole National line rather than shredded wheat alone.

We have not had a falling off in recent years in our shredded wheat business, since the depression started. I would say possibly eight or ten per cent; but our shredded wheat volume has held up in better proportion than our cracker volume. The cause of

that is each man's personal opinion. It is hard to tell what would cause it. My own opinion would be that, in the sale of cookies, there are more farmers. They can manufacture and cook their own cookies, rather than buy them. I think that is making the difference. That would be, I would say, a depression condition. The small National shredded wheat, in the individual cartons, has almost gone off the market in my district, because there is no demand for them. I have never had any cases in which I handled the small National biscuit in any other way than in individuals. That has never been, to my knowledge, put into the large cartons. In all the time I have been with the company, that is the only change in size that has ever taken place with the National shredded wheat, as far as I know, just in the little individual package.

RE-DIRECT EXAMINATION.

THE WITNESS: I made it clear to Mr. Clarke that I was merely reciting the instance of jobber co-operation to show that we did get it, in answer to his question.

The situation mentioned by Mr. Clarke, supposing an institution specification for twelve and a half ounces to the package is purely hypothetical, as far as I am concerned. I have never had such a case. The only reason I mentioned that is that, in bids, we have received for our cracker products, it is not uncommon to designate the wrong weight of biscuit. For instance, they will say a five-ounce package of Uneeda Biscuit. It weighs four and a quarter. When they specify shredded wheat, they call for shredded wheat.

(End of plaintiff's depositions.)

DEFENDANT'S WITNESSES.

CLARENCE L. JORDAN.

DIRECT EXAMINATION.

I am advertising vice-president and director of N. W. Ayer & Sons. We handle the newspaper, magazine, billboard and radio advertising of the Kellogg Company. I handle the personal contact between our business and the Kellogg Company.

N. W. Ayer & Sons is the oldest and one of the largest advertising agencies in the world.

Some of the accounts we handle are the American Telephone & Telegraph Company, Ford Motor Company, Kellogg Company, Canada Dry Ginger Ale, National Carbon, Union Carbide & Carbon, Armour & Company.

We have handled the advertising of the Kellogg Company since about 1921, and during that time we have advertised all of the Kellogg products—corn flakes, All Bran, Whole Wheat Biscuit, Pep, Kaffee Hag. We have handled the advertising of the Kellogg Company in relation to Kellogg's Whole Wheat Biscuit from the beginning, as far as 1927 and 1928 is concerned.

In this advertising we follow the same general procedure that we follow on every product. Our first duty is to become thoroughly acquainted with the work. We send our writers in the first instance out to Battle Creek. They go to the factory just the same as one of the men working on the line. They talk to the people; they see the product being made, follow it through in every step and get thoroughly familiar with it.

We also send our men out in the field. We maintain a large corps of men. We extend their time in

the trade to get the general reactions of the public toward different types of product that we must know in order to prepare our advertising. Of course, in that instance those people went out specifically to find out about this particular food product. After they came back, we got their records and put them down. In addition to that, we employed the Medical Arts Laboratory in Philadelphia—that is a separate scientific organization—to make an independent study of Kellogg's Whole Wheat Biscuit, and to tell us at the end of their analyses the truth of the claims and the statements we might make regarding the food value of that product.

We had actual knowledge of the conditions in the trade in relation to the Whole Wheat Biscuit. We have men who do nothing in the world but contact with the trade on the Kellogg Company and its problems.

Our Research Department is concerned primarily with the reactions of consumers towards different types of products and with the reactions of the trade. We try to forecast the type of things that a consumer will want to buy, so that we can meet that desire in the advertisement.

We are concerned with everything that has to do with advertising; we write the advertising, draw the pictures, do all of the work.

The headquarters of N. W. Ayer & Sons are located in Philadelphia. We have at the present time something between 700 and 800 men and women. We have offices in New York, Boston, Philadelphia, of course, Chicago, Detroit, San Francisco. We have two offices in South America and one in London.

The full functions of N. W. Ayer & Sons, if we are retained to help promote the sales of a new product—well, I should say we have two definite functions. The first one and the function that is most vital is the writing of the copy and the making of the pictures

and putting it on paper, the advertisement, but in order to be able to do that successfully, we must know what we are doing, so that research work goes on, doing all of that work—I can perhaps illustrate it best by saying that we have customers, for example we handle Marshall Field in Chicago, the wholesale end of their business. Marshall Field has many people to whom they are putting out style articles. They get to work in the fall, for example, on what the woman is going to wear in the spring. Without a good deal of research you cannot tell what the woman is going to wear in the spring, and we try to do the same type of work.

In dealing with food products we do house to house canvassing. We are just completing one. I had the privilege of taking to Battle Creek about ten days ago a study made of the feeling of personal interviews in six thousand kitchens. We call it six thousand kitchens, because our investigators are required not just to go to the door and have a woman come and ask the question, but in talking about food products they are required to go into the kitchen, and actually see the work, and actually talk with them in the kitchen when her mind is on the subject.

We rather pride ourselves that when we do an advertising campaign for a customer, we start right at the ground floor and follow it all the way through, get in as closely as we can to every move that is made, because a lot of the things that are done, even some of the machinery in the factory becomes at times a basis for an advertising campaign. We made a check-up at the factory and also checked up on the consumers. As a result of that investigation, we started to get together in our mind the classification of this work—that is, what we would have to do, and as we see it, there are only two types of products fundamentally that can be disposed of successfully. Any

product to make a success of advertisingly has got to be something entirely new, something that fills a long-felt want or opens up a new avenue of business, or has got to represent certain improvements of salable differences as compared with anything else of its type on the market. The initial result of our investigation was to classify Kellogg's Whole Wheat Biscuit—Kellogg's Shredded Wheat Biscuit.

As a result of the investigation we classified the Kellogg's product as one which had certain improvements of salable differences as compared with anything of a similar type on the market. Those differences, as we found them in our discussions, were first of all that we had a similar biscuit which, because of its more convenient size, made an appeal to a certain number of women. It was a smaller size. We thought the smaller size was a salable difference, because when he told us that a number of women said that the smaller-sized biscuit was just about the right size for a child and two of them were the size for an adult. Another point of difference, it seems a salable point of difference, was the toasting on both top and bottom, which gave a brown, crisp appearance to the biscuit. Another salable point of difference was the 15 biscuits to a package, and particularly during the last two or three years, the economy appeal as exemplified by 15 servings, if you want to look at it that way, was a salable point of difference, and, of course, the fourth salable point of difference, which was developed later as a result of the Medical Art Laboratory, was the fact that we certified the food value on each of these biscuits, and that every claim was certified by that laboratory.

Well, when we had decided that it was advertisable, we, of course, were ready then to begin making our recommendations. Our recommendations were largely based on the fact that since we had a product

which had salable points of difference, but was not an entirely new product, that we should go into what we call a competitive or comparative advertising campaign. That means that the basic policy for that advertising campaign for this biscuit was to establish the difference between it and any other biscuit, or any other similar product, as quickly as we possibly could; this as opposed to an educational type, which we would have done if there had been no competition on the market.

Ready-to-eat cereals are one of the most competitive articles that any one can advertise, not only because of the large numbers that are on the market, but because most of them are highly specialized, and if a person eats one brand, if he eats corn flakes, he will not eat bran flakes. We also consider that we are in competition in so far as ham and eggs—everything that is eaten for breakfast, almost every cereal is highly competitive. Competitive advertising, probably a better word or as good a word, is also comparative. You compare your product in the advertising in a perfectly thorough manner with what you consider part of your competition. You have got to compare it with other cereals, and in this instance we recognized that we had to do some comparisons with the Niagara product. The basic policy was to tell the difference between our biscuit and the Niagara biscuit, which we call competitive. If you like, I can illustrate that better by just showing some of the advertising than I could by talking.

I go back to the beginning of an advertising campaign. The agency side, as we look at it, includes everything that has to do with the marketing of the product. We make our recommendations on the packages; for example, we make our recommendations with all of the advertising that goes to match the package. We make our sales recommendations also, then we go

and get back of that and do our advertising for publication, so I will tell you just how, once we had arrived at the fact that we wanted a comparative policy, we went through with it. We recommend designing. We drew original designs for their consideration. We made up a number of designs. The final design is the working out of several years' packages, so that is not one of our original designs, but we contributed to the step that came up to this.

That is the Kellogg Whole Wheat Biscuit carton with cellophane front. As I say, this has been added to since we started by so many people, that it does not go back to the original design. That has been a step by step process, but we have assisted in every one of the steps.

First of all we have in the Kellogg family covers, red and green, one of the most distinctive package lines in the grocery store. It has been on the market for years, so it is known as the Kellogg family. The Kellogg family products all are products, with the exception of bran flakes, as in this red and green package, so as you go into the grocery store you get this whole picture of the red and green Kellogg packages, as they are the largest manufacturers of bread wheat cereals in the world, so it is probably the best known package. So we felt that was nothing more than that red and green package and the Kellogg name, we had a distinctive package, but it was our desire to go further than that. The first thing, the real reason for this bowl with the two biscuits being on the front of the package, was to illustrate the point which we make in all of our copy, and that is that we have a size package biscuit where two of them exactly fit the cereal bowl.

That was entirely competitive. If you have a picture of two biscuits in the bowl, you can see how different it is from others, and our reason for putting

it on there was to illustrate that point. It is brought out in our advertising copy also. You will notice that this bowl is drawn with a perspective—looking down on it like that (indicating). That is one of the most difficult jobs that we have. We had to make the drawing over at least half a dozen times, because if you put a bowl of cereal down and look at it at an eye level, as you would ordinarily draw it, you do not get the end of the biscuit—any biscuit, regardless of its length. They all look about the same. We were so anxious to illustrate the difference in length between our biscuit and competitive biscuit, and we finally arved at making this drawing, and it illustrates the point we wanted to bring out. In addition to that, of course, there are salable points of difference as connected with this product.

As to the cellophane, I would like to mention the real reason for the cellophane window, first of all seeing food products through cellophane has become a very big sales point the last few years, and every manufacturer would like to have it if he could. We have tried it on corn flakes and other packages, but while it was suggested that we might have put the cellophane on the side, actually these products are not displayed with the side pointing towards the customer. They are displayed in that (indicating) direction, and the cellophane on the side would not have done it much good, so it had to go where it would do us some good.

In reference to our experience in making these investigations of consumer's condition and state of mind, I can give you an opinion of what we have done, and probably in several thousand stores in the last two years, and that is that in our opinion most women, when they buy them, see the name on the package and they buy carefully. I have never met very many women who have bought without looking. My opinion is certainly that the average woman is a careful buyer.

THE COURT: Are you seeking relief?

MR. CLARKE: None in this case.

WITNESS: I was talking about the points of difference that we had incorporated into this carton, to stress the individuality of our product. I had mentioned the ones on the outside of the carton. We went further than that. We did something that has never been done in the making of cartons for cereal products, so far as we know, and that is a different color of lining to the package, so that after a woman had opened the package and looked inside, seeing this green color in here, she would get something that would strike her as being different from anything she had ever seen.

We went still further than that, and developed a different type of separator for packing the biscuit. Perhaps that is best explained by this exhibit over here.

Separators, as they have been used before, had largely been instruments for carrying an advertising message printed on cardboard, and in this particular instance of ours we developed this new type of separator, which would be entirely different.

Now, coming back just to that point again that I made earlier, in pointing out the difference in this drawing—over here are two biscuits in the bowl. We consider that a perfectly legitimate selling drawing, because you can see how we stressed in that bowl the small size and darker color of our biscuit as compared with the larger size, lighter color of the biscuit on competitive sizes. You can also see the point that I have made, had we drawn our bowl as we did in trying to arrive at the correct way. In that perspective as is shown there, we could not have shown the shreddings of our biscuits as well as drawing in this fashion.

It is common practice to use dishes containing a portion of the contents of the food cereal package. I

have here a number of labels where that is done, on a great many products on the market, which speak for themselves. All food products.

(Received in evidence and marked "Defendant's Exhibit No. 128.")

I have known this type of advertising device that uses a dish with a portion of the contents of the food package ever since I have been in the advertising business, it seems, but I cannot give you a definite date, but I have always thought it was used. I cannot give you the number of years I have definite knowledge that it has been used. I am under the impression it has been used ever since I have seen it. I have knowledge that food products have been illustrated on the label for the last ten years, I can say definitely.

I have completed the comparative analysis of the two cartons as to the difference of matters emphasized in the plaintiff's carton and in the defendant's carton. I am going on from there to carry this policy right straight on through, and show how the same thing was done in the advertising that appears in newspapers. For example, I will not take up the time to read all of this exhibit, just to give you the facts. In this advertising we used them for headlines. This is the first advertising—newspaper advertising that ran in 1927, by the Kellogg Company of Kellogg Shredded Whole Wheat Biscuit, in these headlines. We used the words "Kellogg Shredded Whole Wheat Biscuit." We used those words. We used Kellogg's Shredded Whole Wheat Biscuit in a headline, simply to inform the public immediately that Kellogg's had a Whole Wheat Biscuit on the market.

The first paragraph of the copy in most instances read something like this:

"The very newest flavor treated by the famous Kellogg kitchen, a brand new Kellogg flavor surprise. You will be delighted with this newest Kellogg cereal."

In all instances, beginning right at the first of the advertisement, our first step was to identify our product as the newest product of this type on the market. That same policy carried right on through all of the advertising, down through 1932, all of it is in these exhibits, you can see. In 1928, where we were illustrating our points of difference, 15 biscuits in a package.

This is all newspaper advertising. We did nothing else except radio and booklets, of course. I just want to show one other example here.

MR. CLARKE: I offer these for identification.

(The same were marked for identification as follows: 1927—"Defendant's Exhibit 129 for Identification," 1928—"Defendant's Exhibit 129A for Identification," 1929—"Defendant's Exhibit 129B for Identification," 1930—"Defendant's Exhibit 129C for Identification," 1931—"Defendant's Exhibit 129D for Identification," 1932—"Defendant's Exhibit 129E for Identification.")

WITNESS: Exhibit 129, that is the advertising for Kellogg's Shredded Wheat Biscuit for the year 1927.

(Received in evidence and marked "Defendant's Exhibit 129.")

WITNESS: 129A is the advertising of Kellogg's Shredded Whole Wheat Biscuit in the year 1928, the newspaper advertising.

(Received in evidence and marked "Defendant's Exhibit No. 129A.")

WITNESS: 129B, this is the advertising of Kellogg's Shredded Whole Wheat Biscuit in the newspapers in the year 1929.

(Received in evidence and marked "Defendant's Exhibit No. 129B.")

WITNESS: 129C is the newspaper advertising of Kellogg's Whole Wheat Biscuit in the year 1930.

(Received in evidence and marked "Defendant's Exhibit No. 129C.")

WITNESS: 129D is the newspaper advertising of Kellogg's Whole Wheat Biscuit in the year 1931.

(Received in evidence and marked "Defendant's Exhibit No. 129D.")

WITNESS: 129E is the newspaper advertising of Kellogg's Whole Wheat Biscuit in the year 1932.

(Received in evidence and marked "Defendant's Exhibit No. 129E.")

WITNESS: These represent advertisements run in the newspapers in those years.

(Adjournment taken at this point.)

(Witness excused until later.)

FOURTH DAY.

May 25, 1933.

MR. COOPER: I will first offer in evidence the certificate of incorporation of the Natural Food Company, being a certified copy thereof, certified under the seal of the Secretary of State of New York.

(Received in evidence and marked "Plaintiff's Exhibit No. 254.")

MR. COOPER: Next I will offer a certified copy of the order of the Supreme Court of the State of New York of Niagara County, authorizing the change of name of that corporation from Natural Food Company to the Shredded Wheat Company.

(Received in evidence and marked "Plaintiff's Exhibit No. 255.")

MR. COOPER: I will next offer in evidence a certified copy of the certificate of organization of the National Biscuit Company in the State of New Jersey.

(Received in evidence and marked "Plaintiff's Exhibit No. 256.")

MR. COOPER: I will next offer a certified copy of the certificate of amendment of the charter of the plaintiff, that amendment being as of the seventeenth day of October, 1902.

(Received in evidence and marked "Plaintiff's Exhibit No. 257.")

MR. COOPER: Next a certified copy, also from the Department of State of the State of New Jersey, of the second amendment of the charter of the National Biscuit Company, the plaintiff, this second amendment being as of the twenty-fourth day of November, 1922.

(Received in evidence and marked "Plaintiff's Exhibit No. 258.")

MR. COOPER: I next offer in evidence the next certificate of amendment of the certificate of incorporation of the plaintiff, being the one as of the 12th of March, 1930.

(Received in evidence and marked "Plaintiff's Exhibit No. 259.")

MR. COOPER: I next offer in evidence a bill of sale, dated the 30th of April, 1930, from the Shredded Wheat Company to the National Biscuit Company.

(Received in evidence and marked "Plaintiff's Exhibit No. 260.")

MR. COOPER: Do you admit that the defendant is a corporation?

MR. CLARKE: Yes.

MR. COOPER: As alleged in the complaint?

MR. CLARKE: Yes, I formally admit that. If your Honor please, with my friend's permission——

THE COURT: You are not raising any issue as to the formal jurisdictional averments in the bill?

MR. CLARKE: No.

THE COURT: And are they all admitted?

MR. CLARKE: As to the corporate capacity of the defendant we raise no question. As to the corporate capacity of the plaintiff, we want to take an inspection of those documents.

CLARENCE L. JORDAN.

DIRECT EXAMINATION (Continued)

The cartons which you have marked on the board are the Quaker packages of our different series. They represent all of the products of the Kellogg Company except one, and that one is Kellogg Bran Flakes. These packages are regularly on the market.

MR. CLARKE: I offer those cartons in evidence as one exhibit, marked from A to R, and if there is no objection by my friends, I will have them in as one exhibit on this plaque.

(Received in evidence and marked "Defendant's Exhibit No. 130.")

WITNESS: Yesterday I was just beginning to show the advertising, by years, for the Kellogg Shredded Biscuit, and later Kellogg's Whole Wheat Biscuit.

The first folder illustrates the advertising in 1927, which was the first advertising that we did for this product. That is Exhibit No. 129. As I explained yesterday, the major feature of this advertising was the identification in the headlines with the fact that Kellogg was making a Shredded Whole Wheat Biscuit. We put that as the major feature on each one of these headings. It did not carry down into all of the small advertisements, but it did carry in all of the larger ones and in many of the small ones. At that time our biscuit had 12 biscuits to the package. We had been justified from the fact that Kellogg made this Shredded Whole Wheat Biscuit, and that it was a smaller size. Those two pages were the first two biscuit pages we advertised.

There are two pages in here. I can read the headings of all of them if you want me to. Well, the headlines are: "Extra crisp Kellogg's Shredded Whole Wheat Biscuit." "New Kellogg's Shredded Whole Wheat Biscuit." Here "Kellogg's Shredded Whole Wheat Biscuit." "Try Them." "Kellogg's Shredded Whole Wheat Biscuit." Then on the smaller advertisement "Delicious," and on this one "Try Kellogg's." On this page of the larger advertisement on the right is: "Order today Kellogg's Shredded Whole Wheat Biscuit, the new way, crisp." The next larger advertisement, "Try Kellogg's Shredded Whole Wheat Biscuit." "Three features you will like, tasty, fits the bowl, just right."

The next exhibit is No. 129-A. That is the advertising that appeared in newspapers in the year 1928. In that year we had 15 biscuits to the package, so we immediately put in as one of our major copy features the 15 biscuits story.

One interest in this campaign is that it shows the development, step by step, of the different features that came in. The headline on here is "Kellogg's Shredded

Whole Wheat Biscuit, browned on both sides." The headline on this one "Here is why they are so popular." In the round circle above that "15 biscuits in each package." That is in every case. "You get so much when you buy Kellogg's." "15 in each package." "It certainly pays to buy Kellogg's Shredded Whole Wheat Biscuit." "Taste them, they are delicious." "A wonderful cereal of a remarkable value." "Each crisp biscuit is toasted top and bottom, and you get 15 in a package."

In these little small advertisements we applied the same ideas as well as we could. "15 in one." "Three features you will like." "15 biscuits." "It is in the toasting both top and bottom, toasted twice." "15 in one, toasted twice." "So crisp." "You get 15." "Just the right size." "Just the right size." "Toasted all over, toasted all over." "And it is new."

Now that completes the advertising for the year 1928. I would like to say this, however, the way this campaign was progressing, we simply got distribution in one market, and then we would break the advertising and move on to another market with the same advertising when the other market was broken. That means, some of the advertising prepared in 1927 and 1928 might have been used in opening new markets in 1929 and 1930, so that while this is the advertising actually prepared during those years, it may have been at different times.

An advertising campaign of this kind covers a series of years. I was just illustrating how we got new points of difference for our biscuit as it progressed.

In regard to the number of years a campaign of this kind would take normally to develop would depend on the success of your work. It might take a good many years, and it may be done quickly. It just depends on how fast the consuming public takes it in volume.

There is a relation between the type of advertising used and in the progress and the distribution of the product that is being advertised. We do not advertise in the market until after the sales force has secured distribution.

This is the advertising for 1929 in newspapers. There were only two proofs prepared new in 1929. As I have just explained, we were using the others for opening markets from year to year. The headlines on these two are: "Served as a toast and a new toast idea." That was some special copy. The first sentence following that is "A new and delicious toast idea, Kellogg's Shredded Whole Wheat Biscuit, heated and buttered." "Many people are eating Kellogg's Shredded Whole Wheat Biscuit in place of toast, as well as a cereal with milk or cream."

The next exhibit is No. 129-A. This is the advertising which appeared—which was prepared in the year 1930. By that time we had received the final analysis from the Medical Arts Laboratory on their independent study of Kellogg's biscuits.

We have dealt with other business than Kellogg. I cannot give a definite answer on it being a recognized institution of standing in that line. We have dealt with them a number of times, but I cannot testify to their size.

We used the analysis of the report from the Medical Arts Laboratory—the food analysis that they made of Kellogg's Whole Wheat Biscuit as the basis for our copy policy in 1930. We also placed on the carton "Certified for Food Value by the Medical Arts Laboratory in Philadelphia." That was another individual point that we brought out in connection with this biscuit, something that had not been done in cereals before.

The headlines in this case, "Modern Wives Realize the Importance of Breakfast."

In order to save time and not read the copy, I will explain that this type of headline was leading into the fact that every mother or every woman should serve a healthful food for breakfast, and the analysis by the Medical Arts Laboratory gave us the facts to tell about what this biscuit contained. It should be a part of the breakfast. We use it for breakfast, and maybe I am wrong.

Each of these advertisements has an illustration at the head of them—each advertisement carries this little seal, "Certified for Food Value." "May be this is why you are tired. Plenty to eat yet. Lucky children whose mothers realize at last. A certified cereal. To a tired business man." And each of these advertisements contains an illustration of the defendant's package of the Whole Wheat Biscuit. "Certified for Food Value. Never before have mothers known a cereal like this. Is breakfast a danger meal in your house? It is not how much, but what you eat, that counts. Now a delicious new food makes breakfast safe. Read how this new cereal helps children make better grades. Your family may have plenty to eat at breakfast and yet be starved. A new contribution to the American table. Delicious cereal biscuits that supply ten important mineral salts."

All the advertisements that I have referred to contained the illustration of the package Kellogg's Whole Wheat Biscuit. The slogan "Kellogg's Whole Wheat Biscuit" is used in the copy. The next exhibit is 129-D. This exhibit shows the advertising that was prepared in 1931 for newspapers, and also illustrates the extent to which the campaign was spreading, showing the different points where the advertising appears.

In this case our advertising appeal was comparative, plus the certified food value. By this time, we had gotten all of our four distinctive points together and

were working them all into advertising, or as many as we could.

The headlines read "Deliciously improved by Kellogg. Try this." Under that is an illustration of the small biscuit with the caption "Deliciously improved by Kellogg." "Try this new Whole Wheat Biscuit, Shredded," and a picture of the biscuit. "Just compare these new biscuits, shredded. To a tired business man. May be this is why you are tired. Lucky children whose mothers realize," and these advertisements down here, "These are the biscuits you want. What an improvement. Here is a new treat. A new taste thrill. Just try this new Whole Wheat Biscuit shredded. Just notice how these Whole Wheat Biscuits are improved."

In all of this series, we are using both pictures and words to explain our points. Here is the certified food value, and here is the toasted top and bottom.

"New cereal helps school grades. Plenty to eat yet. Modern housewives realize importance of breakfasts. At last a certified cereal. Just look at the difference. Just look at this new and different Whole Wheat Biscuit. Try these improved biscuit. Kellogg's Whole Wheat Biscuit are new and different. Kellogg's Whole Wheat Biscuit are new and different. Kellogg's Whole Wheat Biscuit are new and different."

Three ads with those headings. "A new Whole Wheat Biscuit shredded. Deliciously improved. A new Whole Wheat Biscuit shredded. Different in size. Different in crispness. Different in flavor. Seeing is believing. Look at this new and improved Whole Wheat Biscuit."

That completes the advertising prepared for 1931.

Exhibit 129-E, this is the newspaper advertising prepared for 1932, together with the parts where the advertising appeared marked on the map. As the

back to the early days, toasted corn flakes was a descriptive name, and we found it was necessary to put the word Kellogg on the package. We thought it would be a good idea if later on we could develop products that would not have a descriptive name, so that there would be no chance of difficulty, so we brought out a product called Kellogg's Pep. There were no descriptive words on the package at all, just Kellogg's Pep, and then the necessary label designation in small type, required by the Government. That product did not go. It did not sell in large volume. We are studying to try to find out, and we finally came to the conclusion that it was necessary to put descriptive words on the package.

We then went to work and called it Kellogg's Pep Bran Flakes, which was descriptive of the product. As soon as we put the bran flakes on the advertising the sales immediately began to shoot ahead. We had the same experience with Crumbles, where we added the word "Wheat" to Kellogg's Crumbles. That practice has been proved out in those cases. It has been followed by other manufacturers—Post Toasties, for example, added the words "Corn Flakes" to their package, so that when we started to advertise this biscuit, we naturally wanted to do it descriptively.

I know that all of the big sellers on the cereal market are either bran flakes or corn flakes or shredded wheat, something of that nature.

We have a designating name which describes the product and I have knowledge of the methods used by the sales force of the defendant company in the promotion of Kellogg's Whole Wheat Biscuit because I worked with them out on the field.

I am constantly in contact with the Kellogg Company. I sit with them on their merchandising committee meetings, as well as their advertising commit-

tee meetings. We discuss and help to lay out all of the sales and advertising plans.

I receive and read all of the reports from the Kellogg district managers and have to do with advertising and merchandising for the Kellogg cereals.

The sales force consists of district managers and salesmen who call on the jobbers, chains and retailers, and men who also go out and manage the sampling crews, put out advertising in the window, go from house to house on special sales.

From time to time I have been out with them on every one of those jobs. I go out and go with them in their calls, so that as representing my firm, we will be familiar with the work that they do in the field. We require that familiarity in order to prepare good advertising. It is purely a simple research and information that we go out for. I can tell you of one of these journeys that I took in Texas, where the district manager and I got in an automobile in Dalias. We drove across the State in Texas, from Dallas to Laredo on the border. On the way down we met Kellogg salesmen in every point where there was a salesman at the time. We covered his route with him at that time, saw the retailers that he ordinarily covers, not all of them—as many as we could in the day we were with that salesman. I contacted with about seven salesmen in that trip across Texas. These men were salesmen of the Kellogg Company, doing nothing else except selling. We called on the jobbers on the way down. We called on the chain store on the way down. We called on a number of retailers on the way down and of course saw the salesmen.

This past spring I was in the South for three weeks, working with the district manager part of the time in the City of Atlanta, and riding some of our men down there through the different parts of that territory for the Kellogg Company, and getting in-

formation on a new product that had been introduced in the South, where we wanted to get a consumer reaction. By our men--I mean N. W. Ayer & Sons' men. We keep those men, associates of mine—at least one of them—in the field all the time. I am only there part of the time.

I went to California and stopped to see all of the district managers on the way across the country, going out the northern route and coming back the southern route. That was two years ago. I am quite frequently in contact with the district managers in New York and Philadelphia, the two largest districts. I always meet with all of the district managers at the sales conventions. I have called on the Chicago office and work with them; on the St. Louis office and worked with them; the Oklahoma City office; Atlanta, Boston, Denver—almost all of them, in fact.

In my contact with the sales force of the Kellogg Company I observed both the district managers and the salesmen talking to retail and wholesale fields regarding Kellogg's Whole Wheat Biscuit. That is as far as I personally observed. When I was with the salesmen in the grocery stores they were looking for orders. They were selling biscuits, making a general good will of the call and selling biscuits.

We plan the merchandising sales and the Saturday morning sales conducted by the representatives of the Kellogg Company. I have not seen any of these sales on Whole Wheat Biscuit—not personally.

The Kellogg Company spends a larger amount per case for advertising on whole wheat biscuit than on other Kellogg products of a similar kind. That was done on the recommendation of the N. W. Ayer Company and approved by the Kellogg Company. We recommended this to the Kellogg Company because of the highly competitive work that would have to be done, as I explained, not only in the entire cereal field,

but also because of direct competition, that we would need a larger appropriation per case in order to promote this product successfully than we did on other products that did not have quite so much competition.

This advertising campaign on Kellogg's Whole Wheat Biscuit is developing from market to market as the sales force gets an adequate distribution in the market. They advise the Kellogg Company, who advise us, to release the advertising in that market, and that progresses right along across the country.

The percentage of distribution that Kellogg Company have secured on this Whole Wheat Biscuit, nationally speaking, is 40 per cent. It is not a uniform distribution throughout the nation. We have very little distribution, almost none in some markets, and we have close to a hundred per cent. in others. It is very spotty. The average goes down to 40 per cent., but there is no uniform distribution at all. As to more advertising support in those markets where the distribution runs high—the distribution has to get up around—it has to be above 50 per cent. before we would consider advertising, and usually up around 70 per cent. before we advertise at all.

The advertising has to follow the distribution for the simple reason that when you put an advertisement in the newspaper, it goes into practically every home in the town. Well, now, unless we have a product conveniently located for the consumer to buy, and she reads about it in the newspaper and goes down to the store, and that product is in there, she will not get it, she will get somebody else's, because she will not chase all over town hunting for the store where our biscuit is distributed. For that reason, in order to enable the advertising to work 100 per cent., you must have 100 per cent. distribution. Of course, you cannot always get that, but the nearer it is to 100 per cent. dis-

tribution that you get, the nearer to 100 per cent. value you get out of your advertising.

The Kellogg Company absolutely stands behind the sale of any product that it stocks the grocer trade with. We pick off the grocers' shelves any product that is not passed fast enough to stand in good condition. I always see—I mean the Kellogg Company, we always work together that way—if we find any Corn Flakes or Shredded Wheat on grocers' shelves that are out of condition, we pick it up and give full value on that.

They know, to answer your Honor's question, when we come to them and offer them a product, that they can take that product just the same as they can take an absolute gold bond, because they can not lose on it. We take it up if it went bad or did not sell.

The methods of securing distribution on the Kellogg Whole Wheat Biscuit depends entirely on the market. In some places where we are closing in on a market, say we have distribution, and went in there and got it simply on the strength of the Kellogg's sales force, selling the majority of the dealers which they can do, and we had finally opened that town, and suppose the merchandising committee had decided to close in around that town, all points, then they would instruct the sales force to go out and tell the dealers in neighboring towns to put it in and it would be backed by advertising, in that case we would plan the advertising at the same time we planned the distribution, otherwise it follows the distribution.

In order to create a demand for the Kellogg products first of all the salesmen of the Kellogg Company get good display in the store, that is the primary job. It attracts the eye of the consumer. This shelf-display or ledge display of all the Kellogg products, is one of the most prominent things in the grocery store, and we try to have that right at the front of the

store, so that the first thing that the consumer sees when she comes in, is the ledge display of the Kellogg product.

That display has quite an effect on advertising. It impresses the customer with the green and red family of products.

As to whether it is a more or less effective method of advertising than the newspaper advertising, the best way to answer that is simply to say that that a chain is not stronger than its weakest link. If you are going to do a hundred per cent. merchandising job, you have to have all the things that go into it. Simple display by itself would not be a way of promoting a product for a period of time, neither would newspapers without display. You have to have them together to do a good job.

In the grocery trade advertising by direct display of the product in the store is a very effective means of bringing it to the attention of the consumers.

There have been window displays of the Kellogg Whole Wheat Biscuit. To give you an adequate picture of the extent of the Kellogg advertising, it is necessary to bring in all of our national work as well as the local newspaper work because on much of our national work Whole Wheat Biscuit is included, as are all members of the Kellogg family.

To state it briefly, Kellogg is the largest advertiser in the cereal field, one of the largest advertisers in the world. We use for general subjects, that is, all of the members of the Kellogg family, the booklets I have just given you, going out over our National Radio programs and National magazine programs. Back of that are the individual campaigns in the newspapers of individual products.

Last year, there were 1,300,000,000 Kellogg advertisements published in newspapers alone. All told, there were nearly two billion, including the magazine

insertions and radio announcements. Of course, that is all we placed for the Kellogg Company. I am speaking of the United States. The figures are affected by the circulation of a newspaper. A newspaper with a circulation of 500,000 means 500,000 ads.

I think I have already answered what effect Kellogg advertising would have on the promotion sales of the Whole Wheat Biscuit, as one of the members of the Kellogg family. I said that the Kellogg's Whole Wheat Biscuit was a part of much of that national effort, and that we included it in the advertising we sent out as responsive to the radio requests and as responsive to the magazine requests. It is a part of it.

As to a consumer demand for Kellogg Whole Wheat Biscuit being created by these various advertising and sales promotional methods, publicity kills the possibility of substitution, and in order to fully explain how I can qualify to make that statement, without going very much into our history, we have been in business about sixty years. We have probably been connected with as many commercial successes as any other institution in the world. Our job is advertising and publicity. We know from that experience that when you put advertising back of a product, and throw it out into publicity, if that product is not worthy to stand on its own feet, it will kill it. It will kill it just the same as a man may do things in private life that are not very nice, and nobody knows much about it, but let him go into the public and get the searchlight on him and it will kill him. Advertising does just exactly the same thing to commercial business that publicity does to a man.

As to whether this Kellogg Whole Wheat Biscuit could be promoted in the trade as a substitute or deceptive substitute for any other product, I can answer that in several ways. The first one is we would not be advertising it if it were; we would not handle it on that basis and the Kellogg Company would not handle it on

that basis. No, I do not see how it could. I think the package is distinctive. It has a name on it. It looks like a different product. I do not see how there could be any.

The tear sheets that you have appeared in newspapers and magazines.

(Received in evidence and marked "Defendant's Exhibit No. 138.")

MR. COOPER: Counsel will concede that all of these issued after the defendant's advertisements, to which the witness has referred, were commenced, and practically all of them, since the beginning of 1931, is that right?

MR. CLARKE: I concede that all of these that have the phrase "When you see Niagara Falls on the package, you know you have Shredded Wheat," were issued by the plaintiff company at some time after the defendant company entered the field as a competitor.

WITNESS: They are photostatic copies of the advertising of Shredded Wheat and Krispies taken from all the issues of magazines by our Research Division. These photostats were made from the *Woman's Home Companion,* March, 1903, to and including the year 1916.

CROSS-EXAMINATION.

WITNESS: I have been with the N. W. Ayer Company since 1915, except for the two years I was in the Army. I have been vice-president since about 1929, I do not remember the exact date, and a director since 1930 or 1931. I made part of the investigation which was made before the advertising of the Shredded Wheat product of Kellogg began.

XQ. 188. And when did you begin to make part of it?

A. In 1927.

basic policy of this campaign, we used the news readers' style of advertising, where the advertising is written and panelled after the same manner as a news story. It is a well-known form of advertising that is used quite frequently to give the story, particularly if you have something new to talk about, and that is why we call it the news reader type. If you have news, this is the form of advertising you can frequently take. In this series we use as a lead-in heading, the major item of news, and we identify it in the sub-heading. That is quite generally the policy followed in every case. It is an old editorial practice, and where you tell what happens in the lead-in headline, and identify it in the sub-heading, thus, "New Shredded Biscuit contain iron and vitamin B. Kellogg's Whole Wheat Biscuit certified for Food Value by Philadelphia laboratory." "New Shredded Biscuit making big hit. Grocers say housewives welcome many improvements in Kellogg's Whole Wheat Biscuit." "Many new features for new Shredded Biscuit. Kellogg's Whole Wheat Biscuit set new standard for this type of cereal." "New Shredded Biscuit. Extra good with hot milk, Kellogg's Whole Wheat Biscuit offer many improvements." "Philadelphia laboratory certifies new Shredded Biscuit. Kellogg's Whole Wheat Biscuit pronounced very rich in food value."

These are typical of all the ads. Here is the reading matter of one particular ad: "One of the first things to be noticed about the new improved Kellogg's Whole Wheat Biscuit is the unusually delightful flavor and crispness. The Kellogg Company uses a special process of pressure cooking. This takes in the original flavor. Every shred is thoroughly cooked and therefore easier to digest. The biscuit are then toasted a light golden brown on both top and bottom. This makes them much crisper and crunchier. Economy has

not been overlooked either. Instead of the usual dozen, you get fifteen biscuit to the package. Incidentally, the biscuit are new, convenient size, two just fit the cereal bowl. There is also news in the fact that the Kellogg biscuit is so rich in food value that the Medical Arts Laboratory of Philadelphia, certifies every package. Mothers are welcoming this improved and healthful cereal. They find it equally delightful for breakfast, lunch or children's suppers, serving it with milk or cream, and sometimes adding fruits or honey. Local grocers have this new shredded biscuit. It may be identified by the familiar red and green package. Made by Kellogg in Battle Creek."

Incidentally I might say that that closing paragraph identified by the red and green package and made by Kellogg in Battle Creek, has been a feature of practically all of this copy.

That concludes the newspaper advertising that we prepared for Kellogg's biscuit.

No, I did not receive any instructions from the defendant in any way altering its freedom in the matter of designing advertising. I did not even know that there was anything pending. I thought that with the dismissal of the other suit, it was entirely over.

This is a window display piece. Are these marked with exhibit numbers or are they all one exhibit?

(Same was thereupon received and marked for identification "Defendant's Exhibit No. 131 for Identification.")

The poster exhibits consisting of a number of pieces are marked A, B, C and D, etc. The first one is marked 1930-A, and that is a typical sampling circular. It is the circular that we gave away as we distributed the small samples and the large samples of this product from door to door. This was the advertising announcing the first certified series.

Exhibits marked E, C—if agreeable, your Honor, I will simply mention the broad general classification covered by this material, and not take it up piecemeal. In this material are contained the store cards, posters for windows on grocery stores. I am talking about the card classification, not the individual features, the circulars that go out inside of the cases with messages to grocers. The booklets that we send out in response to requests; on our radio programs, The Singing Lady and Buck Rogers. I simply will say in that connection that on The Singing Lady there have been in excess of a million requests on that program and we are running up around 400,000 of Buck Rogers.

The Singing Lady is broadcast over the Blue Network of the National Broadcast Company, and Buck Rogers has broadcast over the Columbia network. We also include the booklets that are sent out on the Slumber Music, which was also broadcast over the Blue network of the National Broadcasting Company. Also a booklet that we send out in response to inquiries received from our magazine advertising. There have been upwards of 150,000 of those, and the other sampling circulars, I explained them first, and the others are here. Those are the broad classifications covered by all of this material.

That material identifies the Kellogg's Whole Wheat Biscuit—it has the name and most of it has the package illustrated in it. All of it relates to Kellogg's Whole Wheat Biscuit.

The large cartons of Kellogg's Shredded Whole Wheat Biscuit—that is a window—what we call a jumbo carton, used in a window as a display. I just classified that under the window and store decorations.

There has been no difference in the general character of the advertising that has been put out since this suit was instituted, about May or June of last year.

The suit was brought on June 11, 1932. Well, on all of the newspaper advertising which I read—that is all except some of the 1932 books, prepared prior to that time, so that is cleared up all right, because it is so marked in the folder.

As to the poster advertising, I can tell you all of that is definitely prior to this. I would have to guess at the amount in the early part of 1932.

This sampling circular announces the first certified cereal. It is marked 1930-A. These pieces I know were.

They have no mark on them, but they are identified by the Kellogg Shredded Whole Wheat Biscuit package, and I know that was prior—prior to 1932-X.

We have never had any instructions as to the litigation, one way or the other. No instruction to shape the advertising in view of any litigation.

As to 32-B, I cannot say definitely whether that was prepared before or after the litigation. 1930-E was prepared before; 1933-C was prepared afterwards; 1932-I, that was prepared before.

1931-N was prepared before; 1931-K was prepared before; 1930-F was prepared before; 1930-G was prepared before; 1932-H and J, I cannot say definitely; 1931-L was prepared before; 1931-O was prepared before; 1930-P was prepared before; 1930-Q was prepared before; 1930-R was prepared before; 1928-X was prepared before. Now, all of these exhibits are marked with double letters. They have no year mark on them, but they were all prepared before, because they are——

Identified for record they are AA, BB, CC, DD, EE, FF, GG, HH, II and JJ were all prepared before.

There are two that I know definitely were prepared afterwards—these two. 1933-B was definitely prepared afterwards and 1933-C was definitely pre-

pared afterwards. After June of last year. 1932-B, I do not know, and 1932-H and J I do not know.

MR. CLARKE: If the Court please, I will offer as Exhibit 131, all the pieces which have been identified by the witness as having been issued before the present litigation was instituted.

(Received in evidence and marked "Defendant's Exhibit No. 131.")

(Received in evidence and marked "Defendant's Exhibit No. 132.")

WITNESS: Other type of advertising has been the advertising of retail grocers. I will tell you our part in it. Every time we sent out a newspaper campaign, we wrote a letter to the newspapers, and I have a copy of that letter in my pocket, asking them to assist us in getting advertising from the retail grocer.

(Received in evidence and marked "Defendant's Exhibit No. 133.")

WITNESS: Retail grocers advertised the Kellogg's Whole Wheat Biscuit. This is a bundle of retail grocery advertising for Kellogg's Whole Wheat Biscuit. I cannot tell how many tear sheets or ads there are in the bundle, but in all of the bundles together there are approximately two thousand advertisements by retail grocers on the Kellogg Whole Wheat Biscuit and between three and four hundred advertisements by retail grocers on Kellogg's Shredded Wheat. That is including all of the bundles. I do not know how much there is in each bundle.

(The same, consisting of five bundles, was thereupon received in evidence and marked "Defendant's Exhibit No. 134.")

(One bundle of retailer advertising Kellogg's Shredded Wheat received in evidence and marked "Defendant's Exhibit No. 135.")

WITNESS: So far as I know neither Kellogg Company nor N. W. Ayer have anything to do with the preparation of the so-called dealer advertising of Kellogg Whole Wheat. Our part is limited to the letter we wrote to newspapers. We had no further contact with the retailers at all. We do not phrase their advertisements. We collected the newspaper tear sheets—cut them out of the newspapers and put them in our files.

This newspaper tear sheets is the separate package that includes those advertisements which advertised Kellogg's Shredded Wheat instead of Kellogg's Whole Wheat Biscuit. This top advertisement contains reference to Shredded Wheat and Kellogg's Shredded Wheat, both under breakfast foods, but that is not true of all of these advertisements. This is the Kellogg Shredded Wheat advertisements. There are two bundles of that.

(Received in evidence and marked "Defendant's Exhibit No. 136.")

(Bundle of tear sheets offered in evidence and marked "Defendant's Exhibit No. 137.")

WITNESS: Some of these advertisements used the terms Whole Wheat Biscuit and Shredded. In the first place, we wanted to describe the product. We had found in the experience that we had had in advertising cereals that there has been no cereal developed into great volume on the American market, no ready-to-eat cereal, unless the name of that cereal was descriptive, or the descriptive words used on the label and in the advertising. Naturally with that experience back of us, we wanted to describe the Kellogg Biscuit as completely as we could. We used the words Shredded and Biscuit and Wheat in order to describe the biscuit.

Yes, I can mention one or two products which were advertised at first under special names. Going

I could not tell you the output. I would not like to guess. One or more packages with the cellophane window in them are put in each case of goods sent out. There are some stores that will not and some get all cellophane windows. I heard a district manager say that he was not ordering anything in his territory except cellophane windows.

Plaintiff's Exhibit 4 is one of the type of cartons which has a light green color applied to the pasteboard inside of the carton.

The carton that we started to put out last September is the one like you hold in your hand.

(Same marked "Plaintiff's Exhibit F for Identification.")

That is the one that had the corrugated liners as distinguished from plain slips of paper. The green lining or green tinting on the inside is practically invisible through the window to your eye. All that one can see there is the oval ends of one row of biscuit and the tops and bottoms of the adjacent rows below and above and the separator.

The clipping from the *Bangor Daily News*, April 11, 1931, is an advertisement of Kellogg's Whole Wheat Biscuit; I am sure that it is in the bundle of advertisements which I have produced. I would have to look up the record to be absolutely certain. I assume it is one directly from Kellogg Company through our company. It looks familiar to me. The cuts that appear in the advertisements of *Marion Star*, Marion, Ohio, April 3, 1931; *St. Paul Dispatch*, St. Paul, Minn., April 9, 1931, were furnished by N. W. Ayer & Company. We drew the cuts of the biscuit. No, I do not think that is a cut that more closely resembles Shredded Wheat Company's product than it does the Kellogg Company's product. I am sure that the artist who made the drawing had a biscuit of Kellogg's

to draw from. Our company furnished the cut of the saucer with the two biscuit in it for the advertisement in the Lancaster, Ohio, *Daily Gazette*, April 3, 1931, but we did not place the advertisement of the *Home Dairy*, Lancaster, Ohio, who are not customers of ours. I assume that cut was furnished to them by the Kellogg Company from our cuts. The drawings of the cuts are not made by our agency artist—we buy our art work on the outside, but they were bought by us and made under our supervision.

The drawings represent Kellogg biscuit as distinguished from the Shredded Wheat Company's biscuit, but not as well as we finally made it after some more trials.

We had some difficulty in the perspective in making pictures that distinguished Kellogg Company's biscuit from Shredded Wheat biscuit—when you look down along the flat. You do not show length as well when you use a perspective. It was easy in this kind of drawing. I mean the type of drawing in the *Jamesville Daily Gazette* of May 19, 1931.

In Exhibit 129-D—advertising of 1931—there is a sheet headed 1ABM 1931, and beneath the picture of a wheat biscuit in the reading matter in the lower quarter of the sheet are the words "Wonderful new flavor"—that was the flavor in the Kellogg Biscuit—the flavor in the Kellogg Biscuit as it had been since 1927. The way you cook it gives it a flavor. The product has a flavor. There is a difference between the flavor of the Kellogg biscuit and the flavor of something else—the something else is any other type of Shredded Biscuit. I am familiar with the Shredded Wheat Company's biscuit since right after the war. It would be very difficult to put into words the "Wonderful new flavor" of Kellogg's. If I knew how to describe it, I would put it in the copy.

I do not know that I have ever tasted the biscuit described by Dr. Oakes as having been made on what he called the automatic machine where there was toasting on both sides.

Our company did not make the drawing with the two biscuit in it. I cannot give you the date on those cartons. I do not remember that. We get into the making of the carton and carton design—we make our suggestions sometimes six months, sometimes a year before they actually come out in the production of the factory. You will have to ask one of the factory men about cartons, because I do not know.

The difference between the picture of the dish with the two biscuit on Plaintiff's Exhibit 1 and the dish with the two biscuits on Plaintiff's Exhibit 5, was we got a darker biscuit and a deeper perspective in the Exhibit 5—Plaintiff's Exhibit 5—as compared with Plaintiff's Exhibit 1.

The drawing that I was referring to (cut of Plaintiff's Exhibit 5) and the drawing that we used in our advertising, is similar to the drawing that is used on other packages. We make the original drawings that are used in the advertising. They frequently place them with the artists who make the packages. What I was really referring to was the number of times we made those drawings for the advertising placed on the package. Our company did not make this drawing that appears on this carton—no, we did not. We made the original that was used in advertising matter of which Kellogg made the drawings that go on the package. We never made a finished drawing that went in any of these packages. A word to explain it is in the nature of the rough suggestion to the Kellogg Company, where we would make these in pencil or in color on tissue paper and give to their advertising department.

Our company made the cuts contained in the large mass of advertising introduced here in the direct examination. We made the cuts and the advertisements. We did not approve the cartons. That is a matter that is done by Kellogg. We talk it over with them and give suggestions, but the approval of the carton is their responsibility, and not ours. We design the advertising ourselves and they approved it. We did not design the carton, Plaintiff's Exhibit 5.

I have never seen the answers to the interrogatories in this case.

MR. COOPER: Counsel has tendered to me recently during the trial a large number of photostats of purported advertisements of the Natural Food Company in its original name, and the Shredded Wheat Company I suppose in succession, which counsel said in general ran from 1903 to 1916. I raised no questions that those were authentic advertisements issued by that company under its several names at about the time the periodicals purport to bear date.

MR. CLARKE: I offer those in evidence as one exhibit.

THE COURT: No objection?

MR. COOPER: None.

(Received in evidence and marked "Defendant's Exhibit No. 139.")

MR. CLARKE: I also offer this pamphlet entitled "Uneeda" which is conceded to be an advertisement of the plaintiff, dated December, 1932, and January, 1933.

THE COURT: No objection?

MR. COOPER: I have no objection.

(Received in evidence and marked "Defendant's Exhibit No. 140.")

MRS. GRACE BURNS.

DIRECT EXAMINATION.

My husband's name is Lester and I have on daughter, sixteen years old. I am a housewife and a a user and consumer of the product known as Kellogg' Whole Wheat Biscuit. I do not remember how long have used that product, but it is several years, prol abl three years or something like that.

I have known it as Kellogg's Whole Wheat Bi cuit. I happened to see the package in the store an as I always used Kellogg's products, other product and I liked the size of the biscuit and I tried it.

My first package I purchased in a service grocer store. I just asked for a box of Kellogg's Shredde Wheat, as soon as I had seen it on the shelf, becaus I had used their Corn Flakes and I saw the small bi cuit which was a better advantage for me to use, and just tried it and we have used it ever since.

Previously to knowing Kellogg's Biscuit I ha known the other biscuit, the Niagara Biscuit, and use it. After making a comparison between the two bi suits I continued to use the Kellogg Biscuit. On reason for preferring the Kellogg Biscuit was the siz It just seemed the right size, and another reason wa that it was brown, it was much browner than the othe biscuit and every one seemed to like them better—th preference seemed to be a general preference. Th main thing was the size because the other biscuits wer so large and there was always just a little more tha they wanted with the breakfast, and that was really th main reason that I continued using this biscuit.

I recommended Kellogg's Biscuit too there beside members of my family, because I liked it so well my self, I will say that truthfully.

I came here today to testify because an agent wa sent from the grocery store to me. A man came an

asked whether I used Kellogg's Biscuit. I had never seen the man before, and I do not know any one connected with National Biscuit Company or the Kellogg Company.

In ordering the biscuit I ask for Kellogg's Whole Wheat.

CROSS-EXAMINATION.

I live at 1125 West Street, Wilmington.

How I came to buy my first package of Kellogg's Whole Wheat Biscuit was because I saw the small size of the biscuit on the package—that was really the first thing I noticed. I saw the sign of the biscuit on the package on the shelf, and that is one reason, and then it was narrower. I do not know whether that picture was always there, but I know it was a different shaped package from the Shredded Wheat. I do not remember whether the package I first saw had a cellophane window in it or whether two biscuits were there at that time or not. It was like that package—pointing to Plaintiff's Exhibit 2.

(Same was thereupon received and marked "Plaintiff's Exhibit E for Identification.")

I was able to tell from the package that Kellogg's Biscuit was shorter than Shredded Wheat Biscuit by the side there. Is not this biscuit packed in the same way as this one? I have forgotten because it is quite a while. The package might have been exhibited either end to me or face to me and in either event since it was this package I observed that it was Shredded Whole Wheat Biscuit and asked for it for that reason.

I knew the product that I had used prior to that time as Shredded Wheat.

As to the package that I saw I do not remember whether the face of the package was exposed, or whether it was the end of the package.

RE-DIRECT EXAMINATION.

RDQ. 56. What kind of biscuit is this Kellogg Biscuit?

A. What kind? I do not know, it is very good, th is all I can say.

RDQ. 57. It is a wheat biscuit?

A. It is a wheat biscuit.

MR. CLARKE: That is all.

MR. MORRIS: That is all.

By MR. CLARKE:

RDQ. 58. What kind of biscuit was this biscuit y used before you used the Kellogg biscuit?

A. It was a wheat biscuit.

MR. MORRIS: Will you mark that E for identi cation, and then we will find out what the exhi number exactly like that is, and then stipulate th that is Plaintiff's Exhibit for identification.

(The same was marked "Plaintiff's Exhibit for identification.")

THE COURT: I would like to ask whether not the state of the record is satisfactory in rega to the tender of that pleading, in evidence.

THE COURT: The tender is withdrawn.

MR. MORRIS: I thought since I have miss something in the beginning of all this trouble, thought I had better take the blame for it.

THE COURT: Thank you very much.

MR. CLARKE: I suppose the record then is co plete, without any motion to strike.

THE COURT: The record is complete. You a standing on proofs.

MR. MORRIS: We are standing on admissio

THE COURT: Admissions in pleadings, ce tainly.

HAROLD F. MUNTZ.

DIRECT EXAMINATION.

I specialize in institution and restaurant sales for the Kellogg Company. I have been employed by the Kellogg Company slightly over six years. I am twenty-eight years old.

The nature of my duties with the Kellogg Company is to work with the district sales managers and Kellogg salesmen in the development of institution and restaurant sales of Kellogg's Whole Wheat Biscuit.

I work with the Kellogg salesmen calling on institutions in an effort to encourage institutions to use the various Kellogg products, including the Kellogg's Whole Wheat Biscuits.

We always interview first the buyer and the dietitians in an effort to have them fully acquainted with the entire Kellogg line. We talk to the buyers about the convenient sizes of the Kellogg biscuits, about the number of biscuits packed in a package, and about the price of the various Kellogg products.

We talk to the dietitians about serving the Kellogg products to the inmates in an institution, and of the food value of the Kellogg's Whole Wheat Biscuits.

In the course of developing institution business we call on all types of institutions, including private institutions, State institutions and Government institutions.

By this I mean we endeavor to call on every place where there are more than twenty-five people eating in the same dining room; that is, we feel that it is worth our while to call to see the buyers and dietitians of institutional outlets where more than twenty-five people are served.

That takes in three very distinct classes; the private institutions which are the city hospitals and orphanages and sanitariums that are in no way connected

WITNESS: I cannot give you the date definitely. I do not remember.

I was one of the men who were sent to the factory in that early investigation. We just went to the factory at Battle Creek—the Kellogg factory in Battle Creek.

No, I did not send men at that time or subsequently to the factory of the Shredded Wheat Company at Niagara Falls. So far as I know none of our people have ever been in there.

When I talked about the kitchen count, I was referring to the work that we do, and I said that we had just completed a 6900 kitchen count.

In the early days of the preparation to take over the advertising of Shredded Wheat product of Kellogg, we investigated to see what the demand was or would be for that product—that investigation included both calls on the retail trade and calls on women to determine their preference for that type of product. These investigations were made primarily in our branch offices in Philadelphia, New York, Boston, Chicago, San Francisco. Those offices took charge of some sort of a canvass of homes to ascertain largely the demand for wheat cereals. We were interested in the entire field of wheat cereals. The investigation started around 1927 and is still continuing. The investigation did not include an examination into the demand for the Shredded Wheat. The reports when they came in included Shredded Wheat. There are several hundred. The reports could be produced for inspection if they are still on file. I doubt very much whether they are.

I was informed of the result of these investigations, and whatever information came in those reports with reference to Shredded Wheat we ascertained the fact stated in the reports at about the time they were delivered to our company.

We did not get a clear idea as to the existence on the market over such part or parts of the country as the investigation covered of Shredded Wheat. We were not really asking for that type of information.

From the investigation we did learn something about the product Shredded Wheat. Before the investigation was put on I personally knew about that product, both by name and by the pillow-shaped biscuit.

At the time of the investigation—what we were trying to do at that time, and what we were doing at that time, was asking what people thought of a biscuit of our size. We were not asking about the demand for a product. We were asking about what they thought of a biscuit of that size and general shape, and so on. It was not a demand investigation at all.

I do not know how many of the several hundred reports made mention of Shredded Wheat, such as Exhibit 1.

I should say that I have known personally of Shredded Wheat, such as exemplified by this Exhibit 1, since after the War, around 1919, or somewhere around there. Other members of the organization of N. W. Ayer & Company also knew the product like Exhibit 1.

As I stated previously there has been no big market made for a food product unless the name was descriptive of the product—that is based upon all the experience of our company, not only in advertising itself, but in noticing advertisements of others who did not retain us as their agents.

Yes, I know a cereal called "Force" which name is not descriptive of the product. It has been a failure ever since I heard of it. It has been off the market in this country. Yes, I have seen advertisements of it recently. They are coming back, but they certainly have not started to sell.

I have heard of cereal called "Grape Nuts." That name is not descriptive of the cereal. "Grape Nuts"

is in wide distribution throughout the United States, but it is not a leading seller. I mean a product that sells up into volume, such as we consider a leader, in big volume. I would estimate that there are not being sold annually in this country fifteen million packages of "Grape Nuts." I agree that then the name is not descriptive.

In connection with our investigation, preparatory to advertising Kellogg Shredded Wheat, we did not make any computation or get any figure to show the output of the Shredded Wheat Company.

We did not design the first carton put out in 1927 of the Kellogg Shredded Wheat. We suggested a number of designs for their carton, but the final work-out was done through the addition of a lot of things and a lot of advice.

I am familiar with Plaintiff's Exhibit No. 2. As far as I know that was the first put out in 1927 by Kellogg for shredded biscuit. I cannot tell exactly, but so far as I know it is. I do not think, in fact I am sure none of our suggestions went into the design of Plaintiff's Exhibit No. 2. Our suggestions were very largely taken on the others.

Plaintiff's Exhibit E is the one which was made from our company's design. They worked that out in spots. That was used pretty generally. That is the course of standard. You recognize that—meaning the colored name; that is all standard and does not require redesigning. The carton like Exhibit E came out some time in 1928.

I recognize features on Plaintiff's Exhibit 1 that we discussed and asked them to work out. We discussed the representation of a dish with two biscuit in it, but we did not make that drawing. We suggested this panel on the side and we worked with them on these suggestions. They were not original with us.

No, the two biscuit in a dish do not fairly represent Shredded Wheat Company biscuits. They represent Kellogg's biscuit fairly accurately.

Plaintiff's Exhibit 1 was designed and put on the market about 1930. I do not remember the exact dates of those cartons.

I cannot tell if Plaintiff's Exhibit 4 represents the carton after the one last inquired about. I recognize it as one that our company at some time helped to develop and recommend. So far as I know it is the first one with the window in one broad size. The date I cannot give.

I examined a large part of the mass of newspaper advertising, not all of it. I do not recall having seen a copy of a part of the *Tampa Daily Times* for Friday, July 8, 1932, containing an advertisement under the heading of Piggly-Wiggly Store, Kellogg's Shredded Wheat, Pkg 9¢. That advertisement was not included in the large bundle of newspaper advertising which was introduced on direct examination. It was not withdrawn from those before production here. Those advertisements that were produced are not complete copies of every grocer's ad.

I observe that Piggly-Wiggly in the advertisement in question uses the word "Kellogg" in the smallest lettering of the advertisement proper and the words "Shredded Wheat" in much larger lettering. I also observe that Piggly-Wiggly puts a representation of the Shredded Wheat Company's package in its advertising.

The Kellogg Company furnishes cuts, as they are called, to the grocers for their advertising.

I have been told that the Kellogg Company worked on the pillow-shaped biscuit before we took over their advertising, but they were not making them at the time I first visited them. I did see the biscuits in the factory before the advertising began, and they ex-

plained to me the advantages that they had in their size biscuit.

From the time we first began to contact with the Kellogg Company, it has been a subject of conversation between the Kellogg Company's representatives and representatives of N. W. Ayer & Company as to the resemblances and points of difference between the two biscuits.

I should say that we did form an opinion from the investigation that was made as to the consumer demand that had been created by advertising for the Shredded Wheat Company's Shredded Wheat.

I did say that the company—N. W. Ayer & Company—has been in business sixty years and that when you put advertising behind an imitation, it will kill it.

I have no case in mind of any of N. W. Ayer's customers being held to infringe other's trade-mark rights.

I can recall conversations and reading about instances in which things which have been extensively advertised have been held to infringe somebody's trade-mark rights. I have no personal knowledge of them, but I imagine it is true.

Mr. Cooper, the question was substituting and not infringement. The statement that I made was with regard to the practice of substituting. Perhaps we look at the definition differently, but an infringement would not come within that statement of mine.

There are about 300,000 retail grocery stores in the United States. In about 120,000 of those there is Kellogg's Shredded Wheat for sale—about 40 per cent. distribution. Actual information about the number of retail stores in which there is on sale today Kellogg's Wheat Biscuit or Whole Wheat Biscuit product, can, I think, be received from the record of the Sales Department at Battle Creek. I based the 40 per cent. distribution on information from our sales depart-

ment. What I gave this morning was on information and not on my knowledge. For information regarding distribution you would have to go to the Kellogg Company.

As to the amount of money the Kellogg Company has spent in advertising the packages which have the words "Shredded Biscuit" substantially as prominent as on these Exhibits E for identification and 2, as distinguished from those like Plaintiff's Exhibit 1 and Plaintiff's Exhibit 4, that give the prominence to Whole Wheat, we have the actual figures here; of course, I can figure out from them right away the proportion.

We do not keep the figures for the advertising that they pay in Battle Creek—that is the store material and that nature. We spend about ten times as much money on the Whole Wheat Biscuit as on the Shredded Wheat Biscuit. That includes all of the different varieties of package in the one group, which has Shredded Wheat Biscuit in prominent letters, and in the other all of the carton that has the Whole Wheat in prominent letters. We have put about ten times as much advertising expense into the cartons which have Whole Wheat in prominent letters, as we put into the cartons that have Shredded Biscuit in prominent letters. It was two and one-half years before they began to put any out with the Whole Wheat in prominent letters, that would make it 1929. Either the end of 1929 or the first of 1930, according as the date goes forward or back.

Cartons put out by Kellogg like Plaintiff's Exhibits 1 and 4 have been displaced. There is a new carton. We have not featured the cellophane window in advertising at all. I could not give you their manufacturing output. That is usually discussed as an advertising package of which there will be a certain percentage to a case. Some stores get more than others.

WILL K. KELLOGG.

Direct Examination.

I am a food manufacturer, president of the Kellogg Company. I have been in the food business upwards of forty years. The Kellogg Company was organized in 1905. It was the Battle Creek Toasted Corn Flake Company at first, and afterwards it was changed to the Kellogg Company. Then that was succeeded about 1922 by the present company, The Kellogg Company. I have been president of these companies throughout the period from 1905 down to the present time with the exception of two years when I was chairman of the board.

The product that the company manufactured in 1905 or 1906 was Toasted Corn Flakes.

I am unable to give the exact date when the company began to manufacture any other products besides Toasted Corn Flakes, but within five or six years after our organization we began to add foods, different foods.

I think it was around 1910 when the company began to experiment with any wheat biscuit in shredded form, and the product was put on the market about that time under the name of Whole Wheat Biscuit, Shredded Wheat Biscuit. The correct name was Kellogg's Toasted Wheat Biscuit. This product was on the market for about six years until war time—was on from 1910 until war time.

This product was a biscuit made from a dough which had been partially cooked and that was shredded, made in the form of biscuits placed on pans, a cover pan was placed over the biscuits and it was then baked in an oven and that constituted the biscuit.

At first this product was composed wholly of whole wheat, but later it was not. At first it did contain sugar and salt flavor and some malt flavor, but

later, during the war period, it contained other grains besides wheat. We were restricted by the authorities at Washington from using so much wheat. We used corn and rye. That particular biscuit was a very edible product, but we found that it was impossible to control the weights. The weights were over, overweight. The package first, I think, contained about ten biscuits and afterwards twelve, and would weigh from —well, it varied from 14 to 16 ounces and sometimes a little more. It proved to be rather unprofitable due to the fact that it was overweight. The admixture of other grains ruined the palatability of the biscuit. It was not as palatable as it was when composed entirely of wheat.

The advertisement you show me is an early advertisement taken from *Munsey's Magazine,* in colors, of Kellogg's Toasted Wheat Biscuit, published about 1913.

The one marked A on the second page is a leaflet of advertising Kellogg's biscuit by different names, indicating the date when it was published or used. That was about the same time as the advertisement, I think.

B is a six-page leaflet, advertising Kellogg's Toasted Wheat Biscuit, published about the same time, or used about the same time. C is about the same type. There is a picture of the factory and the original factory where the food business was started in Battle Creek. D is the advertisement from *Home Life* of Kellogg's Toasted Wheat Biscuit, which appeared in *Home Life* about March of that year.

E is a cut-out of a counter display sign, advertising Kellogg's Toasted Wheat Biscuit, on a plate—a saucer. Two of the biscuits being illustrated in the saucer.

(Received in evidence and marked "Defendant's Exhibit No. 145.")

WITNESS: That biscuit went off the market during the war time and that identical biscuit was never manufactured after that period. We continued the experiments in our laboratory in the factory for some time, and we brought out another biscuit about 1922—another Shredded Wheat biscuit. I think it was called Shredded Wheat Biscuit. Yes, the name Kellogg appeared on that—"Kellogg's Toasted Wheat Biscuit." That was a carton like Kellogg's Shredded Whole Wheat biscuit carton which you have here, with the exception that the name at the bottom was "Kellogg's Toasted Corn Flake Company instead of Kellogg Company. There were some pictured in colors, a green and a red.

The carton you show me is one of the cartons put on the market by the Kellogg Toasted Corn Flake Company in 1922. It has some of the old biscuit in it, which are small in size and well toasted.

(Received in evidence and marked "Defendant's Exhibit No. 146.")

WITNESS: The advertisement marked G is from some local magazine, full page; H is an illustration of a girl with a package of Kellogg's Toasted Biscuit and I is an advertising page in colors taken from the *Field and Stream* magazine, August 20th, but I do not see the year, and Kellogg's Shredded Whole Wheat Biscuit.

Kellogg's Shredded Whole Wheat Biscuit of 1927 was manufactured for five or six years and how long it remained on the market after that period I cannot say. The one of 1922—I suppose you refer to the one I have been testifying about—that was on only a short time. That is Exhibit 146—my recollection is that it was on for less than a year, or about a year or less. As to the carton, I believe it was the same carton.

About 1926 or 1927 the company put Kellogg's Shredded Whole Wheat Biscuit back on the market with another biscuit and it continued on the market with an increasing trade. The name was changed. I think it was put on first as Shredded Wheat Biscuit, Kellogg's Shredded Wheat Biscuit. Afterwards it was changed to Whole Wheat Biscuit, Kellogg's Whole Wheat Biscuit.

The carton, Plaintiff's Exhibit 2, is Kellogg's Shredded Whole Wheat Biscuit manufactured by the Kellogg Company. The net weight is nine ounces, the package states. Plaintiff's Exhibit 3 followed Exhibit 2. It is Kellogg's Shredded Whole Wheat Biscuit. 15 biscuits.

I do not think the size of the biscuit has changed between 1922 and 1927 and the present time.

The biscuit taken from Exhibit 146 is the same size that we continued to use after changing from the larger size. The larger size was discontinued in war time.

The original name—Sanitas—of the corn flake product under which it was advertised was placed at the top of the package in small letters. It was only used for a short time, and then it was sold as Kellogg's Toasted Corn Flakes, but I think at the time the Sanitas was on the heading of the carton, that W. K. Kellogg or Will Kellogg was on the end of the package "Non-genuine without this signature."

The corn flake business was purchased from the Sanitas Nut Food Company. The Sanitas Nut Food Company was Dr. J. H. Kellogg of the Battle Creek Sanitarium. He owned it.

The Sanitas nut foods were foods packed in cartons. I think there was something like a hundred of them. I cannot describe them all. Some of them were made from nuts, cereals, different preparations, quite a large variety.

The carton that you show me is one of the original cartons which was used at the time the business was taken over by the Battle Creek Toasted Corn Flakes Company from the Sanitas Nut Food Company.

(Received in evidence and marked "Defendant's Exhibit No. 147.")

WITNESS: The product was sold as Toasted Corn Flakes. We endeavored to control the market by having the only toasted corn flakes.

After removing the name "Sanitas" from the package, we used the name "Kellogg" and continued to do so to the present time.

Dr. Kellogg was my brother. At the time the name Kellogg's was put on that package I am not positive that we were the only concern manufacturing Toasted Corn Flakes, but I am not sure.

We encountered competition—severe competition within the first year.

The name has been added to each new product as brought out, and includes the bran, All-bran, Bran Flakes, Kellogg's Krumbles, Kellogg's Wheat Krispies, Kellogg's Rice Krispies and Pep. The name Kellogg appears from six to nine times on every package.

There is a very great value to the name Kellogg due to the fact that it has been advertised so many millions or billions of times.

It is a very easy matter to introduce a new product to the grocery trade just on the name. The grocers are aware of the fact that we stand back of the name, that if any product which we put out is not satisfactory in every way, it is taken back and the money refunded. It is of inestimable value in putting out new products.

In an average year the name Kellogg appears on packages, I think, in excess of one billion and a half; on the cartons only.

In advertising products under the name Kellogg the company has expended since it began advertising in 1905, in excess of fifty million dollars; the name Kellogg has appeared in every advertisement.

As to whether the Kellogg name under these circumstances has value as a sales element—it has very great value. Unless the consumer created a demand for the product through the advertising, the retail grocer would not be interested in stocking the goods.

The units of sale you ask about—the products are all sold in packages or cartons, as indicated by this exhibit. Some are individuals and some are family size.

To mark these cereal products, the Kellogg Shredded Wheat Biscuit, the Whole Wheat Biscuit, we introduced some years ago a glacine front, a cellophane front, which showed the biscuit very plainly, so that the consumers may know what they are buying. It is impossible to mark flakes.

None of the cereal products of the Kellogg Company, other than the whole wheat biscuit, are individually marked as to the product itself, when it is outside of the carton.

Kellogg's Whole Wheat Biscuit is a product made from the entire wheat. It is shredded and the shreds are very fine shreds. It is well baked and toasted, dark on top and bottom, and it is a small biscuit. That is the size (indicating) as compared to the other biscuit.

Nothing is added to its flavor, but the process produces a special flavor. This is done by dextrinizing more thoroughly the starch of the wheat.

As to whether the small dark biscuit of the defendant could be palmed off as the large biscuit of the plaintiff—in my opinion, one would be able to tell one biscuit from the other, when it is white on the bottom, slightly toasted on the top. The smaller biscuit is well toasted

on top and bottom, and the flavor, when eaten, is different.

(Offered in evidence and marked "Defendant's Exhibit No. 148-A to 148-H for Identification.")

The exhibit you show me marked Defendant's Exhibit No. 148-A to H, is the tear sheet from a magazine, *Literary Digest,* of Kellogg's Shredded Krumbles.

B is an advertisement of Kellogg's Shredded Krumbles, an advertisement from a magazine or newspaper, I am not sure which.

C is an individual carton of Kellogg's Shredded Krumbles. It is marked "Free Sample."

D is an advertisement of Kellogg's Shredded Krumbles taken from some magazine and I am unable to state which one.

E is proof sheet of a carton of Kellogg's Shredded Krumbles.

F is a magazine tear sheet in colors, advertising Kellogg's Shredded Krumbles showing a facsimile of a carton and a girl in colors.

G is the same thing as the preceding one, an advertisement of the Kellogg Shredded Krumbles.

H is an advertisement of Shredded Krumbles showing a boy and a facsimile carton.

I am unable to state the month these advertisements were run, but the copyright would indicate that they were not run before that date—1920.

They were run as advertisements of the defendant company.

(Received in evidence and marked "Defendant's Exhibit No. 148.")

The copyright date of 1920 and the package illustrated contains the words "Kellogg's Toasted Corn Flakes," which would fix the date between 1920 and 1922.

The carton marked for identification 149 is a carton of Kellogg's Krumbles, Shredded Whole Wheat, put out by the Kellogg Company.

THE COURT: Have crumbs and Krumbles anything to do with each other?

MR. CLARKE: I do not know. Mr. Kellogg might answer that question.

WITNESS: It is a shredded product.

MR. CLARKE:

Q. 106. It is in cracker or in biscuit form?

A. It is just in shreds.

THE COURT: A crumb would suggest Krumbles?

WITNESS: According to the name, it did. It is small Krumbles or shreds.

(Received in evidence and marked "Defendant's Exhibit No. 149.")

WITNESS: Package marked for identification as Defendant's Exhibit 150 is a package of Kellogg's Wheat Krumbles printed in the Kellogg colors, and it is whole wheat, shredded and toasted, and it is shown to be served in a dish, or the product is in a dish on the package on both sides.

A very large demand has been created by advertising for the products known as Kellogg's Whole Wheat Biscuit and Kellogg's Shredded Whole Wheat Biscuit.

(Package offered in evidence and marked "Defendant's Exhibit No. 150.")

CROSS-EXAMINATION.

WITNESS: I have been forty years directly and indirectly in the prepared food business. I was associated with Dr. J. H. Kellogg at Battle Creek, Mich.

with the State or Government. The fraternities and sororities, colleges and universities, are under the first classification.

The second classification, the State institutions, that is, institutions that are owned and controlled by the various States in the United States, including prisons, hospitals, State hospitals for the insane, sanitariums, homes for the aged, which are all controlled by the various States.

And the Government institutions which include the Department of the Interior, the Veterans' Administration, the United States Army, the Navy, and the Marine Corps, and all Government institutional outlets.

The Department of the Interior has Indian hospitals and schools, of which there are about seventy-two throughout the entire United States.

This institutional work as I have outlined it has a fairly large market for the Kellogg biscuit. It is a very special market and it is a market that we have tried to develop in a special way, because as a general rule it does not resell the Kellogg products.

I have been working at Battle Creek about five years, and I have been spending the majority of my time since I have been with Kellogg Company in the development of that particular type of business. I travel all over the United States in the development of the institutional restaurant.

The Kellogg Company, to my knowledge, is the only cereal company at the time I started in the development of institution sales that specialized in selling institutions.

For example, the Department of the Interior, up until three years ago, did not use any Kellogg's Whole Wheat Biscuits, or a wheat biscuit of any type.

Up until the time the Kellogg Company started such specialized work, for example, the Navy Department, in the latter part of 1928, made it possible for the

navy to use—ready-to-eat cereals, including a wheat cereal, such as Kellogg's Whole Wheat Biscuit.

Up to that time the navy has never approved the use of any ready-to-eat cereals for the use of the general service.

The Department of the Interior stated that if we could create a demand for such a product, that they would include it in their catalogue, include both Kellogg's Whole Wheat Biscuit and Kellogg's All Bran in their catalogue, which made it possible for the institutions to obtain those products in serving cereals to their inmates in the institutions. He gave his consent to our going ahead and supplying samples of our products to the various institutions, and told us if the institutions requisitioned the cereals, they would be placed on the catalogues and put out for competitive bidding, and at that time he asked me if there were any other competitive products on the market for both of the two items that we were interested in.

That was the Whole Wheat Biscuit and Kellogg's All Bran, and I, of course, told him there was a competitive product for both of them; the National Biscuit Company's Shredded Wheat and Posts Whole Bran. When I speak of him I mean the purchasing agent, W. B. Fry.

The way the business was handled within the Department of the Interior is that requisitions go into the purchasing department annually, and if they call for any such particular items, they are purchased on competitive bidding. Now, the institutions requisition the Kellogg products, and at that time Mr. Fry asked us regarding the way he should call for such products, so that it would be open to competitive bidding, and at that particular time we, of course, were anxious to get him to call for Kellogg's Whole Wheat. He says, "You will have to appreciate the fact that the Government

always wants competitive bidding on anything that they buy, and asked us to look over a particular clause that he had used in calling for this particular item."

I have here a copy of the bid which they just recently issued, showing the way they called for this particular product, in the very first year that they issued proposals, calling for bids for a wheat biscuit. This bid was opened on May 18th and is an annual bid. The document is our extra copy of request for a bid. It is the statement on Government form of bid marked groceries, samples not desired, directed to the purchasing officer, Room 144, Department of the Interior, Eighteenth and E Streets, Washington, D. C., and attached to it is a schedule, one of the paragraphs of which reads:

> "56-G-590-1072. Case of biscuits, Whole Wheat, Shredded, to meet Federal Specification No. NC-191, as described, E-2H thereof. 24 12½ oz. packages and 36 12 oz. packages to type 1 or 2 carton; samples not desired. State price per pound."

Q. 30. Do I understand that that specification of what was desired to receive bids on, was prepared in any way in collaboration with you?

A. No, sir, he prepared it and asked us if our product would meet that specification.

WITNESS: Our product meets specification 24 12½ ounce packages. The product manufactured by National Biscuit Company meets the specifications of 36 12-ounce packages. I could not state definitely, but I rather imagine the product known as the Rippled Wheat would meet the specification, although that would be a matter of analysis. When it comes right down to it, the Rippled Wheat really would not meet that specification, I do not believe.

I know of only those two that would meet the specifications—plaintiff's product and Kellogg's product.

Yes, the Government mails this form to the Kellogg Company. To my knowledge they are mailed by the Government to cereal manufacturers at large.

When the bids are received by the Kellogg Company they are filled out just above the word "Biscuit, Whole Wheat, Shredded" on page 18—would fill in the name "Kellogg's Whole Wheat Biscuits, packed 24 12½-ounce packages to the case." I attended to this bid opening.

Q. 46. You filled in the price at which it was bought?

A. Yes.

WITNESS: That is a copy of our bid. It is a request for bids from the Department of the Interior. The bid went in as a duplicate of this, with the price added. I attended the bid opening. I heard all of the prices that were bid. The National Biscuit Company bid on that.

Q. 52. How was the product identified on plaintiff's bid?

A. It was identified as "Original" Shredded Wheat, using the word "Original."

(Received in evidence and marked "Defendant's Exhibit No. 141.")

WITNESS: I have several other samples of various types of bids. The Navy Department calls for cereals. These bids are the standard Government specification known as M-C-191, dated July 21, 1931. There is a specific specification for Shredded Wheat on the third page, paragraph E-2-H.

(Received in evidence and marked "Defendant's Exhibit No. 142.")

WITNESS: I have here a proposal calling for food requirements for the Naval Supply Depot at Norfolk, Va., for their commissary store. This is for resale in the commissary store, and calls for one item, No. 315, which item reads—"Item No. 315, 2400 packages wheat, shredded, Kellogg's, 12½ ounce packages, and Item No. 316, 400 packages wheat, shredded, N. B. C. 12 ounce packages."

Item No. 315 refers to Kellogg's because the printed name Kellogg's is referred to, for one thing, and the 12½-ounce size is the Kellogg's package, the weight of a Kellogg package.

Item 316, reading 400 Whole Wheat, Shredded, N. B. C., refers to National Biscuit Company's Shredded Wheat.

The procedure of the Kellogg Company was to fill in the standard form, No. 31, the first sheet indicating the name of the Kellogg Sales Company and address, and we have indicated under item No. 315 the name "Whole Wheat Biscuit." We typed that in. The printed name, Kellogg's, is, of course, in there, and I might add that in this particular instance they accepted the lowest bid on Kellogg's for item No. 315, and the lowest bid on National Biscuit Company's product for item No. 316. We did not bid on item No. 316, which is specified as the National Biscuit Company's product. Both those articles were ordered for resale in commissary stores. The bid as returned has certain prices marked opposite the item "Whole Wheat, Shredded, Kellogg's 12½ ounce." You simply filled in price for that one article. Opposite "Whole Wheat, Shredded, N. B. C." the price columns are blank.

(Offered in evidence and marked "Defendant's Exhibit No. 143.")

WITNESS: I have several others similar. Here is one from the Naval Supply Depot, calling for delivery to the Naval Hospital. The Naval Hospital has also specified a distinct brand name, and this calls for delivery both to the General Hospital and for the general service. The general service, of course, does not specify brand name, but for the hospital delivery, they call for "Wheat, Cereal, Kellogg's Whole Wheat Biscuit, one ounce packages." I might add here that the National Biscuit Company placed a bid on this particular item, which was specified "Kellogg's."

The Kellogg bid, "Wheat Cereal, Kellogg's Whole Wheat Biscuit, one ounce packages," was filled in and returned to the Naval Supply Department.

(Offered in evidence and marked "Defendant's Exhibit No. 144.")

FIFTH DAY.

May 26, 1933.

MR. COOPER: The next point is about the Plaintiff's Exhibits 254 to 260 inclusive, those being the certificates of incorporation of the Natural Food Company and the amendment of its charter, and so on, down through the title papers which I offered yesterday and the ruling of which was suspended pending an examination and consideration by the defendant's attorney. I understand that they have no objection.

MR. CLARKE: No objection.

THE COURT: Admitted.

(Received in evidence and marked respectively "Plaintiff's Exhibits Nos. 254 to 260.")

MR. COOPER: We would like the privilege of withdrawing these and substituting photostatic or other copy.

from the Navy purchasing officer at New York City on April 8th. The bid was opened April 18th. This proposal calls for cereals, ready to eat, to meet specification No. NC-191; calls for wheat, shredded, equal to paragraph E-2-H, Specification 191, in Bulk. That is in large size packages, and also wheat, shredded, equal to the Specification NC-191, paragraph E-2-H, in individual packages.

That specification referred to is the Government Federal Specification. We have placed our bid on Kellogg's as is indicated on this copy.

The word "Kellogg" in different type was not in the bid when it was received by me. I typed in after "Wheat, shredded—E-2-H" the word "Kellogg's". I then typed in the figures, giving the price at which we were bidding.

(Received in evidence and marked "Defendant's Exhibit No. 153.")

WITNESS: The proposal which has just been offered in evidence, called for food requirements to supply the Navy during the month of May, 1933, and I have here a price bulletin of provision contracts, issued from the Navy Purchasing Office at New York City, which is sent to all naval supply stations supplied out of the New York Purchasing Office. This shows the name of the contractor, the contractors' address and telephone number, so that the purchasing officer may place his orders against the contract which is entered into on the part of the contractor with the U. S. Navy. This particular price bulletin shows the Kellogg's Sales Company as having been the successful contractor for certain items, and it shows the National Biscuit Company as also having been a successful contractor for certain items.

Both of these items include either Whole Wheat Biscuits or National Shredded Wheat. The items

which are called for in large packages, or in bulk, are considered—or are given to the Kellogg Company, as indicated by the number which is assigned to the Kellogg Company—the number is 45,172. This represents the number by which the contractor is designated. On the first page it shows No. 45,172, as being the Kellogg Sales Company of New York City; 41,186 is the number for the National Biscuit Company. The National Biscuit Company was awarded the item of individual packages for wheat cereal, shredded, as indicated here as original; .1448 indicates the net price per pound. Number 41,186 is the number of National Biscuit Company. There are no other references regarding cereals.

(Received in evidence and marked "Defendant's Exhibit No. 154.")

WITNESS: This is really an accompanying letter from the Navy Purchasing Office, stating that the award for that particular item was made to the National Biscuit Company. The original memorandum received by Kellogg Sales Company follows notification number to the National Biscuit Company.

I have here a copy of a standard Government form of bid. It is a request for a bid, a copy of a request for a bid received from the Navy Purchasing Office at New York, calling for a delivery to their commissary store, such items being resold as resale items in the store.

Under Item No. 725 it calls for Wheat, Shredded, Kellogg's in 12½ ounce packages.

We have shown on the copy of our bid that we are bidding on Kellogg's Whole Wheat Biscuits, 12 ounce packages, 24 to the case, and the price.

The document as I received it described No. 725 Wheat, Shredded, Kellogg's 12½ ounce packages. It could not refer to any other product on the market. I might add in this particular instance, as is the case

with any commodities purchased by the Government for resale in the commissary stores, that when a brand name such as "Kellogg's" or "National" or "Niagara" is specified, the award goes to the lowest bidder on the brand name that is specified.

There could only be competition in bidding on the Kellogg item.

(Bid received in evidence and marked "Defendant's Exhibit No. 155.")

WITNESS: The next one is a standard Government form of bid, a request for a bid from the supply officer, Naval Air Station, Lakehurst, New Jersey. This calls for delivery to their commissary store and calls for under Item No. 143, Whole Wheat Biscuits, Kellogg's, twenty-four 12½ ounce packages. We have filled in the name Kellogg's Whole Wheat Biscuits on this, indicating the produce we are bidding on. This word "Kellogg" was on there when it came to us. The whole line reads "143 Whole Wheat Biscuit, Kellogg's," that is the way it came originally, and I added on the same line "Whole Wheat" and on the next line below that "Biscuits, twenty-four 12½ ounce packages, Kellogg's," was added to the bid. Both the proposal and the bid have the name "Kellogg's." I added the name Kellogg to the bid and it was right on the proposal when received by us.

One of these requests was for bids of an article specified by brand names for resale in a commissary store. Whenever they call for bids for the general service, they simply call for the type, that is, wheat cereal or corn cereal, and refer to the specification. There is no reference in this proposal, as it was received by us, for the Federal proposal of cereals.

(Received in evidence and marked "Defendant's Exhibit No. 156.")

WITNESS: Here is a proposal calling for bids from the Quartermaster, Selfridge Field, Michigan. This proposal calls for Item No. 57, "Cereal Breakfast, 12 ounce package, National Shredded Wheat."

Under Army purchases, cereals are classed as resale items, or as sales items. They are not issue items.

Kellogg Company has bid on that in the past, but we have since ceased bidding, because the name "National" is specified and regardless of whether our price would be lower, the name of the National Biscuit Company is always accepted.

(Received in evidence and marked "Defendant's Exhibit No. 157.")

WITNESS: I have here a proposal calling for bids from the Quartermaster at West Point, New York. Under Item No. 42, they call for Cereal Shredded Wheat Biscuit, 12 ounce package, National Biscuit Company. We have ceased bidding on this because the business always is awarded to the National Biscuit Company because it is their brand that they desire for resale purposes.

(Received in evidence and marked "Defendant's Exhibit No. 158.")

WITNESS: If we were awarded the item we would have to go to the market and buy National Shredded Wheat.

This is a letter received from the Quartermaster at West Point answering an inquiry of ours which we had made in regard to an item specified as National Shredded Wheat.

I have here a standard Government proposal calling for bids for the Veterans Administration Home, National Military Home, California. Item No. 14 calls for Whole Wheat Biscuit shredded, fresh, and marketable in every respect in individual packages. We bid

on that and it was awarded to the Kellogg Company. Samples were submitted in connection with that bid.

(Received in evidence and marked "Defendant's Exhibit No. 159.")

WITNESS: This is a proposal for bids received from the Veterans Administration at Washington, D. C., calling for various ready-to-eat cereals, and under Item No. 1-0 for delivery f. o. b. Perryville, Maryland, calls for Shredded Wheat, twenty-four 12 ounce packages to the case. Item No. 1-P Shredded Wheat, 60 packages to the case, either 1½ ounce or 2 ounce packages, meaning the individual packages.

This invitation to bid calls for "E-8 Shredded Wheat shall be prepared from sound clean wheat without material removal of the bran; shall be processed with or without added flavoring, drawn into fine shreds, formed and baked in oblong biscuits of uniform size and shape, weighing approximately one ounce each, shall be porous, tender, crisp and of excellent flavor, free from rancid, musty or other undesirable taste or odor, shall contain no dirt, grit or other extraneous matter."

(Received in evidence and marked "Defendant's Exhibit No. 160.")

WITNESS: The next one is from the U. S. Marine Hospital in St. Louis, calling for Item 108, "Wheat, shredded, 24 to the case, 12½ ounce." The word "Kellogg" was typed in. We bid on that and sample was submitted.

(Received in evidence and marked "Defendant's Exhibit No. 161.")

WITNESS: This is from the purchasing and contracting officer, Fort Benjamin Harrison, Indiana, and another Item No. 31 calls for Whole Wheat biscuit, 12½ ounce, Kellogg's. We typed in the words "Kel-

logg's Wheat Biscuit 12½ ounce, Kellogg's 360 packages, .0838," and submitted a bid.

(Received in evidence and marked "Defendant's Exhibit No. 161.")

WITNESS: This is from the purchasing and contracting officer, Fort Benjamin Harrison, Indiana, and another Item No. 31 calls for Whole Wheat biscuit, 12½ ounce, Kellogg's. We typed in the words "Kellogg's Wh. Wh. Biscuit, shredded (24-12-½ ounce pkg) Whole Wheat biscuit, 12½ ounce Kellogg's, 360 packages, .0838," and submitted a bid.

(Received in evidence and marked "Defendant's Exhibit No. 162.")

WITNESS: I have here a proposal from the Quartermaster at Port Hoyle, Maryland, under Item No. 26, calls for Shredded Wheat, Kellogg's, 12½ ounce package.

(Received in evidence and marked "Defendant's Exhibit No. 163.")

WITNESS: Here is one from the U. S. Property of Disbursing Officer, State of New Jersey, Trenton, New Jersey, under Item No. 5, Whole Wheat Biscuits, Kellogg's, one-half ounce package, 60 packages to the case.

(Received in evidence and marked "Defendant's Exhibit No. 164.")

WITNESS: Another one from the Quartermaster of the Army War College at Washington, D. C., under Item No. 102, calling for cereal, Whole Wheat Biscuit, Kellogg's 12½ ounce packages. That is for resale purposes. The Army War College maintains a college store.

(Received in evidence and marked "Defendant's Exhibit No. 165.")

WITNESS: One from the contracting officer at Fort Moultrie, South Carolina, calling for Item No. 14, cereal breakfast, Shredded Wheat biscuits, Kellogg's.

(Received in evidence and marked "Defendant's Exhibit No. 166.")

WITNESS: That is for resale in the commissary store. The purchasing and contract officer at Langley Field, Virginia, under Item No. 43, Shredded Wheat, 12½ ounce Kellogg's.

(Received in evidence and marked "Defendant's Exhibit No. 167.")

WITNESS: Here is one from the Quartermaster at Fort Crook, Nebraska, under Item No. 14, Wheat, Shredded, 12½ ounce, Kellogg's.

(Received in evidence and marked "Defendant's Exhibit No. 168.")

WITNESS: Here is one from the purchasing and contracting officer at Fort McClellan, Alabama, under Item No. 39, Shredded Wheat Biscuit, Kellogg's.

(Received in evidence and marked "Defendant's Exhibit No. 169.")

WITNESS: Here is one from the Quartermaster supply officer, San Francisco General Depot, Fort Mason, San Francisco, California, under Item No. 235, Shredded Wheat, large package, for Fort Winfield Scott, Kellogg's.

The specification number is indicated where there is no brand specified. As you will note, the brand is specified opposite each item, where the brand is desired, where the specification is desired. Where there is no brand, where the name Kellogg does not appear, Specification NC-191.

(Received in evidence and marked "Defendant's Exhibit No. 170.")

WITNESS: Referring now to 171, all of these had the name Kellogg as they came to us, put in by the department.

(Received in evidence and marked "Defendant's Exhibit No. 171.")

WITNESS: This is from the Quartermaster supply officer at Brooklyn, N. Y., calling for delivery at—this is the contracting officer, but it calls for a delivery to be made to the Quartermaster, Port San Juan, Porto Rico. This calls for Item No. 171, cereal breakfast food, Whole Wheat Biscuit, 12½ ounce, wax wrapped packages, Kellogg.

(Received in evidence and marked "Defendant's Exhibit No. 172.")

WITNESS: This is an informal contract received from the Marine Corps, calling for delivery to the Marine Corps, Marine Barracks, Navy Yard, Washington, D. C., and to the Marine Barracks, Naval Ammunition Depot, Dover, New Jersey, under Item No. 45. It calls for delivery to Washington, D. C. It calls for Shredded Wheat, 12½ ounce packages, to be Kellogg's Whole Wheat Biscuit. That is our order. That is the contract that they sent to us after we had placed the bid. The language "48 packages Shredded Wheat, 12½ ounce packages to be Kellogg's Whole Wheat Biscuits per package NC191" was in the order when it came to us.

It is subsistence, and that is why the specifications NC191 was indicated on there; when the proposal came to us, we indicated just Shredded Wheat and specification No. 191. This is the contract. There is another one here calling for delivery to the Naval Ammunition Depot at Dover, New Jersey, on the same sheet. It is also item No. 45, specified forty-eight packages Shredded Wheat 12½-ounce packages to be Kellogg's Whole Wheat Biscuit per package NC191.

Dr. J. H. Kellogg was the head of the Battle Creek Sanitarium at the time of my entry into the Kellogg Company forty years ago, but not at the present time. He was the first Kellogg, so far as I know, in the breakfast food or cereal food business. I remained in association with him in the breakfast food business somewhere between ten and twelve years.

The manufacture and distribution of the foods of the Battle Creek Sanitarium was handled by others. I had something to do with it—I was working for the Battle Creek Sanitarium in a business capacity; was there during those 25 years in all and I was in charge of certain matters pertaining to the food business, but not the selling or distribution. I had something to do with the foods—in preparing them and in suggesting experiments carried on. I did not have much to do with the sale.

Dr. J. H. Kellogg was well known as a physician and the food business developed later. It was developed in a small way—the food business—during that period.

There was a Mr. Brown who was president, I think, less than two years. No, I have to correct that statement—my son was president of the company.

My son was president for two years and Brown was president for a matter of somewhat less than two years.

The carton which you have marked for identification (Plaintiff's Exhibit 261) which you state from information given you was purchased at a store at Kenosha, Wisconsin, known as Bernson's Grocery, on December 24, 1932, appears to be one of my company's products of the character described as Kellogg's Whole Wheat Biscuit.

(The same was marked "Plaintiff's Exhibit 261 for Identification.")

WITNESS: The top layer of the biscuits inside that carton do not seem to be as much browned on one side as the other, but one side is quite distinctly paler than the other. The one that you picked from the next lower layer is just about the same as the first one that you showed me. It might occur that our biscuits do come through a little more brown, as noticeably more brown on one side than the other. The present biscuit, I think, are well browned that you found on the marked day—I think are well browned and that is an old package, some years ago. No, I cannot tell from the character of the package about its vintage.

The package which is Plaintiff's Exhibit 261 for identification is quite similar to Plaintiff's Exhibit 4 to the interrogatories. I have no recollection as to the dates of these packages, or the forms, except what you tell me. There was no time when we baked differently on the two sides—it might have been an error in baking. I am not sufficiently in touch with the daily output to know whether or not biscuits differently browned on the two sides are a part of the regular output of the company, but I have an explanation to make. The instructions were to brown them on both sides, and they are uniformly browned, occasionally they are not.

(Received in evidence and marked "Defendant's Exhibit No. 132.")

WITNESS: Among our advertised products at one time and another there was a cereal substitute for coffee known as Drinket; that was advertised under the Kellogg name. Yes, I see on Defendant's Exhibit 148, an advertisement of Drinket. I cannot state what length of time it was advertised among the Kellogg line; also I cannot state when it ceased to be put out. I have no recollection of the date. We did withdraw it from the market, but it was sold in a small

way for some years after 1920 perhaps, and finally it stopped selling.

There was another product called Wheat Flakes which we manufactured. It was withdrawn after a time for a better product that came later. Corneoka was brought out during the war time as a substitute for other products not obtainable, and when the war ceased we discontinued the product. It was not advertised very extensively.

This was tapioca corn, but the Government asked us to refrain from using the name tapioca and we discontinued. About the early Wheat Biscuit, which was begun about 1910 and continued until the war time, we had by reason of Government requirements to mix in corn and rye with the wheat. We may have changed our names, but I have no definite recollection. I do not recall advertising that we no longer were making a wheat biscuit. It was a fact, however, that we did substitute other grains for wheat.

In the manufacture from the beginning of 1910, we made a dough in which there was some flavoring matter in addition to the wheat itself—sugar and salt and malt.

The advertisement showing a picture of chil or young lady eating it as a cracker says nothing a at eating it as a cracker, but it was eaten as a bread or a substitute for bread, eaten as a cereal, principally as a cereal in a bowl, the same as other cereals. I do not recall the exact words "eaten as a cracker." We issued a great many advertising circulars, booklets, and I am unable to remember the text of all of them. The young lady shown in Defendant's Exhibit 145 was cating the biscuit—shows very plainly. The Krumbles shown in Defendant's Exhibit 130 is fairly shown in the dish, but not absolutely.

In regard to Krumbles the wheat is cooked, shredded in flat shreds, not round shreds. There are

some broken off in the packing of the product. It has been called "ribbons" and the package called Krumbles. Flavor is added. No, I would not say it was sweet. It is slightly sweetened, but not materially sweetened. There is other flavoring added besides the sugar and that flavoring is added before the final cooking of the material. Whatever flavor is added, is added to the material which is shredded. After shredding it is baked in an oven until it is crisp. I am not sure that Defendant's Exhibit 150 is the only one which my company markets at the present time—Wheat Krumbles. There may be another package.

(Same was marked "Plaintiff's Exhibit G for Identification.")

WITNESS: I recognize that as a carton put out by my company. It is in the same colors that we use on all of our packages. It was used for marketing Kellogg's Shredded Wheat Krumbles, some time ago. The date I could not state.

The carton was made in Canada, packed in Canada, sold in Canada, by another company.

I could not say that we did not use such a package as this for Krumbles. I think we probably did. In the United States, yes.

The company controls the Kellogg Company of Canada.

The contents of this package is quite similar to the contents of Defendant's Exhibit 150.

That is correct $50,000,000 has been expended by the Kellogg Company to build up its line of cereal products.

RE-DIRECT EXAMINATION.

WITNESS: My brother, Dr. John H. Kellogg, was a very large stockholder in the Kellogg Toasted Corn Flake Company, for several years. Then he engaged in competitive business and sold his stock in the Kel-

logg Toasted Corn Flake Company. I purchased nearly all of his holdings. I am owner of 60 per cent. of the Kellogg Company stock.

Drinket was a very small seller. It was put out experimentally and improved and doctored and various things happened, and it was finally allowed to dwindle, no push was put back of it, and another product was put in its place.

The name Kellogg on the package will secure distribution for the product very quickly with the grocers and grocer trade, both the retail and the wholesale trade. Consumer advertising and effort, window dressing and newspaper advertising, billboards, are usually found necessary to produce a consumer demand for the product. I think the name Kellogg will induce consumers to give the product a trial in the beginning. It will be helpful. Many people will buy a product with the name Kellogg on it but whether it would be a continued repeat business, it is difficult to state unless it was advertised in addition to being on the shelves.

Unless the product repeats it is not a success. It must repeat in order to make it profitable. I could not say that I have ever marketed any products, which, after they were tried by the public, by being displayed on grocers stands and windows, were found not to be repeating sellers—I do not recall any.

The package that you hand me is a package of Kellogg Wheat Krumbles, whole wheat, shredded and toasted, put out by the Kellogg Company of Battle Creek, Michigan.

(Received and marked "Defendant's Exhibit No. 151 for Identification.")

WITNESS: I think the figure of fifty million dollars is straight advertising and sampling. I do not think it includes the store and window work that has

been done which amounts to a very considerable sum. As to window work coming under some bookkeeping systems as advertising, there will be people here who will be competent to answer that. I can not.

RE-CROSS-EXAMINATION.

The particular package (Exhibit 151 for Identification) marked with the Battle Creek is sold in the United States only, and abroad, I think perhaps a small sale abroad; not including Canada.

The Canadian Company has a very similar package with a different imprint. In London, Ontario, instead of Battle Creek, Michigan. The colors are the same. So far as I am aware the lettering otherwise is the same.

I could not state the date when this package, Exhibit 151—I mean that type of package—was put on the market, but there are people here who can.

As to products found not to be repeat sellers—I cannot answer that directly. I think we have never put out a product, but what has repeated to some extent, but whether it repeated in a satisfactory manner would be another question. I do not think we ever put out a product, but what it did have some repeat, but whether it repeated satisfactorily so it became profitable, is another matter. There were several that were not satisfactory from a profit standpoint.

(Bid Naval Supply Depot of Norfolk, Va., May 3, 1933, received in evidence and marked "Defendant's Exhibit No. 152.")

HAROLD F. MUNTZ, recalled.

DIRECT EXAMINATION (continued).

I am still dealing with Navy Department proposals and bids. I have here the bidders' file copy, which is our file copy of a bid we placed on a proposal

Item No. 6 for the Illinois School for the Deaf, eight cases of biscuits, Whole Wheat, 12 ounce packages.

Item No. 6 for the East Moline State Hospital, five cases of biscuits, Whole Wheat.

Item No. 6 for the Elgin State Hospital, four cases of biscuits, Shredded Wheat.

Under Item No. 6 for the Illinois Eye & Ear Infirmary, one case biscuits, Whole Wheat, 1½ ounce package, individual size.

For the Soldiers and Sailors' Children's School, Item No. 6, 15 cases biscuits, Whole Wheat.

For the State Reformatory for Women, Item No. 6-A, these cases biscuits, Whole Wheat, individual size.

And this last paragraph here on the bid calls for samples. Do you wish me to read that?

On all items requiring samples which are submitted by parcel post, bidders must include sufficient postage stamps for return of said samples. They request samples, however, on the second page, where it states that two samples of each item must accompany bid, except in the case of Items Nos. 12, 13, 17, 18 and 20. On this proposal Item No. 6 is the biscuit, Whole Wheat, and we were required to submit samples.

(Received in evidence and marked "Defendant's Exhibit No. 184.")

WITNESS: We always submit our samples in our regular packages, like this package, when the large sized packages are called for. When the small individual size is called for, we furnish the small individual size package.

(Received in evidence and marked "Defendant's Exhibit No. 185.")

WITNESS: We have never had any goods rejected as not being ordered by the various departments. I do

not see how that could happen because in every instance we always indicate that we are bidding on Kellogg's Whole Wheat Biscuit, and submit samples to show the product that we are bidding, whenever samples are specifically requested, which is most generally the rule.

The samples submitted are always in the regular Kellogg cartons; bearing the name Kellogg's on every side is the standard practice.

We have submitted here proposals showing instances where the plaintiff here, National Biscuit Company, has put on proposals specifying the product to be bid on as Kellogg's.

We have bids of National Biscuit Company in which that product was bid as "Original" Shredded Wheat.

Many dietitians and stewards in institutions prefer the small size biscuit, because there is absolutely no waste to that size. For that reason they specify in ordering the small size biscuit.

By the small size biscuit I mean the Kellogg Whole Wheat Biscuit, and the stewards and dietitians know that is the Kellogg Whole Wheat Biscuit.

In some instances they specify the larger biscuit of National Biscuit Company. As a general rule we have found the dietitians and stewards seem to prefer the small sizes.

Yes, I have something to do with the servicing of restaurants and hotels with Kellogg's Whole Wheat Biscuit. The Kellogg's Whole Wheat Biscuits in the individual packages are distributed to the wholesale grocers, and we have Kellogg salesmen call on restaurants and hotels all over the country to show our package to the restaurants and hotels, and to tell them what we are doing, to create a demand for that product, and to try to get them to handle Kellogg's Whole Wheat Biscuits.

We furnish the restaurants with advertising material relating to Kellogg's Whole Wheat Biscuit. I have here a little restaurant display that was developed very early in 1928, which shows—may I have an individual package to show just how this is displayed. The individual package is displayed in this manner, and very beautifully shows up the Kellogg's Whole Wheat Biscuit package itself and two biscuits in the bowl, showing the two small biscuits and the language that they do fit so well in the cereal bowl.

Restaurants use the displays of the Kellogg product. We have distributed thousands of them around the country. In addition to that, I might mention that we also furnish restaurants and hotels with a menu slip. It also—that is the menu sheets, as well as the menu slips that shows the Kellogg Whole Wheat Biscuit. The menu sheets themselves I do not have with me, nor the menu slips. We furnish these menu slips without charge and they refer to the Kellogg product as "Kellogg Whole Wheat Biscuit. We have distributed many of these menu slips. Those who have their own menu cards, we always ask them to list Kellogg's Whole Wheat Biscuits on their menus, and that is a very general practice of all the Kellogg salesmen.

We have been successful in inducing hotels to list the product as Kellogg's Whole Wheat Biscuit on their menus, as can be shown in two menus that I have here. One is from a railroad, the Chicago, Milwaukee, St. Paul & Pacific, showing Kellogg's Whole Wheat Biscuit as one item, and Shredded Wheat as another.

(Received in evidence and marked "Defendant's Exhibit No. 187.")

WITNESS: Here is one from the Fort Shelby Hotel in Detroit. It calls for Kellogg's Shredded Whole Wheat Biscuits for one item and Shredded Wheat for the other.

(Received in evidence and marked "Defendant's Exhibit No. 188.")

WITNESS: On the Kellogg's Whole Wheat Biscuits approximately 2 per cent. of the total sales of the Whole Wheat Biscuit are sold in the individual packages. Approximately, and as near as I can estimate, 98 or 99 per cent. of our biscuits sold to restaurants are in the individual packages. There is really only a very minute qnantity sold to the restaurants and hotels in the large sized packages.

In my travels about the country on this restaurant and hotel business I have never seen a glass globe the size of Plaintiff's Exhibit 36. I have a smaller one, but it has been quite a long time ago. I do not believe I have seen more than eight or ten of them at the very most.

In my work with the Kellogg salesmen, I call on restaurants and I have called on literally thousands of restaurants since I have been working for the Kellogg Company. I do not believe I have seen more than eight or ten of them in that period of time.

CROSS-EXAMINATION.

WITNESS: I am now 28 years of age and have been with the Kellogg Company a little over six years. I started with the company when I was 22 years of age. That was my first experience in the cereal food business. Before that I had sold groceries in a grocery store, but not for more than two or three days. I have been in the meat business and in the furniture business. I went to school at the University of Illinois. I worked for the Kellogg Company while I was in school. I called on fraternities and sororities at the University of Illinois. At that time I was on a salary. That period is included in the six years I worked for the Kellogg Company.

WITNESS: I first went to Battle Creek in August, 1928. Prior to that I had been at the University of Illinois until March, 1928, at which time my finances were in such shape that it was necessary for me to quit school, so in August, 1928, I became permanently established at Battle Creek with the Kellogg Company. Since that time my employment with them has been continuous. When I first started with them I was in charge of institutional sales directly under the supervision of the general sales manager. There was one man who preceded me, but he was in the department a very short time, as I recall the dates, from March until August. It was a comparatively new department. I took charge of it within four months of its establishment. After a short stay at Battle Creek I started traveling and that has been my occupation since that time.

My time was well divided between institutional selling and visiting restaurants and hotels, with possibly the exception of the first few months I was at Battle Creek at which time I spent a majority of my time on institutional selling.

At that time we were selling some of our products to institutions, but as I recall the figures, the volume was not any very great volume. It was a worth-while business for the company, however, I would imagine. The present volume I would say is a very worth-while volume.

There are three distinct classes over which my jurisdiction extends—the first takes in private institutions such as private sanitariums, orphanages and the like—and hospitals and city jails I would class under that, city institutions. I have always been in the habit of classifying them under those three groups and including city institutions under the privately owned group. The second group are institutions that are owned by the various States. The Federal Government is in-

cluded in a separate classification—the Army bases, Naval bases, and the like, are classified as the third class. Fraternities are under the private colleges and schools and universities.

In the first class, described as private institutions, I met competitive bidding. The purchases of private institutions are always purchased on competition. They ask for prices from the wholesale grocers or they will call a wholesale grocer on the telephone and ask for various prices. Some private institutions do issue proposals, but I would say as far as those who would actually ask for bids on paper, they are very few.

Classes two, consisting of State institutions, and three, consisting of United States Government institutions, may not be wholly distinguished from the first class by the fact that they are required to or do call publicly for bids upon a competitive basis, because many city purchasing departments handle the purchasing for the city hospitals, the city prison and the State sanitariums and the like.

Hotels are not included under the classification of institutions—they are included under the classification of restaurants and hotels. That is entirely apart from the institution business.

The Government and particularly some States buy without competitive bidding; at times.

Institutions buy other competitive products as well as the Kellogg products, and have for many years.

In reference to the Kellogg Company specializing exclusively in institution work, I mean that the Kellogg Company, to my knowledge, was the only cereal company that went in to develop the institutional business in a very specialized way, which is necessary in the development of that particular market.

As to the Shredded Wheat Company selling its cereal products to all these institutions, I know that after I started to work at Battle Creek, that for quite

some time the Kellogg Company was the only cereal company calling on the greatest majority of the institutions in the United States. Prior to the time I took over the work I never saw any specifications or invitations for bidding from institutions—I do not know what they contained.

The Kellogg Whole Wheat Biscuit competes directly in these institutions with Shredded Wheat—the two items are in competition with each other.

When interviewing Mr. Fry of the Department of the Interior he asked me to name a competitive product and I told him the product manufactured by the Shredded Wheat Company; that was early in 1930. The Navy Department until 1928 had never permitted the purchase of cereals for general service—that is to be served to the men on board ship. It did, however, permit their purchase for commissary stores for resale.

I would not say that the change in the specifications for the service was due to my efforts. I was very much surprised to see the specifications—they were mailed to us one day from Washington, D. C.

The first time I called on Mr. Fry was in 1928. The real purpose of my visit at that time was to become acquainted with Mr. Fry, and to talk to him about all of the Kellogg products. It was not until 1930 that we knew sufficiently about the manner in which that business was handled, to ask him to include any additional cereals other than the cereals they were purchasing at that particular time. They were purchasing corn flakes, bran flakes, wheat krumbles and the rice. We started to bid on them. I could not say it was in 1928, because my first experience with the Kellogg business at Battle Creek was in 1928, and that proposal comes out early in the year, each year, and it was in 1929—the early part of 1929, that I made out the first proposal for bids for the Department of the Interior.

I interviewed Mr. Fry, as I recall it, early in 1930, and at that time we showed Mr. Fry two products that we were interested in getting the Department of the Interior to use, Kellogg's All-Bran and Kellogg's Whole Wheat Biscuit. It was necessary for us at that time to take the two packages that we were trying to sell them, to the dietitian for the Department of the Interior, and ask her regarding them. They purchased all of their cereals annually on bids, and at the time I went into Battle Creek, they had not called for Whole Wheat Biscuits or Shredded Wheat on the bids. In calling on the institutions we found out, of course, they were not using Shredded Wheat, because they could not get it through the regular source of supply, and many of the dietitians in the institutions were interested in having a greater variety of cereals, and that is the reason that we approached Mr. Fry regarding the two Kellogg products I have mentioned.

Mr. Fry at that time asked the names of other competitive products and I mentioned the product manufactured by Shredded Wheat Company. It was considered that Kellogg's Whole Wheat Biscuits were in competition with that product at that time.

I did not mention Muffets as a competing product, as it cannot be considered up to the Federal qualification for a Shredded Wheat. The specifications stated it shall be drawn into fine shreds and Muffets is the ribbon shape. Muffets have never been bid. I imagine if they were in competition, Muffets would have been bid on for Shredded Wheat as called for, and it states oblong biscuits.

No, I did not assist Mr. Fry in preparing the specifications he got out. We talked to Mr. Fry early in the year regarding our two products, and it was necessary for us to create a demand in the institutions for that particular product, before he would even consider adding it. The dietitian approved the use of the two prod-

(Received in evidence and marked "Defendant's Exhibit No. 173.")

WITNESS: That is the way we received the order from the Government after we had placed our bid. I have here the bid itself from the Marine Corps. The proposal is not here. I just brought that along to show how the order is received. The proposal would be in our branch office files, and could be produced. This is from the Commonwealth of Pennsylvania for the Pennsylvania Department of Health Tuberculosis Sanitarium No. 2 at Cresson, Pennsylvania, and calls for twenty cases Whole Wheat Biscuits, Kellogg.

(Received in evidence and marked "Defendant's Exhibit No. 174.")

WITNESS: In connection with the last proposal that was offered as evidence, this is the State specification from the Commonwealth of Pennsylvania for cereal breakfast foods, and under type, under the second paragraph B, type, grade and size, the item is listed as Whole Wheat Biscuit and in brackets, "shredded" in cartons 12-ounce weight in cartons 12½-ounce net weight.

That means either 12-ounce net weight or the 12½-ounce. On page No. 4, paragraph G, they give their specification for Whole Wheat Biscuits Shredded.

Paragraph G: "Whole Wheat Biscuits Shredded, shall be prepared from sound, clean wheat, without material removal of the bran, shall be processed with or without added flavoring, drawn into fine shreds, formed and baked in oblong biscuits, of uniform size and shape, weighing approximately 1 to 1.2 ounces, shall be porous, tender, crisp and of excellent flavor, free from rancid, musty or other undesirable taste or odor, shall contain no dirt, grit or other extraneous matter."

That is from the Commonwealth of Pennsylvania. The biscuit of both the plaintiff and defendant meet those specifications.

(Received in evidence and marked "Defendant's Exhibit No. 175.")

WITNESS: I have here a proposal from the State of South Dakota together with a sheet from their specification book. The sheet from the specification book shows one paragraph headed "Shredded Wheat, 12 ounce package, 3 dozen to case," and item No. 1880 Niagara. Item No. 1880½ Kellogg's. That is the extent of the specification. That is a sheet from their specification book.

There is a reference here on page 1 of the proposal for bids, Item No. 11 calls for three cases of No. 1880½ Shredded Wheat, one-half dozen to the case, and the Item No. 1880½ refers to the Kellogg number on the specification sheet. Reading under Shredded Wheat, 12 ounce packages, 3 dozen to the case Niagara is No. 1880, and 1880½ is Kellogg's.

(Received in evidence and marked "Defendant's Exhibit No. 176.")

WITNESS: There is a reference back here, there is one which calls for Item No. 1880, 36 package Shredded Wheat, and the No. 1880 is the Niagara.

I have here a request for bids from the Bureau of Purchases, State House, Augusta, Maine. This calls for Item No. 2 Kellogg's Whole Wheat Biscuit No. 324, 24—12½ ounce, and under that "or equal".

Item No. 9, one case Kellogg's Whole Wheat Biscuit No. 324, which is the number for the Kellogg product, and in brackets, 24—12½ ounce packages or equal. There are several of these items that are just identical to the first two that I have read. If you wish me to read all of them, I will.

Item No. 21, 10 cases Kellogg's Whole Wheat Biscuit, No. 324, 24—12½ ounce or equal.

Item 130, 10 cases Kellogg's Whole Wheat Biscuit No. 324, 24—12½ ounces or equal. Here is one more that I notice, No. 37, 2 cases Kellogg's Whole Wheat Biscuit No. 324, 24—12½ ounce or equal.

(Received in evidence and marked "Defendant's Exhibit No. 177.")

WITNESS: Here is a proposal for furnishing supplies to the Rockland State Hospital at Orangeburg, New York; it calls for Item No. 20 Whole Wheat Biscuits, Kellogg's 24—12½ ounce packages to the case.

(Received in evidence and marked "Defendant's Exhibit No. 178.")

WITNESS: And here is one from the State of Tennessee under Item No. 3 for delivery to the Central State Hospital at Nashville, 6 cases Whole Wheat Biscuits, Kellogg's 12½ ounce 24s, and they asked for the price per dozen.

Under Item No. 41, for delivery to the Tennessee School for the Deaf at Knoxville, one case Kellogg's Whole Wheat Biscuits. I believe that is all in here.

No, here is Item No. 21 for delivery to the Tennessee Vocational School for Girls, one case Shredded Wheat Biscuit.

(Received in evidence and marked "Defendant's Exhibit No. 179.")

WITNESS: I have here a group of orders received by our Syracuse, New York, office from various State institutions in New York. They call for—the first one calls for delivery to the Wassaic State School, Wassaic, New York, Item No. 33, Wheat Biscuits, Kellogg's, 24—12½ ounce packages to the case, 15 biscuits in the package.

(Received in evidence and marked "Defendant's Exhibit No. 180.")

WITNESS: These came all addressed to the Kellogg's Sales Company at our Syracuse office. These are actual shipping orders.

This is the Newark State School, Newark, New York, calls for Item No. 24, Whole Wheat Biscuits, Kellogg's 24, 12½ ounce packages.

(Received in evidence and marked "Defendant's Exhibit No. 181.")

WITNESS: This is from the Great Meadow Prisons, Comstock, New York, calling for Kellogg's Whole Wheat Biscuit, No. 360, individual size.

(Received in evidence and marked "Defendant's Exhibit No. 182.")

WITNESS: And this is from the Willard State Hospital, Willard, New York, Item No. 16, Kellogg's Whole Wheat Biscuits, 24 packages to case.

(Received in evidence and marked "Defendant's Exhibit No. 183.")

WITNESS: This is a proposal for bids from the State of Illinois, from the Division of Purchases and Supplies, the State House, Springfield, Illinois, showing their specifications and their quantities for various deliveries to the institutions requesting bids.

Under their specifications, Item No. 6, they show biscuits, Whole Wheat, 12½ ounce packages, bidder to state number of packages in case. For the Illinois School for the Blind, Item No. 6, eight cases Whole Wheat Biscuits, 12½ ounce packages, 24 to case.

From the Chicago State Hospital, Item No. 6—Item No. 6, by the way, refers to their specifications—five cases Whole Wheat Biscuits.

ucts, but it was necessary for us to call on the institutions, and to send samples of our products, before they would even call for the two particular products that we were trying to sell.

The institutions under the Department of the Interior send in requisitions annually for their requirements, and when the requisitions came along calling for Whole Wheat Biscuits, as a result of our calls and submitting samples, Mr. Fry then drew up a specification, and at the time we called on him, he asked us if our product and the product made by the Shredded Wheat Company, would comply with that specification.

Rippled Wheat really would not meet that specification. It has never been bid where Shredded Wheat is called for. I believe Rippled Wheat has been on the market at least eight months. I am not certain regarding that. Rippled Wheat is a ribboned wheat, and inasmuch as the specification reads: "Shall be drawn into fine shreds and in oblong biscuits," it would not meet the specification.

In regard to specifications being drawn with reference to both products, I might explain that by using an example, if I may. For example, where Shredded Wheat is called for by the Government, and we bid on Kellogg's Whole Wheat Biscuits, as we always show on our bids, if our bid is low, we receive an award just as in the case of where Corn Flakes are called for on the specifications, where Corn Flakes are called for by the Government without a brand name, the product or award is made to the lowest bidder on any brand of Corn Flakes. Both products will meet the Federal specification and each one will claim the Federal specification.

When the proposal calls for Shredded Wheat we do not change the proposal. We simply show that we are bidding on Kellogg's Whole Wheat Biscuits just exactly as when we bid on Corn Flakes. We say Kel-

logg's Corn Flakes. We indicate Kellogg's Whole Wheat Biscuits. There can not be anything added to the proposal itself, because that is made up on a mimeograph form, that is already made up. We show on bids that we indicate that we are bidding on Kellogg's Whole Wheat Biscuits.

When we received a proposal calling for Shredded Wheat, we always fill in the preliminary form indicating that the Kellogg Sales Company is placing the bid and for the item Shredded Wheat, frequently above that we fill in the name Kellogg's Whole Wheat Biscuits, 24—12½ ounce package to the case, if it is the large size package.

THE COURT: Then you do alter the offer of the Government by adding something to it.

WITNESS: We indicate what we are bidding on, and that is general practice in all bidding for the various bidders to show what they are bidding in. We show that we are bidding on Kellogg's Whole Wheat Biscuits.

THE COURT: Would the terms of the contract not be understoood unless you changed the wording of the Government offer?

WITNESS: I do not believe I understand your question.

THE COURT: The bid is the offer?

WITNESS: Yes.

THE COURT: The proposal is a general specification of the subject matter of a contract?

WITNESS: Yes, just exactly like when they call for——

THE COURT: You make an offer, and not the Government.

WITNESS: Yes, we make the offer.

WITNESS: Yes, I know Mr. Lewis, a Kellogg representative at Syracuse.

I have seen similar sheets as that of Exhibit 79. I recognize the two kinds of typewriting on that sheet.

Whenever we receive a proposal calling for Shredded Wheat as is indicated on here, we show that we are bidding on Kellogg's Whole Wheat Biscuits. We send the proposal back to the institutions with our offer, and they open the bids at a certain hour and read that publicly, so that they are always accessible for any one who is interested in finding out the prices, but I would just like to explain here that our general practice is always to fill in the brand as indicated in this column. This column calls for brand and we filled in Kellogg's. It states that bids can not be accepted unless size, kind, brand and if possible, manufacturer of each article is specified.

That proposal is our bid to supply Kellogg's Whole Wheat Biscuit.

It is quite general practice to receive two or three blank copies. I should not say blank, but partially filled in, calling for the items that they desire, and as this particular instance it calls for Corn Flakes and Shredded Wheat. In the item of Corn Flakes, there are undoubtedly six or seven different brands.

THE COURT: And you add those words and transmit the bid.

MR. VILAS: The paper that I handed your Honor, Exhibit 79, in its inception is a proposal or invitation to bid. When it is returned, it is an offer or a bid, upon which with others like it, the contract is awarded.

THE COURT: Is or is not awarded?

MR. VILAS: Yes, it is awarded to some one who bids on that particular form.

WITNESS: The practice as exemplified by Exhibit 79 is typical of the practice of the company under similar circumstances.

Mr. John Hopkins is the district sales manager of the company at Philadelphia.

Defendant's Exhibit 100-A is a proposal asking for a bid from the Government.

It is not a general practice to paste a rider on the bid. Mr. Hopkins does it because he wants to give a very detailed description of the product on which he is bidding, as you will note on the original sheet there is hardly room enough for him to fill in without having the letters very confusing, the fact that each package contains 15 biscuits, net weight of contents of each package is 12½ ounces.

Mr. Hopkins does that with my knowledge and assent. He wants to give a full explanation of the product he is bidding on.

As I have already stated Mr. Hopkins pastes a piece of paper on the proposal referring to Item 28-A-2 100 pounds Shredded Wheat to be Kellogg's Whole Wheat Biscuit package 24 packages to the case. Package containing 15 biscuits, net weight of contents of each package 12½ ounces. He does it to put on a full description of the product on which he is bidding. As you will note, this refers to the Federal specification NC 191, and inasmuch as there is no room to type in here, he has filled in this sheet. He fully explains what he proposes to furnish. The paragraph of the proposal calling for Shredded Wheat is a Federal specification as to the type of product wanted.

I never give approval to any company policy, no. This is not a general practice. Mr. Hopkins does it and with my knowledge, but I have never told him to do it, but I knew he did it. I have never told him not to do it. Mr. Hopkins likes to have all of the purchasing

officers fully acquainted with what he proposes to furnish, if our bid is accepted.

The Kellogg Company does not submit bids on all proposals. Bids are submitted upon proposals of institutions, calling for cereals, by jobbers and other deals; just as they submit bids on all kinds of ready-to-eat service. In other words, Mr. Hopkins does not send bids for the Kellogg Company to the Philadelphia Navy Yard—that is left open to competitive bidding of the jobber.

The type of cereal that is called for on navy yard bids or proposals and other Governmental proposals, is Shredded Wheat.

Plaintiff's Exhibit 227 is a price bulletin issued by a Government institution—it is a bulletin indicating the award of contract. On page 4, under cereals are the words "Shredded Wheat" with reference to the specification—that is the Federal specification. Contract No. 12879, on the first page, is awarded to Price Brothers. To my knowledge they are wholesale grocers in Philadelphia. They carry Kellogg's products as well as all other cereals. I do not know whether they carry the National Biscuit Shredded Wheat. I imagine they do. The price bulletin indicates that a contract was awarded to Price Brothers for Shredded Wheat at a unit price of .118 cents. The price indicates either the Kellogg product or the National Biscuit Company's product. That I might say is just as in the case of Corn Flakes on there. They have not indicated what brand they propose to supply, so they can supply any brand of Corn Flakes. The Price Brothers could have supplied either Whole Wheat Biscuit like Kellogg's or the Shredded Wheat made by National Biscuit Company because they are both up to Federal specifications.

I know very frequently Kellogg's Whole Wheat Biscuit is supplied on a specification where only the

words Shredded Wheat appear, as both are always bid. We get the business sometimes and National Biscuit Company get the business sometimes.

Defendant's Exhibit 173 is a subsistence contract. The specification No. 191 is on that. The invitation or proposal to bid is in our branch office. This is our actual order. The contract is in the files of our New York office—or the bid. I asked our branches, of course, to send us copies of orders.

This can be supplied. It is dated 1933, so I believe we can supply that.

I have never called on the purchasing department of South Dakota myself. The representative of the Kellogg Company from our Minneapolis office calls on the purchasing department there.

I have no information as to the date on which the particular Exhibit 176 was printed or issued.

XQ. 297. Bearing in mind the specification as I just read it to you, namely, "Shredded Wheat, 12-ounce package, three dozen to the case," did the Kellogg Company bid on that particular specification?

A. We did not bid direct for the State of South Dakota. That is handled by the jobbers.

XQ. 298. Please answer the question. Did the Kellogg Company bid on that specification and fill the order?

A. No, the Kellogg Company does not.

XQ. 299. Could it?

A. The Kellogg Company could, because we can indicate the number of packages that we wish to supply in a case.

XQ. 300. Can you bid on a specification calling for a 12-ounce package, three dozen to the case?

A. It is quite a general practice to bid the different sizes.

XQ. 301. Can not you answer the question?

A. We did not bid on thirty-six packages to the case.

XQ. 303. It is a fact, too, is it not, that as you say, a jobber or a wholesaler whom you say fills or does the bidding in South Dakota, could not fill an order for Shredded Wheat, 12-ounce packages, three dozen to the case, with your product?

A. Not with the Kellogg product, but they can bid and indicate on the bid the quantity that they will supply, packed in a different number of packages to the case, and that is quite a general practice in all business.

WITNESS: May I explain this, so that there will be no misunderstanding regarding it? For example, we receive proposals calling for bids, that call for individuals, packed in 100 packages to the case. Outside of one item, we do not pack individuals 100 packages to the case. They are packed 50, with the exception of Whole Wheat biscuits, which are packed 60, and we change the quantity accordingly, cross out the 100, and indicating that we are putting in 50 packages and change the quantity accordingly, so that the contractor will get the proper number of packages which are called for.

RE-DIRECT EXAMINATION.

WITNESS: I do not know of any Federal specifications which would be specified by only a product of a single manufacturer. They are all drawn for competitive bidding, because that is what the Government desires as well as most of the State institutions.

As I indicated in my testimony yesterday, I saw the bids of National Biscuit Company for offering to supply the original Shredded Wheat under a bid or proposal called for by the Department of the Interior. I have seen two such bids that I can recall right at this minute, one for the Department of the Interior, and

the other for the Veterans Administration, both at Washington, D. C.

The proposal referred to under the name of the Department of Interior was opened a week ago last Thursday. I believe that is May 18th. It called for 1072 cases, of biscuits, Whole Wheat, Shredded. It referred to the Federal Specifications for cereals calling for Shredded Wheat, paragraph 2-H.

May I state here that it is the practice in some of the departments of the Government to send only the required number of copies that they require to be returned, and I made the statement that the Marine Corps copy of our proposal or bid is in our New York office. If that was one where every copy was required to be returned to the contractor, we would not have a copy of that in our files. It would be in the files of the Government. I could not state for certain that it would be possible to get that from the Government files, but I rather imagine that it would. At least we can try.

The second bid that I spoke of was at the Veterans' Administration at Washington, D. C. It was last December, 1932, when that bid was opened, as I can recall the dates, and the bid called for Shredded Wheat 24, 12½ ounce packages, and they had indicates that they were bidding on original Shredded Wheat.

SIXTH DAY.

May 31, 1933.

HAROLD F. MUNTZ

resumed the stand on

DIRECT EXAMINATION.

WITNESS: I produce the bids of the Marine Corps and information as to the Price Brothers' bid. This Norfolk bid is a bid dated November 13, 1933, in which the product on the invitation to bid was wheat cereal, Kellogg's Whole Wheat, and the word "Kellogg's Whole" has been struck out by National Biscuit Company, and the word "Shredded" written into the bid, and then the amount of the bid dated March 13, 1933.

(Paper received in evidence and marked "Defendant's Exhibit No. 189.")

WITNESS: The Marine Corps for Washington, D. C., the exhibit referred to by Mr. Vilas on Friday, referred to a bid that we placed for delivery to the Quartermaster of the United States Marine Corps, Washington, D. C., and I have here our file copy of that bid. The proposal for bids came to us reading, "Item No. 45, Wheat Shredded, 12 ounce packages, to be in accordance with Federal Specification No. NC-191". We have offered to deliver or to furnish Kellogg's Whole Wheat Biscuits, packed 12½ ounce packages to the case. We filled in the words "Kellogg's Whole Wheat Biscuit, 12½ ounce packages" and the price at which we were bidding.

THE COURT: In this instance you did what?

THE WITNESS: We filled in the name of Kellogg's Whole Wheat Biscuit, 12½ ounce packages, offering to supply that on this bid.

THE COURT: And transmitted that as part of your bid?

THE WITNESS: We transmitted that as the bid itself. That was the bid itself and was sent to the United States Marine Corps at Washington, D. C.

(Paper received in evidence and marked "Defendant's Exhibit No. 190.")

THE WITNESS: Referring to Defendant's Exhibit 189, in evidence, a bid of the National Biscuit Company, reading "Wheat, Cereal, Kellogg's Whole Wheat Biscuit, 1¼ ounce packages" the defendant company does not strike out any special brand name as Kellogg's, or Original, or Niagara, in returning those bids. When we receive a request for a bid, we always fill in the name of Kellogg's Whole Wheat Biscuit. We do not strike out any printed name. We feel that that is actually altering the bid. In our evidence, we have submitted cases just where it shows the brand name National Shredded Wheat and NBC Shredded Wheat. There are two such examples in at the present time. At the present time we do not bid on them, because when there is a brand name "National", the same as "Kellogg", that means the Navy Department or the Army departments want that particular brand because it is for retail purposes.

THE COURT: When a manufactured product is requested you do not bid?

THE WITNESS: We do not bid. For a while we bid. We soon realized it was futile, because the particular manufacturer's brand is specified and there is no chance of our getting the business as long as the National brand is specified. We say we are not bidding on another's whole wheat biscuit, and in the event we did get the award, it is not filled in the name of Kellogg's Whole Wheat Biscuit. We would have to supply the National Shredded Wheat. We no longer bid on those, because there is a very specific demand for that man-

ufacturer's product, and those are resale articles, and the defendant is permitted to specify brand names for resale articles.

On the Marine Corps order which was referred to on Friday, for which we were requested to supply copies of our bids, there were three orders, one a bid placed at our Boston office, one at Philadelphia and one at New York. The Philadelphia proposal has already gone in, and here is a typed copy of our bid for the Boston office which does not call for any Shredded Wheat Biscuits.

It was necessary for us to return to the Government all of the copies they sent us. We are always in the habit of making some record of what we place a bid on, but in this particular instance, as it was called for on the order, there was no Shredded Wheat Biscuit. The uniform practice is for the Government to send three mimeographed invitations to bid and to ask that all three, or either two or three be returned.

The plaintiff requested us to produce a bid placed by Price Brothers for delivery to the Philadelphia Navy Yard. I do not recall just what date the bid in question was, the date that it was sent out. We went to Price Brothers and we have the latest bid that they have in their file, and they tell us that they always after the award has been made, they destroy copies of their bid.

We have the copy of their bid, however, for May 18, 1933, in which Price Brothers have placed a bid to the supply officer at the Philadelphia Navy Yard, Philadelphia. Price Brothers are wholesale grocers and market our goods as well as other cereals on the market. In making the bid, they are not acting as agents for the Kellogg Company; they buy our products and resell them in the regular course of business transaction. They are acting as principals on their own behalf.

In this bid the reference is to "Shredded Wheat —see detailed requirements of above specification, paragraph E 2-H"—and the quantity to be bid on is one thousand; written under that "In bulk commercial packages." That is the way the bid was received, and then the words written in in pen are "Kellogg's W. Wheat, 12½ ounces", and the figures, the net price, .118, and the total amount $118.

(The paper was received in evidence and marked "Defendant's Exhibit No. 191.")

RE-CROSS-EXAMINATION.

THE WITNESS: Defendant's Exhibit 189 is an invitation to bid and a copy of a bid of the National Biscuit Company. Defendant's Exhibit 173 is not the contract on which that bid was awarded. Defendant's Exhibit 190 relates to the contract Defendant's Exhibit 173, that was our copy.

Referring to Defendant's Exhibit 189 which is the bidders' copy of the bid to Norfolk, Virginia, I observe on the second sheet the item "Cereal, Shredded Wheat, in packages of 5,000." The Kellogg Company bid on that item. When the bid was received, we filled in, possibly right in here, "Kellogg's Whole Wheat Biscuit." We either did that, or we pasted the sheet on here. We usually do both to show that we are placing our bid to supply Kellogg's Whole Wheat Biscuits. On the third sheet is an item "Wheat, Cereal, Kellogg's Whole Wheat Biscuit," and we also bid on that. I am quite certain that the contract was awarded to the Kellogg Company. At the present time, where a brand name is specified, we do not place bids. When we first started to handle Government business a few years ago, we did, because we did not realize the whole significance of the specification of the brand name, as for example, Selfridge, Field, they called for Shredded

Wheat, National, and that is a brand name—National —when we put Kellogg's Whole Wheat Biscuits on a bid, that specifies the brand name. On National, we never get the business, even though our price is lower. When brand names are specified it is always on commissary requirements, for resale items. But when we find a bid, as we just did in Exhibit 189, Shredded Wheat for subsistence supplies, we write in Kellogg's Whole Wheat Biscuit. When bidding upon specifications calling for Shredded Wheat, I did not and do not know that the words "Shredded Wheat" have been filed in the United States Patent Office as and for a registered trade-mark. I have examined the plaintiff's packages Plaintiff's Exhibit 1 and Plaintiff's Exhibit 148, and I observe that under the word "Shredded" is found the expression "Trademark, Reg. U. S. Pat. Off." I have never observed that before although I have seen packages like that before. The Federal classification calls for bids on any brand of Shredded Wheat.

On Defendant's Exhibit 191, the words "Kellogg's W. Wheat" filled in by pen and ink were filled in by some representative of Price Brothers in Philadelphia.

It has been the company's practice to write in on bids calling for Shredded Wheat the words "Kellogg's Whole Wheat Biscuit" ever since I have been placing bids; we have always handled them that way. We did not call our product Kellogg's Whole Wheat Biscuit until 1930, but from that date on we have always filled in the name Kellogg's Whole Wheat Biscuits. We have never bid the Kellogg product and supplied it upon bids calling for Shredded Wheat without filling in the words Kellogg's Whole Wheat Biscuit or their equivalent.

Before 1930, when we began calling our product Whole Wheat Biscuit, it was designated on the bids

as Kellogg's Shredded Whole Wheat Biscuits. It was our custom then to fill in on bids Kellogg's Shredded Whole Wheat Biscuits. We never placed any bids without fully describing the product that we are offering to supply. All proposals usually request that brand names be specified on the products. I have placed many such bids myself, and many have been placed by branch offices directly under my supervision.

Referring to Plaintiff's Exhibit 227, and Defendant's Exhibit 191, the only difference in these two is that this is the bid offering to supply Kellogg's Whole Wheat Biscuits for June delivery, and this is the Price bulletin of provisional contracts for March. Price Brothers' bid for March delivery was identical to this, but has been destroyed.

MR. VILAS: Pointing to Exhibit 191.

THE COURT: Who projected Price Brothers into this case?

MR. VILAS: Price Brothers came into the case during the taking of the deposition of John Hopkins, the general sales agent of the defendant company for Philadelphia territory.

THE WITNESS: These two exhibits indicate a bid by Price Brothers and an award of the contract under which Kellogg's Whole Wheat Biscuit was supplied, but the bid is dated May and the provisional contract is dated March. The bid was identical with that made for the March business.

RE-DIRECT EXAMINATION.

With regard to all of the bids concerning which I have testified, we have at some time or another, placed samples with every department of the Government and State.

OTIS K. BERRY.

DIRECT EXAMINATION.

I am district sales manager of the Kellogg Company, and have held that position for four years, the first of last October. Previous to that I was connected with the Kellogg Company as a salesman, ten years the 19th of last March. I was not in the grocery business before going with the Kellogg Company. My district embraces the major portion of the State of Virginia, all of North Carolina, and the major portion of South Carolina, with one or two counties in West Virginia. I have eleven sub-districts and about fifteen men varying; sometimes it will 12 and sometimes 15 or 16; Mr. Munz does some work in my district. As sales manager, I am called upon to market Kellogg's Whole Wheat Biscuit. A consumer demand has been created in my territory. At the start it is our job to go out and sell the wholesale grocer any new product that we are marketing. Referring to the Whole Wheat Biscuits, we first sold the Whole Wheat Biscuit to the wholesale grocer and then we endeavored to sell it to the retailers, and at the time that we sold it, we usually put on, if possible, campaigns, throw several salesmen into one large city, and what we call crew work.

We would go to these stores, sell them on our biscuit, prominently display it in the stores, in the windows, and endeavor to get the store to allow us to place a package near the cash register for display purposes.

We always endeavor to sell this product as Kellogg's Whole Wheat Biscuit and would not stop there. We would explain to the grocer that we were going to do follow-up work. That follow-up work consisted of sampling, house-to-house, and we have also done other house-to-house work by selling one package and giving one package free. In the manner——

Q. 14. Is this one package of Whole Wheat?

A. One package of Whole Wheat to the housewife at the regular retail price that the grocer charged for it, and give her one package free. We would go up to the house and always carry a package open and explain to her that this was a new product, Kellogg's Whole Wheat Biscuit, and in order to get it on the market and get people familiar with it, we were doing this special work. If you buy one package, we give you one package free.

We usually, in fact, in my territory, we have always paid the retailer his regular retail price for the package given away free.

Then in addition to that, we have been using cards. We would go into a retail grocery store, usually we picked the stores that we thought or figured would be good merchandisers, people that would give us a little publicity probably in advertising or by letting us prominently display the product in their store, we would take the names of fifty or more of their customers and send to each one of these customers a card stating that if you will take this card to your retail grocer and purchase one package of Kellogg's Whole Wheat Biscuit, he will give you another package free. Then we in turn pay the retail grocer the retail price for the card that has been turned in to him.

In addition to that we have had very definite tie-ups with some of the cooperative chains of larger grocers, by having two of these Kellogg Whole Wheat Biscuit packages tied together at the factory with what is known as a Geography Chart, and we have also merchandised them with what is known as our Jungle Land Books. Then we have used some—little novelty premiums with the packages. In addition we had song and rhyme books tied in the same manner, and have done a general job of house-to-house sampling, with our salesmen, and they hire four boys that carry

these samples in bags and deliver them door to door in the city; to drive the point home that it was Kellogg's Whole Wheat Biscuit, in each instance we have one of these boys take a full sized package to the door and explain to the lady that the next time she bought Whole Wheat Biscuit, we would like to have her try Kellogg's in this package, and we would hand her the little package.

We would open the package and tell the grocer it was a new product, Kellogg's Whole Wheat Biscuit, small biscuit, fits the bowl, and there are also 15 biscuits to the package, 12½ ounces, packed 24 to the case; and the consumer work, we have spent a great deal of money and done a great deal of advertising on our Saturday trade promotion sales. We usually featured this Whole Wheat Biscuit in our Saturday sales, selling three other packages of Kellogg's products and giving one package of Whole Wheat Biscuit free. All our packages are cut open, across this slit, to show the product, and also the Kellogg name; we have always used that method to show customers that come into the store, and we feel that is good advertising, because the customers will see our product and be attracted by them. We put a great deal of effort behind Whole Wheat Biscuit in that manner.

The purpose is to promote good will and sell our merchandise and the manner in which it is handled is for us to go to the grocer Monday or Tuesday before the Saturday sale and sell him the idea of featuring our products and giving us a large order to take care of the demand which we hope would be created through the special sale that he would run on our products. We always requested him to mention this special in his ad.

In my territory the ads usually run Friday, and on Saturday one of our salesmen goes into the store and works from the time it opens until 10 or 11 o'clock at

night. We endeavor to get all of the clerks to push our merchandise as a little help to us in promoting the sale of our products.

THE WITNESS: Our salesman contacts customers all day long, and endeavors to sell them on our products and tell us about the Kellogg line in general. Outside of the large chains—and by that I mean the A. & P. Tea Company—we have had, we consider a very thorough distribution of the retail stores in my district. I would estimate that we have made from 65 to 75 per cent. distribution on our product, outside of the chains. My sales methods are no different as applied to Whole Wheat Biscuit from what they are as applied to the rest of the Kellogg Cereal line. We use the same methods. I have seen the small individual package of the plaintiff in restaurants in my section and I have also found their large individual packages in restaurants. I do not recall seeing both of them in the same restaurant. I have seen the little individuals or the small packages referred to and the larger in one restaurant and the larger individual packages in other restaurants. On the small package, the plaintiff's biscuit is a very small biscuit more similar to our biscuit; and the large biscuit is the same as is displayed in their Exhibit No. 1; it is quite a bit longer. Defendant's Exhibit No. 60 is what I consider one of the small individual packages.

THE COURT: The remarkable thing is that this large individual has a small biscuit in it.

THE WITNESS: Yes, sir.

MR. VILAS: May I explain that? I show your Honor an exhibit, which I think is Plaintiff's Exhibit 21, in which I explain how the waitress put two Kellogg biscuits back in our package, and put it back in stock. Those were Kellogg's biscuits in

our package, and that is what happened to me in Burlington, Vermont, as I explained in my statement about the depositions.

(Package received in evidence and marked "Defendant's Exhibit No. 192.")

THE WITNESS: Exhibit 192 is a package of so-called standard size individual cartons. The defendant company has no other individual size, and the biscuits she brought are the same size as the regular standard biscuit of the defendant. I have had no reports and have had no observation of conditions of confusion in my district between the plaintiff's product and the defendant's product.

In the chain stores there are a great many specials run on Defendant's Exhibit 1, at 2 for 19 cents. The prevailing price on our product is from 12½ to 15 cents.

Their prices vary a great deal. Some chains sell it for 10 and 11 cents, and retailers sell it from 12½ to 15 cents. Of course, we have had several grocers that would run them on a special sale at a little less. The name Kellogg on the Whole Wheat Biscuit has trade value in introducing the product. It greatly facilitates the matter of getting a Kellogg distribution. I know that it is a very easy matter to sell our product, especially a new product—to either a wholesaler, retailer, or consumer.

I do not know how long the defendant's small carton of individual biscuit like Defendant's Exhibit 60 has been on the market. I never saw it before this year. Before I saw plaintiff's small carton corresponding to Defendant's Exhibit No. 60, I had seen the plaintiff's large individual carton like Defendant's Exhibit 59. It has been there ever since I have been on the territory, and I have been there four years last October. So that up until this year, the competition in the individual

packages has been between defendant's small individual, like Defendant's Exhibit 185, and plaintiff's large individual, like Defendant's Exhibit 59. And this year, for the first time, I have encountered plaintiff's small biscuit in the individual carton corresponding to Defendant's Exhibit 60. I have never, at any time, encountered in my territory any of plaintiff's small biscuit of the size of Defendant's Exhibit 60, packed in the large or standard size carton that is 12 biscuit to the carton.

CROSS-EXAMINATION.

I observe on the top of the bundle of advertising, marked Defendant's Exhibit No. 137, a newspaper advertising two packages of Kellogg's Shredded Whole Wheat Biscuit for 19 cents. I have no doubt that retailers sell them for that figure, and on the very top newspaper of the other large bundle, known as Defendant's Exhibit No. 134, I see an advertisement Kellogg's Whole Wheat Biscuit, 3 packages for 25 cents, and I have no doubt that they sell them for that price.

Prior to four years ago last October, I was located in the New England states for the Kellogg Company; and it was in October, 1929, that I took my present territory. I was six years in the New England states, and during that time I saw plaintiff's product Shredded Wheat sold in individual cartons of the same size and appearance as Defendant's Exhibit 59 in restaurants. So far as I know, that was the plaintiff's original individual size cartons. I cannot say definitely how far back my acquaintance with that goes. I have seen that package on the market a good many years, certainly all of the time I was in New England, and I have seen it during the whole time that I have been in my present territory. I have seen the small package in some restaurants this year, but that package has been in others so far as I know. The original

individual sized package of the plaintiff like Defendant's Exhibit 59 that I have seen during this whole ten years.

I do not know off-hand how many packages containing 15 biscuits of the Kellogg product were given away in my territory to householders while introducing the Whole Wheat Biscuit, and I cannot give you any idea. I should say it would run into many thousands which were given away with the purchase of one package or with the purchase of three packages in Saturday sales. I would not say it was fifty thousand and I cannot say anything except many thousand. I have no definite idea behind the word many. I could not state during what period of time this large quantity of biscuit were given away, but I have been doing it for a long time. I have done the bulk of this business in the summer or early fall. I do not recall having done any in the spring.

We have used it in some territories once, some territories and other times in several territories; in other words, we have done it where we thought we could get the greatest possible result in doing house to house work.

I could not state the time definitely whether it was the summer of 1929 or the summer of 1930, but I know definitely that we did house to house work in distributing free packages of Kellogg's Whole Wheat Biscuit in 1931.

I cannot recall whether in distributing packages we gave away packages like Plaintiff's Exhibit No. 3 to the interrogatories. I could not state whether it had the words Shredded Wheat on it or not. I know that it had Kellogg's and that is all that I know, and I do not know whether it said Shredded Whole Wheat Biscuit or Whole Wheat Biscuit. I cannot state whether at any time we distributed free packages prominently marked with the words "Shredded Bis-

cuit" in substantial sized lettering like those on Plaintiff's Exhibit 3 to the interrogatories. Since I have been in that territory, I think the packages have had Kellogg's Whole Wheat Biscuit on them.

In connection with this business, we furnished grocers cuts for advertising matter for them to use. We did not pay for that advertising, and we did not make any allowance to the grocers, giving them nothing directly or indirectly of value. We did not furnish free goods to the grocer when introducing the goods, except that if they bought so many for a special sale immediately after local advertising, in some instances the grocers do not advertise, and we have helped sales in the stores, even though the sale was not advertised; it was not compulsory. I cannot state definitely whether in distributing business, we ever gave one case of Whole Wheat Biscuit free for each six cases purchased by the grocer. I think that we have in times gone by had what is known as special deals for a certain length of time whereby we gave the wholesaler one case free if he bought a certain number. At the present time we have a deal on our corn flakes, buy six cases and get one free. I do not know whether we have had a similar deal on biscuits or not, but we have had since the time I have been in Richmond deals on that product. I do not recall any such deal on Whole Wheat Biscuit since I have been in Richmond, and I think I have a fair memory but not on that subject.

XQ. 113. Now will you pick out from among all of these Kellogg cartons on Shredded Wheat Biscuits that are here, the one which you can distinctly remember as the first that you gave away?

A. This package here (indicating Plaintiff's Exhibit 201).

Mr. Cooper: That is the same, your Honor, as Plaintiff's Exhibit 1 on the interrogatories.

THE WITNESS: I do not recall whether or not that is the first package we used. I do recall using that package for free distribution to the housewife, but I could not state whether I used for free distribution at about the same time the cartons like Plaintiff's Exhibit 3 to the interrogatories.

I testified I thought we had between 60 and 75 per cent. distribution in my territory in the retail stores outside the chains. I am referring to the A. & P. as the large chain. That means that, according to my estimate, from 60 to 75 per cent of the retail stores outside of the chain stores carry Kellogg's Whole Wheat Biscuit; and, whether they sell it or not, I still found a store that has had some on hand as going to make up the 60 or 75 per cent. The Kellogg Company does not fix the price at which the retail store shall sell Whole Wheat Biscuit. We have always suggested that retailer and wholesaler alike make a profit on our items. We do not state which prices it shall be sold for. So that if the retailer wants to sell it at any price he chooses that is his business. We always request when an unusually low price comes out that they refrain from pursuing that practice. However, that is left entirely up to the grocer. After the merchandise is his, as I understand it, he is the owner and can sell it for whatever he wishes. I should consider three packages for twenty-five cents a very low price, and two for nineteen cents would be unusually low for my territory. In instances where a particularly cut-rate store has featured Corn Flakes at five cents a package, we have asked them if they would not just as soon get a profit for it. We would probably do the same thing on Biscuit if it came to our attention.

During the time I have been with the company, I have handled Whole Wheat Biscuit in cartons like Plaintiff's Exhibit 3 to the interrogatories. I have, myself, gone around to householders, carrying cartons

on some of these campaigns; but I do not definitely recall ever having carried such a carton as Plaintiff's Exhibit 3 to the interrogatories. I will not say that I did not.

RE-DIRECT EXAMINATION.

WITNESS: The plaintiff has sometimes given free deals on special sales of Shredded Wheat, and they have used similar sales where it was three for ten in my territory in selling merchandise other than at the regular price. That is a common practice in the cereal line, especially in the last three years. We have had several deals on Corn Flakes, Bran Flakes and other cereals as well as other Whole Wheat Biscuit. We consider that selling Whole Wheat Biscuit as low as three for twenty-five cents is very much to our disadvantage. That is our reason for, when the thing is called to our attention, endeavoring to get the dealer to charge more for it so that he can make at least a reasonable profit. We are afraid that it might affect the attitude of other dealers towards the product.

WILLIAM P. PENTY.

DIRECT EXAMINATION.

I am fifty-four years old, and am employed by the Kellogg Company in charge of supervision of the work of the experimental department, and also the supervision of the processing and quality of our several foods. I have been with the Kellogg Company twenty-two years—that is, with the Kellogg Company and its predecessor Kellogg Toasted Corn Flake Company.

I started with the Kellogg Toasted Corn Flake Company on January 16, 1910, and for the first three months I was employed as a roll man in the corn

flake department. In March of that year I was placed in the experimental department, and on May 8th of the same year previous to that, we had two twelve-hour shifts. We started our three eight-hour shifts, and on May 8th I was placed as the general foreman on the three to eleven shift, retaining the supervision of the experimental department.

This has continued until the year 1929, with the exception of about a year and a half that I was out of the employ of the Kellogg Company, and since 1929 I have taken over the entire work in the experimental department and the supervision also of the processing and quality of our several products.

I have had to do with the product known as Kellogg's Whole Wheat Biscuit. We are working continually to produce new foods and to improve, if possible, the quality of foods that we are running at the present time. That comes under my charge in the experimental department.

In the regular production I have the supervision of the quality of the Biscuit to see that they are up to the proper standard, to see that they are properly processed at all times and, if for any reason, they are not to take it up with the foremen or workmen connected with the processing of the foods.

During my connection with the Kellogg Company, I have been a member of the City Commission of the City of Battle Creek for the past eleven years, and have had two terms of four years as Mayor of the City of Battle Creek, a city of fifty thousand population. The duties of mayor is not full-time work, but I would be in the office in the City Hall every afternoon from 2:30 to 5 or 6 o'clock. The Kellogg Company allowed me that time to take care of the duties of mayor. I reported every morning at 8 o'clock to the factory, and took the lunch hour, along about 2:30 in the afternoon would go to the Mayor's office; and

after finishing those office hours I always returned to the factory and made general check-up of the plant, and sometimes came there again late in the evening.

Under my supervision, we have developed the products which are known as All-Bran, Bran Flakes, Pep Bran Flakes, Wheat Flakes, Rice Krispies, Wheat Krispies, and Shredded Whole Wheat Biscuit. I had to do with the experimental work in connection with all of them. I have also been connected with the actual production of these products and am familiar with the method of processing Kellogg's Shredded Whole Wheat Biscuit. We purchase winter white wheat, which is received in box cars, and before being placed at our unloading dock, samples are taken, which are run through our testing laboratory, to see if it is up to the standard we require for our Shredded Wheat Biscuit. If it is up to the standard, no decay, it is unloaded and placed in bins—in concrete bins. We have a number of a capacity holding about 5000 bushels, as our capacity in the bins which we have, and it is removed from the bins, preparatory to cleaning or cooking. It goes over a large Invincible compound shaker, which is double separation, which removes sticks, paper and straw, hulls, corn, beans, and other material larger than a berry of wheat, after which it is conveyed to a Carter disc separator, which is a machine composed of three units, the upper section removes oats, hulls, beans and corn or materials that would be larger than a berry of wheat, and the center section removes the smaller berries and oats and corn and alfalfa or alfalfa seeds and it goes to the lower section, which removes the broken berries and smaller or lighter materials, after which it gets to a set of stoning machines, to remove stones and any material which is heavier than a berry of wheat.

After passing through those stoning machines, it goes through an Invincible Duco Separator, operated

by air, which removes the broken and small particles, or particles of lighter than a small berry of wheat, and also any fine seeds that might be retained. From that machine it is transferred into the No. 2 building, as we call it, with large bins, where it is stored, preparatory for cooking, and on travelling over to No. 2, it passes over a supersyphon machine to force out any foreign matter which may still be retained in the grain, lighter or heavier than a berry of wheat.

THE COURT: Dust?

THE WITNESS: Yes, such things as that. It is then ready to be cooked, and it is taken from these receiving bins and placed in hoppers, where we weigh it for the amount that we wish to place in our cooker, and it is then placed in a Lang cooker, as we call it, a cast-iron cooker, which has on the inside a perforater shell, which holds and retains the wheat, and we cook each cook—we cook it in steam. The wheat is placed in the cooker first, and then it is thoroughly covered over with water. We generally figure five or six inches of water over the top of the wheat, so that there is plenty of water, and it is cooked at a 17-foot steam pressure for twenty minutes, after which we open a valve underneath the cooker and permit the water to be drawn off, and the wheat is retained in that inside perforated shell.

We then steam it with dry steam for five minutes, which draws the outside of the wheat and permits it to flow more easily and to be dried. It is discharged from the cooker into a Huhn drier, through which warm air is passing. It passes through there. It is only in there a few moments to remove the exterior moisture, and is then conveyed to our tempering bins. We have a series of wooden bins. The wheat is placed in for tempering and left to remain in for eighteen hours.

After tempering for eighteen hours at a temperature not to exceed 80 degrees Fahrenheit in the room,

it is then ready for the process of shredding. It is then taken from those bins and conveyed in conveyors over the tops of our shredding heads.

We have a battery of 27 shredding heads each containing two rolls, one roll is grooved and the other being plain. The grooved roll, there is attached to that a comb-like steel scraper which fits into the grooves and discharges the shreds on to the receiving travelling belt below.

(Witness refers to blueprint diagram.)

THE WITNESS: There are 54 shreds, it is a 2¾ face across, and 55 lugs, but 54 shreds in each one. The depth of our shredding roll, our shreds are 20/1000ths each, and they are 50/1000ths on center, and 2¾ face, and 6 inches——

(The blueprint used by the witness was received in evidence and marked "Defendant's Exhibit No. 193.")

THE WITNESS: I produce a book containing 13 photographs numbered, showing as follows: No. 1 shows the shredding head and the conveyor which conveys the wheat from the bins above these hoppers, the wheat goes down into the hopper, and this little hopper is where it goes down between the two rolls, the rear one being the plain, and the front the shredding mill, and then it is enclosed there, and it goes on to the receiving belt below. Photograph No. 2 is the biscuit mill from above which shows the two rolls, the shredder roll, and this is the plain, where they are run together with the wheat down in the center.

Photograph No. 4 shows the wheat shred. This is the shredding mill, and this is where the comb-like scraper sets into the little grooves which allows the shreds to come off of the shredding roll and deposits on this receiving belt below which is slotted here, and

there is now the shreds coming from 22 to 23 mills. They then pass on to our cutting chain which sets down into the slots right here, and register the top cutting belt with the lower. No. 3 is a close-up of a biscuit mill showing the wheat shreds.

No. 5 is a photograph showing the shreds which have been removed from the receiving belt below to give an idea of holding together and just showing the shreds.

No. 6 is a photograph showing the raw shreds of wheat before formation in the biscuit. They are placed on a pan which is in the length to take a photograph showing the shreds in the length.

No. 7 shows the front of one of our ovens. It is closed and just shows the front of the oven and a belt coming along where the biscuits are discharged into it.

No. 8 shows the biscuits as they enter the oven on to the brackets on the revolving Ferris Wheel-type oven. The biscuits are placed on the perforated pans on the brackets.

No. 9 shows the toasted biscuits leaving the oven after they have been toasted for 45 minutes at a temperature of 400 degrees. The bottom is served by the perforated pans and it allows the heat to penetrate.

No. 10 is a close-up of the biscuits leaving the oven.

No. 11 is a tray of toasted biscuits which have been removed and a photograph taken of it. It shows the perforation on the pan.

No. 12 is a picture of our biscuit baking line showing our semi-automatic packing machine.

Photograph No. 13 is a close-up of the packing line showing the young lady putting the carton on the block of the semi-automatic packing machine after it had been filled with biscuits and flaps top and bottom.

The whole wheat goes into the hoppers over the shredding rolls which is composed of one grooved roll

and one smooth with a scraper which removes the shreds on the receiving belt below.

We use from 22 to 23 mills and sometimes it will vary one more or less to get the proper weight for our biscuit, and after the required amount is deposited on the receiving belt below, it is carried on this belt to our cutting belt which is an endless belt equipped with cutters which fit into the slots below, on the lower receiving belt.

These cutting edges are not sharp. They are about 3/32 wide, so that they do not give a sharp cut. It is more of a nip off or weld, so as to weld the biscuit together on the side. If it was a sharp cut, it has a tendency when they get into the oven and being toasted, and they start to puff and crack on the sides. I mean that the shreds run lengthwise with the belt, and instead of using a sharp knife to cut these shreds crosswise into the biscuit, you use a rather dull knife which nips them off rather than a sharp cut and presses the ends of the shreds together. And the top cutting belt is equipped with a perforation on the chain and blocks which allows a suction of air or vacuum to retain the biscuits after they cut and form them, and they carry them along over to the top or suspended over perforated pans on which they are toasted, and as they get to the end of the pan, 20 of those biscuits are released by a cam operation, which releases the air or vacuum and deposits them on the pan below.

The pan automatically moves forward just far enough to allow the second row to be deposited without touching the biscuit that has previously been deposited there until four rows of 20 biscuits each, or 80 to the perforated pan, that fills the pan which is conveyed to our toasting ovens which are of the rotary Ferris Wheel type, and they are then placed in the oven from the conveyor on the brackets on the inside until the oven is completely filled, after which it is revolved

down into the heat and up in order to allow the moisture to be expelled from the biscuit, as it is in the process of toasting, for, in the neighborhood of 45 minutes at 400 degrees Fahrenheit of heat, after which they are removed from the oven on to a conveyor belt where they are conveyed over to our evaporator and there placed on racks.

These racks are placed inside of our evaporator which has a chain on the bottom equipped with lugs which carries the pan slowly through the evaporator.

Q. 34. Are they still in the pan?

A. They are still in the perforated pans.

Q. 35. Right there, I might ask you what is the purpose of the perforation in the bottom of the pans with the 80 biscuits in the pan?

A. That is to assist in toasting the bottom of the biscuit. They are then conveyed through the evaporator by these lugs coming in contact with the rack, for it takes about one hour at a temperature of 210 degrees. After being removed from the evaporator, they are set to one side in the racks on the perforated pans, to allow it to thoroughly cool before they are packed. They are examined when they come out of the evaporator to see that they are free of moisture, to insure safe packing, and they generally take a biscuit and break it in their hands and see that it is dry, which is the test we make, and there are moisture tests in the laboratory.

They are then conveyed on a belt past an inspector who insects the biscuits to see that there are not any broken biscuits or some that might have gotten broken in the process of making, to our semi-automatic packing machine. This semi-automatic packing machine is equipped with 32 hoppers, blocks or hoppers, which has hinges on the side and it opens up at an angle of about 45 degrees which permits the girl to take three biscuits at a time and send them in there, and then a divider until 15 biscuits and 5 dividers have been placed

in this block which automatically closes, and then the girl places a carton over the top of this box which is open, both top and bottom.

The carton then goes to a sealing machine which puts glue on the bottom flaps and then continues on through a drier which dries the glue on these bottom flaps and seals it and travels on to the end to a conveyor where the biscuits are automatically transferred into the carton, which then travels along a belt for our final inspection of the biscuits at the top, and see if the carton is properly filled. There is another divider placed on the top to keep any glue from getting on to the biscuits. It then goes to our top sealer where glue is put on the top laps, the carton laps, and then is conveyed to our packing table where they are packed 24 cartons containing 15 biscuits each in a case, or 360 biscuits in all.

The photographs show the operation of taking the biscuit in the metal tray by which they are inserted into the carton.

Photograph No. 12 shows the block as it comes to the girls at about a 45-degree, which permits them to slide the biscuits right down into them until it gets down to the end where it automatically closes. The girl places the carton open on both ends over the block. Then after passing around through this drier belt, it automatically is discharged from the block into the carton at this point, and goes for final inspection to see that the carton is properly filled. I superintended the taking of these photographs personally.

(Book of photographs was received in evidence and marked "Defendant's Exhibit No. 194.")

THE WITNESS: There are 22 or 23 layers of shred. It varies one mill. As a general rule, we are using 22 shredding mills, and that determines the number of

layers in the biscuit. Each shredding roll is 2¾ on face and makes 54 shreds. The receiving belt below the mills, which travels at a slightly faster speed than the mills to allow the slight stretch to the shreds, which is necessary; when the cutting knife comes down from the cutting above, it further stretches those shreds, so that when they are placed in the oven and the heat comes in contact, it naturally gives a puff or rise to the biscuit. If they are not stretched a little, they do not have a tendency to do so; the second belt cuts and forms the biscuit and lifts the biscuit off the lower belt until they are over the pan and are fixed twenty at a time. It is released by a cam movement.

For our biscuit products, we require white winter wheat, matured berry, not to exceed 10 per cent. of red wheat. There is a little sprinkling of Durum wheat. It seems impossible to get it free of all Durum. We prefer the white wheat. We have a small amount of Durum, but in our standard for biscuit work, it must not exceed 10 per cent., and the ideal is to remove it all, if possible.

In our experimental work we have found that eighteen hours tempering of the wheat seems to be the best to make a good strong shred. We tried to shred the wheat at 42 per cent. of moisture to the shredding roll. If we shred too much over 42 per cent., the wheat is more sticky and would be too wet, so that it makes the biscuit a little heavier and they do not puff as well as they do at 42 per cent. About 25 per cent. of moisture is taken out in the process of toasting, so that when they come out of the oven, there is probably 15 per cent. of moisture still in the center of the biscuit. The top and bottom seems to have dried out practically in the operation of toasting. Through the Huhn drier there is some moisture removed. When the biscuit comes through the evaporator, the moisture is

down to 3 or 4 per cent., which we consider dry enough for packing and keeping.

The package marked Exhibit No. 146 resembles the biscuit Kellogg Company made in 1922.

We determined that 3 or 4 per cent. moisture would not interfere with the keeping of the biscuit through experimental work. We have packed biscuits at different moistures of 2½ to 5 or 6 per cent., and laid them away to determine their keeping qualities, with more than 3 or 4 per cent., the biscuit does not keep as well, and is apt to become moldy and rancid, so that if it is over 4 per cent. we put them back through our drier again to remove any excess moisture.

We shred our wheat at approximately 42 per cent. moisture, of which the oven reduces 25, leaving 15, and in the process of going through the evaporator, it removes all the moisture with the exception of 3½ or 4 per cent., which by an analysis in the laboratories shows still remains, but if you would take that biscuit and crumble it up into your hand, after it comes out of the drier, it all goes into flour and it is apparently bone dry.

The difference between the Kellogg Shredded Wheat Biscuit and the National Shredded Wheat Biscuit is that one is smaller than the other, and one biscuit is more prominently, the small biscuit, is toasted on top and bottom more than the other. The smaller biscuit is the Kellogg biscuit. Practically the only two points that I see of difference in the size and in the toasting.

In my opinion, it would not be possible to manufacture a practical biscuit of the type of this triangular biscuit from Plaintiff's Exhibit 241. One reason is on account of the sharp hard cutting edges which are objectionable. The other is the irregular shape, and also on this end of the biscuit, being small, it is

hard and has not—is not puffed as much as it was if it was not closed. It is very necessary to have those open ends on the biscuit from the standpoint of proper puffing, and to allow the heat to penetrate the biscuit properly beside. In my judgment, a practical biscuit should be one with the minimum amount of the edges open on both ends and toasted both top and bottom.

In my judgment, the diamond shaped biscuit in Plaintiff's Exhibit 240 are not practical biscuit because you have four of those sharp, hard edges, besides it is not open on any of the edges properly—to be properly puffed. It would not puff as well as an open end biscuit. The puff is essential to the distribution of the heat, and in manufacturing the shred you stretch them on your receiving and upper cutting belt, drawn tight; and it has a tendency when it gets into the oven and the heat penetrates to the center, to bring those objectionable spaces in closer, and in making our biscuit, we just nip it off, instead of cutting it, so that the heat has a penetration effect and lets the biscuit rise.

In the manufacture of the defendant's Shredded Wheat Biscuit, nothing is added to or taken away from the wheat.

In my judgment, the doughnut-shaped biscuits in Plaintiff's Exhibit No. 242 would not be practical biscuits for the same reason that you have the entire outer rim on the sharp, hard edge, and also in the center, and they are enclosed all the way. That does not allow the heat to penetrate as well as though they were open.

In my judgment, the biscuit in Plaintiff's Exhibit No. 245 are not practical Shredded Wheat Biscuit. They have not been stretched the way they look. They look more as though they had been coiled around, instead of running along in stretch, and it is closed on

all sides, and I would not consider them a practical Shredded Wheat Biscuit.

In my judgment, the biscuit in Plaintiff's Exhibit 244 are not practical biscuit for the same reason that they have a hard, sharp outer edge and are not open to permit proper toasting.

In the manufacture of the defendant's Shredded Wheat Biscuit, there is a slight amount of spoilage sometimes at the panning machine, but we do not reprocess our scrap. It is sold for wet feed. If two biscuit on the pan, in depositing, get disarranged, they are spoiled; and if the inspector notices it, it is removed from the pan and put into wet feed. Farmers come to our feed house and buy what we call wet feed, with the moisture that would be in it, instead of going to the work of drying it out would come and buy it in wet feed. I imagine the wet feed is used for cattle and hogs. After the biscuit has been baked or toasted, there is sometimes some spoilage. Sometimes the tops of some of the biscuit might be too brittle or soft to stand shipping. Those biscuits would not be packed. They are taken and removed and we do not pack those biscuits. Some of them are given to the Salvation Army, to our welfare department, and as many as they can possibly use, and they are given over to welfare department work. We have tried the reprocessing the untoasted or unbaked shred or scrap but it did not prove satisfactory. In reprocessing the shreds after once going through the shredding mill, they are more doughy, making a harder shred than what went through the mill the first time, and also the shred loses the identity of the bran and the tender shred which is going through the first time, so that we have not reprocessed them. It makes a hard part in the biscuit if there would be very much of it.

I have three samples showing unbaked shredded scrap that has been reprocessed by going through the

mill. This one would be the shreds that go through the shredding mill the first time.

(Received and marked "Defendant's Exhibit No. 195 for Identification.")

THE WITNESS: This is shreds that have gone through the mills the second time.

(Received and marked "Defendant's Exhibit No. 196 for Identification.")

THE WITNESS: And these are shreds that have gone through the shredding mill for the third time.

(Received and marked "Defendant's Exhibit No. 197 for Identification.")

THE WITNESS: Referring to those three exhibits, there is a difference between the product for the various shredding operations. On the shreds going through for the first time, they are light, tender shreds, which bring out quite prominently the bran in it, and it is more or less of a loose shred, that is, the material. In the shreds that have been reprocessed the second time, it shows the more or less doughy effect that has been caused by going through the shreds the second time, showing that from reprocessing it brings out more of the doughy effect and that the bran is not as prominently shown in them as it was in the first.

On the reprocessing of the third time, it shows even more the evidence of a dough effect, and where it would have a tendency to curl up at the knives. There is quite a difference from what it is going through the first time.

(The three exhibits were received in evidence and marked respectively "Defendant's Exhibits Nos. 195, 196 and 197.")

THE WITNESS: I have made up some biscuit from the double processed shreds. I have a carton here of

those biscuits that were reprocessed where the shreds were put through the shredding mill the first time and then the second time, and that resulted in this biscuit. This carton contains 15 biscuits, the same as our regular carton, although it is not nearly full, and the biscuits are very firm and hard, instead of being more porous and puffed, as the regular biscuit; and in the oven where our regular biscuits are toasted in 45 minutes at 400 degrees temperature, these were in the oven at 400 degrees for one hour and thirty minutes.

It took more heat to toast them, and we left them in to try to get them to puff more, but on account of being reprocessed the second time, it was heavier and harder and more doughy like than going through the first time.

(Biscuit received in evidence and marked "Defendant's Exhibit No. 198.")

THE WITNESS: These 15 biscuit in Defendant's Exhibit No. 198 do not fill the package to the top. You can get three more in there. There is a space of about an inch down from the top that is empty, and that package weighs 19½ ounces net where our regular package weighs 12½. The extra space is due to the fact that the biscuits do not puff as much on account of the reprocessing. They have a tendency to be more doughy and a harder shred and the heat does not seem to penetrate as well as it does the first time. It is more doughy and harder. The more it is reprocessed, the more doughy it seems to get.

The biscuits in Defendant's Exhibit 198 were made by the same method as on the regular biscuit. They were put in on one of the perforated pans into the oven with the regular biscuit. I observed them at the end of the time necessary for baking regular biscuit, and they were still light colored, and they were not ready to come out, and we continued to let them revolve as

long as they could to see if they would puff any more than what they were, and when they got colored as much as we dared let them go, and not have them burned, we removed them from the oven. The only other difference in the processes from the regular standard biscuit was that the biscuits in Defendant's Exhibit 198 were put through the shredding roll twice and were in the toasting ovens for an hour and thirty minutes. If we had kept the defendant's standard biscuits in the oven for one hour and thirty minutes, they would be burned black because they would be beyond being able to be used. Forty-five minutes is about the limit that we toast our regular biscuit. In my opinion, double shredding of the biscuit makes a difference in the physical characteristics of the completed biscuit.

There is no spoilage or scrap due to the standard method of cutting the shreds. Our cutting belt registers with the lower receiving belt and we have no spoilage there. Then it carries it on over to the perforated pans to deposit it, and sometimes in depositing that there might be something break loose at the end and touch the ones below which displaces them or rolls them up, and those are the ones that we remove. There is no normal spoilage, it is all accidental.

In a biscuit like Defendant's Exhibit 240, the diamond-shaped biscuit, there would be a great deal more standard unavoidable amount of waste or uncooked scrap. I would say there would be half of the shreds which would go into scrap and would be cut out. I do not see how you could avoid the scrap in making those diamond-shaped biscuits.

In my judgment, there would be scrap in manufacturing biscuits like those in Plaintiff's Exhibit 243, and in 242 there would be more so in this side than in the previous one. With respect to Exhibit 245, I understood that is put down in a hollow tube then pressed down and removed in that way. As I said before, it

would be more. Instead of stretching your shreds like we do our biscuit, they would be just winding them down very similar to winding a rope. There would be not so much waste in that type as there would be in the others on account of being confined in that circular tube. In Exhibit 244, the biscuit appears to have been cut out of a form of some kind, and I would say there would be considerable spoilage to it.

In my judgment, there would be considerable spoilage with a biscuit of the shape of those in Exhibit 244. It seems to be such an irregular shape from what the others are. The spoilage would be in the cutting for one thing; and another thing, it would be more apt to break on this end in the handling.

As I said, the Kellogg Company does not reprocess scrap, if we did a second time, you certainly would have some of those which would probably go through a third or fourth time as you continued to use it. You could not say that it would just go through the second time; it would be very apt to go through the third or fourth time some portion of it. The more you get into it, the more the tendency would be to make a heavier biscuit because it would not puff as well as the biscuit would with the shreds just the first time. From our standpoint, the biscuit being open on either end and properly toasted and rising makes it a better biscuit to be eaten than though it had hard sides and had not stretched it properly toasted on the inside. A biscuit that is not open on the top and bottom does not get a chance for heat to penetrate the center. The welded ends are the least edible part of the biscuit. They are the hard part and the objectionable part. We try not to have any more than the minimum amount and also in stretching a biscuit when it is nipped off these cutters and stretching the shreds as tight as you can, when the heat does go in the oven, and they are open-ended, penetrating that it draws that biscuit in. That reduces

the welding edge to the minimum. That is why it is not so objectionable as it would be if it were on four sides or sharp.

The defendant's standard biscuit runs quite uniformly as to color. Sometimes, in the burners of our oven, it might possibly get blocked up, which would have a little tendency to make a white streak at the time, until we get an opportunity to redry them, and there are times when I have known what we have had what we call a flashy fire, which possibly the attendant might not turn down the burners while it was being loaded, and left them too high, which would have a tendency to toast the top as much as required, before the bottom might have been toasted as brown as we desire it, but our standard is toasted top and bottom, and there are very few instances that are that way. We have the inspection of the oven men, and then there are also the regular inspectors on the belt who inspect the biscuits before they go to the packing line, and there is also the regular inspector going through inspecting the biscuits on the rack.

I am familiar with the process used by the Kellogg Toasted Corn Flake Company in making toasted wheat biscuit from approximately 1912 until around 1918. In the processing of the biscuit made in 1912 until 1918, we used the white winter wheat. Instead of shredding the whole wheat as we do at the present time, it was ground into flour and this flour was put into a large D. mixer, a certain amount, and to that was added water, until it was mixed up into a dough, and this dough went down from the mixer into what we call a loaf-forming machine, which was a circular machine that formed the dough into loaves, and these loaves were removed and placed onto little buggies, there were 24 to each one, and two of these buggies were put into a steam cooker called a retort, and cooked for about 45 minutes in the steam, after which they were removed and the buggies

were placed on tracks which were on the floor of the room, and left to temper there in the open air for 24 hours, after which these loaves were put through a sort of a stone crusher or heavy machine, as the dough was very tough and ground into small particles, and these small particles were conveyed into our shredding rolls and the dough or fine ground-up dough was shredded into the shredded biscuit.

They were placed in pans which run on the receiving belt below. These pans had the form of the biscuit. Onto them were placed a top which fastened over the top, converting the form of the entire biscuit, and they passed to a machine which gave a pressure of air and forced it down and cut and formed them and they were then allowed to go down and into a large chain oven we had with brackets on which allowed the chains to go into the heat and up to the top of the oven and they continued through a matter of about 18 minutes, when they were removed from the oven and the top taken off of the pan with a machine that lifted it off and the biscuits from the lower pan were dumped down to wire trays, placed in racks, and put into the evaporator and the moisture evaporated from them, after which they were taken to the packing room and packed in the cartons. That is practically the process.

We used the Whole Wheat and ground it into flour instead of at the present time we use the whole berry. That biscuit had a flavoring of salt and sugar; the loaves were broken up and shredded. I misspoke myself when I said our wheat bins had 5000 bushel capacity. I meant 500,000.

The wheat used in making the standard Kellogg biscuit is White Winter Wheat from Michigan. In previously saying Durum, I erred, as we used the soft winter wheat. It was a sprinkle of amber wheat that we used. The Durum is a hard winter Western wheat. In using that, I erred in saying that. We used a sprin-

kling of Durum and a soft winter wheat. Amber wheat is a Michigan wheat.

In the production of the regular Kellogg Shredded Wheat Biscuit, there have been times when it runs a little higher than 42 per cent. moisture. If it is much higher than 42 per cent., it makes a more brittle shred; also it makes soft tops in the finished biscuit so that if they are soft tops it does not permit packing them because they would not stand shipment.

We have experimented in trying to make identification marks on our biscuits, by putting bands on some with different materials. The biscuit in Defendant's Exhibit 199 were banded by shredding some rice into the center of the top of the biscuit and making a small ribbon there for identification. That is not a practical Shredded Wheat Biscuit of Whole Wheat because rice is added to it. It is not Whole Wheat biscuit. To my knowledge, it would not be a practical biscuit. It would be objectionable from the standpoint of the consumer not knowing what that form of material might be probably.

(The biscuits were received in evidence and marked "Defendant's Exhibit No. 199.")

With the biscuit in Exhibit No. 200, we took some green food coloring, similar to what they use in cakes, in food coloring, and took a small brush, and before the biscuit was put into the oven and toasted, we painted it across the center with a small brush in a food coloring—just a green food coloring. I do not know the consistency but it is what they use in the restaurants and bakeries in their cakes for coloring—what is commonly known as food coloring. In my opinion, that would not be a practical Shredded Whole Wheat biscuit on account of the material that was used, the consumer not knowing just what might be the green color.

(The biscuit was received in evidence and marked "Defendant's Exhibit No. 200.")

THE WITNESS: In the biscuit in No. 201, after the biscuit had been toasted and finished, we took a mould with a large K on it and had that put in to an electric soldering iron and heated, and then took the hot mould and pressed the K on to the outside of the biscuit—tried to make a K. It had a tendency of the shreds to stick to the hot mould when you would press on it, because it was necessary to press hard enough and leave it there long enough until it branded the letter K on it. It would not be a practical biscuit in my opinion for the reason I have already specified. It would be objectionable from the foreign material on top, where it is printed.

(The biscuit referred to was received in evidence and marked "Defendant's Exhibit No. 201.")

THE WITNESS: No. 202 was where we shredded some of the red food coloring on to the bottom mill to make a shred through there, and that is produced on the bottom of the biscuit before it went into the oven that was toasted, and when that came out, why, I would say that it would be very objectionable, from color. It looks as though it might be something that would not be acceptable as a biscuit. The biscuits in this box No. 202, in my opinion, are not practical Whole Wheat Biscuits.

(The box of biscuit was received in evidence and was marked "Defendant's Exhibit No. 202.")

THE WITNESS: In this one here Defendant's Exhibit No. 203, this one we used the little brush with the red coloring and placed it on the biscuit before it was toasted quite heavily, which made it a very pronounced objectionable color on the biscuit. I would say that they would not be practical for that reason. The putting on of the food coloring is the addition of a foreign material.

(The box of biscuit referred to was received in evidence and marked "Defendant's Exhibit No. 203.")

THE WITNESS: No. 204, we took before the biscuit was toasted, the green fruit coloring and with a little brush we just painted the edges of this mould, and then pressed it onto the white shreds and put it through the oven with the result that it came out showing a K more or less and green spots around, which would be objectionable on account of the foreign material that was used. In my opinion, it is not a practical Shredded Wheat Biscuit.

(The biscuit was received in evidence and marked "Defendant's Exhibit No. 204.")

THE WITNESS: This one Exhibit 205 is where we put the green food coloring in the shreds on top of the biscuit where the one before was on the bottom, leaving a green stripe through there, which is objectionable on account of these foreign material. In my opinion these biscuit in 205 are not practical biscuit.

(The biscuit were received in evidence and marked "Defendant's Exhibit No. 205.")

THE WITNESS: Exhibit 206 which shows a letter K, we took the letter K, if I might be permitted, I might show you with the biscuit here—this is the biscuit before it has been toasted, after being formed, and with this biscuit here we took the large K and pressed them with this mold until we could make a mark on it. If you press it with an easy pressure it does not make a mark. It is necessary to press it quite hard. In that case it parts the biscuit. The biscuit has become a little dry and they have a tendency to tear. We took the letter K as it is here and with the biscuit as they came preparatory to going into the oven, we pressed each one of them and put them through the oven and

toasted them to bring the letter K out. The biscuit in No. 206 are not practical shredded wheat biscuit. There are two things objectionable to them. One is that they have not puffed up near as much as our regular biscuit on account of the pressure that you have to use on them, and it deforms the regular biscuit. The second objection is where that letter K is from pressing it down so far, it has made more hard substance in the biscuit which is objectionable.

(The biscuit was received in evidence and marked "Defendant's Exhibit No. 206.")

THE WITNESS: No. 207, we took some of our Krumble Wheat which we shredded for Krumbles and put that in the center of one of our biscuit shredding mills and shredded it over the top to make an identification mark, with the result that you see there. In my judgment they would not be practical biscuit on account of the looks of them which would be objectionable and the material not knowing what it would be.

(The biscuit was received in evidence and marked "Defendant's Exhibit No. 207.")

THE WITNESS: No. 208, I wish to say that we made biscuit with both this large K by pressing them as I showed you with the large K and also with the smaller one to see if we could have any better results, but the results were practically the same. It made the hard centers here, and also that biscuit is only about puffed half to what the regular biscuit is, so that those features would be objectionable. In my opinion, it is not a practical shredded wheat biscuit.

(The biscuit was received in evidence and marked "Defendant's Exhibit No. 208.")

CROSS-EXAMINATION.

By MR. COOPER:

XQ. 308. Mr. Penty, you have produced several of these biscuits with marks on them as to which you

said they would be objectionable because consumer would not know what the added material was. I want to ask you whether the name Kellogg and the reputation of Kellogg, together with an explanation, would not, in your opinion, satisfy the consumer that the materials were what Kellogg represented them to be?

A. We would not put out a product like that feeling that it would be objectionable to the consumer. As an experimental work, we brought that out, and we would not manufacture a product like it and send it out to the consumer.

XQ. 309. Well, what you said was that it would be objectionable, because the consumer would not know what the added material was. What I am asking is if Kellogg said, for example, that as an Exhibit 199, the bands that were added were of rice, would not that be sufficient in your opinion, with Kellogg's great name which has been so much testified to here, to satisfy the consumer?

A. Well, sir, as I say, our company would never pass on them as a merchantable product to send out, so I do not know what the consumer would say regarding that, on account as I know our company would not pass them out, as we feel from the standpoint of manufacturing they would be objectionable.

XQ. 310. Then your point is not that it would be objectionable to the consumer, but that it would be objectionable to pass them out?

A. Our company would not see fit to pass out any product like that.

THE WITNESS: Referring now to Plaintiff's Exhibit 240, the diamond-shaped biscuit and to a rough sketch which you have marked Exhibit A, a biscuit like that would be different than what it is on the present biscuit. It seems as though there would be more or less spoilage from that. I do not know as to whether that would work or not. I am not positive whether it

would work or not. I do not think it would be practical to turn the knife and let your biscuit material run longitudinally, like your sketch A, but I have never given any study to it, except as you just now put it to me.

With respect to sketch B, on the same sheet, assuming two knives, one of which went at right angles across the line of travel of the material and the other diagonally across, it might be possible to get a triangular biscuit without wastage with a hand mold, but from a practical standpoint of manufacturing the biscuit, I do not think it is practical. I did not understand Dr. Oakes to say that he could commercially produce both the triangular biscuit, and the diamond-shaped biscuit commercially from the moving mass of Shredded Wheat filament.

(The paper containing the sketches A and B was received in evidence and marked "Plaintiff's Exhibit No. 262.")

THE WITNESS: The 10 per cent. to which I testified, as being wheat other than Durum, is what we call red wheat; amber wheat is what we call it. There might be a small sprinkle of it but we use the white winter wheat and ask for the white winter wheat. Amber wheat is not a species of Durum wheat. Durum is a hard winter wheat, while amber is soft winter. It is practically considered a white wheat. It is in between a white wheat and a red wheat. I do not understand amber to be Durum wheat.

The material that comes off the machine due to partial spoilage before biscuits go into the oven, we call wet scrap and we do not reprocess it. I understood Dr. Oakes to say that they reprocess it in the center of the biscuit. I have never examined National Biscuit Company's biscuit to try to identify in the center of the biscuit some of these reprocessed filament. I have had them at home and have eaten them, but I never examined them from that standpoint in the factory.

I testified that some of our biscuits would be baked more on the top than on the bottom, and I meant by that that when the oven was loaded with biscuits there might be some of the burners on the bottom plugged which sometimes happens for a short time and that would necessarily allow the heat from the top burners to color the top biscuits faster than they would the bottom of the biscuits on the perforated pan, but at the same time when the top of the biscuits were sufficiently toasted it is necessary for the operator then to remove the biscuits or they would be spoiled. It has also happened where the top burners are also plugged. I would not say that biscuits differently baked top and bottom occur in as much as 25 per cent. of the cartons put out by our factory. I have no idea how many there would be. Our standard is to toast top and bottom.

Our biscuits are weighed previously to going into the oven because it is necessary to ascertain the weight at that time because after they are finished it is pretty late to change the weight, but we go according to the weight of our package. Our biscuits weigh finished seven-eighths of an ounce to sometimes an ounce. The biscuits are weighed in the cases after they are packed, but not after they have been weighed at the oven. After they are packed if they should run heavy or light, the light weight are set out and repacked and they notify the roll man as to it, but they weigh the biscuit, the biscuit before going to the oven approximately weighs an ounce and a half with the moisture and all, so that they try to hold their weight in that way as nearly as possible. The weight is mostly seven-eighths. Sometimes they run a trifle over, and sometimes they get a little heavy, but they weigh about 12½ ounces net in a package, and they may vary in weight. There is very little variation in our regular output. Some of our packages may run a little over 12½ ounces. If the biscuit weigh an ounce apiece, it would be 15 ounces, but

they do not run that unless there is something that happens and the dough might be a little wet, and we try to hold our mills down to get the weight, but our weight runs approximately 12½ ounces net to the package. We have some over-weights, but not much.

It is my understanding we sell some of our rejected wheat material to farmers. I know they frequently come up there and they do get, as far as I know, and buy what they call wet material, for hog feed principally, and instead of its being dried, why, it is dumped out of the truck or barrels right into their wagon, and it is generally lumped off to them. Some of this wet material may possibly be dried in driers, but not to my knowledge—sold as wet feed. I know nothing in regard to sales. I do not know as to the sale of rejected dry biscuit to fox farmers. I know our broken and rejected biscuits as long as they are good in all other ways, are given to the Salvation Army or welfare department and institutions of that nature.

With reference to the round biscuit in Exhibit 244, 245, and 242, I stated that they were not in my opinion practical. I am familiar with the product known as Muffetts from seeing it, and while it may be a commercial article, from the standpoint of Shredded Wheat Biscuit, they do not compare. I have seen the article known as Rippled Wheat, and I do not consider it as a Shredded Wheat Biscuit. It may be an article that the manufacturers sell. The firm that manufactures it may be able to sell it for what it is called, but it would not compare with Shredded Wheat Biscuits. From its name I would say it was composed of ribbons instead of shreds. That is the appearance it gives me. I do not compare them with Shredded Wheat Biscuit.

I said that the exhibits that I made up would not be practical from the standpoint of a foreign material being in them, and for the objection from the way they

looked, and also some of them there are disfigured and hard in spots in the center, and in my opinion, it would not be practical to merchandise such a product as that. They would be objectionable to the consumer.

SEVENTH DAY.

June 1, 1933.

Re-Direct Examination.

By Mr. Clarke:

The Witness: In my opinion, I would say that the diagonally cut diamond-shaped biscuit shown on the sketch A, Plaintiff's Exhibit 262, would not be a practical Shredded Wheat Biscuit. It would not pack in a carton similar to what we have now. It would be necessary to change the shape of the carton. I think there would be empty spaces in a rectangular carton. The end portions of the biscuit would not be as strong as the end portions of a pillow-shaped product. Where it would come to a point, a sharp point, that point would not be as strong as it would be where it is more uniform in a biscuit of this nature, and would have a little tendency to be harder on the point, and if there was much of it, the hard part is objectionable, as I stated before. I do not think it is practical to put the diagonal ends on the belt so as to make a biscuit like that shown in Plaintiff's Exhibit 262. I have never made any biscuit such as shown in A; Exhibit 262.

(A carton of biscuits was received and marked "Defendant's Exhibit No. 209 for Identification.")

The Witness: The biscuit which you now show me I did not see until last night. In my judgment it is not a practical biscuit because it has the appearance of a distorted biscuit and the ends prove fragile, and

also it would be a difficult biscuit to pack on account of the shape. The sharp ends here are harder than the main part of the biscuit.

(Two packages were received and marked "Defendant's Exhibits 210 and 211 for Identification.")

THE WITNESS: The defendant's standard biscuit taken from one of those cartons, is in my opinion, a practical Shredded Wheat Biscuit. One of the plaintiff's large standard biscuit which you show me, is also a practical Shredded Wheat Biscuit. These biscuit are not of the same size. I know of no other way than that which the defendant has embodied in this small standard biscuit, namely, by using a smaller biscuit and a darker biscuit, by which the defendant company can produce and market a practical Shredded Wheat Biscuit which is distinguishable outside of the carton from that large light biscuit of the plaintiff's manufacture.

RE-CROSS-EXAMINATION.

By MR. COOPER:

THE WITNESS: During all the time that I have been connected with the Kellogg business, their goods have been put out in cartons, as far as I know. As far as I know, the cartons are designed with reference to the contents, and, if one wanted to pack biscuits of the diamond-shape such as has been shown to me, I do not think it would be practical to make a carton to take biscuits of that form. That is my opinion.

In making the biscuit twice processed, in Defendant's Exhibit 198, I was assisted by a young man in the experimental department. He and I were the only two that made it, and it was taken from the experiment room. We made it in the mill room and put it through our regular ovens where the regular produc-

tion is going on. The men up there saw the biscuits. It was put through a regular shredding machine of the same size as our regular mill, but in the experimental room. We have a regular shredding mill, equipped the same as in our mills in the line, in our experimental department, and we used a mold in making these biscuits. The second processing was in a separate shredding mill, not the one in our regular line of production. The whole wheat was put through this mill the first time, and the shreds taken that had gone through the first time, and put through the mill the second time, double-processing it and made this biscuit. The mill was not adjusted in any way between the first and second time. We made twenty-two shreds similar to running twenty-two mills on the regular line, by passing the mold back and forth under the mill and and stretching the shreds similar to what we would in our regular line. I counted the shreds as I passed it under the mill going back and forth. I do not think you could count them accurately now, but I counted them as I was making them, twenty-two layers.

STANLEY B. HEARN.

Direct Examination.

The Witness: I am a grocer, doing business under the name, Hearn Brothers, and my brother and myself are the proprietors. We have sixty-two clerks regular and six extra on Fridays and Saturdays. The store is located at Concord Avenue and Washington Street, in Wilmington, and is a service store. About 60 per cent. of our orders come in by telephone and most of them are taken care of by girls. Some of the people ask for a certain man clerk. We handle two kinds of Shredded Wheat in our store. They are known as National and Kellogg's. We have handled

Kellogg's Shredded Wheat approximately three years. I could not say there is any confusion in our store as between the two products. When Kellogg's Shredded Wheat first came on the market and we began selling it we had quite a few complaints, due to the fact that the people had always bought the National Shredded Wheat, which was known as Niagara at that time. As there were numerous occasions where a person asked for Shredded Wheat Biscuits and wanted Kellogg's, and they were given the Niagara, due to the fact that if you were to come into my store now and ask for a box of Shredded Wheat, it is probable that the clerk would hand you a box of National Shredded Wheat. In other words, we instructed our clerks that if a person asked for a box of Shredded Wheat to send them the National Shredded Wheat, but only send Kellogg's when they specified Kellogg's Shredded Wheat. If a customer asks for Kellogg's Shredded Wheat we give them Kellogg's Whole Wheat Biscuit and the name must be written out in full on the order.

We have had cases where Shredded Wheat has been ordered and National Shredded Wheat delivered where the customer has not taken it and has returned the product. I presume that after a person uses Kellogg's Shredded Wheat for a while they forget that it probably was Kellogg's and in ordering and re-ordering they would call up and ask for a box of Shredded Wheat and Shredded Wheat being marked on the order they would be sent a box of the National Shredded Wheat. And we have had cases where the customer sent it back and requested Kellogg's.

We sell probably 60 per cent. National and 40 per cent. Kellogg's in our store. There is a consumer demand for Kellogg's product. We do not substitute one product for another. We are so situated that we give the public what they want, that is, we try to carry

the better known and best advertised goods. In other words, if there were three or four more kinds of Shredded Wheat Biscuit, we would carry them, if there was a sale for them.

For instance, we carry twenty-three different kinds of package coffee. We try to give the customers what they demand. I think we have told the salesmen and other people that come there, that our service is to the public and not to the manufacturer. We carry six different kinds of whole wheat bread, known by the company that manufacturers them. The product of National or Kellogg Company is a Shredded Wheat Biscuit. It is a breakfast food. It is a Shredded Wheat Biscuit, both of them are known as that. The fact that the National Biscuit Company recently acquired the Shredded Wheat Biscuit Company or the Niagara Biscuit Company, there is not many of the public that really know it as National. While the clerks in the store know it, and know that it is the National Biscuit Company Shredded Wheat, I do not think the public in general knows that it is Nationally owned. The reason that we give out the National Shredded Wheat, whenever the public ask for a box of Shredded Wheat, is due to the fact that the public asks for a box of Shredded Wheat knowing that only as Shredded Wheat. They do not know it as National Shredded Wheat like they do Kellogg's Shredded Wheat. Instruction to the clerk were to ask which one they wanted, whether they wanted National or Kellogg.

As to whether the name Kellogg is of advantage to the grocer, I can only answer you that Kellogg's is a national advertised product. The majority of people buy by name as much as by anything else today. If it is Kellogg's, it must be good. If it is Heinz's, it must be good, and in merchandising Kellogg's Whole Wheat Biscuit, when we have a special

on it—for instance, have it advertised at a price—the fact that it is Kellogg's helps materially in selling the biscuit, because of the house behind it, you understand. People know that it must be good or it would not be Kellogg's.

We advertise Kellogg's Whole Wheat Biscuit and give it store and window displays. We have a local newspaper that we advertise in with a circulation of 5300, just in our section of the city.

CROSS-EXAMINATION.

THE WITNESS: We call both of the products Whole Wheat Biscuit. I would say that I recognize the name Whole Wheat as applied to the Kellogg product. It has been only within the last three years we have really sold most of Kellogg's Whole Wheat Biscuit. As far as we are concerned up to three years ago the only one I knew was the Shredded Wheat Biscuit of the Shredded Wheat Company at Niagara Falls—that is with Niagara Falls on the package. And if anybody telephoned to me then that they wanted Shredded Wheat I would invariably send them that product from the Shredded Wheat Company. My best recollection is that we have carried the Kellogg product about three years. When we started we probably had a special sale. We did not keep any records of it. The Kellogg people have always co-operated with us in stirring up interest in their product. I am not sure that I can recognize the package known as Plaintiff's Exhibit No. 2 to the interrogatories. Kellogg changes their packages very often, and while this (referring to Plaintiff's Exhibit 5 to Interrogatories) is the package they are putting out now I would not want to say that that was the particular package at that time. On Exhibit No. 2 of the interrogatories, the prominent words are "Shredded Biscuit," and they are much

more prominent than the words Whole Wheat. I cannot say that there in the beginning we were furnished with goods in the package that had Shredded and Biscuit on it in prominent type. We carry 2400 articles in our store.

Sometime after we began to handle the Kellogg product people who ordered from us would call for Shredded Wheat when they wanted Kellogg's, and we not knowing which they wanted would give them the Shredded Wheat Company product. That probably commenced about two years after we began to handle the Kellogg product. Our first order of the Kellogg product was probably one case, and it probably took a good while to dispose of that case.

CLARENCE L. JORDAN, recalled.

DIRECT EXAMINATION.

THE WITNESS: The biscuit in Defendant's Exhibit No. 200 has not got any consumer appeal with the green on it. It looks rather spoiled. 207 looks very much the same way. There is practically no appeal because that looks as though something foreign is in the biscuit. 204 is exactly the same with the green in there. As to No. 205, I do not think that any of these colors—they really spoil the eye appeal of the biscuit because it looks green and rather mildewy. No. 203 has another color and has the same objection; and so has 199 and 202. The biscuit in Defendant's Exhibit 201 looks burnt and has the same objection. The biscuit in Exhibit 208 looks squashed down from the sides. They are both the same way. They look squashed down and flattened out and have been very badly harmed.

I spent yesterday at the office going over the correspondence concerning which Mr. Cooper asked as

to the investigation. We seldom keep the individual reports of our studies, because our written records are the advertising copy. We simply walk out and talk to women about this type of biscuit to get their opinions regarding it and what they felt about it. We took that information that we got to write the advertising copy and that is our permanent record.

Looking at Defendant's Exhibits 210 and 211 for identification, the biscuit are not as attractive as the defendant's standard biscuit. It does not puff up as well. It does not look as crisp.

CROSS-EXAMINATION.

THE WITNESS: The reports that I said I did not have on file were the ones you asked me about concerning the study we made in 1927. So far as I know they have never been on file, but I cannot tell you because I do not remember. A great deal of that work was done through other of our offices across the country. The 6000 house-to-house study was not made in 1927, and I have already explained that on cross-examination. I do not know how many houses were visited in 1927.

(Two documents were marked for identification, "Plaintiff's Exhibits Nos. 263 and 264 for Identification.")

THE WITNESS: I recognize Plaintiff's Exhibit 263 which is a report of hot and cold cereals by the Curtis Publishing Company in 1931. That is a concern in Philadelphia that puts out the *Saturday Evening Post* and other periodicals. This report is well known. I cannot state how well recognized it is. We have used it as a basis of comparison.

The other document for identification, Plaintiff's Exhibit 264, purporting to be a report for a cereal survey from the *Chicago Evening American*, I do not

know whether I have ever seen that or not. I cannot identify it. Most of them are sent out by newspapers and I look at them, but I get hundreds of them, and when they come they are retained and used in our business, if needed.

RICHARD S. POOLE.

Direct Examination.

The Witness: I am assistant superintendent, in charge of production of the Kellogg Company, and started with the company in March, 1910, working on the packing room machinery, and I gradually worked up to having charge of one of the packing rooms. In 1914, I changed from the operating to the mechanical line. I then went into the designing of automatic machinery, and took over the supervision of the packing up until 1929, when we went on the six-hour shift. Then I took complete charge of production. In January, 1931, I was appointed assistant superintendent and still retained in charge of production. I have to do with the designing of several machines mostly in the packing line, and two in the biscuit pan machine, and there was a semi-automatic biscuit packing machine.

As production manager I am responsible for the cost of all of our labor and all of our products, and I have to arrange the production so that the sales requirements and the output of the plant will balance at the end of the month. Every month the sales department furnish us with a forecast as to their requirements for that month. It is the duty of our office to schedule our output, so that the even flow will meet the requirements as they are requested by the different branch managers in the field. I am entirely responsible for production costs.

Whenever there is a change suggested by the experimental department or any member of the executive staff, we are sent over the recommendation or a sample of the change that they anticipate making. It is our duty to make an investigation as to the machinery that could be used for the particular change, and submit facts regarding the actual production cost. Those facts are submitted through my superior, the general superintendent, to the board. They make the final decision as to whether it is practical with those facts.

In the past two or three years we have had samples submitted by the experimental department of biscuits having identification marks.

(Three packages were received and marked "Defendant's Exhibits Nos. 212, 213 and 214 for Identification.")

THE WITNESS: Defendant's Exhibit No. 212 for Identification represents a biscuit with a band or a piece of paper wrapped around it with the name Kellogg's on it. This was submitted to me and I was requested to give them figures regarding the cost of labor and material on this particular identification mark. The figure was 72 cents a case of 360 biscuit—72.3 cents a case. That would not be a practical expense to put on biscuits of this character. It would be prohibitive.

(The box received in evidence as "Defendant's Exhibit No. 212.")

THE WITNESS: This band is made of a bonded printed sheet around the biscuit and is sealed on the bottom. The best cost that we could get was a semi-automatic machine for that. The biscuits are so tender that it is impossible to get them in a magazine and feed them out without too much spoilage.

I was asked to work out costs on Defendant's Exhibit No. 213 for identification. That represents

biscuits with a tag tied around the biscuit with the name Kellogg's on it. This was presented to me and I went into the study of the possibility of getting a machine that would do this work. I found that at Blissville, Michigan. They made what is called the Saxmayer tier. The cost of this was prohibitive and the exact cost was 77.4 cents per case of 360 biscuits. They have an automatic machine so that the tags can be put on to a magazine and fed off at the ends just the same as a needle would be, and the tying of the string goes through the eye of the tag and ties automatically on the bottom of the biscuit. The biscuits are fed to the machine by hand.

(Received in evidence and marked "Defendant's Exhibit No. 213.")

THE WITNESS: Exhibit No. 214 for identification represents biscuits put in glassine envelopes. This was tried quite extensively by the Kellogg Company. They experimented with it a long time and they even used it for their sampling, distributing samples, but they found that the cost per 360 biscuit would be 59 cents a case, and of course it was given up, due to the fact that it was too expensive. Those biscuit are packed by hand, and there is a standard rate of 6½ cents a hundred.

(Received in evidence and marked "Defendant's Exhibit No. 214.")

THE WITNESS: Cellophane is more expensive than glassine, and this is a glassine wrapper. It is just the same as any envelope, a satchel bottom envelope, and the envelope is opened up and the biscuit is put in and the ends are twisted to hold it.

At the time they were experimenting with the marking of biscuits, I was asked to submit a preliminary cost on the marking on the biscuits, but we

found in making this survey that the cost would exceed 19 cents a case, and, therefore, we submitted those figures, 19 cents a case. Those are absolutely prohibitive figures.

The biscuit in Defendant's Exhibit 210 and 211 were made in a form. Those submitted by plaintiff had a diamond-shape biscuit, and of course I was asked to figure the cost of what were entailed in making those in our production line. Looking at them I wondered why they had submitted a biscuit, in that shape cutting so much waste.

Over the week end, in going down and looking their machine over, the thought came to me, would it be possible to obtain the same results, or as good by making a diagonal cutter on the line and having them just cut it out and make the big trim.

The Kellogg Company do not reprocess scrap, and it would be absolutely impossible to make a biscuit without having as much food as it would a regular biscuit going into the packages. I made up a form and made these biscuits from that form. They are absolutely not practical Shredded Wheat Biscuit, because it would be very difficult with the present machinery or with our present equipment it would be absolutely impossible to fit those knives in diagonally across the chain. It would be impossible to make a practical package to run on the machine and pack them, without putting in some waste or something that would be really prohibitive to take up the loose corners on the carton.

They also have a corner that is very tender—that is, it would break very easily, and by the cutting in a diagonal way as this is, it tends to push out on the corner and make objectionable pieces in the biscuit.

I would not submit that biscuit to the board for consideration. I have examined the samples of biscuit submitted on behalf of the plaintiff, for the pur-

pose of making a survey as to the extra cost involved in making similar shaped biscuits for the defendant. The cost of our packing for a triangular shaped biscuit like Exhibit 241, would be doubled, due to the fact that the girls on our semi-automatic machine sit along the line and put up units. It is a matter of units with them, and place them in the cartons. With this biscuit there would be twice as many units, or it would take twice the labor. There would also be an extra expense due to the spoilage in handling this biscuit from the cutter chain to the packing machine, due to this end which is not supported by enough material to really hold it.

Exhibit 240, which is known as the diamond shape with the shreds running lengthwise of the diamond on our machine, if it was possible to put our knives as they are, which I doubt very much, I would not want to attempt it myself. It would be a 50 per cent. wastage—that is in scrap material, which would go to feed, or if it was reprocessed, it would double our processing cost, just completely double it, due to the fact that the biscuit are put out in units, and if you had a hundred bushels of wheat, and you put it through, 50 of the bushels would have to be dropped to the side and reprocessed. Therefore, you would do just as much reprocessing as you did in the first place. After the 50 bushel was put through, you would have 25 and so on. It would completely double the cost. The packing would be a big problem, due to the triangular shape or the diamond shape, and it would be almost impossible to have a practical carton, without some stuffing or something that would be objectionable.

Exhibit 242, which is the round circular biscuit with a hole in, has a trim of 38 per cent. and, therefore, that biscuit would increase our processing cost 38 per cent. It would also be a bad biscuit to pack, due to the

tenderness of the biscuit, and that only the edges touch in the package in the shape, they would break up.

Exhibit 245 is the matted down biscuit that was made in the tube. This biscuit would be very difficult to make, due to the stopping and starting of the machine in making this mold. We have a continuous process that runs right straight along, and there is no stop and start to the chain itself. Therefore, this would involve a good deal of engineering and would be impractical from the continuous machine. As to packing, you would have the same difficulty in packing this into a carton; and for the proper protection for the edges, both to the outside of the carton and the biscuit in coming in contact with itself, there would be quite a little crumbling and spoilage.

When the defendant's biscuit is packed in cartons, it is held on four sides; and on the top and bottom we have a pad to protect the shreds and take the jar of shipment.

Exhibit 244 is the circular biscuit. This biscuit in the process would trim 27 per cent. of the finished biscuit. Therefore, it would increase our cost of processing immediately 27 per cent. The same difficulty would be experienced in the contact with the biscuit to the carton.

Exhibit 243 contains a round 3 inch biscuit which has a trim of practically the same percentage of the finished biscuit, and it would increase our cost just 27 per cent. of the process. In packing, you would experience the same difficulty. I do not regard any of the biscuits in Plaintiff's Exhibits 240 to 245 as practical Shredded Wheat Biscuit, and I would not submit any of those to the board for possible manufacture by the defendant company.

In my judgment, the most economical Shredded Whole Wheat Biscuit to make from the standpoint of factory cost is a biscuit without trim of uniform shape,

open on both ends so that the shreds are dropped into a trough, and you cut them in a parallel line. A uniform shape so that they will pack easily in a regular sized carton. The plaintiff's standard biscuit and the plaintiff's small size biscuit respond to the test as I have just defined it. The defendant company does not make any other size than the small size Whole Wheat Biscuit. And that standard size of defendant's biscuit also responds to the test. All of the biscuits, both plaintiff's and defendant's, are held on all four sides or edges when they are packed in cartons. I know of no other method or form of making a practical Shredded Whole Wheat Biscuit except the form adopted by the defendant in its standard small size biscuit, which would be distinguishable from plaintiff's large size biscuit outside of the carton.

If we were allowed to make a longer biscuit than we do, we would be able to put more tonnage through our machinery than is now possible due to the fact that the speed of the shreds going in the longitudinal direction is the bottle neck of the production. The biscuit is the unit of speed in the machine both on the pans and in the cutting chain.

CROSS-EXAMINATION.

By MR. COOPER:

THE WITNESS: The envelopes in Exhibit 214 were used for a period of three years in sampling only as an experiment. I cannot recall the exact date when the tags on Exhibit 213 were made. It was some time in the fall of 1932. Exhibit 212 is a biscuit with a band with the word Kellogg on it; that was around the same time that it was first talked of and the figures were submitted. Exhibits 210 and 211 were made over the last week-end. The form was made with the lines diagonally instead of straight across the line of the shred, and the shreds were put in there 22 thick or deep and

the forms pressed down, then they were put on the pans and into the oven. When I spoke of the paper on Exhibit 212 as a bonded paper, I used it for identification, just a common banding paper that will take ink. A bonded paper is one that will do a good job of printing on it.

When I was speaking of the extra expense in the production of the doughnut shape and round diamond shape biscuit in Plaintiff's Exhibits 240 to 245, I meant that we discussed the possibility of making a machine that would do it the best way—manufacture them the best way. We had this discussion over the week-end with counsel and with the engineering department. I arrived at the figure of 27 per cent. trim on the round biscuit by taking the area of the circumference or the diameter of a sphere of that size—a cylinder of that size, and subtracted that from the square that would be necessary to make that biscuit, and got my percentage in that way.

(A slip of paper was hereupon marked "Plaintiff's Exhibit No. 265 for Identification.")

THE WITNESS: The figures on Exhibit 265 for identification show a 100 per cent. biscuit. I said that the trim would be 27 per cent. of the finished biscuit, but with reference to the material there would only be a loss of 21½ per cent. approximately in the case of the round biscuit like 243, 244.

It is customary in the case of round cookies and round ginger snaps to pack them in appropriate cartons, but they are all of harder substance than the biscuit and are not as liable to break in shipping as the biscuit themselves. I have seen round cookies in cartons on the market for many years. I do not recall heart-shaped cakes, but there have been several different shapes.

Referring to my testimony about the part of the machinery which is the bottle-neck of production, I referred to the shreds of the wheat, as the experimental department have experimented to get the exact texture in the wheat by the cooking and the processing, the speed of this panning machine or the machine that shreds the wheat, puts it on the receiving chain, is all determined by the amount of stretch that the shreds will take. Therefore, the speed of the panning machine is determined by how fast or how slow they will be able to run, by the shreds of the wheat. The amount of strain that we can put on the shreds of wheat constitutes the bottle neck of the process because that governs the speed of the machine. I referred to it as the panning machine, and that is part of the unit; that is the bottle neck of the process. The fact of the matter is that it is all one machine connected up.

On Defendant's Exhibit No. 194, pictures Nos. 1, 2, 3, and 4 show the parts of the machine to which I refer. I refer to the panning machine as a complete machine in itself, it is all driven on the same motor connected with chains and positive drives to one complete driving unit. The photographs in Exhibit 194 are the only views we have of our panning machine. The Kellogg Company has more than one panning machine. They are both identical. A single panning machine feeds to several ovens. There are several ovens from our various panning machines, the pans with the biscuit on them are conveyed to the ovens in a single line. We have seven ovens. The belt that goes up to the ovens, the pans are fed on from both machines, one oven is filled at a time, and therefore there would be pans from both panning machines going to each oven when both panning machines run. If only a single panning machine is running, it would not be necessary to use seven

ovens. We never operate that way. The ovens are heated with gas and have no supply of steam.

I would say that the cost of the raw material, meaning wheat, would exceed 10 per cent.

The figure of 27 per cent. trim on the round biscuit which I gave with respect to Plaintiff's Exhibits 243 and 244 would amount to 9 cents per case of 360 biscuits. The figures I gave you dealt with labor only. As it has been before stated, we do not reprocess scrap. That would be an additional cost of the loss between the cost of the material put into the biscuit, the difference between the cost that is put into the finished biscuit and the price we would get for feed would be an additional expense per case. The figure of 9 cents per case dealt with labor only. The figure of 27 per cent. was all material. The material that goes into a case of 360 biscuits amounts to about 18¾ pounds raw material, approximately. The oven shown on photograph No. 8 of Defendant's Exhibit No. 194 is one of our regular commercial ovens, one of the seven that I talked about awhile ago.

RE-DIRECT EXAMINATION.

By MR. CLARKE:

THE WITNESS: The evaporators or driers in the defendant's process are heated by a bank of steam coils, the air being circulated through these coils making a change of air to take off the moisture. No moisture is introduced into the evaporating area from the steam coils. They are used to keep the evaporator at 210 degrees of heat, and the steam inside of the coil is segregated from the drying air outside.

On the conveyor that conveys the wheat from the tempering bins to the shredding rolls at the end of one of the conveyors there is a magnetic pulley, we term it as a trade name, the magnetic pulley. The wheat passes over this pulley, spread out thin so that if there is any

metal that is metallic in the wheat, it will be taken out at this point. That is before it goes to the shredders.

The figures per case that I gave on cross-examination were on a dry basis, and the normal moisture content of the wheat on an average would be about 12 per cent.

RE-CROSS-EXAMINATION.

By MR. COOPER:

This magnet was first introduced on our conveyor at the time we installed the equipment in the building that it is now located in. I could not say definitely the time. It has been there a good many years.

ROSS T. ADAMS.

DIRECT EXAMINATION.

THE WITNESS: I am vice-president in charge of purchases, secretary, and a director of Kellogg Company. I have been connected with the company since 1917, and during the first year or two, I held several minor positions around the office and in the factory, and in 1920 I was made purchasing agent. In 1925, I was elected a director of the company; in 1930, secretary; and about a year ago, vice-president in charge of purchases. I have general charge of purchases, as well as holding the other offices. I purchase wheat for Kellogg's Whole Wheat Biscuit. We do not buy any Durum wheat. We use only soft white winter wheat, from certain areas in Michigan. We purchase the wheat from certain locations, or certain counties, where the best varieties are grown. In other words, we aim to secure what might be termed almost strictly soft white winter wheat, comparatively free from amber wheat. Amber is a variety of white wheat which we have found does not process as satisfactorily as the

straight white wheat. We would see that white wheat would not exceed 10 or 15 per cent. of the amber variety. More than that would cause the wheat to be rejected. We do not use Durum wheat at all. It sells at a large discount under soft white winter wheat. Durum wheat is a strictly hard wheat, but it is not a soft wheat. There are two varieties; a red Durum and an amber Durum wheat.

I also purchase cartons and carton board for the defendant. On this chart, identified as Kellogg's cereal cartons, Kellogg's corn flake cartons A, B, and C have been on the market in substantially that same form since about the year 1906. Originally the product was called toasted corn flakes, later the name was changed to corn flakes. The cut of the product identified by carton D, individual size, has been on the market since about 1922. Kellogg's Whole Wheat Biscuit carton, both the regular and individual, has been on the market since about 1930, although the Shredded Whole Wheat carton, as identified by N, has been on the market in that or slightly different sized cartons since about the year 1912. That product is still on the market, regularly marketed by the defendant and shipped to various parts of the country. The old brown carton, identified by J, has been on the market for about ten years. The Wheat Krispies product, identified by N and P, is a comparatively new product with the Kellogg Company and has been on the market about one year. Cartons K and L represent the individual and standard size Whole Wheat Flakes carton, and that product has been on the market approximately two years. O and Q are Rice Krispies cartons, which product has been on the market for about five years. The same general design is carried out, although the colors may differ. For instance, Kellogg's has always appeared in large script in red, and Rice Krispies in pretty much the same form, but always the same color scheme has always been car-

ried out. Kellogg's standard colors are red, light green, and dark green.

The use of a representation of saucers and dishes is a common advertising process in connection with food packages. The Kellogg Company has made use of the saucer and dish, or saucer pictorial representation of the product for some years; and I know that a good many other concerns make use of similar illustrations on their cartons or containers or cans to identify their food products. For instance canned corn, canned peas, succotash, vegetables of many kinds, canned fish, etc. Many of them have a representation of the product on the label. Defendant's Exhibit No. 128 represents instances of food products employing the dish, with some of the contents. On the first page I notice labels of Lenox brand Spaghetti, Lenox Red Kidney Beans, Lenox June Peas, Spinach, Sliced Pineapple, etc. In every instance, the products are shown illustrated in a dish on these labelled products.

This is a chart headed "Kellogg's" and prepared under my direction. It contains in the upper left-hand corner a Kellogg's Whole Wheat Biscuit carton. Immediately on the right is a Kellogg's Shredded Whole Wheat Biscuit carton, and next are a series of four corrugated partition pads, such as are used to separate the layers of biscuits in the Kellogg Whole Wheat Biscuit and Kellogg Shredded Whole Wheat Biscuit cartons.

Next in line are six Kellogg's Shredded Whole Wheat Biscuits, three of them located in the exhibit with the tops exposed, and three with the bottoms exposed.

Below, under the title National Biscuit Company, there appears a Shredded Wheat carton such as used by the National Biscuit Company. Immediately to the right are three partition pads or partition cards, such as used to separate the layers of biscuits in the plain-

tiff's carton. Immediately to the right of the three partition cards is an exhibit showing three of the plaintiff's biscuits with the tops exposed, and under those three with the tops exposed, are three of the plaintiff's biscuits with the bottoms showing.

Referring to Defendant's Exhibit No. 215 for Identification, Kellogg's Whole Wheat Biscuit and Shredded Whole Wheat Biscuit cartons, as shown in the upper left-hand corner, are made from a No. 1 white patent coated newsboard with a green tinted back. This is a grade of board which at the present time sells for about forty-five to fifty dollars a ton.

The carton in the lower left-hand corner identified as a Shredded Wheat carton of the plaintiff's, is made from a bleached manila board ordinary news back. The present market on boards of that character is about thirty-eight to forty dollars a ton. Incidentally, the back of that carton, that Shredded Wheat carton, is made from ordinary news, whereas on the Kellogg's Shredded Wheat carton, the back is made from a white liner tinted to the shade of green as indicated in the specimen carton itself.

Getting to the matter of dividers as used on the Kellogg cartons, some two or three years ago it was found that some of the biscuits going to the trade were becoming broken. The Kellogg Company devised a new type of divider to eliminate so far as possible this breakage. The result is the corrugated divider as seen on this exhibit. It is made from pure bleached sulphide paper, which costs at the present time about $90 a ton. This paper for these dividers is shipped to a firm at Monroe, Michigan, where it is corrugated on a B-Flute corrugator, the large rolls of corrugated stock are returned to the Kellogg Company, where they are cut into small pads on machinery which was developed in the Kellogg Company plant.

The dividers are then delivered from this machine in the form as seen on this exhibit. The corrugators cushion the biscuit. The nature of the corrugated pad is such that it allows for a cushion between the various layers of biscuit and the cartons will then stand considerable abuse without the biscuit becoming broken. No printed matter comes in contact with the biscuit in the defendant's container, but that is not true in the biscuit of the plaintiff's container. In the partition pad used by plaintiff, the pads to start with are made from an ordinary news sheet, and by news sheet I mean that the sheet is made from old newspapers and the stock after having been cut into the size is printed and may be printed incidentally before being cut, and the present cost of newsboard such as used by the plaintiff, is approximately forty dollars a ton.

This is a shipping container identified as case 360, Kellogg's Whole Wheat Biscuit used for packaging 60 individual packages of Kellogg's Whole Wheat Biscuit.

(Received in evidence and marked "Defendant's Exhibit No. 217.")

This is a Kellogg's 324 Whole Wheat Biscuit container used for packaging twenty-four 12½ ounces of Kellogg's Whole Wheat Biscuit.

(Received in evidence and marked "Defendant's Exhibit No. 218.")

THE WITNESS: This is a window display put out by the National Biscuit Company and entitled "More Power to You. Shredded Wheat. 12 big Biscuits."

(Received in evidence and marked "Defendant's Exhibit No. 219.")

THE WITNESS: I have here a No. 124 Kellogg's Corn Flake carton. On the front panel, below the leg-

end "Kellogg Company, Battle Creek, Michigan," appears the phrase: "Also makers of All-Bran, Pep Bran Flakes, Krumbles, Kellogg's Shredded Whole Wheat Biscuit." I have some half a dozen or more examples of other cartons of that same general type. They are regularly used or have been used in times past. The circulation on this particular carton, No. 124, has been in excess of 45,000,000.

(Received in evidence and marked "Defendant's Exhibit No. 220.")

THE WITNESS: This is a book prepared under my direction, and showing a series of photostat copies of magazine advertising such as put out by the Natural Food Company, Shredded Wheat Company and National Biscuit Company, during a period of some fifteen or more years.

I have here two photographs of stores. One is the Kroger store, Calhoun Street, Battle Creek, Michigan; and the other the Central Grocery, Fort Wayne, Indiana. These photographs were taken under my supervision.

(Received in evidence and marked "Defendant's Exhibit No. 221.")

THE WITNESS: I have here three photostat copies of pages from the Denver Daily News, Denver, Colorado, July 17, 1895, July 10, 1895, July 27, 1895. In all three pages there appear advertisements under the item of Shredded Cocoanut, the advertisement being carried by Golden Eagle store.

MR. COOPER: Just to save the encumbering of the record with more exhibits, I will admit that the Golden Eagle store in Denver, Colorado, about July, 1895, advertised among the line of other goods an item Shredded Cocoanut.

THE WITNESS: I have here a letter from the National Biscuit Company, dated June 2, 1933, addressed to all jobbers and signed by C. K. Brace, Manager, National Biscuit Company, Denver, Colorado. I understand this letter was circulated to jobbers.

(Received in evidence and marked "Defendant's Exhibit No. 222.")

THE WITNESS: This is a chart of Kellogg's Shredded Wheat Biscuit cartons prepared under my direction. The various cartons included on this exhibit were used by either the Kellogg Company or its predecessor, the Kellogg Toasted Corn Flakes Company, from the year 1912 to the present time. The carton appearing in the upper left-hand corner was a carton used in 1912. These cartons were taken from the files of the Kellogg Company, and the information which I have indicates that the cartons—for instance, Exhibit A, were used during 1912, also Exhibit B; and Exhibit C in 1915. These are indicated by the regular record of the Kellogg Company. The next item D is a Kellogg Shredded Whole Wheat Biscuit carton, used in 1922. The next one, E, Kellogg's Shredded Whole Wheat Biscuit carton, used in 1927. F is a Kellogg's Shredded Whole Wheat Biscuit carton, also used in 1927. The carton identified by G was used in 1928. H is a Kellogg's Shredded Whole Wheat Bissuit carton being used at the present time. J, Kellogg's Whole Wheat Biscuit carton, was used during 1930. I is being used at the present time, as well as the carton identified by the letter K. On the extreme right-hand side, we have a sample of Kellogg's Wheat Biscuit cartons being used about 1912, and below the sample cartons are three individual Kellogg's Shredded Whole Wheat biscuit, the Kellogg's Whole Wheat Biscuit cartons used during 1928 to the present time.

The carton identified by the letter H is the one that is still in use by the defendant company.

(Received in evidence and marked "Defendant's Exhibit No. 223.")

THE WITNESS: The standard biscuit of the defendant is the fragile biscuit, and the cushion carton helps materially in eliminating breakage to the biscuit. On the plaintiff's carton, the phrase "Handle with Care" appears four times on the carton, twice on the top and twice on the bottom.

I have here a carton known as Kellogg's Shredded Krumbles sample carton, which was used in the year 1921; also one of the standard size net weight 8 ounces used during 1921; and a third specimen, net weight 8 ounces, used during 1919.

(Received in evidence and marked "Defendant's Exhibit No. 224.")

THE WITNESS: I have an advertisement of the plaintiff from a Detroit paper called *Trade*, April 9, 1913. It reads "Made at Niagara Falls. Look for the picture of Niagara Falls on the end of the carton when you buy Shredded Wheat Biscuit. Any other Shredded Wheat that may be offered you is merely a poor imitation of the only original Shredded Wheat, the kind your customers have always bought, the kind that stands up in the market, always clean, always pure, always the same. Made only at Niagara Falls, New York, in the cleanest, finest food factory in the world."

(Advertisement of *Chicago Daily Tribune*, June, 1928, received in evidence and marked "Defendant's Exhibit No. 225.")

MR. COOPER: The *Battle Creek Evening Journal* of September 21st, seems to contain an advertisement of Kroger's store, which contains among other things listed, this statement: "Shredded

Wheat, Kellogg's or Niagara, Pkg.," which I suppose is meant for package, "10 cents." Is that the concession you want?

MR. CLARKE: Yes.

MR. COOPER: All right. That of course is not from us, but from a local dealer.

MR. CLARKE: Yes, all right. With the concession I will not have to burden the record with this piece.

MR. COOPER: I can make a concession now. The advertisement that counsel tendered to me from the *Battle Creek Moon Journal* of Thursday, May 25, 1922, the duplicate of that is a part of Plaintiff's Exhibit 110, so if counsel wants to offer this separately, I will concede that this is just as good as the one that is in Plaintiff's Exhibit 110.

THE COURT: Admitted.

(Received in evidence and marked "Defendant's Exhibit No. 226.")

MR. CLARKE: I offer in evidence this letter—open letter, addressed to "Dear Madam," on the letterhead of National Biscuit Company, Uneeda Bakers, 449 West 14th Street, New York, The Bakers of Shredded Wheat:

"Dear Madam:

"Please accept with our compliments this sample package of Shredded Wheat Biscuit. You will enjoy it with milk or cream, berries, peaches, bananas or any other fresh or preserved fruits.

"Shredded Wheat is the whole wheat—nothing added, nothing taken away. It contains proteins to build muscle, vitamins for health, and the proper proportion of bran which Nature provided.

"There is scarcely a breakfast table in the country on which this famous energy food does not

appear. Perhaps Shredded Wheat is already your chosen breakfast dish. If not, we hope that this sample may prove to you the deliciousness of Shredded Wheat.

"Your grocer sells Shredded Wheat. (Look for Niagara Falls on the package.) Twelve full-sized biscuits in the package; a serving costs but a few pennies.

"Sincerely yours,
"NATIONAL BISCUIT COMPANY."

And the postcript is:

"We invite you to visit the Home of Shredded Wheat, either at Niagara Falls, or at Oakland, Calif. Your trip through the bright, clean bakeries will be an interesting experience, and competent guides will show you how the plump, sun-ripened whole wheat grain is steam-cooked, drawn into filmy, porous shreds and baked into crisp, nutritious Shredded Wheat Biscuit. Bring your friends with you. A treat is in store for you."

(Received in evidence and marked "Defendant's Exhibit No. 227.")

MR. CLARKE: I offer in evidence this complimentary sample carton of Shredded Wheat.

(Received in evidence and marked "Defendant's Exhibit No. 228.")

MR. CLARKE: I offer in evidence this pamphlet, "Fifty Ways of Serving Shredded Wheat," "Including the Dishes That Won the Gold Prizes."

(Received in evidence and marked "Defendant's Exhibit No. 229.")

(Another pamphlet of the plaintiff received in evidence and marked "Defendant's Exhibit No. 230.")

THE WITNESS: The Kellogg Company sells a product known as Battle Creek Shredded Wheat. I have one of the cartons for that product and produce it. It is marketed only in small amounts throughout the country for the purpose of maintaining our trade-mark and is marked "Battle Creek Shredded Wheat."

(Received in evidence and marked "Defendant's Exhibit No. 231.")

THE WITNESS: We have been putting out Battle Creek Shredded Wheat cartons for possibly two years. And we have a trade-mark, "Battle Creek Shredded Wheat," registered in the Patent Office February 11, 1930, and from approximately that date to the present time we have been putting out Battle Creek Shredded Wheat in small quantities.

(Received in evidence and marked "Defendant's Exhibit No. 232.")

(An exception was reserved and allowed to the plaintiff upon the reception of Defendant's Exhibits Nos. 231 and 232.)

THE WITNESS: From the year 1906, the inception of the Kellogg Toasted Corn Flake Company, through the years and including advertising and sampling of the Kellogg Company from 1922 to the present time, the company has expended in excess of fifty-one million dollars for advertising and samples. These figures do not include any expenses of salesmen or branch offices.

(Article in *Chambers Journal* for January 27, 1900, received in evidence and marked "Defendant's Exhibit No. 233.")

MR. CLARKE: If your Honor please, this is a transcript of record of appeal in the Court of Appeals of the District of Columbia, Patent Appeal Docket No. 455, Natural Food Company, appellant, v. William E. Williams. The decision in this case

is reported in 30 Appeals, D. C., and has been referred to in the opening argument.

MR. COOPER: We tendered the depositions taken in the Connecticut case, and they were ruled out on your objection. Now you tender evidence in another case, and I object on a like ground.

THE COURT: Your objection is sustained.

MR. CLARKE: May I have an exception, if your Honor please?

THE COURT: Certainly.

(Certified copy of proceedings in the matter of registration of the trade-mark Shredded Wheat by Shredded Wheat Company, January 15, 1924, No. 178,725, received in evidence and marked "Defendant's Exhibit No. 234.")

(Certified copy of proceedings in the matter of application for registration No. 213,456, issued to plaintiff on May 25, 1926, received in evidence and marked "Defendant's Exhibit No. 235.")

MR. CLARKE: The registrations contained in this book, are brought together under one head. Plaintiff has offered two of them, and I will make the same offer with regard to all of them. The registrations are numbered as follows:

No. 52,858, dated May 22, 1906, and issued to the Natural Food Company, on biscuit and crackers, showing the Ceres Goddess.

Registration No. 85,186, issued January 30, 1912, to the Shredded Wheat Company, the statement containing the following:

"No claim being made to the representation of a Shredded Wheat biscuit."

The trade-mark illustrated is a saucer with cream and one biscuit in the saucer.

I also offer Registration No. 89,071, issued to Shredded Wheat Company, registered November 5, 1912. The trade-mark represented is a pictorial representation of the manufacturing plant of Shredded Wheat Company at Niagara Falls.

I also offer the Registration No. 178,725, issued January 15, 1924, to Shredded Wheat Company under the Act of March 19, 1920, the three preceding registrations having been under the Act of 1905, and this Registration No. 178,725 specifies that the alleged trade-mark on which registration is solicited, are the words "Shredded Wheat for use on biscuit or crackers in Class 46, Foods and Ingredients of Foods."

I also offer Registration No. 213,456, issued May 25, 1926, to Shredded Wheat Company, on the alleged trade-mark "Shredded Wheat for use on biscuits, crackers and cereal foods, cooked or prepared for consumption in Class 46, Foods and Ingredients of Foods."

The registration states that applicant is the owner of trade-mark registration No. 178,725, granted January 15, 1924, which has been previously offered.

I also offer Registration No. 216,593, issued August 17, 1926, to Shredded Wheat Company of Niagara Falls, under the Act of February 20, 1905, showing a representation of a saucer containing two Shredded Wheat biscuits. It is stated, "For use of biscuits, crackers and cereal foods, cooked or prepared for human consumption."

I offer those registrations in this book as one exhibit.

MR. COOPER: I understood it was so offered. I have no objection.

(Received in evidence and marked "Defendant's Exhibit No. 236.")

MR. CLARKE: I will offer as one exhibit this bundle of correspondence conceded by my friends to be true copies of correspondence, including a letter from A. J. Porter, President, Shredded Wheat Company, dated January 19, 1922, to Kellogg Toasted Corn Flake Company of Battle Creek, Michigan; a letter dated January 25, 1922, to the Shredded Wheat Company of Buffalo, New York, marked for the attention of Mr. A. J. Porter, President, signed Creighton Clarke, W. H. Creighton Clarke, attorney for the defendant; a letter to the Kellogg Company dated April 8, 1927, signed by Breed, Abbott & Morgan, who were attorneys for the Shredded Wheat Company at that time; a letter on the letterhead of W. H. Creighton Clarke to Messrs. Breed, Abbott & Morgan, dated April 22, 1927; also a letter to Creighton Clarke from Breed, Abbott & Morgan, dated May 10, 1927, and a letter from Creighton Clarke to Breed, Abbott & Morgan, dated May 16, 1927, and I ask that that go in as one exhibit.

(Received in evidence and marked "Defendant's Exhibit No. 237.")

THE WITNESS: I have here a specimen of shredded paper put out by the Pioneer Paper Stock Company of Chicago, Illinois. One is white, and the other is green colored. This is largely used for packing purposes, etc. I have a similar specimen of shredded cellophane which comes, according to this exhibit, in several colors, made by E. W. Twitchell, Inc., Philadelphia. I have also a package of Chalmers' Shredded Gelatine, which is sold in grocery stores; and a sample, No. 151, of Shredded Gelatine, which was secured from the Hughes Gelatin Company, Detroit, Michigan.

(Received in evidence and marked "Defendant's Exhibit No. 238.")

THE WITNESS: Defendant's Exhibit No. 146 is a package or carton of Kellogg's Shredded Whole Wheat Biscuit, which was taken from the laboratory of the Kellogg Company at Battle Creek, Michigan. It is in the carton of the Toasted Corn Flake Company, and the carton was used in the year 1922.

The Kellogg Sales Company is a selling organization for the Kellogg Company.

This is a shredded dough biscuit, made in the laboratory of the Kellogg Company, on my direction, and represents substantially the same type of Shredded Whole Wheat Biscuit that was put out by the Kellogg Toasted Corn Flake Company, prior to the year 1920. It is substantially correct as to size and dimensions, and I have seen some of the biscuits myself.

MR. CLARKE: I offer that in evidence. It does not purport to be an original biscuit, if your Honor please. I want the record to show that it is reproduction. May I have that banded and labelled.

(Received in evidence and marked "Defendant's Exhibit No. 239.")

THE WITNESS: I am a director of the defendant company, and am familiar with these exhibits, Plaintiff's Exhibits Nos. 240 to 245, inclusive. I have examined them here in the court room, and, as a member of the board of the Kellogg Company, would not consider them as practical biscuits to be marketed by the defendant company. I would not submit any of them to the board for possible marketing.

The biscuit in Defendant's Exhibit No. 206, 202, 203, 204, 200, 208, 201, 199, 205 and 207 are, in my opinion, not practical as I do not believe they could be merchandised under the Kellogg label successfully. I would not submit any of them to the board for possible manufacture.

The corn flakes and other cereal foods of the defendant company are not marked, so as to distinguish the Kellogg Company when served outside of the carton. The nature of the product is such that they would not lend themselves to being marked. I do not know of any other way than that which the defendant company has adopted, that is the making of a small biscuit and a dark biscuit that would produce a practical Shredded Wheat Biscuit, which would be distinguishable outside of its carton from the biscuit of the plaintiff's manufacture.

Defendant's Exhibits 210 and 211 I would not consider practical Shredded Wheat Biscuits, and I would not submit them to the board for possible manufacture by the defendant.

MR. CLARKE: I will ask to have this copy of the transcript of the record in this Williams against Natural Food Company marked for identification.

(The same was marked "Defendant's Exhibit G for identification.")

THE WITNESS: I produce three specimens of other products marketed with cellophane fronts. No. 1 is Golden Harvest Lima Beans, in which there is a cellophane window front and plainly shows the contents of the carton to be lima beans. I also have a Golden Harvest Quick Fire Pop Corn with a cellophane window front, and the pop corn is very readily seen. As a third exhibit, I have a pack of Sunnyfield Yellow Split Peas with a cellophane window front, and the split peas are also plainly visible.

(The three packages were received in evidence and marked respectively "Defendant's Exhibits Nos. 240, 240A and 240B.")

THE WITNESS: I have some knowledge regarding the development of cellophane in wrapping goods and

in windows in packages. As a matter of fact, the du Pont Company has on many occasions contacted with Kellogg organization, attempting to interest them in the use of cellophane for wrapping their cartons, and also for use as window frames in their various lines of cartons. They have submitted proofs indicating that certain commodities, food commodities and food products, and so forth, that the sales had increased from 25 to 1000 per cent. with the use of cellophane as a wrapper. The use of cellophane wrapper has helped the sale of Kellogg's Whole Wheat Biscuit. The cellophane front has materially aided the sales.

The Kellogg Company has some scrap and broken biscuit. There is the first known as the wet waste feed, that is normally sold to farmers that come in every day or two and haul it off in that condition. It is wet feed which is sold in that form principally for hogs. The second line of feed is that of the Shredded Biscuits after they have gone through the oven, and also through the evaporator. Some biscuits become damaged and they are not of the Kellogg quality and they cannot be packed. These biscuits, some of them, are given away or sold to local institutions, and the balance are sold to fox feeders. It seems that Shredded Whole Wheat Biscuits are very valuable to feeders of Silver Gray fox, and so forth. I understand it helps the fur. The biscuits that go to the asylums and similar institutions are ones that are thoroughly clean, that have not come in contact with the floor and really are edible, with the exception that they may be a bit distorted in shape or something of that kind. The biscuits that go to the fox feeders are biscuits that have been on the floor and become otherwise contaminated very slightly.

MR. CLARKE: I have certain issues here of the *Grocery World* for 1903. My friends do not object to the manner of the proof, but I think to the materiality, and

I just want to substitute these photostat copies for page 4 of the issue of *Grocery World*, Philadelphia, Pennsylvania, October 26, 1903, including that photo of French Java coffee held in a cup marked "Trademark."

MR. VILAS: I make no point of the form but I object to the offer as immaterial and irrelevant. It is a picture of a package of French Java coffee, is that right?

THE COURT: The point being that the advertisement is in the saucer?

MR. VILAS: The picture is holding a small cup in his hand.

THE COURT: I thought he was drinking from a saucer.

MR. CLARKE: I do not think this is a very serious issue in the case. I offer that all as one exhibit from the *Grocery World*, Philadelphia, Pennsylvania, November 2, 1903, I offer a photostat of page 13. And from the same publication of November 23, 1903, I offer page 16; and from the Christmas number, December 1903, Volume 17, No. 24 of the *Grocery World*, I offer the inside of the cover page, and from the same volume, Christmas number, December 1903, page 59. Each of these illustrates a figure of a food package, either holding a saucer or cup.

THE COURT: They are all admitted.

MR. VILAS: May I have an exception?

THE COURT: Certainly.

(Received in evidence and marked "Defendant's Exhibit No. 241.")

MR. CLARKE: This book of patents, issued to the Shredded Wheat Company, I will offer this in evidence

as one exhibit, and I will ask the reporter to copy the individual numbers of the patents in the books, together with the additional numbers.

(Received in evidence and marked "Defendant's Exhibit No. 242," and will be found at the end of today's proceedings.)

MR. CLARKE: My friends direct my attention to one patent of R. E. Valentine, No. 831,909, that neither of us is prepared to say at the moment whether it is a Kellogg patent or one of plaintiff's. I will offer that separately. I understand there is no objection to that. That is No. 831,909. This is the book.

(Received in evidence and marked "Defendant's Exhibit No. 243," and will be found at the end of today's proceedings.)

MR. CLARKE: This is a book of patents on Shredded Wheat machinery and Shredded Wheat Products, issued to the Kellogg Company or its predecessor, Kellogg Toasted Corn Flake Company. I offer that as one exhibit, and will ask the reporter to copy those individual numbers into the record.

(Received in evidence and marked "Defendant's Exhibit No. 244," and will be found at the end of today's proceedings.)

MR. CLARKE: My friends have offered to furnish me with numbers of additional Perky patents. They are not in this first volume, and I ask to have those offered in evidence just as if they were physically produced here. I will supply them in a few days' time and add them to this exhibit. I would like to make the offer as if they were physically in court at the present time. They are furnishing the numbers.

I will offer as one book of patents this set of miscellaneous patents on Shredded Wheat machinery and Shredded Wheat products, issued to others than either

to the plaintiff or the defendant, and ask that that be marked as one exhibit.

THE COURT: The tender of the miscellaneous patents is admitted.

(Received in evidence and marked "Defendant's Exhibit No. 245," and will be found at the end of today's proceedings.)

CROSS-EXAMINATION.

THE WITNESS: These particular copies of patents were not taken from the Kellogg Company's files. The original patents, however, are in our files. I have examined these patents, and I have noticed the very last one issued to a man named Williams, No. 1,263,009, on a method of marking articles of the Shredded Cereal Biscuit type. Its apparent purpose is to mark a wheat biscuit with some identifying means upon the biscuit itself. I have read the patent and know substantially the process that is suggested by it. It is a method of injecting a strip of colored shreds into the center of the biscuit longitudinally with the shreds of the biscuit proper. The identifying band, I, is obtained by baking along the line of that bank I, so that the shreds along that line get to be a deeper color or a different color, so that that will be a mark which will stay on permanently up to the time of consumption. I recall having seen the patent, but that particular item in my memory is not exactly clear. That is my general understanding of it.

Defendant's Exhibit No. 239 is a biscuit recently made up under my direction to represent the product of the Kellogg Company in the dough biscuit, made prior to 1920. That is supposed to represent the biscuit shown on Defendant's Exhibit 145. Exhibit 145 fairly accurately represents my recollection of the appearance of that biscuit. Of course that is many years

ago, and I could not testify as to the exact size of it, although from my recollection, the size of the biscuit which we have identified by No. 239, is about the same size that we manufactured at that date. If the cereal bowl and saucer are correctly depicted on Exhibit 145, I would say that the biscuit there are a little longer than the biscuit in Exhibit 239; and there is a difference in the coloring. The color on 145 is much browner than on 239. I think that may be explained perhaps by the fact that this is a laboratory experiment and a biscuit not made in the regular production.

The Whole Wheat Biscuit is the only carton on which we now put cellophane. I believe it has materially helped the sale of Shredded Whole Wheat Biscuit, and the representation of the duPont people was that its use would greatly promote the sale of the Kellogg Company's products.

Referring to Defendant's Exhibit 231, the pasters bearing the printing "Battle Creek Shredded Wheat," are pasted over the words on the carton itself, "Whole Wheat Biscuit." I am unable to state the exact quantity of these cartons that have been put out. We had put them out from month to month in small quantities, a few cases, one or two or more. We probably put out not to exceed half a dozen in any one month. I would say that we have put out as many as three in one month.

XQ. 145. Is it your purpose in putting this paster on the cartons like 231 to represent that to the public as your trade-mark, the words "Battle Creek Shredded Wheat"?

A. Yes, it is.

THE WITNESS: There is a trade-mark registration notice on the carton in the lower right-hand corner front panel, and that was on the carton as it was originally before this paster was put on. I do not

recall off-hand what trade-mark or trade-marks registered in the United States Patent Office are referred to by the notation to which you have called my attention on Exhibit 231. I do not think there is any trade-mark on Whole Wheat Biscuit. I believe Kellogg's description of registered is a trade-mark in the United States Patent Office, and that is the only one I can see without further examination.

In 1912 I was going to school. There is nothing on board Exhibit No. 216 that was put out by the Kellogg Company in 1912. If I was taken by the reporter as having said that carton N on Exhibit 216 has been in use in that or different time since 1912, that is a mistake which I now rectify. In 1912 we did use a Kellogg's Wheat Biscuit carton of a different size, but of somewhat the same design.

XQ. 159. But it is not correct, is it, to state that the Shredded Whole Wheat carton as identified by N on this Exhibit 216, has been on the market in that or a slightly different size carton since about the year 1912?

A. I think the different size covers the answer, and I refer to Exhibit B, or carton B on Exhibit 223.

THE WITNESS: Carton B on Exhibit 223 is what I say was put out in the year 1912. Carton N on Exhibit 216, or one quite similar to it, was put out in the year 1922. According to the answers to the interrogatories, Plaintiff's Exhibit 3 to the interrogatories was the one put out in 1928, and proof of that is the fact that we have a 1928 label on the carton which I believe to be identical with that identified by G on Exhibit 223.

HAROLD F. MUNTZ (Recalled).

DIRECT EXAMINATION.

THE WITNESS: I produce photostatic copies of additional institution bids. The first one is a photostatic copy of the bid placed by National Biscuit Company with the purchasing officer of the Department of the Interior at Washington, D. C., which was opened on May 13, 1933, on the second sheet, which is the reverse side of the first sheet, under Item 56-G-590, The National Biscuit Company has filled in as one item, a summary of the items on which they are bidding the following:

"Original Shredded Wheat, 36, 12-ounce packages to type 1 or 2 carton, 1,072 cases."

Indicating under the quantity 28,944 pounds and the unit price .1222 and the total price $3536.96.

The next sheet is a reproduction of the sheet on which Item No. 56-G-590 is listed as 1072 cases of biscuits, Whole Wheat, Shredded, over which the National Biscuit Company has filled in the words "Original Shredded Wheat."

It is stated "To meet Federal Specifications NC 191 as described in paragraph E 2 H thereof." The original paper as it was received from the Department of the Interior called for twenty-four 12½-ounce packages or thirty-six 12-ounce packages. The National Biscuit Company has typed out the twenty-four ½-ounce packages indicating that they are offering to supply the thirty-six 12-ounce packages.

(Received in evidence and marked "Defendant's Exhibit No. 246.")

THE WITNESS: The next one is a proposal or a bid or copy of a bid placed by National Biscuit Company with the United States Marine Corps at Washington, D. C., on December 14, 1932.

Under Item No. 7 for delivery to Quantico, Virginia, it calls for Shredded Wheat, thirty-six 12-ounce packages to case to be in accordance with Federal Specifications No. N C 191, 75 cases.

There is a space for which the brand is to be indicated and the National Biscuit Company has indicated that they are bidding on N. B. C. brand.

Q. 3. They filled that in, that was filled in?

A. That was filled in by the National Biscuit Company as is clearly shown in the difference in type on these sheets.

Under Item No. 14 for delivery to the United States Marine Corps at Quantico, Virginia, it calls for Shredded Wheat, thirty-six 12-ounce packages to case to be in accordance with Federal Specifications No. N C 191. The National Biscuit Company has indicated N. B. C. brand, which is filled in by the National Biscuit Company.

Q. 4. The three letters N. B. C. and the word "Brand"?

A. Yes. Under Item 28 it calls for Wheat Shredded thirty-six 12½-ounce packages to case to be N. B. C. The "To be N. B. C." was on the proposal when it was received from the Government indicating that that is the only item they want. The Federal specification is not referred to in this particular item which shows that that is a resale item for commissary stock.

Q. 5. And that would be one of the items which the Kellogg Company would not bid on, as I understand?

A. That is right.

(Received in evidence and marked "Defendant's Exhibit No. 247.")

THE WITNESS: This next one is a bid placed by the National Biscuit Company with the United States

Marine Corps on March 21, 1933, and under Item 7 calls for Shredded Wheat, thirty-six 12-ounce packages to case to be in accordance with Federal Specification N C 191. The National Biscuit Company has filled in N. B. C. brand and their price.

Item No. 7 was for delivery to Quantico, Virginia.

Item No. 12 calls for delivery to Norfolk, Virginia, Shredded Wheat, thirty-six 12½-ounce packages to be in accordance with the Federal Specification N C 191. The National Biscuit Company has filled in N. B. C. brand.

Item No. 36 calls for Shredded Wheat, thirty-six 12-ounce packages to case to be N. B. C. The "N. B. C." was on the proposal at the time it was received from the Government.

A. That is for resale to the families at the Government Reservation.

(Received in evidence and marked "Defendant's Exhibit No. 248.")

THE WITNESS: The plaintiff requested us to produce a copy of our bid placed with the Post Quartermaster at the Marine Barracks, Naval Ammunition Depot, Dover, New Jersey, and I have here a copy of that bid.

It shows that the bid was opened on February 15, 1933, and under Item No. 45, calls for Shredded Wheat 12½-ounce Specification N C 191, 48 packages. The Kellogg Company filled in the name of our product, Kellogg's Whole Wheat Biscuits, 12½-ounce.

And the price.

(Received in evidence and marked "Defendant's Exhibit No. 249.")

CROSS-EXAMINATION.

THE WITNESS: My statement in regard to all these exhibits that the National Biscuit Company has filled

in certain information is because I have seen the original placed by the National Biscuit Company in the Department of the Interior, as you can see clearly by the difference in type on the sheet. I draw the conclusion that the National Biscuit Company put that in because it also corresponds with the prices that are filled in figures the price of the National Biscuit Company. The Kellogg Company bid on Item No. 7, calling for Shredded Wheat, 36 12-ounce packages to the case, to be in accordance with the Federal Specification N C 191. The word "Brand" was a part of the bid received from the Government, and the Kellogg Company bid on that, filling in the name Kellogg Whole Wheat Biscuit under the space provided for brand. The Kellogg Company does not furnish its biscuit in thirty-six 12-ounce packages to the case, but bid on twenty-four 12½-ounce packages. The Kellogg Company obtained the award on this particular Item 7 for twenty-four 12½-ounce packages to the case.

On Exhibit 247, Item 7, the wording is the same as on the previous exhibit, Shredded Wheat, thirty-six 12-ounce packages to the case, and the blank for the brand filled in in another typewriter is N. B. C. and the bid. The Kellogg Company also bid on Item 7 in this instance, offering to supply Kellogg's Whole Wheat Biscuit. The contract was awarded to the Kellogg Company from that bid. The Government accepted the award on twenty-four 12½-ounce packages, and adjusted the quantity accordingly so that they got the number of packages or the total net weight desired. The Kellogg Company also bid on Item 14 on the same exhibit and was also awarded the contract.

On Exhibit 248, Item 36, Shredded Wheat, thirty-six 12-ounce packages to the case, N. B. C., the sheet is marked with a circle around the price of $3.30 a case, which is an indication that the award was made to the National Biscuit Company. That is the item I

said the Kellogg Company did not bid on because it said to be N. B. C.

Exhibit 246, Item 56-G 590, is the exhibit in which I say the words "Original Shredded Wheat" were written in by National Biscuit Company. When it was received from the Government, there was nothing on that sheet. This second sheet is the reverse side of the first sheet, and there is nothing on that when it is received from the Government. The words "24 12½-ounce packages to the case" were crossed out by National Biscuit Company. I draw that conclusion because I saw the original bid placed by the Biscuit Company. No award has been made as yet on that contract. The bid is just opened on the 18th and the award will not be made for possibly another three or four weeks.

Exhibit 249, Item 45, was received by the Kellogg Company, as you see it here, with the exception of the written in part. Item 45 calls for Shredded Wheat, 12-ounce, Specification NC-191, 48 packages. The Kellogg Company filled in, as you see right here, the name of its product "Kellogg's Whole Wheat Biscuit, 12½ ounces" and filled in our price. The contract was awarded to the Kellogg Company.

OTIS K. BERRY (Recalled).

DIRECT EXAMINATION.

THE WITNESS: I saw these Marine Corps bids of National Biscuit Company at Washington. These two bids referred to as Defendant's Exhibits 247 and 248 are the two that I saw in Washington as placed by the National Biscuit Company. Item No. 7, calling for Shredded Wheat, 36, 12-ounce packages to the case, to be in cartons for Federal Specifications No. NC-191, N. B. C. brand had been filled in by National Biscuit

Company, and the price was $3.30, unit price, and total of $247.50. Also Item No. 14, Shredded Wheat, 36, 12-ounce packages to the case, to be in accordance with Federal Specifications No. NC-191, brand, N. B. C. and the unit price $3.30, total $33. The last N. B. C. brand and the price had been filled in. N. B. C. refers to National Biscuit Company products.

Exhibit 248, Item No. 7, Shredded Wheat, 36, 12-ounce packages to the case to be in accordance with Federal Specifications No. NC-191, brand, N. B. C., was filled in by National Biscuit Company, unit price $3.30, total $148.50. The words filled in were "N. B. C. brand" and the unit and total price. Item No. 12, Shredded Wheat, 36, 12-ounce packages to the case, etc., was filled in by National Biscuit Company, N. B. C. brand, unit price $3.30 a case, total $33. I saw the original bids.

CROSS-EXAMINATION.

I think it is usual for the original bids to be shown to contractors. I go there for the purpose of keeping posted on all bids, and on this occasion went on instructions of Mr. Clarke. When I say so readily that the bid has been filled in by National Biscuit Company I mean that I saw the original but I did not see National Biscuit Company write it in.

(Pages 1254 to 1257, stenographer's minutes omitted. These pages consist of a list of patents put in by the defendant as Exhibits Nos. 242, 243, and 244.)

EIGHTH DAY, JUNE 2, 1933.

ROSS T. ADAMS (Recalled).

CROSS-EXAMINATION (Continued).

THE WITNESS: I am not familiar with Plaintiff's Exhibit No. 264 for identification, which purports to be a report or analysis by the *Chicago American*. I have heard of the Curtis Survey, but I am not familiar with this particular document.

(Advertisment of the Natural Food Company in *New York Daily Tribune*, dated May 12, 1907, received in evidence and marked "Defendant's Exhibit No. 250.")

MR. CLARKE: Mr. Savage or Mr. Cooper, how about this advertisement *Trade Detroit*? Mr. Savage said they found some evidence of the cut and arrangement.

MR. COOPER: We can not identify that in any way but still I am not inclined to raise any objection about it and it may go in evidence as though it had been proved that it was an advertisement emanating from the Shredded Wheat Company.

MR. CLARKE: Of Niagara Falls, New York?

MR. COOPER: Yes.

MR. CLARKE: I offer that in evidence.

(Received in evidence and marked "Defendant's Exhibit No. 251.")

RE-DIRECT EXAMINATION.

THE WITNESS: These little packages you show me I purchased this morning at the drug store in the duPont-Biltmore Hotel.

RDQ. 168. What is the material on the end; is that glassine or cellophane?

A. It appears to be cellophane.

MR. CLARKE: I will offer those in evidence as three exhibits.

(The package of Arrowroot received in evidence and marked "Defendant's Exhibit No. 252.")

(The package of Fig Newtons received in evidence and marked "Defendant's Exhibit No. 253.")

(The package of Hydrox received in evidence and marked "Defendant's Exhibit No. 254.")

MR. CLARKE: If the Court please, this certified copy of the Articles of Incorporation of the Shredded Wheat Company, or a certified copy, or an exact duplicate of this certified copy, was offered at the depositions at Colorado, but the original exhibit seems to have been misplaced. I am making this offer to have a duplicate of this exhibit under a new number.

MR. VILAS: No objection.

(Received in evidence and marked "Defendant's Exhibit No. 255.")

THE WITNESS: In my opinion, the biscuit marked as described in Patent No. 1,263,009, by running in some coloring matter, does not represent a practical Shredded Wheat biscuit; and I would not submit such a biscuit to my board for possible manufacture by the defendant company.

It would not be possible to use the cellophane window on other cartons of the defendant company for other products for the reason that the cereals in the Kellogg line such as Corn Flakes, bran, etc., are in a

waxed paper inner bag; and if a cellophane window front were used the contents of the package would not be exposed to the public. The Whole Wheat Biscuit carton has no waxed liner.

I have here a package of No. 136 size Kellogg's Corn Flakes, showing the waxed paper inner bag within the carton. It would be necessary to put cellophane windows in both the carton and the liner, in order to get the transparent effect. The same condition exists on all standard line regular size packages. These other products are very susceptible to moisture, and it is necessary that a wax liner be used in order to exclude the moisture from the packages so as to keep the contents fresh.

(Received in evidence and marked "Defendant's Exhibit No. 256.")

THE WITNESS: In our estimation, the Kellogg package is much more up to date than the plaintiff's package. I do not think it would be possible to make a practical carton for the diagonal shaped biscuit. I do not think grocers would receive the carton with any degree of welcome, because the cartons would be an entirely different shape than the standard size cartons used to package other cereals and other commodities, and at the moment I cannot think of any triangular shaped cartons which are on the market today. There is no question but that a carton with diagonal ends would require different arrangement for packing in the packing case. The Kellogg Company does not market any package foods in cartons not of substantially rectangular outline.

(Sketch, exhibited to the witness Oakes, marked for identification as Defendant's Exhibit A for identification, received in evidence and marked "Defendant's Exhibit No. 257-A.")

(Defendant's Exhibits Nos. 210 and 211 marked previously for identification received in evidence as "Defendant's Exhibits Nos 210 and 211.")

(Chart containing the current carton of the plaintiff and two current individual cartons, large size individual and small size individual, and small size Triscuit received in evidence and marked "Defendant's Exhibit No. 258.")

RE-CROSS-EXAMINATION.

THE WITNESS: There are two grades of cellophane, one is moisture proof and the other is not. One common usage of cellophane today is for cigars. That grade of cellophane could be substituted for the waxed paper in the containers which I have testified about and that would be transparent, and if it were substituted for wax paper, and a window cut in the carton, the contents would be visible.

It might be possible to develop a different shaped package from a triangular shaped package which would be somewhat practical, but I do not believe it would be as practical as a rectangular shaped carton. Most food products lend themselves to being packed conveniently and satisfactorily in a rectangular carton, and the rectangular carton will set on a grocer's shelf conveniently without loss of space. I believe that a carton must be a rectangular shape in order to be practical for grocers as a container of food products.

RE-DIRECT EXAMINATION.

THE WITNESS: It would be impractical to substitute for the wax liner a liner made entirely of cellophane for the reason that cellophane is several times as expensive as wax paper; and if a complete inner liner were made of cellophane instead of wax paper, the cost would be almost prohibitive.

RE-CROSS-EXAMINATION.

THE WITNESS: I have not up to the minute quotations, but if I remember correctly, the last figure on moisture-proof cellophane was something like 60 cents a pound. That was a couple of months or more ago, but I would say the price is about the same today. I am not sure of the quantity on which that figure was made, nor of the thickness of the cellophane.

RE-DIRECT EXAMINATION.

THE WITNESS: There would be a slight additional cost involved in cutting off the outside of the carton in order to insert cellophane windows and to let a cellophane liner show through the carton.

GILBERT G. WAGNER.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am an advertising man, connected with Associated Newspaper Color. I know Mr. Warner as a business acquaintance, and Mr. West is a little more than a business acquaintance. I have no interest either with either National Biscuit Company or the Kellogg Company. I am a user of shredded wheat, both the National Shredded Wheat and Kellogg's Whole Wheat Biscuit. I have known Shredded Wheat twenty years, I should say. During that time, I have known where the product was made. I believe the original company was in Niagara Falls, and I think they were manufactured in Oakland, also. They have a plant here.

I have been familiar with advertising of Shredded Wheat Biscuit. Niagara Falls is on the outside of the

package. They advertise extensively. I do not recall if Niagara Falls has been associated with their advertising, aside from the package.

I have been familiar with Kellogg's Whole Wheat Biscuit about two years. I am a user of that product, and have been off and on since that time. I first became acquainted with it through sampling, I believe. The samples were consumed. I believe I got the first sample through Mr. West, about two years ago. We had samples which we consumed, and we also purchased them at San Mateo. I cannot recall whether Kellogg ever ran a campaign on their Whole Wheat Biscuit or not. We have received samples of all kinds of products. I have seen other samples, besides those Mr. West gave me, either through picking them up at his office or I have seen them.

I have purchased both products. We have been a consumer of the Kellogg product off and on for two years. We distinguish the two products. The package is different entirely. When you ask for the Kellogg product, you usually say Kellogg's Whole Wheat Biscuit. When you ask for the Niagara Falls product, you usually classify it as Shredded Wheat. By shredded wheat or shredded whole wheat biscuit, I understand is meant a prepared cereal wheat biscuit. It is a biscuit, made out of wheat, shredded and baked, I imagine. I am not familiar with the manufacturing process of either product. The size of the Kellogg biscuits is different. I think there would be a little difference in the taste. Kellogg's product is a little bit crisper. Fifteen of the Kellogg's come to the package, and I think there are twelve of Shredded Wheat.

I have purchased the Kellogg biscuit in grocery stores, but not in restaurants. It is carried by grocery stores I am familiar with. I have not made a check-up on the various stores that carry it. I am familiar with some stores in San Mateo that carry the product.

CROSS-EXAMINATION.

THE WITNESS: I think the earliest time I became familiar with Niagara Falls Shredded Wheat was at least twenty years ago, just as a consumer. I knew it then as Shredded Wheat. As long as I can remember, Shredded Wheat, with its pillow shape, has always been the same size and had the same appearance. Up to two years ago when I became acquainted with Kellogg's Whole Wheat Biscuit, I never saw or heard of any other food product called Shredded Wheat. I am a consumer of both products and I happen at this time to have them both in my home at the same time. I board. I am a single man. Shredded Wheat or Kellogg's biscuit at my place of residence is served to me two biscuit or one on a plate or saucer. I know them apart and am able to tell which it is that is being served to me, because one is of different size than the other. It is hard to say whether you can tell them apart by the taste. If they were laid down side by side, you could tell the difference. One is usually a little lighter in color. Not paying particular attention, if a couple of biscuit were served me in a dish, I think I would notice whether it was Kellogg's biscuit or Shredded Wheat, from my knowledge of the circumstances.

I am connected with Associated Newspaper Color, Inc., an advertising agency. My concern carries advertising for the Kellogg Company, but does not run any for the National Biscuit Company at the present time. I came here to testify at the request of Mr. West. We were talking. He asked me if I could tell the difference between a package of Shredded Wheat and a package of Whole Wheat Biscuit. I said I thought I could. He asked if I would be willing to make a statement to that effect, and I said yes.

RE-DIRECT EXAMINATION.

I have heard of shredded cocoanut and shredded soap. I do not believe I have heard of shredded codfish.

STANLEY M. WEST.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am Stanley M. West; age, 42; residence, Burlingame, California. I am district sales manager, Kellogg Sales Company, and I have been connected with them approximately seventeen years, during which time I was formerly assistant district manager in southern California, in Los Angeles; for the past seven years, district sales manager in San Francisco, my duties being supervising sales, advertising, and general salesman and advertising activities in California, Nevada, and Yuma County, Arizona, which constitute my territory.

I am familiar with the product known as Kellogg's Whole Wheat Biscuit, formerly known as Kellogg's Shredded Whole Wheat Biscuit. Our cartons are now marked Kellogg's Whole Wheat Biscuit. The merchandise we have in this territory now does not carry the word shredded as part of the trade name. Kellogg's Whole Wheat Biscuit have been distributed in my territory, I would say, about three years, and the distribution during that time has been under my direction and control as district sales manager.

We have used various promotion methods, including house-to-house sampling in some districts, newspaper advertising, store demonstrations. When it comes to getting actual distribution in the retail store and restaurant, our general plan is to have our salesmen take orders through jobbers, also go to the jobbers and purchase a certain amount of stock and resell it to the grocer. In that way we find they are able to get a quicker distribution, and we are sure the grocer has it; whereas, sometimes, jobbers do not always fill or-

ders promptly. We have also done canvassing, where the crew manager goes to the grocer and purchases stock, selling it to the housewife, as a means of introducing the product to the housewife.

Kellogg's Whole Wheat Biscuit has been advertised in our district. We have done quite a bit of newspaper advertising and house-to-house sampling, which is, of course, a form of advertising. There is a very good distribution in my district of Kellogg's Whole Wheat Biscuit. Possibly some of the stores carry our biscuit exclusively. The majority carry both products. I might add that the National biscuit probably has a better distribution than we. Our distribution is somewhat spotted. In some sections, we have nearly all stores carrying our product; in others it is not so good. It depends somewhat upon our consumer demand. In some sections, it is much stronger than in others.

There is no question that there is consumer demand for Kellogg's Whole Wheat Biscuit. We have found that many consumers ask for it by the full name. They are gradually learning to specify Whole Wheat Biscuit. In all cases, as far as I know, the name Kellogg is associated with the product.

We have very good distribution in the restaurants. It is difficult to say what percentage, because there are very small restaurants, hardly classifiable as restaurants, and some that carry no breakfast foods whatsoever. The majority of restaurants which carry, say, half a dozen products, will make one of them Kellogg's biscuit. They are packaged in small individual packages, containing two biscuit. That is the way practically all restaurants sell it. Personally, I know no restaurant using our large package. I believe at least 99 per cent. of our restaurant biscuit business is in individual packages, almost universal.

That opinion is based on my personal experience in this district and personal check-up of our salesmen,

by making calls myself on restaurants and retail stores. I have about twenty salesmen in my district. They are working the whole district uniformly and constantly. In restaurants, it is an almost universal practice to serve the biscuit in the carton. Some will place it right in the bowl and let the consumers open it themselves. The majority will bring it in the bowl, set it down on the table, and the serving person will open the package at the top with a knife. The consumer takes the biscuit out of the package himself. In this district, there are a number of jobbers serving nothing but restaurant, hotel, and institution trade. Most of the larger jobbers serve some restaurants and hotels. Most of the business is serviced through special jobbers.

The policy of the Kellogg Company is to push the sale of its biscuit in the individual cartons to the restaurant and hotel trade. We will not permit our salesmen to take an order for the regular-sized package from a restaurant. I believe most of the better class restaurants handle our biscuits and that we have better than a 50 per cent. distribution.

I believe the practice of substitution in the grocery trade is on the decrease. I do not think it is possible for the manufacturer, the wholesale distributor, or the retail distributor to build real business through substitution. By *substitution* I mean filling an order with one product when another product is called for. If the consumer knows she is not getting the product she asked for, that would not exactly be substitution but selling her something else. Substitution, as far as the consumer is concerned, is filling her order with a product similar to the one called for, in such a manner she does not know she is getting a different product.

If a consumer asked for Royal Baking Powder and got baking powder not Royal but she thought it was, I would call that substitution. If she asked for Royal Baking Powder and received Davis' Baking Powder, I

would call that substitution, also. The consumer, after seeing the package, would know she was not getting Royal and could send it back; but there is no question in my mind that there was a substitution on her original order.

On an over-the-counter sale, if the grocer said he would like to recommend Davis' instead because it had certain qualities better suited for her purpose, that would not be substitution. It would be switching the customer from one product to another. That practice is indulged in where the grocer wants to introduce a new product. Quite frequently, a grocer will have a particular interest in a product that he is anxious to have his customers try. When the customer asks for a similar product, it is not at all uncommon for the grocer to suggest another product.

Kellogg's Whole Wheat Biscuit in my district are distributed generally through the whole class of stores, chain stores, independent stores, self-service stores. A self-service store is one where the consumers go to the shelf, help themselves, and have the merchandise checked out at the cashier's counter. They pick up the package, and the sale is not influenced in any way, shape or form, by the clerk. Our best business has been built with that type of store. We have a very good general distribution of Whole Wheat Biscuit in them.

We have practically 100 per cent. jobber distribution of Whole Wheat Biscuit. All jobbers carrying our general line carry our biscuit. Chain stores, as a rule, do not carry our entire line. The wholesale grocer, distributing to independent retail or voluntary-chain stores usually carries all our products, both large and individual sizes, Corn Flakes, Pep Bran Flakes, Whole Wheat Biscuit, Krumbles, Rice Krispies, Bran Flakes, All-Bran, Kaffee Hag Coffee. Except one bran flake which is packed in a brown or yellowish package for distinguishing purposes, all our cereal products are

dressed in a generally similar type of package, with the familiar red-and-green colors. The jobbers in my district generally carry both the Niagara Falls and Kellogg's Biscuit. I believe, in the last two or three years, there has been a change in the methods of distribution of the National or Niagara Falls biscuit, as relates to jobbers. I understand the National Biscuit Company sell through jobbers and also sell some goods direct to the retail stores. I have not made a very close check on it; but I guess they still distribute more through jobbers in this district than direct to grocers.

Many of the retailers or distributors in my district feature our biscuits in their own advertising, in which Kellogg's name is practically always used. Where it is not used, the biscuit is advertised as Whole Wheat Biscuit.

I think Muffetts and Triscuit are both in competition with Shredded Wheat Biscuit. Other wheat products, such as Wheaties and Wheat Flakes, or any wheat breakfast food, in fact, practically any ready-to-serve breakfast food would furnish competition with them. Wheaties had a very good sale in some sections, and they have been very highly advertised.

We do sell individual Kellogg's Whole Wheat Biscuit to dining cars or railroad services in this district for service in the dining cars or their lunch rooms or their various types of eating places. We have some distribution in this district of Kellogg's Whole Wheat Biscuit in that class of dining cars and restaurants, not what would be called universal distribution, at all. With one of the largest roads, it is an optional item. The dining car steward does not have to carry it but can order it from the commissary if he has demand on his particular run. For instance, between here and Los Angeles some cars carry certain products that are not carried on runs to the east. That is true of not

only our products but a good many others. The commissaries carry compulsory items that they have to carry on every diner. There are a few other items that the steward can order, if he so desires. That applies to their lunch rooms, ferry service, and various other types of service. Kellogg's biscuit is in that category.

Practically 100 per cent. of jobbers who handle our full line, handle the Whole Wheat Biscuit. By full line jobbers, I mean that there are some types of jobbers who cater to a class of trade not providing outlets for every item we make. Others we classify as wholesalers, like chain stores, are sold direct and do not carry our full line. The jobber customers or direct customers with a general wholesale grocery business all carry our Whole Wheat Biscuit. Some of them have salesmen to the trade, and some sell on a cash-and-carry basis, where the grocer goes in, picks out his merchandise, and pays the cashier.

Display advertising is distributed through our salesmen, as a general rule. They always carry a supply of display cards and dealer helps or store helps right in their cars. They will usually have a few cards in their hand when they call on the dealer. I do not believe business in a product like shredded wheat, either Kellogg's or the National would continue in its present volume if advertising were discontinued. I have charge of demonstration crews when they are put on. We have used demonstration crews in selling Kellogg's Whole Wheat Biscuit in this district, both in stores in house-to-house can assing.

Our regular salesman holds Saturday demonstrations. The usual procedure is a table display of our products, laying particular stress on the product we are pushing at the time. Packages are opened and they occasionally sample the customer directly out of the package. Part of the time they will serve the product they are demonstrating, with sugar and cream.

The regular demonstrators that do nothing but demonstrate serve at all times. If the customer desires to taste it, they will try to serve them with sugar and cream. Once in a while, a customer will pick up a biscuit and say, "I would just like to try it this way."

The canvassing method is to go to the house, ring the bell, and show the housewife the biscuit by carrying a package in the hand, from which the front part has been cut on three sides, so the package can be readily shown and the merchandise displayed. He will call the consumer's attention to the various points we think are particularly meritorious, the size biscuit to fit the bowl, toasted on both sides, and crisp. They introduce themselves as a representative of the Kellogg Company, something like this:

"I represent the Kellogg Company. We are introducing Whole Wheat Biscuit in this territory. I would like to show you how this product looks. Opening the package, you will notice the biscuits are somewhat smaller in size than the ordinary biscuit of this type and it is toasted on both sides. We have a very definite purpose in making them a little bit smaller, as we feel they fit the dish more conveniently. By toasting on both sides, the flavor is brought out in the more distinctive manner. Another point is we pack fifteen biscuit in every package; so, in serving children for breakfast, you get fifteen servings from every package. To introduce them in this market, we are taking orders through your regular grocer at a special price. We are selling for the benefit of your local grocer. The merchandise I have with me was purchased from your local grocer, and we are reselling to you for his account."

If a purchase is made, the demonstrator asks the name of the grocer from whom they usually purchase, so he can give him credit for the sale. That is the gen-

eral procedure, but it may vary, depending on questions asked by the consumer.

Cross-Examination.

The Witness: The demonstration I have just given you comprises the instructions given to our demonstrators or samplers. I myself went around and gave that talk to housewives, when we were doing that type of work. It has been my experience that the best way to get a crew started is actually to work with them on a few calls, to make a few calls personally, if possible, to get the consumer reaction and find out if there are any angles whereby you can improve the sales talk. I absolutely have personal knowledge about what I have been telling you about the practice in the field and demonstrating.

I think about two years ago we did the first house-to-house work on Whole Wheat Biscuit. It may possibly have been as long as three years ago. It has been made for longer than that, five or six years, anyway, to my knowledge. Without consulting records, I would hesitate to state exactly how long. Before they called it Whole Wheat Biscuit, they called it Shredded Whole Wheat Biscuit. I recognize the cartons, Plaintiff's Exhibits 165, 166, 167, and 168. I have participated in the distribution of both of those Mr. Vilas is holding in his hand. I recognize both of them. Plaintiff's Exhibits 165 and 166, each of which bears the legend "Kellogg's Shredded Whole Wheat Biscuit," have been sold by me in the California market, while I was here, approximately three or four years ago. The smaller package, Plaintiff's Exhibit 166, which stands on end, was the first package, stating "net weight, nine ounces," containing twelve biscuit. Plaintiff's Exhibit 165 followed that, and contained fifteen biscuit. As far as I know, that was used

up to the time the word *shredded* was taken out of the product name and it was called Kellogg's Whole Wheat Biscuit. Prior to two and a half or three years ago, the product we were selling here was in cartons which called it Shredded Whole Wheat Biscuit. It actually sold as shredded wheat.

Plaintiff's Exhibit 168, with a window in it, was introduced about May of 1932. Biscuit in packages like that were sold in cases. We had some cases packed with only one display package in the case, that is, a package with the cellophane window in it. When we first developed the window package, we put only one in a case. Later, we developed a stronger container in which we found we could ship twelve, or even twenty-four.

Plaintiff's Exhibit 167 happens to be a later package than the one we have just been talking about. The design has been slightly changed, in that the outer margin or line around the outer edge of the package has been left off, and other slight changes. I notice now that there is a difference in the appearance of the biscuit in the dish, although I did not notice that before. The particular difference, as I see it, is in the dish and not the biscuit. That package came out in about October of 1932. I could not say, without getting the other package whether that was the first package which contained on the ends "a shredded wheat product," and "shredded wheat in its most delicious form." I do not see it on Plaintiff's Exhibit 168. This says "Whole wheat shreds," also "Kellogg's Shredded Whole Wheat Biscuit," on the end of the package. I do not see on it the words you quoted, immediately under the product name on the end panel. To be perfectly frank with you, I do not know whether that matter was on any other package or not. I never happened to notice it, even on this package. Quite frequently there are slight changes in our packages.

It would not be called to my attention. That is particularly true of the small print on the ends of the packages.

Plaintiff's Exhibit 167 is the package currently in use now, although we have that same type package with the cellophane window in it on one side; but, to the best of my knowledge, there has been no change in the package since Plaintiff's Exhibit 167 came out, that I know of, with the exception of there being a window in some of them. All the demonstrators or samplers I use are direct employees of the Kellogg Company. We have employed outside distributors to distribute samples, but not to do demonstration or sales work. To the best of my knowledge, the only distributors we have employed in this district have been direct employees of the Kellogg Company; that is, for the Whole Wheat Biscuit. I am sure we have not had any contract distribution of Whole Wheat Biscuit. We have used it for sampling some of our other products. We are carrying on sampling of other products than Whole Wheat Biscuit at the present time.

I do not know how many restaurants there are in the San Francisco territory. I would not dispute you if you said that in round numbers there were about two thousand in San Francisco and its environs, including the Bay section, over in Oakland and Alameda I presume there may be that many. I think that is a little bit high. The estimate would not shock me particularly as being exaggerated.

I do not mean that all the two thousand restaurants would serve cereals in individual packages, nor have I personally seen all or the greater part of them. I base my opinion on the daily salesmen's reports. It is an opinion. We instruct our salesmen to push the sale of the small package to restaurants and places where the product is served to a consumer. We nat-

urally do not forbid them to sell the larger package if they cannot induce the restaurant man to take the small packages. It would depend somewhat on the type of outlet. Theoretically, we would not insist upon the use of the small package to the extent of passing up sales to a reasonably reputable restaurant. In actual practice, we find that, if a man can be sold our biscuit at all, he can be sold in individual packages. We are not in the habit of making combination offers to the retailer. We have encouraged the grocer to make the combination sale of three packages.

For instance, our salesman will go into a store and arrange for the dealer to hold a special sale on Saturday, three packages of our products in a combination sale. That might be any three products, although we try to make three different products, such as corn flakes, rice krispies, and whole wheat biscuit; or it might be Pep, Brand Flakes, All-Bran, and Krumbles. We may offer a small premium to the consumer, in the way of a novelty for children or something useful, as an inducement to buy those three packages. We have offered a combination in which we said we would sell two packages for a quarter and give free a package of whole wheat biscuit. That has been done. That is useful in introducing either a new or a comparatively new product, new to the territory or a product which moves a little more slowly than the other. It has been adopted in the introduction of Whole Wheat Biscuit.

The Kellogg Company furnishes cuts to customers, to aid them in advertising. The customer, as a rule, gets up his own copy; although our salesmen may occasionally assist the dealer in getting up copy. The biscuit is usually advertised as Kellogg's Whole Wheat Biscuit. It is true that, sometimes, a dealer will put out a handbill or a half-quarter page in the paper and call it Kellogg's Shredded Wheat. That does happen. We encourage them to advertise our

product; but we prefer and have requested our salesmen, on numerous occasions, in sales conferences and through bulletins, to get the dealer to feature our product as Whole Wheat Biscuit, not as Kellogg's Shredded Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I am quite sure our product has not been sold as shredded wheat, apart from the name Kellogg's, although I can only speak for my own territory. It has never been sold other than under the Kellogg name and in the Kellogg package, in this territory. On all our packages, the name Kellogg's is displayed, very prominently. I purchased this package of shredded codfish, Defendant's Exhibit 12, from a local grocery store.

Defendant's Exhibit 13, a package of Baker's Cocoanut, marked "Premium Shredded," was purchased from a local grocery store.

Defendant's Exhibit 14, Kellogg's Whole Wheat Flakes, is a sample package, currently used as samples.

(A package of Muffetts was offered in evidence and marked "Defendant's Exhibit 15.")

HOBART W. MEARS.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am Hobart W. Mears, residing in Ross, California, aged forty-four. I am purchasing agent of the Mateson Navigation Company and have been for sixteen years. I purchase food supplies for that concern.

I am familiar with the product known as Kellogg's Whole Wheat Biscuit. I first became acquainted

with it through salesmen who called on me. My office is at 480 Main Street, San Francisco. I purchased the product through these salesmen, and I have since continued to handle it. I do not remember how long I have handled Whole Wheat Biscuit. We were approached two or three years ago, I believe. We use it in the individual cartons and it is served in those cartons to our consumers, travelers on the Matson ships.

CROSS-EXAMINATION.

THE WITNESS: I have heard of Shredded Wheat. We have not bought any, to my knowledge, during the time we have been using the Kellogg product, for two or three years past. I will not say that we have no Shredded Wheat on the ships, because they go to other ports and they may have gotten it there. Stewards on ships in a foreign port have liberty to purchase locally anything they need. If the ships run short of supplies, they are at liberty to purchase what they need. The large bulk of standard supplies, however, such as dry cereals and other items that keep, are purchased through me, largely in San Francisco, which is the headquarters of the Line. A steward making quantity purchases in another port is the regular thing, not the exception, because they are forced to buy at other ports. We cannot figure positively how much a ship is going to need. She may run out of a certain item between here and Honolulu. The Lurline came here from New York on her maiden voyage last month. As far as cereals are concerned, I do not know what she had. She took on her supplies at New York. She may have had Shredded Wheat of the National Biscuit Company at New York. I have purchased that Shredded Wheat in the past, probably prior to the three years or so we have been using Kellogg's. I

have known of Shredded Wheat myself since I can remember anything. It has always been called Shredded Wheat and has always been made in this pillow-shaped biscuit with shreds or threads of wheat. So far as I know, it has always looked the same since I ate it as a boy at home.

I have sailed occasionally on some of our own ships. They have menus in the dining saloons. There is a list of cereals on the breakfast menus. I believe the Kellogg Biscuit is listed both as Whole Wheat Biscuit and Shredded Wheat. We try not to advertise on the menus. We would not list a brand of coffee under the brand name. If we had Shredded Wheat on board, we would list it as Shredded Wheat, and we might list the Kellogg biscuit either as Whole Wheat Biscuit or Shredded Wheat, or both, although it is not called Shredded Wheat.

I recognize Plaintiff's Exhibit 162 as a menu of the Lurline. Shredded Wheat is listed among the cereals. I do not know whether we had Shredded Wheat on board on January 19, 1933. She was on her way from New York when that menu was printed. She was not victualed in San Francisco until after she arrived, which was the twenty-fifth of January. That menu was used on her maiden voyage from New York.

We have a steamship Monterey, plying between here and Australia. She was on the high seas on the date of the menu, December 27, 1932, probably outward bound to Australia. I recognize Plaintiff's Exhibit 163 as a menu of the Monterey. Under cereals is the term Shredded Wheat. She had no Shredded Wheat on board, to my knowledge, when she left San Francisco on that voyage.

We purchase only individual cartons of Kellogg's Whole Wheat Biscuit. The waiter brings them to the table in the individual package. That is the customary way of serving them.

RE-DIRECT EXAMINATION.

THE WITNESS: My understanding of shredded whole wheat biscuit is that it is a breakfast food, served as a dry cereal, made of wheat. I do not know the technical way the wheat is treated; but I understand it is shredded. It is put through some sort of process whereby the wheat can be shredded, so-called. The shreds are then put into the form of a biscuit.

The Kellogg biscuit is made of wheat, I understand, shredded and formed into a biscuit. We are buying Kellogg's Shredded Whole Wheat Biscuit and are serving them to the public. As far as I know, we have never had objection from the traveling public that we were not serving what they asked for. They get the package and know what they are getting. There are probably lots of objections from passengers on ships. They have nothing else to do but kick about the food. If objections come in any quantity from various passengers, the matter is brought to the attention of the port steward and then to me. There has never been any objection to our serving Kellogg's Whole Wheat Biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: I know that the Shredded Wheat I have known since I was a youngster has always been known as Shredded Wheat. It has always, in the minds of the public, been associated with the Niagara Falls or Oakland manufacture. I am familiar with the box with the picture of Niagara Falls on the end, and a picture of the factory. I have known that all my life. If Shredded Wheat is mentioned, that famous Shredded Wheat Biscuit is called up in my mind. There is no question about it. Even though I have not heard a multitude of objections from passengers sufficient to bring it to the home office, it does not follow

that some people may not have thought they were getting a different kind of Shredded Wheat or something substituted for it when they got the Kellogg product on our ships. It is quite possible there have been complaints. The Kellogg biscuit looks considerably like the Shredded Wheat Biscuit. I think an order for shredded wheat could be filled with the Kellogg biscuit. No doubt it has been. Apparently, many persons may accept it and not raise any question about it.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know any other descriptive name for this product than shredded wheat biscuit. It is a wheat biscuit. I do not know what else you can call it. You cannot very well call it a cracker. I would hardly call it a flaked biscuit. A flake is something flat and rolled out.

Surely, for at least two or three years, I have been cognizant of the fact that this product I have described as a shredded whole wheat biscuit is being made by two different manufacturers. We bought Kellogg's biscuit because they were offered to us cheaper than we could buy Shredded Wheat, without sacrificing any quality in the product we were buying and without changing the physical character of the product that was served to our customers.

RE-CROSS-EXAMINATION.

THE WITNESS: We assumed the two products were substantially identical for the purposes of our service, and we got a little better deal from Kellogg than we could from the National. That is the whole story.

JOSEPH G. COHEN.

Deposition taken at San Francisco, California, February 9, 1933.

Direct Examination.

The Witness: I am Joseph G. Cohen, 185 Vasquez Avenue, San Francisco, age forty-two; a buyer for Haas Brothers, wholesale grocers, located in San Francisco. I have been a buyer for them since September 15, 1928. During that time I have been acquainted with products of the Kellogg Company at Battle Creek, Michigan. My concern handles those products, Corn Flakes, Pep, and Kellogg's Whole Wheat Biscuit. The latter product has been known by that name during the time I have been acquainted with it. We also handle the Shredded Wheat Biscuit. Naturally I do not know how it is manufactured, but, in appearance it is similar to the Whole Wheat Biscuit. The National Shredded Wheat Biscuit are packed thirty-six to the carton, and Kellogg's Whole Wheat Biscuit are packed twenty-four to the carton. When I say carton, I mean cases, not individual cartons. We handle it in a wholesale way, and I am not familiar with the number of biscuit in a retail package.

We have handled Niagara Falls Shredded Wheat for some years. We do not still handle it in the same volume or quantity we formerly did, because the National Biscuit Company sells direct to the retail trade. The Kellogg Company does not, to my knowledge, distribute direct to retailers, but exclusively through jobbers and wholesalers.

The orders for these two products reach us through our salesmen and also by telephone. The Kellogg product is ordered as Kellogg's Whole Wheat Biscuit. If my house were to receive an order for Kellogg's Shredded Wheat, they would understand they were to ship out Kellogg's Whole Wheat Biscuit.

I cannot say definitely if we receive orders in that way; but, to my knowledge, we do not receive them generally in that manner. They usually come in calling for Kellogg's Whole Wheat Biscuit. They are listed in our price book as Kellogg's Whole Wheat Biscuit. The salesmen have instructions to write up orders as they are listed. So, in practically all cases, an order sent in by salesmen would be for Kellogg's Whole Wheat Biscuit. As far as I know, there is no confusion between these two products in our concern, at all.

CROSS-EXAMINATION.

THE WITNESS: We still carry Shredded Wheat Biscuit. If a retail customer were to call up and ask for Shredded Wheat, he would get Shredded Wheat Biscuit, manufactured by the National Biscuit Company. I have been in the food game since 1906, so I have known Shredded Wheat for a good many years. It was Shredded Wheat in 1906. I cannot say about before that. My recollection does not go back that far. From my time in business, it has been known as Shredded Wheat. I cannot say definitely, how long I have known Kellogg's Whole Wheat Biscuit by that name; possibly, the last three years. Before that, they sold the same article as Kellogg's Shredded Whole Wheat Biscuit. We carried that, also. When we carried the item under that former name, I cannot remember how the orders were received. I only handle about three thousand different items. It is pretty hard to remember a detail like that. I cannot recall it. I would say that, even when Kellogg's was known as Kellogg's Shredded Whole Wheat, if an order came in for Shredded Wheat, the National Biscuit Company's product would be sent out on the order. That has been so before and after the Kellogg people got into this line with the biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I would understand substitution, as applied to the wholesalers' business being the substituting of another brand or variety of merchandise for a particular article, when there was no question of doubt what article was intended to be ordered by the buyer. My house does not practice substitution of that kind. The practice is general among wholesalers not to substitute.

I do not know whether the Kellogg biscuit is the same type of biscuit physically now as it was when it was known as Kellogg's Shredded Whole Wheat Biscuit. I do not believe I have seen a package of the Kellogg biscuit for quite some time. We have so many items that we do not go into it. I am just familiar with the wholesale case containing twenty-four cartons and with the package contained within the case, but not with the biscuit itself.

We have handled the Kellogg biscuit in the individual carton. Whether we have them in stock or not, I could not say. Our house deals with both the grocery trade and hotels and restaurants. We do handle the individual, two-biscuit carton. It is not sold at all to the grocery trade; to the restaurant trade, only. The small cartons is the general form in which the restaurant and hotel trade usually buys whole wheat biscuit.

I believe I have been familiar with the Kellogg biscuit ever since it has been put on the market. I do not recall when that was. I would say they come directly into competition with the shredded whole wheat biscuit made by the National Biscuit Company. It is, competitively speaking, a similar product, the same, I would say, as Kellogg's Corn Flakes and any other nationally advertised brand of corn flakes. The Kellogg and the National biscuit are physically the same

product in general appearance. I do not know whether they are in the same size or not.

RE-CROSS-EXAMINATION.

THE WITNESS: The Kellogg biscuit will supply the same call as Shredded Wheat. That is what I mean by competitive. Where, for many years, Shredded Wheat has held the field as the only item of that kind, we now have Kellogg's Whole Wheat Biscuit, which could be used to fill the same want to the consumer.

Haas Brothers are interested in a voluntary chain, the I. G. A., Independent Grocers Alliance, a very large organization, covering a great portion of the United States. Approximately two hundred and twenty units of the I. G. A., in California constitute the portion we are interested in. Under our arrangements, it is possible for manufacturers to contact retail stores directly. The National Biscuit salesmen can contact retail stores and take orders for their product. Haas Brothers pay the bills, and have a discount for their trouble. Shredded Wheat is sold through our I. G. A. outlets in that way.

I have no doubt that Haas Brothers are very particular that a customer gets what he orders. If a customer asks for Shredded Wheat, he gets the National product; if he asks for Kellogg's Whole Wheat Biscuit or Kellogg's shredded wheat, we know what he means. There is no confusion or substitution in our dealing with our retailers. I know nothing about the contact or relationship between the retailer and the consuming public.

JOSEPH B. BRUN.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-three years old, a buyer for Western States Grocery Company, with whom I have been connected since they began, March, 1928. Before that, I was connected with J. H. Newbauer, now out of existence, liquidated.

I know of a product called Kellogg's Whole Wheat Biscuit. As far as I can describe it, it is something like the Shredded Wheat Biscuit you buy from Oakland; but I believe it is a smaller biscuit. Except as to size, it is practically the same kind as the Oakland biscuit, practically identical. By the Oakland biscuit, I mean the National Biscuit product. We have known it as the Oakland biscuit, because it was always from there. The National has taken it over. It is practically known the same way, as far as we are concerned.

I believe we have handled the Kellogg biscuit ever since they were on the market, some two and a half or three years, if I am not mistaken. When they first came out, they were known as Kellogg's Shredded Wheat, I believe, and they changed over. In the beginning the grocery trade used to order those biscuit as shredded wheat. We had some cafeteria trade that came through, and they would want Kellogg's. There were times they would come in for *shredded wheat* and we would know they wanted Kellogg's. We would ask them which they wanted, because, if we sent out the Oakland Shredded Wheat, as we termed it then, a lot of it would come back, because they wanted the Kellogg shredded wheat.

Orders do not come to us now for Kellogg's shredded wheat; they have changed over and orders

come to us for Kellogg's Whole Wheat Biscuit. Our Oakland Shredded Wheat has dropped off materially. I believe we sell hardly any. I have not bought any for months. They have sold direct to the trade. They go right to the wagon trade. They are practically out of the picture, as far as that is concerned. I believe we have not sold ten cases in a month. There is no confusion in our house as to the sale of the Oakland and the Kellogg products. The grocers specify clearly which they want, and we give it to them. We do not substitute anything at all. By *substitution*, I mean to give something I think will be exactly the identical type of merchandise to what the party asked for, which you did not have, which was not the product they specified they wanted. Our house does not practice substitution, unless it is authorized by the customers. If a customer orders one kind of a product and we do not have it, we offer him something else. If it is o. k., we send it to him; if not, we do not send it. That is what might be called authorized substitution.

I cannot say whether substitution is practiced generally in the wholesale trade. I am not familiar with what the other people do on that. I am practically in the buying end of it. So far as our cash-and-carry and carry departments are concerned, we substitute nothing at all. We speak to them. If they want to use something else, all right; but we would not substitute without their knowledge of it.

The retail division of our concern conducts retail stores as well as wholesale; the Safeway, MacMarr, and Piggly-Wiggly. The retail division is what I mean when I speak to a customer about trying a new product. Of course, I do not want to go on record as stating anything regarding the retail division. I do not know what they do. We have in our organization six wholesale depots, aside from our main office. No substitution is practiced in those depots. I do not know, of my

own knowledge, what the general conditions are among other wholesalers, as to whether they substitute or not.

We do not practice substitution for the simple reason that, nine times out of ten, it comes back to you. The grocer will not accept it if it is not what is ordered. It comes back and it is only additional expense to put credits through. The bulk of our business in shredded whole wheat biscuit is in the Kellogg product.

For the period of time the National Biscuit have been selling Oakland Shredded Wheat, they have been selling it direct. I have no record of that, except a very limited sale now. I believe there is a genuine demand for Kellogg's Whole Wheat Biscuit among the customers of our house. They seem to be buying it all the time, so there must be demand for it.

CROSS-EXAMINATION.

THE WITNESS: I am in the buying end of the business; but, when the order desk will be busy, big accounts, such as cafeterias, come over to my 'phone. I buy supplies in wholesale lots from the manufacturer, generally; so my contact with Kellogg's Whole Wheat Biscuit is as a buyer, to fulfill the requirements of the various branches. Western States Grocery Company is a wholesale grocery. Our cash-and-carry stores belong to us. They are a direct branch of our firm. We have them in outlying districts, such as Army Street, Fulton Street, Sacramento Street, First Avenue. They are wholesale units for the convenience of the retailers; six wholesale branches. You might call it a sort of wholesale chain store. We carry our supplies in these various six units; and the retailer may come there, make his purchases, and take them away. We supply the Safeway Stores with their requirements. We are affiliated with them, part of their organization. They are an organization of retail chain stores. Safeway, MacMarr, and Piggly-Wiggly have about two hun-

dred stores here in town. All we are interested in is just San Francisco, except that we have a few stores in Redwood City which we acquired. They have come over into our field. We have taken them away from Oakland. The Western States fills the position of jobber for this chain. We purchase shredded wheat and other cereals that are purchased in bulk and distribute them to those retail stores as they order them out. We sell to any legitimate retailer. The bulk of our business is to the chain stores. I believe they are all cash-and-carry stores. I believe practically all of them are self-service stores. Piggly-Wiggly is self-service. Shredded Wheat, as made by the National Biscuit Company, is carried in the Safeway and Piggly-Wiggly Stores. The National Biscuit distributes Shredded Wheat and its other products from its bakeries direct to the various units. That is why we are more or less out of the picture regarding National Biscuit Shredded Wheat. The Safeway Stores are sold by the National Biscuit Company as a chain. The Western States Grocery Company do not participate in any of the wholesale discounts given by the National Biscuit Company when they are sold direct to Safeway Stores. The Safeway organization deals with the Biscuit Company. We buy independently of them. Anything we do, as far as I know, is handled with our own firm.

I have been familiar with Shredded Wheat for a long time. At one time there was a question in my mind as to what a customer meant when he placed an order for Shredded Wheat, when Kellogg called theirs Shredded Wheat. Prior to that time, there was no other shredded wheat, before Kellogg's came out. There was only one. I do not believe there was any item that could be substituted for it, to my knowledge. At present, assuming the dealer was willing to make a substitution, there is Kellogg's Whole Wheat Biscuit which could be used to fill an order for Shredded

Wheat, providing it met with the approval of the customer. We would not knowingly substitute anything at all.

If a customer called on the telephone now and asked for a case of shredded wheat, we would ask him what he wanted; because some customers still know Kellogg's biscuit as shredded wheat. We know some customers use Kellogg's shredded wheat right along. For instance, one account, Foster's lunch, I know particularly, when they called for shredded wheat, got Kellogg's, because that is what they always used and we knew it. Other customers whose wants we would not know would get the regular Shredded Wheat, if they did not specify Kellogg's. There are very few calling for the National Biscuit Shredded Wheat now, since they have gone direct with them. They get their supply of Shredded Wheat direct from the manufacturer.

If we do participate in anything with the Safeway organization, it is of a confidential nature I know nothing about. There is a financial connection; but regarding any buying power or anything like that, I do not know about our participating in it.

RE-DIRECT EXAMINATION.

THE WITNESS: We handle the Kellogg individual-size Whole Wheat Biscuit, selling to restaurants, cafeterias, and hotels. The sale of the individual is far ahead of the regular package, because practically all shredded wheat goes right to the restaurants. They ask for Kellogg's individual shredded wheat, and that is what they get all the time, all ready for service.

I do not think it would be up to the wholesaler at all, to introduce new products to the retail grocery trade. Of late years, their own direct factory representative comes out. They contact the retail trade and create a demand for it. He will come around to us, stating they have two men working on the trade, and

they ask us to put some in on a guaranteed basis. That is the only way. The wholesalers work to supply a demand that has already been created. Judging by the orders for Kellogg's, I would say there is a demand for that product in the trade.

MRS. HAROLD L. MacMILLAN.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife and have a little girl, seven. We live in San Francisco, since June; before that, in Seattle, two years. I have heard of a product called Kellogg's Whole Wheat Biscuit. I think I first saw it on the shelves in the Piggly-Wiggly store. I purchased it, because I have used Kellogg's products consistently for some time. It was in with the other Kellogg products on the shelf in the shop. When I first saw the package, I imagined it was something similar to Shredded Wheat Biscuit; but that was as far as I know. I decided I would take one and see how we liked it. We tried it. I thought it was quite similar to Shredded Wheat, although we liked it better. We liked the size better. One of the others seemed too much. This size in the Kellogg box I thought was a better size; because my child would not eat a whole one of the other, but she would eat a whole Kellogg Biscuit. We got more biscuit in the box, so I did not really waste any at all. She used one biscuit a morning. I have continued to use Kellogg's Whole Wheat Biscuit. I believe it is called just Kellogg's Whole Wheat Biscuit. I pick my own things off the shelf. I am a cash-and-carry shopper. I go into the shop. There are baskets provided for the customer as you go in. You pick up your basket and go around. I usually have a list. If

it is a shop I usually shop in, I know just about where everything is. Kellogg's products are practically all on the shelves of the same section. They have Pep and the different things. I take my biscuits and get butter, bread, and so forth on the shelves; go back to the checker at the counter; he checks my articles, tells me how much it is, and I pay for them and take them home. I get practically all my groceries that way, taking them off the shelves.

I have noticed on the shelves of the stores I deal with another shredded wheat biscuit besides Kellogg's, which I think is just called Shredded Wheat. I believe it is the same type of product as the Kellogg biscuit, except as to size, although we just felt we liked the other better. I think the size had a great deal to do with it. It is a similar biscuit. I have purchased it ever since I found it on the shelves.

I dealt with old-line service stores in Seattle when I first went there, Benzak-Benson's, because I was not near a store, and I could not carry things any distance. I only shopped that way for a couple of months. It was too expensive. I had not been in Seattle long enough to know what they had on the shelves. I ordered practically everything by name. The introduction to me of Kellogg's biscuit was by seeing it on the shelves and by taking it at that time and trying it.

CROSS-EXAMINATION.

THE WITNESS: Before I discovered Kellogg's Whole Wheat Biscuit, we used Shredded Wheat occasionally. I used to buy a box. My small daughter did not care for it greatly. I do not buy Whole Wheat Biscuit now every time I go to the store. I buy Pep and so on, rotate all her cereals. It may be fair to say that I am a Kellogg customer and like Kellogg products. I can tell you the same thing about Post Toasties. I used to think I liked Post Toasties as well as Kellogg's Corn

Flakes, until I used enough Kellogg's to realize there was something about the product I liked better. When Kellogg came out with a biscuit that looked like Shredded Wheat, I felt it would be something reliable and made by a concern I believe in, so I tried it. I found I liked it better for my purposes, because of its size. Before my little girl was born, I very seldom used Shredded Wheat. I do not eat cereal at all. I knew about Shredded Wheat. I do not think many girls, before marriage, pay much attention to those things. If you do not like them, you do not eat them, and you do not pay much attention to them. Even as a young girl, I did know Shredded Wheat, knew what it was.

I was asked by Mr. West, a friend of mine, but no relative, to come and give a deposition. I am not related to anyone connected with the Kellogg family. I am a Canadian.

RE-DIRECT EXAMINATION.

THE WITNESS: Mr. West is not a neighbor. I lived in Burlingame. That is where I first met Mr. and Mrs. West. I lived in Toronto six or seven years ago and I used Kellogg's products long before I came to the United States. My first experience with Kellogg's Whole Wheat Biscuit took place in Seattle, where I lived for two years previous to June.

L. P. SCHMIDT.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-seven years old; vice-president and general manager of the Purity Stores, Front and Union, which are a chain organization of retail stores, some service and some self-service. They

are all cash stores. I have been connected with the grocery business about twenty years. I have knowledge of the product known as Kellogg's Whole Wheat Biscuit. We have handled them in our stores about a year and a half. I had seen it before. I did not know it when it was called by another name. I have only known it as Whole Wheat Biscuit. They have been carried in our stores about fifteen months, and there is a consumer demand for it there.

We handle the Oakland or National brand of Shredded Wheat and have handled it for many years. We buy it direct from the National Biscuit Company. We buy the Kellogg biscuit direct from Kellogg. The customers ask for them as Kellogg's Whole Wheat Biscuits. If any of our customers asked for Kellogg's Shredded Wheat, I would give them Kellogg's Whole Wheat Biscuit. I would describe it as made out of wheat, shredded, in the shape of a small pillow. I would say it resembles, physically, in appearance, the National Shredded Wheat biscuit. It is smaller in size. There are more in a package, and more by weight, I believe.

I believe, at the time we took the Kellogg biscuit on, they had a cellophane window in the package and attention was drawn to the fact that there were more biscuit in the package. I believe there is half an ounce more weight in the package. In our advertising, we probably featured them as being so many in a package and the weight. Naturally, the salesmen or clerks would do the same thing. That type of advertising would, I think, have the effect of creating consumer demand for Kellogg's biscuit.

I believe there is a genuine consumer demand for Kellogg's biscuit existing in our stores. Substitution is something we never practice. A woman steps in and asks for a certain brand. It would be substitution if the clerk immediately offered her something just as

good, or another product. We do not encourage our men to do that.

We distinguish between the clerk offering something just as good and handing out a different product without remark; but, in our store, the clerks do not even try to interest them in something just as good, particularly in a cereal. The time required to talk about another cereal is not justified. I do not believe any good grocer will substitute. After all, we are here to serve the public and give them what they want. I do not believe any real or substantial business would be built up in the trade on the practice of substitution.

We advertise to consumers by means of circulars and in newspapers. We have advertised Kellogg's biscuit since we first stocked it.

CROSS-EXAMINATION.

THE WITNESS: We have one hundred and ten stores in our chain, all in northern California. We have consumer demand for Shredded Wheat, also. We sell it in fairly large quantities. We buy it from the National Biscuit Company. We do not handle other National Biscuit products, their crackers, or their baked goods. I have been familiar with Shredded Wheat for a great many years, nearly as long as I can remember. It has always been known as Shredded Wheat and always looked the same as it looked today, a small-sized pillow-shaped biscuit. When I started to describe the Kellogg biscuit, in answer to Mr. Clarke's question, I started to say it was a shredded wheat biscuit. That was the first thing that came into my mind. If my customers ask for shredded wheat, I give them Shredded Wheat, the product sold by the National Biscuit Company. I would not offer such a customer Kellogg's Whole Wheat Biscuit. I would consider that substitution. My stores and the better class of grocery trade do not try to substitute

one article for another. I presume there are all kinds of people in the grocery business and some would substitute if they did not happen to have Shredded Wheat. If a call came for Shredded Wheat and the grocer had only the Kellogg biscuit, he probably would substitute it for that particular call. I think the Kellogg biscuit is the same kind of food and would, to a certain extent answer the call. It is similarly made and looks like Shredded Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not think it would be possible to get a customer to take the Kellogg's product and think she was getting the Niagara Falls product. Supposing, for instance, an order for a can of coffee. The clerk might say he did not have XYZ coffee but had ABC coffee, or coffee just as good. He would certainly not lose the sale if he could possibly avoid doing so. My clerk would say, in this instance: "We do not have the Shredded Wheat or the Niagara Falls Shredded Wheat, but we have Kellogg's." I think that is what I meant to tell Mr. Vilas when I said the Kellogg product could be substituted if somebody asked for Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: I have had actual experience in selling at retail in stores. A discerning customer handed a package of Kellogg's Whole Wheat Biscuit would have no doubt it was made by Kellogg; but, no doubt, we have customers who do not notice so closely. We have customers who, perhaps, trust the grocer, give orders, and assume they are getting what they ask for. Some people send their children to get groceries. While I do not believe any of our managers would do it, it would be possible for a child to ask for Shredded Wheat

and carry home a package of the Kellogg biscuit, thinking she had what she asked for.

RE-DIRECT EXAMINATION.

THE WITNESS: When a child brings back something else than it has been told to ask for, I think you make enemies. Some of the consumers would return the product.

RE-CROSS-EXAMINATION.

THE WITNESS: Some of them would not. We find some inertia in consumers. When they get something that can be used, they say, "Oh, well, I will take it"; and we never hear of it again.

RE-DIRECT EXAMINATION.

THE WITNESS: When they do not complain, we do not know if they have any complaint, unless you lose sales in that particular store. These are all just small things that count in making a store a success.

In our stores, for these reasons, we do not practice substitution. We consider 80 per cent of the sales ability of a store will lie with the men in the store, not so much the price or the article. When one of our clerks explains to a customer we have a new kind of a certain product and would like them to try it, I regard that as absolutely legitimate.

MRS. A. E. KRUG.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I do not necessarily know anyone connected with either the National Biscuit Company or the Kellogg Company. I do not know Mr. West. I have heard of the product known as Kellogg's Whole Wheat Biscuit. I use it, and have used it, I believe, for several years. They gave samples around at the doors, a small carton containing two biscuit, marked Kellogg's Whole Wheat Biscuit, and the man said it would be at the stores. I gave it to the youngest one for breakfast one morning, and she liked it. Seeing she liked it so well, I got more at the store, and continued to buy the Whole Wheat Biscuit.

Sometimes I buy it at a chain store, but mostly at independent service stores. I tell the clerk I want a package of Kellogg's Whole Wheat Biscuit. I do not believe I have bought it in self-service stores, and do not know whether I have seen it there. I continue to buy it from time to time. We experiment with foods, on account of the youngsters. I have three. When anything new comes, we always try it. If we like it, I get more. That was the case with Kellogg's biscuit. Previous to that, I had used Shredded Wheat and tried Muffetts and several different biscuit like that. They liked Kellogg's the best. I could not say whether Muffetts are shredded. They are round, cake-like things.

CROSS-EXAMINATION.

THE WITNESS: I do not buy Shredded Wheat now, because my little one likes Kellogg's biscuit better. Before we got the Kellogg sample we bought Shredded Wheat, not a long time. I did not think a whole lot

of Kellogg's; we bought it because the little one liked it. I have known about Shredded Wheat. Everybody knows Shredded Wheat, yes, indeed. I never heard the Kellogg Whole Wheat Biscuit called shredded wheat. I did not know about Kellogg's biscuit before it was brought to my door within the last couple of years.

RE-DIRECT EXAMINATION.

THE WITNESS: By shredded wheat or shredded whole wheat biscuit I mean wheat that is shredded. That is about the only way I can describe it.

RE-CROSS-EXAMINATION.

THE WITNESS: I am with Mrs. Maude. Mr. Jensen, who, I guess, is with the Kellogg people, asked us to come. He is a neighbor. They asked us to come and tell about the purchase of the Kellogg product.

RE-DIRECT EXAMINATION.

THE WITNESS: I guess I have seen advertisements of Kellogg's Whole Wheat Biscuit. I do not remember.

MRS. JENNIE MAUDE.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. Mr. Jensen, of the Kellogg Company, asked me to testify in this case. I have heard of and used the product called Kellogg's Whole Wheat Biscuit. I should judge I first heard of it about three years ago, through a sample that was delivered at my door. We put it on the table, used it, liked it, and we have bought Kellogg's ever since.

Previous to that sample, we had used the Niagara Falls or Oakland Shredded Wheat. I prefer Kellogg's because it is not such a large biscuit and I like it in general. I have always bought Kellogg's since that sample came. Sometimes I get it at chain stores and sometimes at neighborhood stores. The chain stores are help-yourself, the other is service. In the help-yourself store, you go around until you find the package marked Kellogg's Shredded Wheat, pick that up, take it to the checking clerk, and pay him for it. The clerk does up your packages after you have picked them off the shelf. I have seen the Kellogg biscuit in that type of store, as well as the Niagara Falls biscuit. They are usually in the same corner or on the same shelf or in the same locality.

CROSS-EXAMINATION.

THE WITNESS: I used Shredded Wheat before I knew about Kellogg's biscuit. I have known about Shredded Wheat for a long time. When I got the sample from Kellogg, I thought Kellogg was starting to make shredded wheat. It looked like the other biscuit, except in size. I like the way it is cooked a little different. It is ground up a little different than the other one. It varies just a little bit from the Shredded Wheat I had known before, so after that I went to the store and looked for the Kellogg package.

RE-DIRECT EXAMINATION.

THE WITNESS: Very few grocers or grocery clerks ever ask me to try new products. I usually get started on a new product nowadays by the sample.

MRS. INA HOLMES.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I know Mr. West and Mr. Stanton, neighbors of ours, connected with the Kellogg Company. I have known Mr. West about a year or two. I have known the Kellogg Company for years. I always use the Kellogg products if I can. I have four children.

I have used Kellogg's Whole Wheat Biscuit, I should judge, two or three years. When I use shredded wheat biscuit, I use Kellogg's. My first reason would be because it is made by the Kellogg people. My next reason is that I think it is a whole wheat biscuit. I thought Shredded Wheat was a white biscuit, just like the difference between white and whole wheat flour in our home. I thought the larger whole wheat biscuit, which comes in a box like Plaintiff's Exhibits 10 and 1, is white. That is not supposed to be a whole wheat biscuit, is it? Is there not a difference of color in the biscuit? I think the Kellogg biscuit is darker, and that is why I thought it was a whole wheat biscuit. Plaintiff's Exhibit 1 is a lighter biscuit. I would not say it is not whole wheat. That is just my own personal opinion. I am not a dietitian. The Kellogg biscuit is also smaller.

As I have used Kellogg's whole wheat product always when I get them, because I heartily approve of the Kellogg people, after I found theirs was a shredded whole wheat biscuit, I used that biscuit. I ask for their products. I did have the thought it was made of whole wheat, while I did not know the other was. I never knew of whole wheat being on the box before.

CROSS-EXAMINATION.

THE WITNESS: Before I knew about the Kellogg biscuit, I have used the other Shredded Wheat, like Plaintiff's Exhibit 1. I have known of it and used it for a long time back. I did not have the impression it was not a whole wheat biscuit until after I had used the other. Then I thought that was a whole wheat biscuit. I was surprised when I saw whole wheat on Plaintiff's Exhibit 1 a few minutes ago. I never read the label or printed matter on the label. Perhaps that is why I did not know. I saw this label a minute ago. I see it says "Made of the whole wheat, nothing taken away." I was a bit surprised when I saw that on there. The Kellogg biscuit is darker, though.

My method of purchasing Shredded Wheat was just the same as the way I purchase Kellogg's. I went to the store and asked for Shredded Wheat; particularly after I found the Kellogg people had it, because I would prefer Kellogg's products. I am friendly to the Kellogg Company. I believe in their products. They make good things. I think one of my reasons for wanting to try that biscuit was that I found they were making it. It was a good biscuit, too. If it were a poor biscuit, I would not use it, merely because it was a Kellogg biscuit.

I am a friend of Mr. West. We are neighbors. There is also a Kellogg salesman my husband plays golf with, Mr. Stanton. I do not know him very well. Mr. West asked me to come down and tell what I knew about the biscuit, because he knew I use these products.

RE-DIRECT EXAMINATION.

THE WITNESS: I deal in self-service stores, with most any store where I can get the best, the most for the money, now. I go to the counter and help myself, have the goods checked and pay for them at the door.

Not only that way, but I trade with other stores where I do not help myself. I never had any trouble buying Kellogg's Whole Wheat Biscuit. They carry them in stock. Sometimes they are out of them, but they may be out of almost anything at times. I cannot remember ever having any trouble getting it.

CHARLES VON HUSEN.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer and have been in that business since 1909. I have my own service store, in a medium-grade residential district. We have about a complete line of Kellogg's products in our store. We handle Kellogg's Whole Wheat Biscuit. It is shredded wheat, made by Kellogg and put up in Kellogg packages, similar in color to other Kellogg packages. I took on Kellogg's Whole Wheat Biscuit as soon as they were introduced to me by the salesman, Mr. Jensen, who came to me and showed me the biscuit. He explained it. I believe he opened the package and showed me where it was a shredded wheat biscuit. He showed me the public were getting three more biscuit for the price of the other package. I bought it at that time, because we like to have new items when they come in. We like to be first in the neighborhood to have them, if possible. A customer will often think a product similar to another one put out by another manufacturer is better. The public like to buy new products and to experiment around, especially, I believe, in the cereal line.

The Kellogg Company does not have a return-products policy, that I know of. It seems to me that

Mr. Jensen did pick up some Krumbles that did not move so fast and exchanged them for other merchandise. It is more or less of a guaranteed sale, the way I understand it. If an item does not move readily, rather than see it go bad on your shelf, they will salvage it.

I do not believe the Kellogg Company have ever helped the retailer sell the goods, aside from promotion of combination sales of two or three items. The name Kellogg on the Whole Wheat Biscuit package would help to connect it up with the other products. I believe the Kellogg name has a lot behind it, as regards the consumer as well as the retailer.

I think we asked people if they would like to try the Kellogg's Whole Wheat Biscuit, explained they were getting a little more for their money than in the other package, probably a little more tasty. That is an effective method we often use of introducing product to our trade. It is effective in introducing it to customers. People are always looking for a little more for their money if they can get it. We have several people who demand Kellogg's shredded wheat biscuits; had one in the store yesterday. We have continued to carry Kellogg's wheat biscuits continually.

We handle the original Shredded Wheat, the other shredded wheat, of Niagara Falls. We still carry that in our store. I cannot say we find any confusion among our customers as to the two products.

Our customers usually specify Kellogg's when they want the Kellogg product. When they ask for the other product, they just say Shredded Wheat. When he does, we usually ask which one they want, original Shredded Wheat or Kellogg's shredded wheat. That is our usual method, except at times when we have advertised the other Shredded Wheat on an ad for nine cents. Then it is understood that is the one they are going to get, the original. At other times, however, I ask

which shredded wheat they want, the original or Kellogg's.

Cross-Examination.

The Witness: For a good many years, the original Niagara Falls Shredded Wheat was the only one we carried. They still ask for it as Shredded Wheat. When customers who know there are two items of a similar nature want the Kellogg product, some of them ask for Kellogg's Whole Wheat Biscuit, and some of them do not. Some of them ask for shredded whole wheat biscuit and others ask for Kellogg's shredded wheat. Since the Kellogg biscuit came out, I have regarded that as a shredded wheat biscuit. Originally, there was the one Shredded Wheat Biscuit I knew for a great many years. I have been in business twenty-four years and have known Shredded Wheat all that time. That is the name by which it was always asked for.

Two or three years ago, the Kellogg people brought me this box, opened it, showed me what was in it and that they had a shredded wheat biscuit. They told me it was a shredded wheat biscuit, compared it with the one made by the National Biscuit Company, and told me they had three more biscuit in the box, and some other points of difference that would help me sell it. There was a little edge on the price, and I think there is now a little differential in the price. We get a quarter for two of the Kellogg's. Under ordinary conditions, we sell Shredded Wheat for the same. On sales, we often have it down as low as nine cents. We never have sold Kellogg's for nine cents.

Sometimes we have had Kellogg's shredded wheat biscuit, Pep, and probably Corn Flakes, in a combination sale, three for thirty or twenty-nine cents, and gave them a booklet or something in that. That is not an unusual way to help introduce or push a new prod-

uct. I think it is a very good system. It is very often used; sometimes, to encourage a slow-moving product, combining it with two good items, encouraging the movement of the slower article by getting it circulation.

We carry Kellogg's wheat on the shelf very near the other one in our store, both on some sort of display, on a shelf in back on the side of the store. We have all the cereals on one side. One reason for putting Kellogg's shredded wheat in stock was that Shredded Wheat was not moving as fast as we thought it should. Often, if you get a new line you think has more inducement for people to buy it, it will stimulate the sale. It is difficult to say whether that has been the result here, whether any more people than before are buying shredded wheat. We sell, at the present time, most of the National Shredded Wheat. It is still a pretty good seller. I imagine there has been a large market for it created by national advertising. I have seen their advertisements through a great many years. We also carry the National Biscuit Company's crackers. I am a member of Associated Food Stores, not a voluntary chain, a buying exchange, co-operative. We operate our own warehouses. My understanding of a voluntary chain is a chain controlled by a wholesale grocer, a jobber-sponsored chain. This is an association of independent retailers. Our combination is merely for the purpose of purchasing economically. We are our own jobbers, have a warehouse and headquarters and concentrate our purchases. The purpose is volume and better management. The National Biscuit Company recognizes that combination with various discounts.

RE-DIRECT EXAMINATION.

THE WITNESS: I cannot say what of those stores carry the Kellogg's Whole Wheat Biscuit. In that group, every man minds his own business, and he has

nothing to say about what the other man shall handle. They simply pool their orders. Otherwise, they are independent.

All these methods, such as combination including Whole Wheat Biscuit, counter displays, and so forth, I believe would have a tendency to help introduce a new product like Kellogg's Whole Wheat Biscuit to the general public. A concern like the Kellogg Company, handling many different products, can and does advertise its new products on the cartons of its old products. I believe that is practiced by a good many manufacturers.

THOMAS W. LAUGHLIN.

Deposition taken at San Francisco, California, February 9, 1933.

Direct Examination.

The Witness: I am forty-four, live at the Ambassador Hotel, and am chef there. It is a second-class hotel, located at Eddy & Mason Streets, San Francisco, with two hundred and fifty rooms. We handle all the Kellogg products in that hotel, among them Kellogg's Whole Wheat Biscuit. They are served every day in the restaurant of the Ambassador Hotel, since we have changed over to them, I think, about four months ago. We had some of the Niagara Falls or original Shredded Wheat at that time, until we ran out. We have not renewed our supply of that product. I do all the buying. I bought Kellogg's Whole Wheat Biscuit because I think they are a better biscuit. I like the way they are packed in the individual package, more sanitary and kept fresher that way. They are served in the carton to the table. People see what they are getting. I really think they are better biscuit. People seem to like them better. We have had a better sale since we put them in.

We have had no complaint from customers at all about Kellogg's biscuit.

Our waiters take the biscuit to the table in the individual Kellogg carton. The biscuit are removed from the carton in the customer's presence. They see what they are getting. The biscuit are mentioned on our menu cards. Occasionally we have little specials, Biscuit with sliced bananas or pineapple. The name Kellogg is mentioned in connection with the biscuit. At the better class houses, it is the customary practice of the restaurant trade to serve products like biscuit and corn flakes out of the carton in the presence of the customer. I have handled the Kellogg biscuit in different places. I did not like the other, because, after the package is opened and standing, if they are not served at once, they seem to collect moisture and get soggy, unless they are put in the oven and dried out. It is not as good a biscuit as the other, not so crisp and dry. You get better results and more satisfaction in serving. That is like practically all the Kellogg products. They have all been better sellers.

I give my orders to some representative of the Kellogg Company who stops at the hotel. I give my orders to him and the goods are delivered direct. I do not know of any jobbing houses who predominantly supply or serve the restaurant and hotel trade. Jobbers all handle Kellogg's biscuit, I think. We buy nearly all our groceries from Sussman & Wormser. I could buy Kellogg's Whole Wheat Biscuit through any jobbing house. I think they would sell it to me in small individual cartons. The use of individual or small cartons helps the sale of cereal products. We have built up quite a bit since we put them in. People seem to like them better after they have tried them out. The service looks a little better. They see they are getting it fresh right out of the package that way. It stands to reason they are more sanitary. The product keeps

cleaner and fresher in a small carton. If you tear the top off the box, it is exposed to the air. I do not think the name Kellogg on the carton would hurt the sale of that biscuit. I think it would surely help it. It is a well-advertised brand.

Since putting in the Kellogg biscuit, we have stopped buying Niagara Falls Shredded Wheat. We are not using it any more. There is a little difference in size between the two; but I think the Kellogg biscuit is a superior biscuit to the other. As far as size goes, there is not much difference in size or shape. It is a little smaller, more oblong, and a crisper biscuit than Shredded Wheat. I think both the Niagara Falls and Kellogg biscuit are shredded wheat biscuit. In that sense they are both shredded wheat biscuits. I felt I did not wish to carry two kinds, so I dropped the Niagara Falls and put on the Kellogg biscuit. There was no use carrying two. We got a little better sale with the Kellogg. I like the quality of the Kellogg biscuit better than that of the old biscuit. Except the size and crispness, they are both shredded wheat. I did not notice any other difference in taste or appearance.

Cross-Examination.

The Witness: Before I took on Kellogg biscuit, I was selling Shredded Wheat in the large package. I did not know there was an individual package of shredded wheat, aside from Kellogg's. I never saw the package, Defendant's Exhibit 1. I have always got the large package. I did not know they put it out small. If I had known it, I could possibly have gotten that size in Shredded Wheat.

I obtained my supplies of Shredded Wheat through a jobber. I never got them direct from the National Biscuit Company.

I have been with the Ambassador Hotel for about six months. Before that, I was at the Gowman Hotel,

Seattle. They had both Shredded Wheat and Kellogg's biscuit there. We were using the large package of Shredded Wheat, and the large package of Kellogg's biscuit. I had never seen the biscuit put up in the individual package until I came here. I believe a Kellogg salesman called on me, solicited my business, and showed me his biscuit in the small package. I tried it out.

I do not know whether the price of the Kellogg biscuit is greater or less than that for Shredded Wheat. I have no menu card with me. The Kellogg people furnish little printed specials, Kellogg's Shredded Wheat Biscuit with sliced bananas or with pineapple, to pin or clip on the menu.

If a customer in the restaurant asks for shredded wheat, we serve shredded wheat. We do not have the other, so we serve them Kellogg's Whole Wheat Biscuit. That is what is specified right in the menu. I think it says Kellogg's Shredded Biscuit. If the customer asks for shredded wheat, he gets Kellogg's biscuit.

I have been in this line of business in various parts of the country about twenty years. During all that time, I have been more or less familiar with Shredded Wheat. All restaurants carry it. When they carry it in the large package, it is put in a dish for the customer without the package. In Seattle, that was true of both Kellogg's biscuit and Shredded Wheat. Nowadays, nearly all cereals are put up in individuals; but you get a little better price in bulk in the large package. Some serve it that way, and others use the little package brought out to the table.

I did not know about either product being in individual packages until my experience here, in all my twenty years. I do not have anything to do with the pantry work. The cereals are not handled out of the kitchen. I do not pay much attention to it. I am the

buyer, and I have been the buyer before in lots of places. Some places the steward does the buying.

RE-DIRECT EXAMINATION.

THE WITNESS: When I heard of the biscuit in individual cartons, I regarded that as quite an improvement for the restaurant trade, and I was happy to buy those biscuit in the individual cartons. It was nicer service. I believe it stimulated demand for shredded wheat to serve it in that way. We expect to continue to serve it in the individual cartons. We like them better, with the advertisement of the maker going right to the consumer.

JOHN TIEDEMANN.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am twenty-two. I work for Tiedemann & McMorran, wholesale grocers, a concern about eleven years old. The Tiedemann in that concern is my father. We serve institution trade: restaurants, hospitals, state and federal government, eating houses, and hotels.

Tiedemann & McMorran handle products of the Kellogg Company of Battle Creek, Michigan, the general line, including Kellogg's Whole Wheat Biscuit. I would say they have serviced that to their trade since it was put on the market, approximately three years ago. We carry the whole wheat biscuit in both sizes of cartons, the large and the individual. I would say we have been instrumental in introducing that product of the Kellogg Company to the attention of our customers and getting them to buy it. We sell it to our trade in

considerable amounts. There is a demand among the trade for Kellogg's Whole Wheat Biscuit which has existed since it was put on the market, to my knowledge.

We have regular salesmen who solicit orders from hotels, restaurants, and institutions. We have handled the Niagara Falls Shredded Wheat in the past, and we still handle it when we have calls for it, in certain instances. Most of the calls, however, are for Kellogg's Whole Wheat Biscuit. We distribute samples of the Kellogg biscuit to our trade. I personally am not in charge of the sale of Kellogg's Whole Wheat Biscuit to these institutions. My source of knowledge in regard to it is through watching the sales, solely, as they come under my observation.

In serving the product in hotels and restaurants to which we sell them, as far as I know, most of them take the carton and cut it with a knife and place it before the individual, and the individual or the waitress empties it. I would say I have known of the servicing of restaurants and hotels with individual cartons for five years. The sale of cereal products in the individual cartons is on the increase. Kellogg's Whole Wheat Biscuit has a substantial distribution in hotels and restaurants throughout my territory. My traveling men take in from King City, California, to the Oregon line. King City is about two hundred miles out of San Francisco. The Kellogg Company have furnished us with advertising matter for use in selling Kellogg's Whole Wheat Biscuit. They cooperate with us very much in the sale of the product.

CROSS-EXAMINATION.

THE WITNESS: I have been with my father's house five years, since I was about seventeen years old. I am not a college man. I suppose you might call me a

buyer. I have held various positions with the firm. I am with the firm for the purpose of learning the business. I have worked in various departments of the house, and I have been on the road selling part time, by myself. At present, I am in the purchasing department. I am not the head buyer.

It is the practice to serve individual cartons in restaurants, ninety-nine times out of a hundred, because it is the most convenient way and they do not open the larger packages, for the reason they would go stale. If they got a call one day for a certain product, it would probably be stale the next day, if they did not use it up. I have been among the various restaurants and hotels and have seen it. I eat in restaurants and cafes and occasionally order cereal. I never ordered shredded wheat in a restaurant. I have never had it served to me in an individual package. When we have a call for Shredded Wheat, we pick it up from a competitor, some other jobbing house. We no longer buy it at the National Biscuit Company, but we did. We do not carry it in stock regularly any more.

If we had an order for Shredded Wheat, we do not sell it with Kellogg's Whole Wheat Biscuit. We do a good deal of bidding on Government departmental contracts. We supply the Naval base and Government hospitals. They issue specifications when they are ready to purchase supplies, which sometimes call for Shredded Wheat. When we get an item like that on an invitation to bid, we just put in the brand Kellogg's, and our price and the size package. It is not altering the specification at all. We just write Kellogg's into the specification. I cannot say that definitely, because I do not do that work. I have seen Kellogg's written in, but I would not say whether it was done all the time or not.

We sometimes get invitations to bid from a public institution with specification of Shredded Wheat, 36 cartons to the case. In that event, our house changes

the size to twenty-fours, because Kellogg's is packed twenty-four to a case. I cannot say whether the Navy base would accept a bid like that with a change in the specifications, but the Government department do accept bids of that sort with those changes in the specifications. We get contracts for them. If a Government department or specification calls for Shredded Wheat, thirty-six cartons to the case, we change that and supply them with Kellogg's. We do not attempt to obtain Shredded Wheat made by National Biscuit Company to fill that order, unless the specifications have not been changed to read Kellogg's. If they are changed, they are changed by our man.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know whether the specifications usually say "shredded whole wheat biscuit." I understand the Kellogg's Whole Wheat Biscuit to be a shredded wheat biscuit. If I got an order for Kellogg's shredded wheat, I would fill it with Kellogg's shredded wheat biscuit. We do get orders for Kellogg's shredded wheat and do fill them with the Kellogg's Whole Wheat Biscuit. I do not have personal charge of the making or receiving of bids.

CARL DUBAC.

Deposition taken at San Francisco, California, February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a restaurant keeper, and I have been in the business for the last fifteen years. I have my own restaurant, the Busy Bee, and I have the John Cold Day with a partner. I operate the two restaurants, located at 141 Montgomery and 537 Sacramento.

I serve my restaurant customers with products of the Kellogg Company of Battle Creek, Michigan, and I have done that ever since I came to the Busy Bee. As far as I can see, the people demand Kellogg products, and they name the products like cereals and shredded wheat biscuit. We do not have any trouble with it. We sell plenty of it. I handle Kellogg's Whole Wheat Biscuit in both the small and large cartons. I keep it in the larger packages, because we could not afford to buy a case containing a hundred packages. We do not sell it fast enough and it would get stale. We buy it in large packages in order to have them fresh. Now I understand they are putting out packages a hundred to a case, mixed kinds. In that event, I prefer to have the small packages, individuals. I have the individuals in my store, of Kellogg's Shredded Wheat Biscuit. We display small packages in a conspicuous place and serve a small package to the customer, opened before the customer, so the people can see what they are getting. The small cartons help keep the product fresh. We can use four or five different kinds in a hundred-package case, which keeps fresher than if I get one kind. A package containing one hundred Grape-Nuts takes too long to sell. I can serve people fresh cereal if I have twenty packages of each. The Kellogg Company has lately furnished those combination cases. As a restaurant man, I regard that as an improvement in service. I suggested to the agent from whom I buy them that it would be to their advantage and ours to put five or six different kinds in a hundred case package, because we can use them fresh and there will be bigger demand. If you get stale cereal, you will not come back; but you will naturally go back to the restaurant where you got a fresh package. For that reason, I like twenty of each, so we may have fresh cereal right along.

To my knowledge, the practice of serving cereals in individual cartons in the restaurant trade is an increasing practice. It is becoming a general practice in the restaurant and hotel trade. Lately, the cases of cereals I purchase from the Kellogg Company contain an assortment in individual packages. I have not had complaints from my trade, to my knowledge, from servicing them with Kellogg's Whole Wheat Biscuit in individual cartons. Many times I hear the customer ask for Kellogg's. They say at times to give them some cereal, Pep, corn flakes, or rice or shredded wheat. At other times they are calling for Kellogg's. Some time ago I handled the National Shredded Wheat. I do not handle it at present. When I did, that was served in the large cartons. The National Shredded Wheat came in individual cartons also. The only reason I discontinued that is I could not use one hundred packages of each at a time. Consumption did not justify my buying one hundred at a time. Naturally, if I could buy an assortment, I would prefer it.

CROSS-EXAMINATION.

THE WITNESS: I had the Shredded Wheat ever since I opened the business. I have some now. Right now, I have a Shredded Wheat in my display all day long. I have customers who ask for Shredded Wheat, and I serve it to them. I have no individual Shredded Wheat packages at present. I bought some, but I have some in larger cartons, and I am trying to use that first. I serve the biscuit in a dish. I have also the larger size Kellogg cartons. I am serving those too. I take them out and put them in a dish. In front of the people I keep them in the case. We take the Shredded Wheat right out of the larger package and put them in the dish right in front of the customer. They see me do it. I know I can obtain Shredded Wheat in individual packages like Plaintiff's Exhibit 21. We never

could get them in broken lots before. Lately, we are getting an assortment in the hundred-package case with Shredded Wheat included.

We have printed menus in our restaurants. We do not carry the cereals by name. We just have Shredded Wheat on our menu cards. This is one of our Montgomery Street menus, which carries "Shredded Wheat with cream, fifteen cents." If a customer comes in, looks at that card, and asks for Shredded Wheat with cream, he gets whatever is in front: Kellogg's or Shredded Wheat. In that event, he does not get National Biscuit Shredded Wheat, because I have none on hand. I do not think I have National Shredded Wheat in my case at all. I would have to look and see.

If we had both products in our case and on the menu card, and the customer asked for a bowl of Shredded Wheat, the waitress would ask him what kind of shredded wheat, Kellogg's or the National, when we had that. Naturally, if we have both products, I and my waitresses will recognize two kinds of shredded wheat. She will ask what kind of shredded wheat they want, and then they tell her. Generally, if they ask, we try to have both, to maintain the business. I really do not know if we have both kinds on hand now. Sometimes the customers say "Kellogg's shredded wheat" and sometimes, occasionally, a customer will say "National Shredded Wheat." They do not always say just shredded wheat. Sometimes they do.

As long as we have individual packages and now have an assortment, we carry more of Kellogg's biscuit than of the National. I do not know what the National sell besides Shredded Wheat. I have been familiar with Shredded Wheat for the last thirty years. I was eighteen years with the Southern Pacific commissary or dining-car department. They bought Shredded Wheat

to serve on their cars and they bought individual packages, for a good many years. During all that time, until Kellogg's Whole Wheat Biscuit was put on the market, I knew Shredded Wheat and just the one item, which meant, to me, the package with the picture of Niagara Falls. The general public was pretty familiar with Shredded Wheat, and they asked for Shredded Wheat repeatedly, surely. I do not remember any other biscuit except Shredded Wheat like that pillow-shaped biscuit. I remember Shredded Wheat. I used it on the ferry boats about thirty years ago. As I remember, that was the name it was always called by. Plaintiff's Exhibit 164 is the menu card I just identified.

RE-DIRECT EXAMINATION.

THE WITNESS: When I speak of shredded wheat, I have in mind that shredded wheat there, Plaintiff's Exhibit No. 1, one of these pillow-shaped biscuits. That is what I mean by shredded wheat. The Kellogg Company is making that kind of biscuit, and the National Company is also making that kind of biscuit.

I am not solicited by salesmen of the Kellogg Company to buy their products. I do not come in contact with the Kellogg sales organization. I buy from my grocer. I get the individual cartons from Lyma-Scheer. I call them and order the assorted case. I say I would like to have so many packages of shredded wheat, so many of Grape-Nuts, and Rice Puffs, and so forth. Sometimes the salesmen come around. Kellogg's Whole Wheat Biscuit was first introduced to me by some of the customers wanting Kellogg's. They asked for it, and others asked for the National. When I got requests for Kellogg's Whole Wheat Biscuit, I placed orders for it with my jobber.

MARK B. CONNELLY.

Deposition taken at San Francisco, California, February 9, 1933.

Direct Examination.

The Witness: I am a grocery merchant, doing business under the name, Pay'n Take It Grocery and Crystal Palace Grocery Shop. One store carries approximately twelve to fourteen thousand dollars of stock, and the other one six to eight thousand. The larger store is the largest store in San Francisco. The other one is approximately next to it. I have been in the grocery business in my own name, approximately five years. I have been in the grocery business generally more than twenty years. My stores are cash-and-carry grocery stores. A customer comes in and picks up a basket, walks up and down, picks up articles, takes them to the cashier's desk. Boys at intervals around the store might suggest articles to them, or there may be sales people demonstrating and selling them articles.

We handle the entire Kellogg line of products in our stores, including Kellogg's Whole Wheat Biscuit. That is a shredded wheat biscuit. There is more than one concern, to my knowledge, making a shredded wheat biscuit at the present time: the Shredded Wheat Company, or the National Biscuit Company, and the Kellogg Company. We handle both those types of shredded wheat biscuit. We have displays on the shelving and also on the floor space. One of them is rather high for some people to reach, so we have stores large enough to make a floor display on both, or a full line of cereals. Those two products are displayed in the cereal department of my stores.

We have handled the Kellogg's wheat biscuit four or five years, since we have been in business, contin-

uously. About one in four or one in five customers select the Kellogg's biscuit, as compared with the ones who pick out the National product. I would say there is a genuine consumer demand in my store for Kellogg's Whole Wheat Biscuit. We have had men come up there, open up packages, and demonstrate it. The name itself has sold the full line of products, as far as my store is concerned, at all times, the Kellogg name. Without hesitation, I would say that the Kellogg name on that whole wheat biscuit is of value in introducing it to customers. I have advertised Kellogg's Whole Wheat Biscuit in the daily papers, under the name of Kellogg's wheat biscuit. I do not think those ads had any bearing on introducing Kellogg's biscuit to customers. It sold right along, anyway. I would say the name was enough to sell it, as any advertised product sells so much of it, anyway. Any advertising has a good effect on any of our products. I have owned this one store for approximately a year. We have had no demonstrations there. Last year, in one store we had demonstrations and displays. I just put them into one store this last year. The other store I have had for four and a half years. The demonstration was in the larger store, the Pay'n Take It Store. In all my stores, the practice has been the same, the customer picking out what she wants with the help of somebody or demonstration or something suggesting it to them. There may be some demonstrator in the store at all times. There may be somebody there five days a week or six days a week. The demonstrator will open up an edible product and sample them to consumers or show them how the product is to be used at home or how to use it to their advantage and talk on the product as much as they can. That form of demonstration has been given in my stores on Kellogg's Whole Wheat Biscuit.

I carry the National Biscuit Company's crackers, cookies, and Wheatsworth products; but I buy my Shredded Wheat from a cash-and-carry wholesale chain store. I have made it a practice to buy my Shredded Wheat from the wholesale house at all times.

The Kellogg salesmen take my order on the whole Kellogg line, including the Corn Flakes and Pep and Whole Wheat Biscuit. They take the order to the jobber and he fills it and sends it out. As far as I know, Kellogg's products have been distributed successfully through jobbers. At the present time, I am buying the National Biscuit cracker line through a buying organization. I have bought it direct, but the buying organization gives me an advantage. There is no other wheat product to my knowledge in competition with these two brands of shredded wheat. I handle Wheaties and wheat flakes. I would say that the average customer shifts from one cereal to another at times. In that sense, I would say that different wheat products compete with each other to a certain extent. A customer who changes from shredded wheat to wheat flakes is, for the time being, probably lost to shredded wheat.

I do not know any other name for shredded wheat or shredded wheat biscuit or shredded whole wheat biscuit, as a common descriptive name for that product that would tell anybody what the product was. You have covered it all right there.

CROSS-EXAMINATION.

THE WITNESS: It is true that there are a hundred or more dry cereals on the market. In my opinion, when you are talking Shredded Wheat or shredded wheat biscuit or whole wheat biscuit, they are not the same kind of thing as Post Toasties or Corn Flakes or Wheaties. A hundred of them would be too gen-

eral. Whole Wheat or shredded wheat biscuit are used more exclusively by certain classes of people. Wheaties seem like a different commodity entirely.

I have been in business more than twenty years and I have known Shredded Wheat all that time and before. I was in the Middle West. We did not use as much of it as when we moved to Montana and the coast. I have known Shredded Wheat for a long time.

There is no doubt that Kellogg's Whole Wheat Biscuit competes with Shredded Wheat, and that Kellogg's Whole Wheat Biscuit answers the call of the Shredded Wheat customers. I am buying the National line through a wholesale grocery house, Kockos Brothers, because I get a better discount at the time I buy, instead of waiting a solid year for it. I do not belong to them, pay any dues, or have any connection with them. He gives me the full discount and bills it to me. The National Biscuit Company recognizes that privilege on my part.

I do not buy my Shredded Wheat that way, but from the Equitable Cash Grocery.

Without any hesitation I would say that the Kellogg name has a reputation that helps sell their products. There is absolutely no doubt that the Kellogg name on a package of Whole Wheat Biscuit is a good recommendation. I do not know whether our Kellogg package of Whole Wheat Biscuit has a window in it, because I just do the buying. I think it is the other one. That side looks more familiar to me, with the picture of the biscuit in the dish. I have been in the retail grocery business in my own name for five years, but I can go back twenty years that I have been associated with the grocery business. I have been traveling on the road. Previous to being in the grocery business, I had spent considerable time on the road.

Our store is self-service, but we have some boys in the aisles to assist customers. At all times we offer to assist them. Some of them decline it and lots of them accept. On certain days we may attempt to apply a little salesmanship in connection with the self-help. We have approximately ten thousand customers on Saturday, so you can imagine it would take plenty of help if I had to do that for all. My customers do not have to follow a regular track. Mine is criss-cross always. They can go in any part of the store. One of my stores is a hundred and twenty-six feet deep, forty-two feet wide. The other store is about one hundred by sixty, the selling space. I can criss-cross them and they can go any way they want in the store. My customers sometimes have to be told where to go. We display the Kellogg Whole Wheat Biscuit and Shredded Wheat Biscuit with the cereals. They are all in one place, or two or three places. Our stores are big enough to have two or three places. The customer goes to a given zone where the cereals are, and she can exercise her own choice which one to take; except that we might have a demonstrator there who would be working on a product and would try to distract her attention from one product to another.

MRS. CHRISTINA S. MADISON.

Deposition taken at San Francisco, California, February 9, 1933.

Direct Examination.

The Witness: I am an editorial woman doing publicity and things of that sort. I have one son. I have met Mr. West of the Kellogg Company twice, and I am here today on his invitation. I do not know anybody connected with the National Biscuit Company.

I have no bias or prejudices one way or the other between the National Biscuit Company and the Kellogg Company. I know and use the Kellogg's Whole Wheat Biscuit. I have used it, I think, about two and a half years. I had a package out at the Food Show in the fall, I think, about two years ago. I used the package and liked it very much. I had previously used the regular Shredded Wheat, the other brand. I personally like Kellogg's biscuit better. I think it is quite different in flavor. I would say the Kellogg product was a shredded wheat biscuit, because it is a small biscuit made out of shredded wheat. I did not think it tasted the same. I have continued to use the Kellogg shredded wheat biscuit. I buy it at cash-and-carry self-service stores. I walk into the store and pick out what I want without the service of a clerk, always. That is the way I buy my Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I was not very much of a user of Shredded Wheat before I used Kellogg's biscuit. I have bought it a long time before. I have known about it a good while. It was used in my mother's home, but I had never used it myself. In my mother's home, it was purchased in a package and served on the table in a dish. I knew it when I was a child, as shredded wheat.

My husband is in the advertising business, connected with the *San Francisco Chronicle*. I do not know whether they carry advertising for the Kellogg Company. I do no advertising work for the Kellogg Company myself. I read all the papers and I see the advertisements, but I could not swear where they appeared. My husband is national advertising manager of the *Chronicle*.

FRED F. ROBBINS.

Deposition taken at Los Angeles, California, February 10, 1933.

Direct Examination.

The Witness: I am forty-five years old, a wholesale grocer. I have been in that business twelve or fourteen years. My concern is the Hoagland-Robbins Company. Our method of wholesaling is usually cash-and-carry. We have a general warehouse, a central warehouse and branch cash-and-carry depots scattered over strategical points. We make the deliveries from our main warehouse to our branch depots, merely to keep the branch warehouses stocked. There is no general arrangement. It is naturally governed by conditions, the building, size of building, and various things entering into it. The merchandise is usually placed in sections. Where space will permit, cereals are usually placed in one section, soaps in another, and so on. The customer goes into the branch and takes his own merchandise. He does not, as a rule, go into the warehouse and pick it up. He is generally waited on by a man; but he goes to the desk, gets his order, and pays for it, and takes it away. Our man usually assists him in taking the merchandise out. If the man is busy or in a hurry, he may wait on himself if he likes and if he knows the location of the stock. The merchandise is usually handled in case lots.

We handle Kellogg's Whole Wheat Biscuit and have had it two or three years. I know what kind of product is contained in the packages. I would describe it as a shredded wheat. I do not know of any other name that describes it as well as that. I handle the other shredded wheat, formerly put out by the Shredded Wheat Company, but only in a small way, simply because they have a policy of selling directly to the retailer, which takes it away from the jobber.

I have little demand for Niagara Falls Shredded Wheat. We have not noticed any confusion between the two products. We have not, to my knowledge, had any customer return either one desiring the other. I am not as familiar as I might be with things that go on in the warehouse, because my duties are in the office.

If people come in and say "Give me Kellogg's Shredded Wheat," or "Give me Shredded Wheat," we usually know what they want, from past dealings with them, and we give them what they want. We sell a great deal of Kellogg's products. We consider that there is a demand for the Kellogg's Shredded Wheat or wheat biscuit.

We service the restaurant trade, indirectly. We have restaurant supply houses that buy our supplies from us, selling directly to the restaurants. Those restaurant supply houses buy the Kellogg Whole Wheat Biscuit from us. They buy them in the individual size cartons, packed in boxes. The restaurant supply houses buy Kellogg's Whole Wheat Biscuit from us in cases with the individual cartons in. That is the only way in which we service the restaurant and hotel trade.

CROSS-EXAMINATION.

THE WITNESS: I have been in the grocery line fourteen years. I had no eperience in it prior to that time in the field. I have been familiar with Shredded Wheat for a good many years. Before the National Biscuit Company took it over and began distributing it, we carried it in quantities. Before Kellogg's put up what they call the Whole Wheat Biscuit, we carried Kellogg's shredded wheat biscuit. I do not know when that change was made. It was some few years ago. We carried Kellogg's biscuit I would say immediately after they put it on the market. That was a long time after

we had been carrying Shredded Wheat. It is perhaps fair to say that I was familiar with Shredded Wheat before I was in the grocery business. It is and has for many years been a well-known product. I always knew it by the name of Shredded Wheat. For a great many years, when my customers sent me in an order, written or oral, for Shredded Wheat, that is what I used to fill the order. I would not say that it is true that if a customer merely asked for shredded wheat, I would know what he meant. Since the Kellogg Company has had a product on the market, we do not consider Shredded Wheat as meaning the one product. If we get an order for shredded wheat at the present time, we usually give them Kellogg's Whole Wheat Biscuit, without any inquiry as to whether they mean Kellogg's or something else. I may not be as familiar with it as those men working in there. You cannot control ten or fifteen men. One of them might give Kellogg's and the other one might not. One fellow might consider it so, and the other fellow would not. I would not say it was a general policy that would be followed. I am answering, merely, from what is in my own mind. There might be some confusion between the two products with somebody else, but not to myself. I know there are two, and if a customer comes in and asks for shredded wheat, my impulse is to give him the Kellogg product, because that is what I carry. Naturally, we carry them and we would not want to miss the sale. We carry Shredded Wheat now in a modified way. It is so small, I might say we do not really carry it. I was just noticing the other day an invoice that came through for five cases. That is the first time I noticed any in some little time. A customer would have to specify Shredded Wheat made by the National Biscuit Company or he would get Kellogg's, perhaps, on account of the fact that we carry one principally.

Prior to about the year 1927 or 1928, we had only the Shredded Wheat Company's Shredded Wheat or National Shredded Wheat, and that is a product I had known prior to that time for a great while. At that time, it was always asked for as Shredded Wheat.

If somebody asked me to describe Cream of Wheat, not knowing the manner of manufacturing it, we frequently say it is similar to Cream of Wheat or like Cream of Wheat. That seems to describe what we are trying to say. Likewise, in describing the Kellogg's products, I would say it is shredded wheat. It looks like it, is made in the same shape, I think; but I do not know that they have the same color or the same size. I have not examined them lately. I would say either one of the products would fill the same want. I think the Kellogg Company have changed the name and no longer call it shredded wheat. I believe they call it Whole Wheat Biscuit. So they have evidently found another name for it besides shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I would not say that Whole Wheat Biscuit is as descriptive of what the product actually is in the general minds of the people as is Shredded Wheat or Shredded Wheat Biscuit. I stated to Mr. Vilas that the Kellogg product, in my opinion, is shredded wheat. That is what it looked like. If I were asked to describe the Kellogg product, physically speaking, I would say it is shredded wheat. I do not recall having noticed any advertisements of either of the shredded wheat products in this market, by either retailers or wholesalers.

RE-CROSS-EXAMINATION.

THE WITNESS: I think the name Shredded Wheat describes the product better than any other name. I have shredded coconut, and it is shredded the same

way. It is in long shreds. You can shred it long or you can shred it short. I do not know that I ever gave the word *shredded* close analysis. I never went to the dictionary. I have an idea what it means. I think it means to tear apart in small pieces, into shreds. I do not know how Shredded Wheat is made. Assuming that the wheat berry is pressed by strong compression rollers into a long string, I would not say that that is a shred. I would think that shredded would mean cut. That is the general or usual or accepted meaning of the word. I would not say it was shredded if it were rolled into a string.

MRS. BLANCHE STEINER.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. I do not know anybody connected with either the National Biscuit Company or the Kellogg Company very well or personally. Mr. Hoover, who I understand is a Kellogg salesman, asked me to be here today. I do not know anybody connected with either companies. My acquaintance with Mr. Hoover would not influence my testimony in any way in the case. I do not know him personally. I have just met him in the restaurant.

I am familiar with the product known as Kellogg's Whole Wheat Biscuit. I use it and have used it approximately six or eight months. I bought it from a store, as it was a Kellogg product and I have used their products, most of which are very good. I had used the other biscuit. I did not care for them so very much, and I wanted to see if the Kellogg biscuit was better. I have bought it ever since. I did not continue to buy the other biscuit.

I do not remember seeing any advertisements of the Kellogg Biscuit. I used to work in a restaurant, but I believe that was before the Kellogg shredded wheat biscuit. I personally have used the other Shredded Wheat biscuit. Since my first acquaintance with the Kellogg biscuit, I have continued to use the Kellogg biscuit.

CROSS-EXAMINATION.

THE WITNESS: I keep house. I can hardly remember when I have not seen the old Shredded Wheat. I always knew it as Shredded Wheat, and I bought it a good many times in stores, years ago. When I bought it, I always asked for Shredded Wheat; did not know any other name to ask for. It was known as Shredded Wheat or Shredded Wheat Biscuit.

I happened to see the Kellogg biscuit in a store where I happened to buy, not a store in which I was interested in any way. The clerk did not call my attention to it. I just happened to find it. It was in a large package. I could see the biscuit through the window. I think it was a package like Plaintiff's Exhibit 168. I only saw the ends of the biscuit through the glassine window. On the other side, I saw the picture of two biscuit in a dish, which looked like Shredded Wheat biscuit. I do not care so much about Shredded Wheat, but I saw this package and thought I would try it. I found it better, liked it better, and I have been using it since then. When I saw it, I recognized it was like the old Shredded Wheat in appearance. Being familiar with Kellogg's products, I thought I would try it.

RE-DIRECT EXAMINATION.

THE WITNESS: The Kellogg biscuit are not the same size as the other. I observed that the first time I used them.

PHILIP RAY RICE.

Deposition taken at Los Angeles, California, February 10, 1933.

Direct Examination.

The Witness: I am thirty-three years old, the manager of a grocery store, Vick's Stores, Inc. We have three self-service stores, where the customer waits on herself. All the merchandise is displayed. When a customer comes in, she picks up a basket and starts buying whatever she wants, taking the stuff off the shelves and putting it in the basket. Then they come up to the check stand and pay for it. She takes the merchandise off the shelf herself. No clerk hands it to her.

We handle a product known as Kellogg's Whole Wheat Biscuit, which is displayed on the shelves of our store in the cereal section. I would say that product is a shredded wheat biscuit. We also handle the other Shredded Wheat, a product called Shredded Wheat Biscuit. That is also, physically speaking, a shredded wheat biscuit.

We find a demand for the Kellogg product in our store. It sells right along. We advertise the Kellogg line, Whole Wheat Biscuit among the other items. It is advertised under the name Kellogg's Whole Wheat Biscuit. Kellogg's Shredded Wheat is packed in a pasteboard carton with a cellophane or glassine front, displaying the contents of the carton. All those I have handled in the past three or four months are cellophane-front cartons. Before that there were some in a case for display purposes. Ever since I heard of Kellogg's Shredded Wheat, they packed some of them that way. I would use those for display purposes. I would say that a customer, in looking at the package, should know exactly what was in it. The appearance

of the package has a certain appeal to her. If the cellophane front were omitted, I would say that the customers would know right away what was in the package, now, after it has been on the market. A certain amount of it would be sold, regardless of whether it had a cellophane front. I think the sales would be greater with the cellophane front. The most accurate description of the product is a shredded whole wheat biscuit. There are a lot of whole wheat biscuits on the market, but they are not shredded. To my knowledge, there are two kinds or makes of shredded wheat biscuit on the market; the product that has been known for years as Shredded Wheat, now made by the National Biscuit Company, and Kellogg's shredded wheat. There are, however, a number of products known as whole wheat biscuit.

I think my stores are typical of a large number of smaller stores in this territory. I think the other stores follow generally the same practice I do in advertising new products to the consumer. We have not used other methods besides display on shelves and newspaper advertisements to bring Kellogg Whole Wheat Biscuit to the attention of our customers. We have had Kellogg demonstrations of their whole line, including the Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I have been connected with the grocery business about fifteen years one way or another, throughout most of my business career, with the exception of seven years traveling in another line. The rest of the time I have been in the retail grocery business. I manage two stores. We have three altogether. It is an entirely independent group. To the best of my knowledge, they have no other connection.

During the fifteen years that I have been associated with the grocery business, and ever since I can

remember at all, in fact, I have known about Shredded Wheat biscuit. It has always been known by that name. It was a very well-known, nationally known product, as far back as I can remember, always called for as Shredded Wheat. There was only one item with which to fill such an order. The name described the product. Until the time that Kellogg's shredded wheat came out, that was the only product of its kind, with the exception of Muffetts, and also Triscuit, a similar product. Triscuit is made by the Shredded Wheat Company of the same material, but flat. I would say Muffetts was a poor imitation of Shredded Wheat biscuit. Kellogg's is shredded wheat.

Looking at Plaintiff's Exhibit 168 with a picture of two biscuit in a dish, that looks like a Kellogg's shredded wheat carton. On the other side there is a display window. That is the way we now carry it. Ever since I have handled it, there has been a cellophane front in some packages of every case of it. Those that did not have the window had a picture like the other side of the package. Looking at Plaintiff's Exhibit 167, I see no difference in it, except that it has no window. It has the picture on both sides. All that I have now have windows in them; so that, when they are displayed on the shelf with the window side out, you see the ends of the biscuit and the customer can see what it contains.

We carry Shredded Wheat biscuit made by the National Biscuit Company, displayed on our shelves, also. Customers come and take that, too. In our stores, the customer wanders about at will, not through definite aisles. Kellogg's shredded wheat and National Shredded Wheat are displayed side by side. One is on the end of a rack and the other is right next to it. If she comes down one side, she will see National Shredded Wheat first; if she comes down on the other side, she will naturally see Kellogg's first.

I think I advertised Kellogg's biscuit as Kellogg's Shredded Wheat once. The salesman told me that it was wrong. I called it Kellogg's Whole Wheat Biscuit after that. I do not receive telephone orders for anything like that. Many times a customer will ask for a particular item. I would not say they ever asked for Shredded Wheat. They might ask where the Shredded Wheat is. We will tell them if is in the cereal section. Our idea is to let the customer get what she wants. I have seen the national advertising done by the Shredded Wheat Company and the National Biscuit Company. I know the item, as far back as I can remember, has been advertised quite generally as Shredded Wheat. I know how it is made. I have been to the factory at Niagara Falls. I associate Shredded Wheat with Niagara Falls and the picture of it on the box in two ways, as to cleanliness. That has been their motto over there in that plant. I have not been to the Oakland plant. I have not noticed it for some time, but they used to advertise "the cleanest and most hygienic food factory in the world."

I recognize Plaintiff's Exhibit 10. That looks like the plant in Niagara Falls. There it is: "The cleanest and most sanitary food factory in the West." They advertised that differently several years ago. They said "in the world." They are not taking in quite so much territory now. This is an Oakland carton. That building does not look like the one at Niagara Falls.

Looking at Plaintiff's Exhibit 1, I recognize that as containing a picture of the factory at Niagara Falls. That is the one with which I am familiar now. I remember seeing a carton like Plaintiff's Exhibit No. 10, with a picture of a dish and two biscuit in it in the National Biscuit Company's product. I recall that for some time back.

RE-DIRECT EXAMINATION.

THE WITNESS: All the deals for buyin; in that line are made in the office. To my knowledge neither of these biscuit had been offered at attractive consumer prices to attract customers to them. The only specials I have any knowledge of are those I run myself. I have run specials on both the Kellogg's and the Niagara Falls. There has been a price differential between the two at different times. I would not advertise both items in the same ad unless I had the same price on both of them. I have advertised them just one at a time. When I advertise Kellogg's Whole Wheat Biscuit, I advertise the price in connection with it. I regard the price I named as an attractive price to the consumers, which would attract them to that product.

The Kellogg Company is a heavy advertiser. I would say the name Kellogg on a package is advantageous, in that it means something that would help the sale of the product to the trade, to the consuming public. Kellogg's have a color scheme of their own that they seem to carry out generally, throughout their entire line. The whole wheat carton is in the same color as the other cartons.

The self-service store is a popular type of store and the only successful type of store in this territory. They are all that way in this territory. There are a lot of them, in Southern California.

RE-CROSS-EXAMINATION.

THE WITNESS: There are a few service stores in Los Angeles, not many. I do not buy the Kellogg item or the Shredded Wheat. I do not know the terms on which it is bought by my employers.

MRS. KEITH LEE.

Deposition taken at Los Angeles, California, February 10, 1933.

Direct Examination.

The Witness: We own a restaurant and run it. I think you would call it a "C" class restaurant. It has a lunch counter, six booths, and dining tables. We have operated that restaurant five years.

I use in my restaurant a product called Kellogg's Whole Wheat Biscuit, and we have used it ever since we opened. We put them on at breakfast in the little individual cartons. We have them on the back bar at the back of the counter. It is decoration, and we take the decorations down. In that way, you keep the product fresh. We sell them so fast, it keeps fresh, by displaying it on the back bar. They come in and do not know what they want. They say, "I will have this" or "that." They say they want shredded wheat or whatever they happen to see they want. I have never handled any other kind of shredded wheat besides Kellogg. Men will point at the package. They say, "I believe I will have that shredded wheat up there." Maybe they will say, "You had better give me some Krispies—Wheaties." They call them Wheaties sometimes. Whatever they happen to see and they want, they say, "I believe I will have that." When they point to the individual packages and say they want that shredded wheat, I just take it down, open the top of the package, cut it so they can take the shredded wheat out themselves, put it on a little plate, give them individual cream and the empty bowl with a little plate. The customer takes the biscuit out of the carton himself. We do not touch it at all. We usually follow that practice, for cleanliness. We are handling all sorts of dishes. You cannot wash your

hands after every order, so we do not handle any food. The customer picks up the carton and dumps the biscuit into the plate. That practice has always been followed during the five years we have had the restaurant. I believe that is a state law. It was supposed to be the law that we are not even allowed to open the top of a bottle of milk. The customer is supposed to open it himself. It is a state law; but we did it ourselves for cleanliness.

CROSS-EXAMINATION.

THE WITNESS: I know about Shredded Wheat made by the National Biscuit Company. I saw it on the market several years ago, and I believe I bought it and we used it long ago, too. I just did not happen to take it up when we were in the restaurant business. There seemed to be more demand for the whole Kellogg line, Corn Flakes, and others, so I just keep the whole line. I have been using the Kellogg line for five years. The Kellogg salesman did not visit me. We stocked first out of the Smart & Final, wholesale grocers.

I have never bought any Shredded Wheat from the National Biscuit Company or the Shredded Wheat Company, although I have known about it for a good many years. Of course, I go into a shop and see it on a shelf, and I might buy it. I have used it at home.

We have menu cards at our restaurant. Cereals are listed: "Dry cereals, 10¢; pure cream, extra, a nickle." That is the only way. We do not feature them by name. As a rule, our customers see what they want and ask for it. I think we have had little stickers I have put on once in a while. If I have a great deal of Corn Flakes I want to move, I feature that. I never had to feature Kellogg's Whole Wheat Biscuit.

My customers come in and ask for Shredded Wheat, and I take down the little Kellogg's package with two biscuit and serve it to them. Sometimes they ask for it as Shredded Wheat, and sometimes they will say, "Let me see; I believe I want that shredded wheat;" or "Oh, give me some of that." As a rule, when they name it, they call it shredded wheat. Sometimes they say, "The biscuit." Half the time when a man comes in for breakfast, his mind is on his work or his paper. Two-thirds of the time he does not know what he asked for. He just says, "Give me this or that."

RE-DIRECT EXAMINATION.

THE WITNESS: When the goods are delivered from the Kellogg Company, there is a supply of the little stickers with them, for All-Bran and Corn Flakes, and, I believe, Wheat Flakes. When I want to stimulate the demand in a certain line, I put the stickers on my menu card. It helps the sale a little bit.

I have never served any shredded wheat in my restaurant out of large cartons. I just use the individuals, because I do not want them to handle it. As far as I know, it is a state law. All I know about the practice in other restaurants is that once in a while I will go out and get a job somewhere else for two or three weeks. I watch what other people do a whole lot. They seem to be doing as I do. They seem to put the full carton on the plate as I do, in the better class restaurants.

RE-CROSS-EXAMINATION.

THE WITNESS: I recognize the little box you have in your hand as the kind I have on my shelves. That is the box that is seen by my customers when they point up and say "Give me some shredded wheat." Plaintiff's Exhibit No. 169 is the carton just shown me.

HARRY FIERSTINE.

Deposition taken at Los Angeles, California, February 10, 1933.

Direct Examination.

The Witness: My age is thirty-one, and I live at 1940 Golden Street, Long Beach, California. I am a restaurant owner, located at 631 West Anaheim, Long Beach. I have conducted that restaurant eight years this coming June. I am the proprietor. I would say it was about a "B" class of restaurant.

I have bought from the National Biscuit salesman, and I know the Kellogg Company representative. I am not conscious of any prejudices as between those companies that would color my testimony in any way. I have heard of the product called Kellogg's Whole Wheat Biscuit. I imagine it was first put in our place through their representative. I handle all the other Kellogg products. I think Kellogg's Whole Wheat Biscuit was introduced as part of the line at some time. I handle it in my restaurant, and I would say I have handled it a couple of years. I would describe it as a whole wheat shredded biscuit. There is the Kellogg's biscuit, and, I guess, the old original Shredded Wheat on the market. I do not handle the old original Shredded Wheat at the present time.

Kellogg's Whole Wheat Biscuit that I carry is supplied to me in the individual cartons, like Plaintiff's Exhibit No. 169. The cartons are displayed on a center case in my restaurant. It has a horseshoe counter, and a center case runs between the two counters. At one end all cereals are displayed, more than one carton. There is a demand for the product as service, served over the counter. We sell them to our customers. Some customers ask for Whole Wheat Biscuit and others ask for shredded wheat biscuit. We serve

the Kellogg biscuit when they ask for it by simply cutting the package and setting it in front of each customer with the bowl. We serve it that way because I think there is a state law prohibiting serving it in any other way and from touching the biscuit.

CROSS-EXAMINATION.

THE WITNESS: I am familiar with the original Shredded Wheat and have known it a good while. I suppose I remember it from the age of youth. I used to have it in my home when I was a boy. It was always known as Shredded Wheat Biscuit. It was the first product of its kind, very generally advertised. I have had it in my restaurant in individual packages. I do not buy it any more. The demand now seems to be for a whole wheat product. The original Shredded Wheat, to my knowledge, is not a whole wheat product.

I recognize the carton Plaintiff's Exhibit 1. I never read the printed matter on it. Looking on the back I see that it says it is a whole wheat product "Made of whole wheat; nothing added or taken away." Now, I believe, I realize I was mistaken in thinking it was not a whole wheat product. Another reason I ceased using the Shredded Wheat is that Kellogg's biscuit is a smaller, handier biscuit to serve. I find it handier to put in a bowl or saucer. To my knowledge there is no difference in the price to me, and I sell them at the same price I did the original Shredded Wheat. Our customers do not usually ask for shredded wheat. Some do and some ask for Kellogg's Whole Wheat Biscuit. They usually point to the package. If a customer asks for Shredded Wheat in my restaurant, I always tell him we have Kellogg's Whole Wheat Biscuit. It is sold in the original package. It has always been sold in the original package, so there is no doubt in their mind what it is. The invariable practice in my

restaurant when they ask for Shredded Wheat is to give them the Kellogg's biscuit and always tell them it is Kellogg's Whole Wheat Biscuit. You have to do that with any product. If they ask for a bottle drink like a Delaware, you tell them you have a Grape Drink but not the original Delaware. You have to do it.

When they ask for Shredded Wheat, if they ask for the original Shredded Wheat, I feel I have to tell them I am giving them something else. A customer seldom uses that language. He comes in and asks for Shredded Wheat, which does not necessarily, in my mind, apply to any particular biscuit that is shredded. It does not apply to the original package necessarily. I think it applies to any biscuit that is made in the same way. Nevertheless, I tell them we have the Kellogg's Whole Wheat Biscuit. I feel that I am giving them something that I must explain to them. Otherwise, I would not do that.

We have menu cards in our restaurant, of which Plaintiff's Exhibit 170 is one card currently in use. It is made of green cardboard, and there is clipped to it a typewritten sheet dated February 9th. That is one that has been in use recently. On the printed part, under the head "Cereals," is: "Pep, Corn Flakes, All-Bran, Rice Krispies, Shredded Wheat, Grape Nuts, with bottle of milk, 15 cents." Those are the dry cereals we have on our counter. Except for Post's Bran, I think all the others are Kellogg's. Puffed Wheat is not Kellogg's and Grape Nuts is not Kellogg's. That is right. But Pep, Corn Flakes, All-Bran and Rice Krispies are Kellogg's products.

In the same line with Rice Krispies and Puffed Wheat, the words "Shredded Wheat" appear. When my customers ask for shredded wheat with reference to that name, I give them the Kellogg's Whole Wheat Biscuit. When it is set before them, there can be no question in their minds what it is, the original package.

I have two people helping to serve in the restaurant besides myself. I do some as extra work. There are no instructions to the help to specify Kellogg's. It is all served in the original package.

If you went in there today and said to my waitress or waiter, "Give me shredded wheat," he or she would take this little individual package of Kellogg's product and hand it to you to help yourself without saying anything about it. The chances would be that she would do that. Plaintiff's Exhibit 170 is the menu card I identified. I was asked to testify here by Mr. Hoover, the Kellogg representative. I obtain some of my supplies through him. He is the specialty man. The supplies are obtained through a wholesale house. I have some contact with him as specialty man for Kellogg's.

RE-DIRECT EXAMINATION.

THE WITNESS: I regard Kellogg's Whole Wheat Biscuit as a shredded whole wheat biscuit. I think any biscuit put up in that form is a shredded wheat biscuit, regardless of who makes it. When I put the individual package down in front of a customer, that package would tell him it was a Kellogg product. It could not do otherwise.

MAURICE J. RIFKIN.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am cashier and clerk in the Bankee Market, in Burbank, at 102 West San Fernando Street. That is the only store called Bankee Market. My father is the owner of it and I work for him. It is a self-service store where a customer comes in, takes a basket, picks out what she wants, is checked out and

pays for it at the door. She takes just what she wants and nothing else. She does not have to go through any aisles at all, unless she wants to get something in a certain place. They are all marked.

I know a product called Kellogg's Whole Wheat Biscuit very well. It is very well known in this market, to my knowledge. My father handles it in the store where I work. We have had it ever since we have been there, about a year at that market. I have eaten the Kellogg biscuit. It is shredded whole wheat flake, apparently a whole wheat biscuit just shredded, well toasted, a regular whole wheat biscuit.

We handle another shredded biscuit besides the Kellogg, just shredded biscuit. I believe it is made by the National Biscuit Company.

Kellogg's shredded biscuit is displayed with all the other cereals. The National Shredded Wheat is also in the cereal section, but there are three sections containing cereals, and they are not next to each other. They are all in the cereal section. Other cereals displayed near it are Kellogg's All-Bran, Pep, and Whole Wheat Flakes. Kellogg's products are all in one place, in a Kellogg section. The National Biscuit Shredded Wheat is in another section of the store, in the cereal section, one section away from Kellogg's. Kellogg's Whole Wheat Biscuit on our shelves are in the regular cardboard carton. They have one kind, a display package with a cellophane front, like Plaintiff's Exhibit 168. The Whole Wheat Biscuit are not all in packages like that. Some of them are just plain cartons without any cellophane front. The cellophane-front cartons are left by the salesman. They are packed in the case. Each case contains at least one. The others are ordinary cartons like Plaintiff's Exhibit 167. We have handled the Kellogg's biscuit since the store has been opened, a year and a month. During all that time, we have had Kellogg's Whole Wheat Biscuit in our store. There

is a demand for them among the consumers, who go and pick it up whatever they want. If they want Kellogg's Whole Wheat Biscuit, they pick them up and put them in their basket.

Kellogg's Shredded Wheat Biscuit have been sampled and there have been demonstrations on them. The demonstrator is right in the store and shows the product to the consumers as they come in. If they want to taste it, they may. We advertise in the paper. About once a week we advertise some Kellogg product. We have advertised Kellogg's Whole Wheat Biscuit under that name to the public. I do not know anything about Triscuit.

CROSS-EXAMINATION.

THE WITNESS: I am twenty years old. My experience in my father's store is my first experience in the grocery business. When we took the Kellogg's Whole Wheat Biscuit in our store, it was my first knowledge of that biscuit. I had known of Shredded Wheat before then. I had seen it before but I had not eaten it. I do not eat much very much. I do not really know whether we had it in the house or not. I had seen it before I went into the store. Customers in our store pick up packages of Shredded Wheat as well as the Kellogg biscuit, if they want them. They are both on the shelf. I think the sale of the two products is about fifty-fifty. The Shredded Wheat is one cent higher than the Kellogg's biscuit. We have advertised Shredded Wheat. There are quite a few articles in the Kellogg line, and we have advertised the Kellogg line. We do not carry other National Biscuit products, but just the Shredded Wheat. We carry another line of crackers. We do, from time to time, advertise Shredded Wheat and run specials on it. We advertise the Kellogg product as Whole Wheat Biscuit. We never say Shredded Wheat. We take no telephone orders. Our store is strictly a cash-and-carry self-service store.

RE-DIRECT EXAMINATION.

THE WITNESS: The last school I attended was the University of Southern California. I go there to night school now. I am able to say that the cellophane opening in the packages of Kellogg's Whole Wheat Biscuit is an attractive feature to customers in our store. The basis of my statement is that the customer can see just what is in the package. Then, it has more color than the other, as the customers tell me, and they seem to like it better because it fits the bowl. It is a smaller biscuit. One customer whom I know very well told me that, when she uses Shredded Wheat Biscuit, there is usually some left in the plate. When she buys these, there is no waste at all. They just eat it all up. We handle only the Shredded Wheat of the National Biscuit Company, not any of their other products. We buy the Shredded Wheat through a jobber. Dad usually gives the Kellogg order to a salesman who comes in. He sends them through, or Mr. Lee Thompson, the Kellogg salesman, brings them out. He takes orders for the whole Kellogg line, including the Kellogg biscuit. Those orders are filled through a jobber. No National Biscuit salesman calls on us. Dad goes down to the jobber and gives them the order for the National Shredded Wheat at the wholesale house.

RE-CROSS-EXAMINATION.

THE WITNESS: Mr. Thompson asked me whether I would come here and testify this morning. I said I would be glad to tell what I knew about how things stand in our store.. I recognize Plaintiff's Exhibit 1 as a Shredded Wheat package, a package we have on our shelves. It has a picture of a biscuit on it. The customer can see the picture, and I imagine she knows pretty well what is in the package. The Kellogg package, Plaintiff's Exhibit No. 168, with the cellophane

window, shows the ends of the Kellogg biscuit. By looking in the package, the customer can see that that is apparently shredded wheat biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I would not say that the Kellogg product is the same. If you take the two of them out, opening both, they do not look the same, at all. If I were asked to describe the kind of biscuit I see through the cellophane front, I would say it is a shredded whole wheat biscuit, of a much darker shade. It is toasted more, on both sides. I am not conscious of any bias or prejudices as between the National Biscuit Company and the Kellogg Company, in favor of either or against the other in any way at all. I have not colored my testimony a bit.

RE-CROSS-EXAMINATION.

THE WITNESS: What I see through that cellophane window is a shredded whole wheat biscuit. I would say it was more toasted than the other. It is a shredded whole wheat biscuit. If I wanted to tell somebody what was in that box, I would tell them it was a shredded whole wheat biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: As I said before, I do not recall ever eating a Shredded Wheat Biscuit, the National Biscuit, but I do recall having eaten the Kellogg biscuit. I liked them very much.

RUSSELL A. POWELL.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-four years of age, and I am purchasing agent and merchandise manager of the

Individual Owners' Stores. I am not conscious of any prejudice in favor of either the National Biscuit Company or the Kellogg Company as against the other that would color my testimony in any way in this case. I am here to testify at the invitation of Mr. Cliff Gardner, a Kellogg salesman. Before my present position, I was in the grocery trade with the Continental Stores, for whom I was a buyer, for four years prior to February 4th of this year. Before that I was also in the grocery business as supervisor for a group of stores in San Joaquin Valley, the Martha Washington Stores, twenty-seven stores, with headquarters in Fresno. Those were grocery stores. Two years prior to that, I occupied the buying position at the former Continental Stores. They were known by the name of Daley's, Incorporated. I have been connected with the grocery trade for approximately the past eleven years.

I am acquainted with a product known as Kellogg's Whole Wheat Biscuit. I have known of it since its origin by Kellogg, approximately four or five years ago. The biscuit is a shredded wheat biscuit made of the whole wheat.

A representative of the manufacturer brought the package to us and offered them. He came to me as a buyer. He offered them for sale as part of the Kellogg line of products. I had had previous experience with other Kellogg products. We did not buy any of the Kellogg's Whole Wheat Biscuit the first time it was offered to us, or until our stores had a demand for it. Then we put it in only in a small way. That demand has increased materially. We advertised Kellogg's Whole Wheat Biscuit to the public through newspapers. No demonstration of the Kellogg's products was used in our stores. At the present time I am talking about my previous connection with the Continental Stores, which were self-service stores. The original stores were seven, but they have practically passed out of the pic-

ture. At least 65 per cent. are now self-service stores. The process of change is still going on. Just as fast as we close a service store we open a self-service store. The customer takes a basket, proceeds to the articles she has in mind, or looks on the shelves and selects for herself something she sees that appeals to her. Kellogg's Whole Wheat Biscuit are, naturally, displayed in those stores in the cereal department. The National Shredded Wheat Biscuit was also used and displayed in those stores. The two products would not be put together, necessarily. The customer could roam at will. She did not have to proceed through an aisle.

Kellogg's Whole Wheat Biscuit was sampled to consumers. I received samples at my own home.

After I left the Continental Stores, I took up service as buyer with another concern. I have not continued to have any experience as buyer with Kellogg's Whole Wheat Biscuit. That has been a very short period of time. We have been transferring our association from an affiliation with Continental Stores to M. E. Newmark & Company, who are wholesale grocers in Los Angeles. At the present time we are dealing with Kellogg's Whole Wheat Biscuit only through the service of our members. It is being supplied us by M. E. Newmark & Company. I do not know whether any of our members are carrying Kellogg's Whole Wheat Biscuit.

There are approximately one hundred and thirty-five stores in the Continental chain. All those stores were carrying Kellogg's Whole Wheat Biscuit. I would think that the distribution of that product in this market is rather general. We serviced also the individual owners and approximately thirty-five stores that belong to the Fitzsimmons organization. I do not know of any other concern making Shredded Whole Wheat Biscuit except the National Biscuit Company and the Kellogg Company, at the present time. I know that

Triscuit has been on the market for a good number of years; but it has never been a seller with us and we have not carried it for three and a half years. My impression of it is that it is a whole wheat biscuit. I do not know. I have seen it and tasted it.

(A carton of Triscuit was received in evidence as "Defendant's Exhibit No. 16.")

The service stores in the Continental chain also carry Kellogg's Whole Wheat Biscuit and the National Whole Wheat Biscuit. To the best of my knowledge, there was no confusion in those stores between customers wanting one or the other of those biscuit. We have been very careful that none of our store managers substitute any article for something the customer asks for. If a customer asked for Kellogg's Whole Wheat Biscuit, that is what she would get, and if a customer asked for Kellogg's shredded wheat, she would get Kellogg's. Our sale would indicate that they did ask for Kellogg's shredded wheat. I have personally sold customers Kellogg's shredded wheat who have asked for Kellogg's shredded wheat, who have said, "I want Kellogg's shredded wheat." I gave them the Kellogg's Whole Wheat Biscuit.

From my experience of the Kellogg product, I am in a position to say that there is a genuine public demand for Kellogg's Whole Wheat Biscuit.

We have had cellophane-front packages like Plaintiff's Exhibit 168 in our stores. Just part of the cartons were that way, previous to this time. My present impression is that all are cellophane front. I purchase Kellogg's Whole Wheat Biscuit, in conjunction with other Kellogg's products, in carload lots, part of which lot is the Whole Wheat Biscuit. The order is given to Kellogg's local representative, who calls on me as buyer. I specify so much Corn Flakes, so much Pep, so much Bran, and so much Kellogg's Whole Wheat Biscuit; part of the line.

The name Kellogg on a new product like Whole Wheat Biscuit would naturally help to introduce that product to the trade and to the consumers, because of the well-known nature and the well-advertised nature of the Kellogg name.

CROSS-EXAMINATION.

THE WITNESS: We do not buy Shredded Wheat Biscuit. We do not carry them at all. They are delivered direct to the stores by the National Biscuit Company. For a year or two after the National took over Shredded Wheat, I purchased from them direct. Before then, I bought Shredded Wheat from the Shredded Wheat Company.

I have known Shredded Wheat ever since my introduction into the grocery business, about eleven years ago. I do not believe I knew about it before then. I have never been addicted to the use of cereals for breakfast. When I came into the grocery business, I knew of Shredded Wheat right away. It was a large seller and moved pretty freely. I do not know anything about the sales of it now. I have had experience with the retailing of Shredded Wheat, and the fact that we carried it in our stores and sell it, but the volume I know nothing about. I could give you no idea of the comparative sales of those two articles whatsoever, at this time.

The Kellogg biscuit, to all intents and purposes, to me, tastes the same and looks the same as Shredded Wheat Biscuit. It immediately occurred to me that that was a shredded wheat biscuit. They are similar in appearance, taste, texture, and so forth. I would say it would be a product like oats. There are Quaker Oats, and there is Newoat, and Albers Oats. Then there is National Biscuit Company's Shredded Wheat and Kellogg's shredded wheat. In other words, I am using the term Shredded Wheat as descriptive of the product,

not as a proprietary name or anything of that sort. It never occurred to me that it might be a proprietary name, although I have known for a great while that that meant Shredded Wheat.

In our retail stores, I have had experience with customers who came in and asked for Shredded Wheat. We would say, "We have Kellogg's Whole Wheat Biscuit, and we have Shredded Wheat by the National Biscuit Company." We do not always, necessarily, make that distinction I do not know how the average store manager would do. If a customer asked for Shredded Wheat, I would get her a package of Kellogg's Whole Wheat Biscuit and a package of the National Biscuit Company's Shredded Wheat, and say, "Which do you prefer?" I would let her take her choice.

To my way of thinking, a customer who asks for just shredded wheat does not have definitely in mind the National product or any other particular thing; because, for example: Jello has put out a gelatine dessert for a great many years. To this day there are customers who come into our stores and say, "I want a package of strawberry Jello in the red carton." The red cartons are put out by Jell-Well, which is also a gelatin dessert. Jello is a trade name. Nevertheless, some customers have used it as a common noun in the way I have described it. We take it that that is illustrative of the way they speak of shredded wheat now.

The Continental Stores is a regular chain of retail grocery stores. They have no affiliations with other stores. The Vans Stores are affiliated with them, being also a retail chain. They are part of the organization, with merely a different name over the door. The license in the stores is Continental Stores. There are three Vick's Stores. They are not affiliated with the Continental, except that the Continental Stores supply them

with groceries on a cost-plus basis. They participate in the advantages of the buying powers of the Continental Stores. I am now in no way connected with the Continental Stores. I entirely severed my connection with them on the 4th of February. My present outfit is what may be called a voluntary chain, headed up by a personnel of four people, of which I am one. We have merely made a tie-up with a jobber; whereby he is to service our stores. We are not affiliated with him at all. We have our separate individuality. There are one hundred and fifteen stores in that group.

The Continental Stores handle the National Biscuit Company's products and serviced by the National Biscuit salesmen in the regular way. That includes the National Biscuit Company's Shredded Wheat. As a buyer, I had no connection with the National Biscuit Company's headquarters at all. Their salesmen called direct on the stores, and they took their orders for National Biscuit Company's Shredded Wheat, crackers, and cakes, and the complete line. Those orders were filled to the individual stores; but the filling was done through headquarters.

RE-DIRECT EXAMINATION.

THE WITNESS: I was formerly associated as buyer in the Continental organization. That was when I bought the Kellogg product from or through a Kellogg salesman. I bought the National products for a period of approximately two years. After that, the National salesmen did not call on me; but a Kellogg salesman did continue to call. The Continental Stores do not carry, I would say, the complete National line, but they have a great many of their products.

I am not positive whether the same National Biscuit Company's salesman handles the whole cracker line plus the Shredded Wheat, now; but they are both on the same invoices. My impression is that the sales-

man who goes to the trade to sell the National line also sells the Shredded Wheat. I do not know of any salesman who simply handles the National Shredded Wheat line. I do not touch the rest of the National cracker line.

From my experience of the grocery trade, it is my opinion that the cellophane front is a help in the demonstration and sales of the Kellogg product; also that demonstrations and sampling of Kellogg's Whole Wheat Biscuit are a help in the sales thereof. That has all been valuable in introducing the product to the public.

The self-service stores of the Continental chain are typical of similar stores of other lines, with other proprietors, throughout Southern California. I would say that the same process of shifting from service to self-service stores is taking place in other organizations besides the Continental. That type of self-service store originated in other sections before it came here. The Piggly Wiggly chain is self-service. They are very wide-flung, covering practically the entire United States. In those stores, the customer goes and picks out what she wants, pays for it, and takes it out. I know of other self-service stores locally in Southern California, but not national stores. I know there are other self-service chains throughout the country, but I am not familiar with their service.

WILLIAM E. SESSENDEN.

Deposition taken at Los Angeles, California, February 10, 1933.

Direct Examination.

The Witness: I am fifty-nine years of age. I have a fleet of trucks operating between Los Angeles and different docks at the harbor, and I am also in the warehouse business. Mr. Gardner, of the Kellogg Company,

asked me to be here today. I know people with both the National Biscuit Company and the Kellogg Company, and I am not conscious of any prejudice or favoritism for one of those companies as against the other, that would color or bias my testimony in any way. I have no feeling one way or the other in the matter. I consume Kellogg's Whole Wheat Biscuit occasionally. I think I have known it since it first came out on the Coast. I then tried it and tasted it as a consumer. I had been a consumer of Kellogg's different products over a period of years. I liked almost everything I ever tried that they put out. I tried this as a matter of experiment the first time. I am very fond of it. I had tried the Shredded Wheat that comes from Niagara Falls or Oakland, before then. The Niagara Falls product and the Kellogg product are very similar, with the exception that, to my mind, the Kellogg biscuit is better done and of a different size. I prefer it, because, to my sense, it was better done than the other, and the size was more convenient to put in a saucer. When I first took the whole wheat biscuit, it seemed to me to be a shredded whole wheat biscuit. I thought it was just the same kind of biscuit as the one I had known before, but I thought it was better done. I recognized the difference in size. I like the better done biscuit better than the lighter biscuit. I use the Kellogg product every day.

I get around among some retail stores, but not as many as I do wholesale places. I know that Kellogg's Whole Wheat Biscuit is generally stocked by the wholesalers in this section. I have seen many cartons of Kellogg's Whole Wheat Biscuit like Plaintiff's Exhibit 168 with the cellophane front, in both wholesale and retail stores. I have noticed the biscuit through the cellophane front. To me, the darker color of the biscuit is very plainly observable through the cellophane window.

CROSS-EXAMINATION.

THE WITNESS: I am not in the food or grocery business or anything like it. I conduct a general warehouse. I have done distributing of vast masses of food products. I distribute Kellogg's products. I receive them in carload lots from Battle Creek, warehouse them, and distribute them in a variety of ways. Sometimes we have what we call pool cars, a definite amount of which the salesman has sold in advance against a car arrival. We carry spot stock on the floor for the jobbers who may call for any of their requirements that they may have run out of. We make shipments to the different towns in the territory on the orders of the Kellogg Company's representative. The Kellogg Company carries a stock in our warehouse as a storage place. It draws on that and issues shipment orders to us against that stock. I am not concerned, in any way, with buying and selling stock. I am just a warehouseman. Before, we did the same thing for the other Shredded Wheat.

I knew the product known as Shredded Wheat for many years and handled hundreds of cars of it. I acted in the same capacity for the Shredded Wheat Company, and received cars from Oakland. None came from Niagara Falls. I acted as their distributor in this territory until the National Biscuit Company took it over, and a short time afterwards, until their sales method was changed. I have been in the warehouse business practically eleven years. Before that time I was similarly engaged. The warehouse business is really a branch of transportation, and all my life has been spent in transportation. I have known about Shredded Wheat for a great many years, and it has been handled in many carloads, in large quantities.

I have noticed advertising of Shredded Wheat in national magazines. It has advertised extensively in

magazines, newspapers, and by other means of advertising. I have used it in my home for many years up to the time I first used Kellogg's. I have never used any since, because I like Kellogg's better. Kellogg's biscuit came to my attention first from the fact that we had some in the warehouse. My curiosity was naturally aroused, and I experimented with it. Prior to that time, I presume I have personally bought Shredded Wheat from retail stores. We have had it at our home. It was served to me on the table from time to time on a dish, with cream and sometimes with fruit. I do not recall the little booklets the Shredded Wheat Company got out telling me how to use it or suggesting ways of using of it. Members of my family might have had them and I would not know. I am willing to say that that product, under the term Shredded Wheat, has been on the market for a great many years and was a very well-known product. When I see the Kellogg biscuit through the window in the package, the first word that comes into my mind would not be Shredded Wheat, because I know the two products. If asked to describe the product, I would say it is a whole wheat biscuit, or shredded whole wheat biscuit. I might explain, possibly, that I do not know. I have never gone into it from the scientific standpoint. It means to me that the whole wheat, all of the wheat is there. Maybe that is erroneous. I do not know; but that is a fact that I gather from the decription. I understand there are certain parts of the wheat that are very nutritious and there are other parts that are not so good for one. I understand they are all there, and that the wheat has been through some process that makes it come out in the strings, or what some people call shreds, and that is why it is called shredded; a mechanical contrivance of some sort that they have, I suppose. I never gave any par-

ticular thought to whether they were really shreds or something else. That is the other fellow's job. Neither Mr. Clarke nor anyone else connected with the Kellogg Company explained to me what the case is about. I do not know what the matter in dispute between the two companies is. I know there is some trouble, otherwise there would not be witnesses brought here; I do not know what the nature of it is.

RE-DIRECT EXAMINATION.

THE WITNESS: I have seen in cafes quite frequently the individual whole wheat cartons, like the one shown to me. They are usually arranged on a shelf. The ones that I particularly have in mind are cafes with long counters. Back of the counter, is a shelf with different commodities. Those are usually stacked up in some ornate shape, right in front, in plain view of the customers.

RE-CROSS-EXAMINATION.

THE WITNESS: I have seen similar cartons of the National Biscuit Company too.

LEE W. THOMPSON.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am twenty-one years of age, and a salesman for the Kellogg Sales Company. I have been employed by them steadily for the last year, starting in February, 1932. I had worked also as an extra with Kellogg Company for about two and a half or three years before I was a salesman. My total experience in the grocery field has been since November, 1930.

The nature of my duties with the Kellogg Company is as a regular salesman on the force. My job is to create a demand for our products. There are several ways of doing so. Taking orders is one. Being sure that your grocer has the products properly displayed; seeing that your products are properly displayed; and, besides the grocer, we work on the consumer too; sampling; testimonial pages; forty-inch ads; store display and advertising form, good-will calls. All those methods of creating consumer demand and introducing new products to the trade have been used in connection with all the Kellogg products, including Kellogg's Whole Wheat Biscuit. Kellogg's Whole Wheat Biscuit has also been advertised on other cartons of the Kellogg Company.

On the package of Kellogg's Wheat Krumbles, Defendant's Exhibit 17, appear the word "Wheat Krumbles," and under that, "Whole Wheat, Shredded and Toasted."

The distribution of Kellogg's Whole Wheat Biscuit in my territory is around 98 per cent. There are no definite figures; but it is in the 90 per cents., closer to 98 than anything. I mean by that that ninety-eight out of a hundred stores in the territory carry Kellogg's Whole Wheat Biscuit regularly in stock. The predominent character of the stores in the territory is self-service. There are very few service stores. A self-service store is where the customer goes in and can pick up any product she wants, without asking a clerk or any other person. She has her choice of any product there.

Kellogg's Whole Wheat Biscuit is whole wheat, shredded and made into a biscuit. There is another general type of product like that on the market, with which that comes in competition: Shredded Wheat made by the National Biscuit Company. Physically

speaking, those two products are both shredded whole wheat biscuit. The two products appear in most of the stores. Practically all the stores have cereals in one section. Your cereals, including Shredded Wheat are all together. As a general rule, they will put Shredded Wheat and Whole Wheat Biscuit side by side. Some of them display them differently, according to space. We have used quite a lot of newspaper advertising in this territory to introduce Kellogg Whole Wheat Biscuit to consumers. We have what we call a forty-inch ad. We go into the town newspaper and give them forty inches, and let them help us out in tying up all the stores with advertising whole Wheat biscuit. The forty-inch ad is on whole wheat biscuit. What we use most as premiums are geographical charts. The geographical chart is a premium we are giving. It consists of round discs with the geographical information of the United States, the capital, the population, main river, population of the largest city, highest point, and so forth, of each state. That is given away with Kellogg's Whole Wheat Biscuit. The newspaper tie-up on the forty-inch ad is what we might term a Kellogg week on the Whole Wheat Biscuit. We take a town and give the newspaper the forty inches, getting the stores to tie in with our advertising, they advertising the whole wheat biscuit and the geographical chart as a premium, to get the stores to make a special display of the Kellogg's Whole Wheat Biscuit at the time it is being advertised in the forty-inch ad. It has the effect of increasing the publicity of the product, by displaying it in the stores and showing it at same time in the newspaper ads.

That type of advertising has been used generally through the towns in Southern California in relation to Kellogg's Whole Wheat Biscuit. Sampling has also been done in our territory, of Kellogg's Whole Wheat

Biscuit. We have one demonstrator who works on our whole line. If it happens to be that the store she is working in advertises whole wheat biscuit, she pushes that the most, because the store has it on their advertising. It is her job to sell as many as she can. She will open up a package of them and serve them. She tries to attract the attention of customers and serve the Kellogg's Whole Wheat Biscuit to them.

We have done quite a lot of advertising on whole wheat biscuit. We have about five pieces that we use here in Los Angeles or in Southern California on whole wheat biscuit. We have a poster ad pertaining to these geographical charts, with a picture of the chart and the whole wheat biscuit, carrying the name "Kellogg's" on it prominently. We had a large piece about two and half to three feet long with a great big dummy package, about a foot by a foot and a half, a whole wheat biscuit, set right down sideways in a great big dish. Displays like that have been used generally in the different stores throughout the territory. We have an advertising company that works quite a lot on it, and we do a lot of it ourselves. The advertising company is under contract to get them into the stores in the territory.

Defendant's Exhibit 18 is one of the wheel-of-knowledge charts that goes into the retail stores. Defendant's Exhibit No. 19 is one of the jumbo cartons of which I spoke. We have used other methods. We have one plan which we have worked out quite extensively recently: A combination deal of three packages which we give the grocer if he will advertise this way: He will list three of the Kellogg products, Corn Flakes, Pep, and Rice Krispies, at a certain price, with the package of Whole Wheat Biscuit free. That has been generally adopted by grocers through this territory. We arrange demonstrations on Saturdays and work

there ourselves. They pay for three of the packages and we give the Whole Wheat Biscuit free, being the fourth package in the combination. The combinations differ, depending on the store and what products they want to run. Our suggestions are usually Corn Flakes, Pep, Whole Wheat Biscuit, Rice Krispies and Wheat Krispies. Kellogg's Whole Wheat Biscuit is used as the free package of the combination because we have been working on Whole Wheat Biscuit to increase the consumer demand on them. We feel that we can push it in that manner, by bringing attention to it, giving one package of them free. That concentrates the attention on the free package rather than on the other three packages. The other packages of the combinations are usually older or more established packages.

Grocers also advertise Whole Wheat Biscuit quite regularly—not all of them, the advertising being paid for by the grocer himself. The copy is prepared by the grocer and he controls the advertising. The newspaper tear sheets I have handed you, Defendant's Exhibit No. 20, carry advertising of Kellogg's Whole Wheat Biscuit in this general territory.

Last September, to the best of my knowledge, we started putting cellophane windows in all the packages of Kellogg's Whole Wheat Biscuit. We have been doing that up until recently. We are now packing them twelve with and twelve without in a case of twenty-four. In the beginning, we had just one cellophane package in a case. For a while we put all of them cellophane, and now half-and-half. The reason for using the cellophane window is that it draws attention to the product itself. Our idea in putting the window in is to show the people exactly what they are getting, a product that is toasted on both sides. It shows the size and that it has a little bit finer shred than our competitive item. It is toasted on both sides and darker in color. The cellophane window has the effect of directing particu-

lar attention to the package itself, makes it more attractive, altogether, and shows the people exactly what they are getting. It is a new method of packing biscuit as far as I know.

These various methods of bringing to the attention of the public Kellogg's Whole Wheat Biscuit have created a consumer demand for that biscuit. In certain instances, we have gotten distribution in stores where it was not before. When I came around to call on them again, they had ordered them out in the meantime. They had used up what they had and ordered from their jobber. I do not know very much about the distribution of the product to restaurants and so forth. I know there is distribution of the Kellogg product among restaurants and I have seen it there. There is quite a bit of it in restaurants, in our individual package, two biscuits to the package, a carton like Plaintiff's Exhibit No. 169. In the large package of Kellogg's Whole Wheat Biscuit there is a half ounce more, and we have fifteen biscuit to the package, whereas there are twelve to the National Shredded Wheat package. The two products are sold at the same price per package to the consuming public generally.

CROSS-EXAMINATION.

THE WITNESS: I started working with the Kellogg Company in November, 1930, as an extra. In February, 1932, I started in regularly. My first business experience was clerking in several dry goods stores. I worked for J. C. Penny and for Montgomery Ward. My first experience in the food business was with the Kellogg Company, from 1930 to the present time. At present I work in the capacity of a regular salesman, having my own territory that I look after, and working under the district sales manager, a Mr. West. Mr. Gardner, who is a jobber salesman, an older man, gives

us what information we need here. Before I went with the Kellogg Company, I did not pay any particular attention to this particular line of business. I had no occasion to make more than casual observation of it.

Plaintiff's Exhibit 168, represents a package with a window in, which has been in use since the fall of 1932. Prior to that time, we had no packages with windows, that I know of, since 1930. I think the package I am familiar with, which we had immediately prior to Plaintiff's Exhibit 168 with the window in it, had two faces, two main panels like the reverse panel on Plaintiff's Exhibit 168, containing a picture of two biscuit in a dish. That was the Kellogg's Whole Wheat Biscuit package during my experience, until they introduced the window package.

I recognize Plaintiff's Exhibit 167. That is a package a little different from Plaintiff's Exhibit 168, a later package. There is a difference in the perspective of the biscuit in the dish. That was introduced recently. I would say it is the most recent package, having come out since the package, Plaintiff's Exhibit 168, with the window. Plaintiff's Exhibit 167 is also made with the cellophane window in it. There is one setting on the table by Mr. Clarke now. The two packages, one like Plaintiff's Exhibit 167, and another just like it except for the window are the packages now put up, twelve in a case. I do not think I know any package of Kellogg's Whole Wheat Biscuit that has come out more recently or that has any difference, either as to pictures or design or reading matter than this. I am not positive about the reading matter, but the general resemblance is the same.

Our Whole Wheat Biscuit competes with Shredded Wheat Biscuit. I have never had any instructions as to Whole Wheat Biscuit being designed to supply the same market as Shredded Wheat Biscuit. I cannot remember having had any instructions of any kind, writ-

ten or oral, from anyone of the Kellogg Company with respect to competition with Shredded Wheat Biscuit. Take it for what the material itself is worth, though. We have heard Shredded Wheat mentioned in our sales talk as a competing item. I understand that Whole Wheat Biscuit competes principally with Shredded Wheat. That is true. It is not true that Whole Wheat Biscuit is the youngest child in the Kellogg family of cereals. We have had two cereals since we put out Whole Wheat Biscuit: The Whole Wheat Flake and the Wheat Krispies. They have not been discontinued. We are still pushing both of them with the same vigor we are pushing Whole Wheat Biscuit. We have sampled both of them. They are included in some of these combination deals. One way to shove out a new package like Whole Wheat Biscuit or Wheat Krispies is to include them in a free deal of that sort. Our idea is to draw the attention to that one product, by means of selling to the consumer two or three of our well-known products that the consumer is in the habit of buying, and then this newer product or lesser-known product goes with it. In that way, it comes to the attention to the consumer, but not involuntarily. It is a free package if she wants it.

The older Kellogg products do not require quite the same kind of intensive attention that the newer ones do. The fact is true that some of our products need more attention than others. I would say that Corn Flakes, for example, and Pep, have, through years of intensive sales effort, acquired a good deal of momentum. They are well known. It is true that people ask for them and repeat, without a great deal of sales effort. So we really concentrate on Whole Wheat Biscuit and newer items of that sort, that are more highly competitive. We run into articles that compete with Pep as directly as Shredded Wheat competes with Whole Wheat Biscuit. For instance, Pep is a bran flake,

and it competes with Post's Bran Flakes. In the same way, I would say that Post Toasties compete with Corn Flakes. The ~~list of~~ Kellogg's products on the jumbo package here is not now a complete list of the Kellogg family. Wheat Krispies and Whole Wheat Flakes should be added to it.

Corn Flakes compete principally with Post Toasties. There are other brands of Corn Flakes; but I do not regard them as important competitors compared to Post Toasties. All-Bran is the whole bran in the form of a rough whole-bran flake. I suppose it is shredded when it is cooked, but it is really not a shred when it is in the package. It is cooked before it is packaged; it is not raw bran. It is cooked to some extent. It is in small pieces.

Pep is a regular bran flake, closely resembling the Post Bran Flakes. Wheat Krumbles are a whole wheat product marketed in the form of narrow strips, precooked and ready to use. I do not know how it is made. I would not call it shredded. It is in small strips. I do not recall any item with which Wheat Krumbles compete right now. It is in a class by itself without any direct competitors. It is true that all dry cereals compete with one another, more or less. It is not introduced for the purpose of competing with some item, and I do not know of any item that particularly competes with it.

Rice Krispies are rice in a puffed form. It is not similar to what we know as Puffed Rice. It is not blown as much. I would not say there are any other direct competitors of it. It is kind of in a class all of its own in taste. They have rice flakes, and Puffed Rice is a well-known cereal. I think the Quaker people make it. I do not regard our Kaffee Hag as a cereal. That is one of the Kellogg products which has as its principal competitor Sanka Coffee. They are both prepared in a similar way by some chemical extraction of caf-

feine. Both are supposed to sell as non-caffeine coffee.

The campaign methods that I have described as being used to interest the public in our Whole Wheat Biscuit have been more or less successful. We have gotten quite a distribution in Los Angeles and Southern California. I would not say that, so far as we have succeeded in getting distribution for that product, it has altogether been at the expense of Shredded Wheat. I think we have created new users who have never used either product before. That is true to a great extent. For instance, when the Grape-Nut Flakes came on, they created new customers who had never used cereal before. Grape-Nut Flakes is a new product, made by the same people who make Grape-Nuts, which had a very wide distribution before Grape-Nut Flakes was made. I think that, to a certain extent, and perhaps to a very considerable extent, Kellogg's Whole Wheat Biscuit has supplanted Shredded Wheat with certain people. It has taken some of the market of Shredded Wheat, and it was obviously intended to do so. So far as price is concerned there is no great amount of competition. As far as I know, the dealer makes a little more on the Kellogg Biscuit than he does on Shredded Wheat. That is something you can never be sure of, because you do not know. I am really not interested in what they are buying competitive items for in order to sell mine at the same price. I guess it is natural for a competitor who comes on the market second to endeavor to get his price a little under that of the original man if he can. I never figured out whether the pound-for-pound price received by the National Biscuit Company is greater or less than that received by the Kellogg Company for its product. There is another way you can look at it. It is according to how and where you buy your Shredded Wheat. We have a fixed price and fixed terms of discount for cash or whatever it may be. In the long run,

it is my impression that the Kellogg price, in most instances, is lower than the Biscuit Company's price. I think there is no difference in the price between the Kellogg product and the Shredded Wheat product in most retail stores. What I meant before was that I do not pay much attention to what the grocer is buying it for from the jobber. I did not know a witness testified this morning that the Kellogg product was sold in his store for a cent less than Shredded Wheat. It may be so. It might be in a few stores. I said that, generally speaking, the prices are the same.

Looking at the *Los Angeles Evening Herald* for January 2d, page A-4, the Kellogg Company does not pay for that kind of advertising. We are instrumental in arranging for that set-up. We asked them to advertise our products. This is Ralph's Grocery Company. Those are dealer ads, not what I referred to as forty-inch ad space. While, in each of the three top advertisements, Kellogg's Whole Wheat Biscuit is advertised at nine cents a package, the usual average retail price is ten cents. The advertisement for nine cents and the one in the *Redding Eagle,* December 13, 1932, Kellogg's Whole Wheat Biscuit, three packages for twenty-five cents you find on specials sometimes.

Referring to the *Seattle Daily Times* for January 6th, special Kellogg deal: One Kellogg's Corn Flakes, one Kellogg's Pep, one Kellogg's All-Bran, one Kellogg's Whole Wheat Biscuit, all for thirty-eight cents; we get that up, and we encourage him. That is one of our combinations. There is another one that calls for two for twenty-three cents. Right next to it in the *Denver Post,* Whole Wheat Biscuit Kellogg's is advertised two packages for ninteen cents.

RE-DIRECT EXAMINATION.

THE WITNESS: Mr. Gardner of the Kellogg Company just calls on jobbers and very seldom has anything

to do with the retail trade. Referring to Plaintiff's Exhibits 167 and 168, I would say that the biscuit shown in the plates of those two exhibits differ in color. One is a trifle darker than the other, Plaintiff's Exhibit No. 167 being darker, the later package. In the sale of Kellogg's biscuit, the words *Whole Wheat* are emphasized in the package and in advertising as much as possible.

The Kellogg product is a shredded whole wheat biscuit. The other Kellogg products, as well as whole wheat biscuit, are advertised by retail dealers. The combination arrangement I have described, being a sale of three packages of Kellogg's with one package free, is regarded in the trade as in the nature of sampling, free sampling. We would not give away one of the packages of Whole Wheat Biscuit by itself. The other three packages have to be bought. If you buy three packages of cereals, you get one package as what you might consider a free sample. In that instance, the sample is a whole-sized package, a regular standard package of Whole Wheat Biscuit. All the products in the Kellogg line are pushed, and all of them are advertised. Most of them are sampled, except one or two. There are three or four other brands of Corn Flakes on the market, including Jersey Corn Flakes, White House, Red and White, Newmark—all toasted corn flakes.

(One package each of Kellogg's Corn Flakes, All-Bran, Pep, Wheat Krumbles, Rice Krispies, Kaffee Hag, Toasted Wheat Flakes, and Wheat Krispies, and Whole Wheat Flakes were received in evidence and were marked "Defendant's Exhibits 21, 22, 23, 24, 25, 26, 27 and 29.")

When a retailer advertises, it is customary for him to advertise products at something a little below the average price. When I said we get up the combina-

tions, I do not mean the Kellogg Company prepares the advertisements, the reading matter, or the set-up of the retailer ads. We tell him we will give him the one package to give away free with three other packages. He writes the ad up himself. The Kellogg Company does not see the ad or have anything to do with it before it is published.

RE-CROSS-EXAMINATION.

THE WITNESS: The advertisements that make a little special price are sort of a bid to get the customers in and interest them in a bargain in the grocery. Then they buy some more things at the regular rate.

RE-DIRECT EXAMINATION.

THE WITNESS: I can say of my own knowledge grocers in this type of ad sometimes offer the National Shredded Wheat in their regular weekly ad at a shade below the average price for it.

RE-CROSS-EXAMINATION.

THE WITNESS: When I told Mr. Clarke that the Kellogg biscuit is a shredded whole wheat biscuit, I meant that, in my opinion, it was a descriptive name for the biscuit.

MISS MARIETTA CONDON.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I live home with my brother-in-law and my sister. I do not know anyone connected with either the National Biscuit Company or the Kellogg Company of Battle Creek, Michigan. I am appearing here on the invitation of Mr. Nigg, who, I

think, is a representative of some kind of the Kellogg Company. He is just a friend of mine. I am not conscious of anything that would prejudice me for or against either company.

I am familiar with the product known as Kellogg's Whole Wheat Biscuit. I use that product as a consumer, and I have used it for about two years. I went to visit some friends. They were having them that afternoon, and I was asked to have one. I liked it very much, so I have been using it ever since. I would describe the biscuit as shredded wheat. I do not know what you would call it. I would just call it shredded wheat biscuit. I have never used any other shredded wheat biscuit but that biscuit. I buy them in a package, sometimes from the Sparton, where you go to the counter, and sometimes at the markets, like the Penny Market, and the Family Market, and the Safeway, where you just go around and buy. When I go to a service store, I go right in and say "I want a package of Kellogg's Shredded Biscuit," and the clerk gives me a package. I have never asked for it any other way than as Kellogg's Shredded Biscuit. One time I asked for Shredded Wheat, and they gave me some kind of a big biscuit like that. I told them I did not want it, that I wanted the Kellogg's shredded biscuit, because I liked it, because they are small, dainty, and I liked them better. In fact, I always use everything of Kellogg's, anyway.

CROSS-EXAMINATION.

THE WITNESS: I know about Shredded Wheat. I have heard a whole lot about it for many, many years. It is a well-known product. I have not eaten it. I have only used these biscuit and the bran. I am not using Shredded Wheat. That Shredded Wheat Biscuit is what I use. That is the biscuit made by the Kellogg Company. I do not know why I call them

Shredded Wheat. I guess it was because the lady said they were shredded wheat. I never even noticed it. I know they are called on the box, Kellogg's Whole Wheat Biscuit. I think that is right. That is what they are. There is the box I get all the time. It says, "Kellogg's Whole Wheat Biscuit." I did call it shredded wheat, Kellogg's Shredded Wheat Biscuit. I never saw Plaintiff's Exhibit No. 1 before. I do not think I recognize it. I see a picture of whole wheat. I recognize it as a Shredded Wheat biscuit. I would describe that as shredded wheat. I have never been a user of that product, and I do not think I ever bought it. I have bought the Kellogg package. That is what I referred to just now as Kellogg's Shredded Wheat. Kellogg's is what I use all the time. It is possible that what I looked at was the Kellogg's, the same kind. I am interested in the Kellogg name and I am a believer in Kellogg's products. I do not really know why I called the Kellogg biscuit shredded wheat. I have heard of Shredded Wheat. Probably it was because the Kellogg biscuit looks like the old shredded wheat biscuit that I immediately jumped to the description; but I do not know that I have ever tasted those. They are not Kellogg's, are they? I have never tasted this biscuit in Plaintiff's Exhibit 1, made by the National Biscuit Company formerly at Niagara Falls, but I have heard the word "shredded."

MISS GLADYS CHILDRESS.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a demonstrator employed by the Kellogg Sales Company. I worked District No. 9, in the City of Los Angeles. I have worked in prac-

tically all the leading markets in the city, sometimes two or three different times. I have demonstrated the entire Kellogg line in those stores, including Kellogg's Whole Wheat Biscuit.

I always have a table. I cut the front out of the cereals, and I sample with a little bit of cream and strawberry preserves on them; on all the cereals with the exception of the Whole Wheat Biscuit. I have not been serving that so much, because I find it a little bit awkward to cut up and give a sample quickly. I have been serving the other cereals, and Kaffee Hag. The demonstration table is usually placed near the cereal section, if possible, so to have access to as many people as are interested in cereals. The purpose of the demonstration is to create new customers, make friends, and show the entire line to people who possibly were using part of the line and were not familiar with the All-Bran or Whole Wheat Biscuit.

In the various stores that I have visited in this district, I have found that they carried Kellogg's Whole Wheat Biscuit in stock.

LOUIS WILSON BROWN.

Deposition taken at Dallas, Texas, February 14, 1933.

Direct Examination.

The Witness: I am buyer for the Handy-Andy self-service stores, a home-owned group of chain stores. Under our direct supervision, there are seventeen in the City of San Antonio. The other stores are under a franchise supervision. We have no control over them at all. We buy for the other stores, when they send in a request to purchase merchandise for them.

The seventeen stores under our supervision are self-service. The customer comes in, gets her basket, picks out the merchandise she wishes to purchase, comes to the check counter, and we check it out.

I know of a product known as Kellogg's Whole Wheat Biscuit, which is on sale in the Handy-Andy Stores. It is what you might call a shredded wheat biscuit. That is the only name I know of that you would call it. I know of another shredded wheat biscuit on the market besides Kellogg's, made, I believe, at Niagara Falls. I also handle that biscuit. The two kinds of biscuit are displayed together. In other words, say this is our cereal section. We have a display of only the one package in the front, mostly, on account of not having sufficient room. We will set one by the side of the other. That is the only way we display our merchandise. The customer picks off whichever package she wants.

We sell approximately three to one of the Kellogg's biscuit to the Niagara biscuit. Those are all sold by the customer picking the package up herself. We have no sales assistants whatever. The cellophane window package, Plaintiff's Exhibit No 161, is the one we have in the stores at this time. All the Kellogg's biscuit we now carry are packed in cellophane packages like Plaintiff's Exhibit 161, as far as I know. The Niagara Shredded Wheat is in packages like Plaintiff's Exhibit No. 1.

Our stores have been handling Kellogg's biscuit at least two or three years, or more; ever since they had the product on the market. I have not been a user of the National Shredded Wheat Biscuit. I have been a user of Kellogg's biscuit. I am a first customer, as far as shredded wheat is concerned, of the Kellogg biscuit. I never used shredded wheat until I was made a present of a package of Kellogg's Shredded Wheat, and I have used some since. We have advertised it,

and they have sampled it. That is the way we have built our business. The sampling has gone right to the home of the prospective consumers. I would estimate that about five cases per store per month of Kellogg's Whole Wheat Biscuit are sold to our stores. The average sale of the Niagara Falls biscuit would be about one-third of that, one and a half or two cases. Kellogg's is packed two dozen to a case and yours is packed three dozen. There have never been cases in any of our stores, to my knowledge, of customers bringing back to the store a Kellogg package which they had picked up, not wanted, and sent back. I do not see any similarity between the Kellogg package, Plaintiff's Exhibit 161, and Plaintiff's Exhibit No. 1, the Niagara Falls package. I do not think I would ever confuse one of those packages with the other in any way. I have never known of any instances of confusion of one package with the other in any of our stores. I would say that Plaintiff's Exhibit No. 161 is a more modern and up-to-date package. I think that fact would help in the sale of the Kellogg product in self-service stores. I know of no substantial change that has ever taken place in the appearance of the Niagara Falls package in the time I have been familiar with it, at least seven or eight years, anyway. I think that, in stores like ours, a modern up-to-date package would have a favorable effect on the sale of an article of food.

I cannot think of any other factors besides those to which I have referred that would help to introduce the Kellogg package to the favorable attention of consumers. I would think the name Kellogg would affect it favorably, because Kellogg's products have always been known as good merchandise among the consuming public. Modern buyers are very conservative, I would say, and not inclined to buy new products until they have at least sampled them or know something about the quality of the merchandise. After that, if

they like the new product, they will absolutely change over to it.

We buy Kellogg's Whole Wheat Biscuit through our local jobber. The Niagara Falls Shredded Wheat is serviced by the National Biscuit Company directly to the stores. The practice of advertising Kellogg's Whole Wheat Biscuit by our stores is a very common practice with us. It is common practice with other stores of the same general type as ours to advertise their product to the public. It is more of a cooperative plan between the owner of the store and the man who is selling the product. It is common practice in the grocery trade.

The National Biscuit Company now have a system right along with the cookies and crackers, the whole business, including Shredded Wheat, where they service our stores now. Before that, we bought our Shredded Wheat through our local jobbers. We now buy it through salesmen of the National Biscuit Company, off the truck. We handle other National Biscuit products besides the Shredded Wheat Biscuit, just a few items, not the whole line.

I know that Kellogg's Whole Wheat Biscuit has a distribution in San Antonio, in the biggest majority of the stores. I have never seen it in a restaurant, because I hardly ever go there. I suppose you could find it there.

I would call Uneeda Biscuit a soda cracker. I do not know any other descriptive name for shredded wheat, or shredded whole wheat biscuit as the name soda cracker is descriptive for Uneeda Biscuit. In my view, the Kellogg biscuit is a shredded wheat or a shredded wheat biscuit.

CROSS-EXAMINATION.

THE WITNESS: I am buyer for the Handy-Andy Stores, a local chain, all under one ownership, at a

central office. My duty is to buy for those chain-stores. I buy for other stores, franchise Handy-Andy Stores, not owned by us. They pay a royalty to us for the use of the name. They have the privilege of buying through us, to get their buying power. I have been buyer for those chains about three years. Before that time I was connected with the wholesale houses. The Handy-Andy Stores have a central buying office, where I am located and do all the buying. It is a pretty good-size chain, and takes up all my time. The advertising of Kellogg's Whole Wheat Biscuit is done in our regular weekly ads in newspapers of all specials that we put on sale to bring customers in the stores. We call it Kellogg's Whole Wheat Biscuit. I did not bring any ads with me. We have never referred to it as shredded wheat in any of our ads, that I know of. I told Mr. Clarke I would call it a shredded wheat biscuit. That is the only way I have been educated to call it. I suppose that is the only thing I could call it. I was so educated by its appearance. That is all I know. I have been educated to the fact that that is the only thing I knew to call it, just like anything else, like an automobile. If it is a Ford, or whatever it is, I call it an automobile. I called Kellogg's Whole Wheat Biscuit a shredded wheat biscuit, because it looked like the only shredded wheat biscuit I had ever seen before, because of the similarity of it. I could not describe it in any other way than just a shredded wheat biscuit. I base my statement on its appearance. I know it is made from wheat. I did not have it analyzed, but it would not be on the package if it were not. It is in shreds, as far as I can see. A shred is kind of a stringy shredded stuff, such as shredded coconut. You see shredded coconut in long shreds. I cannot give you a definition of shredded or shred. It is just strings, like shredded coconut. I never heard of shredded corn. I could not picture it.

I could not picture it torn into shreds. I could picture it in pieces; but shreds mean to shred an article into strips. I could not tell you how you could rip or tear a kernel of wheat apart and make a long shred. I have no idea. I cannot conceive of any way that it could be done; but it is there, that they show it to you. It is advertised as that by the Niagara Falls Shredded Wheat. They have a biscuit there that they call Shredded Wheat. I would not say that a trade name necessarily implies that it is the name of the ingredients from which the product is made. Shredded wheat as the trade name of the product in Plaintiff's Exhibit No. 1 is the only descriptive name I know of it. That is the only name I know of that particular kind of biscuit or that I knew until I saw the Kellogg biscuit on the market. I do not remember handling the product known as Triscuit. I do not think I have ever seen any product on the market, except Plaintiff's Exhibit 1 and Plaintiff's Exhibit 161, made either in that form or from long threads of wheat. I think it is good policy for the manufacturer of nationally distributed merchandise to change the appearance of his package. They do that quite generally.

I buy and sell Royal Baking Powder. I do not know how long it has been on the market. I do not know that I have ever seen it in any other package except the identical package in which it is distributed. It is hard to say whether that identical package for fifty years would be good merchandising or not. It seems sometimes as if it has more competition. I do not think that, if the Royal Baking Powder people materially changed the appearance of their package, it would hurt the sales of it a great deal. I think that people recognize, the instant they come into the store, the Royal Baking Powder package and that that is what they want.

I have bought and sold Armour's brand of soda. I have not seen any change in that package. Some of the standard brands that have been on the market as far back as I can remember have not changed their package.

We do not advertise shredded wheat biscuit like Plaintiff's Exhibit No. 1 in our ads. I suppose advertising has something to do with the sale of a product. The Kellogg Company does not pay for the advertising I do for Kellogg's Whole Wheat Biscuit or for any part of it. The Kellogg Company does not direct or place the ads. They solicit it. That is all. By that I mean that their representative comes around and asks us to place in our ad any certain item they may wish to get out. Sometimes they will sample it over the city and asks us to place it in our ad of specials. We do that at their request whenever we feel like it. They give no allowance to cover advertising, that I know of.

So far as I know, I have never been solicited to advertise shredded wheat like Plaintiff's Exhibit No. 1. On your special product, the consumer demand has not been great enough to justify me to advertise that; and the company seems not to co-operate with us nearly as much as the Kellogg Company does, in sampling the trade, or in soliciting our assistance in helping put their product over, and things like that. We never heard a word at all from the Niagara Shredded Wheat people. The Kellogg salesman would come around and tell us: "Mr. Brown, we have distributed so many thousand samples of Kellogg's Whole Wheat Biscuit over the city, and we would like to have you run it special in your ad this week," for a tie-up of the advertising campaign. I do not know of the Niagara Falls people ever doing anything such as that. We always do tie up with any manufacturer who get out

and does such things. That is the only relation I have with the Kellogg Company. They just come in and ask us to advertise. That is the only tie-up I have with them.

As buyer, I purchase such of the shredded wheat as I purchase direct from the National Biscuit Company and not through jobbers. I have not asked my jobbers for it lately. We did at one time. It was in the jobbers' hands at one time. For a while, we were unable to get it from the jobber. I could not tell you why he did not have it in stock. I do not know whether the jobber handles it or not now. I have not had occasion to find out, because I have a regular schedule from the National Biscuit Company.

RE-DIRECT EXAMINATION.

THE WITNESS: My attention being directed to "It's All In The Shreds", that refers, on Defendant's Exhibit No. 8, to the biscuit, as far as I can see, the little strings of which the biscuit is made. I do not remember seeing that phrase displayed on any other packages or any of the advertisements of the shredded wheat of the National Biscuit Company. The dealer advertising I think would help to move our stock of Kellogg goods and create a consumer demand for it. We wanted to tie up our advertising of the Kellogg product so that it would fit in with the sampling that the Kellogg Company distributed to the consumers. Such things as allowance for advertising are not told. If there is such a thing going on between us and some corporation, our trade in the stores do not know it. As far as I know, the Kellogg Company does not make any allowances for advertising. They have no supervision whatever over and do not dictate the form of the advertising or have any control whatever over the ad.

RE-CROSS-EXAMINATION.

THE WITNESS: We get no regular monthly or weekly allowance from the Kellogg Company to cover advertising matter, that I know of.

GEORGE F. BARTH.

Deposition taken at Dallas, Texas, February 14, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am superintendent of the Handy-Andy Stores, San Antonio. We are a chain food store with seventeen units. They are exclusively self-service stores. When a customer comes in our store she goes by the basket rack and gets a basket. The stores are so arranged that she goes through the vegetable department first, then the meats, then the groceries. As she brings in her basket, they check off the bills and she pays going out. Everything she picks up she picks up herself, without the assistance of any clerk. We have a manager and checker in each store. They are usually on the checking stand or else arranging stock on the shelves. About 15 per cent. of all the stores in San Antonio are self-service stores. Practically all the other stores tend to shift over to the self-service basis.

I certainly know of a product called Kellogg's Whole Wheat Biscuit. I believe I have known it ever since they first started to make it. I have always been in the grocery business. I was up in Michigan where they are made. I do not know how many years ago that is. The Handy-Andy Stores carry Kellogg's Whole Wheat Biscuit regularly in stock. I have been with them a little more than a year, and they have had them about since I have been with them. They also

carry in stock the Niagara shredded wheat. Kellogg's biscuit will outsell the Niagara Shredded Wheat by a big margin. I do not know how much. Offhand, I would say probably three or four Kellogg packages to one of the Niagara, all of which are sold by the self-service method I have described. Each one is as well displayed as the other. The customer makes her choice in all cases. Based on my experience in the Handy-Andy Stores, undoubtedly there is a genuine consumer demand for Kellogg's Whole Wheat Biscuit in those stores. The consumer demand has been created, I would say, by the advertising methods of Kellogg's, the way they have gone after it, demonstrating it, the much more modern and attractive package, I believe, is what put it over. The name Kellogg would have an influence on it. I believe it would help put any product over, on account of the quality of their merchandise in all their packages. The Kellogg package is much more modern than Plaintiff's Exhibit 1. In fact, I think that is the biggest feature of it. I refer to Plaintiff's Exhibit 161, the package with a cellophane window in it. I could not give you the exact figures on the average number of cases of Kellogg sold in our stores in a month's time. That would be within the province of Mr. Brown, the buyer. I would describe the Kellogg biscuit as a shredded wheat biscuit. I do not believe any other name comes to my mind, any other descriptive phrase. It is made out of wheat, I believe, and the wheat is shredded. Shredded wheat biscuit would be the only thing I would think of.

CROSS-EXAMINATION.

THE WITNESS: I am superintendent of the stores, seventeen of them, in San Antonio. I have heard before of the biscuit like those in Plaintiff's Exhibit 1, called Niagara shredded wheat, because I used to sell it before Kellogg's put theirs on the market, and they

always called them Niagara shredded wheat. I have gone through their factory so many times, and people up North called it that. I have been through the Niagara Falls factory several times. I have called it Niagara Falls shredded wheat ever since I have been able to walk, I guess. It is called shredded wheat more than it is called Niagara shredded wheat, I guess. That is the name I have always known it by. When I was up there, the Niagara Falls factory had a sign on it: The Home of Shredded Wheat.

I do not remember any changes in the Niagara Shredded Wheat package. I believe the picture of the biscuit on the front is new, but I do not recall definitely. I remember the picture of the factory and of Niagara Falls on the end as long as I remember the package.

Looking at Plaintiff's Exhibit 161, the Kellogg package, as I look through the cellophane window and see what is inside, I could not think of any other thing to call them by than shredded wheat. I cannot see any difference between them as I look at them through that window than the shredded wheat biscuit I have always known. The Kellogg advertising of this product has been very active ever since I have been down here, a little more than a year. My knowledge of this territory is only about a year. Before that, I was in the same line of work in Michigan. The advertising with which I am familiar in places took the form of a great deal of sampling and house-to-house work. I believe they have also given one package free with the purchase of one package. We have done a lot of window advertising, window displays, but no demonstrators in our stores. We have carried both kinds of Shredded Wheat, and they are featured about the same on our shelves. They are near together. A customer can wander all over the store wherever she pleases. She has one way in and one way to get out, however. We

have all our cereals segregated in one place in the store. We have no specific place for either Kellogg's Whole Wheat Biscuit or shredded wheat, except on the cereal shelf. That would be entirely up to the manager. We classify the cereals; so Kellogg's Whole Wheat Biscuit and shredded wheat might be side by side. Our stores do not necessarily push Kellogg's products.

Kellogg's Whole Wheat Biscuit sells three or four to one of shredded wheat, without any particular effort on our part. I believe that is because the Kellogg has a better means of advertising their products than the shredded wheat. At least, they do it more, and I think they do it better. They get to the point. I do not recall Kellogg doing anything else in San Antonio than I have already mentioned. We have a few display materials, such as we put in our window. We have had some copies of the Wheel of Knowledge stuck on to some of the packages. I believe Plaintiff's Exhibit 161, with the window, is the exclusive package we use in San Antonio at present. I do not believe we have any packages without windows. I believe I have seen them without the window and with both panels like the rear panel of Plaintiff's Exhibit No. 161.

I recall the package, Plaintiff's Exhibit 10. I could not honestly say that I remember seeing the dish with biscuit in it on the package. I usually associate that Niagara package with the picture of the factory on the side. I do not remember seeing the plate on one end. I do recall seeing it in shredded wheat advertising.

I have known the Kellogg biscuit ever since it has been on the market. I do not remember how long. There was a different shaped package at one time. I remember packages like Plaintiff's Exhibit 166. That is the time they called it Shredded Whole Wheat Biscuit. I do remember that. I was up in Michigan at that time, in Saginaw. I was not with the Kellogg Com-

pany, but I was in business for myself. I carried the Kellogg products, and I carried shredded wheat. They were handled through the Shredded Wheat Company at that time. The Kelloggs had not been doing very much advertising at that time, so the Shredded Wheat had the edge on them at that time. It was a big seller at that time, and it did sell easily.

RE-DIRECT EXAMINATION.

THE WITNESS: There is a difference in the size of the Kellogg biscuit, as compared with Niagara Falls shredded wheat. I believe there are fifteen of Kellogg's and twelve to the Niagara. I believe there is a half ounce difference, if I remember right. The Niagara is the largest individual biscuit. I believe Kellogg's have a half ounce more to the package. The fifteen Kellogg biscuit weigh half an ounce more than the twelve shredded wheat. The methods we have referred: Dealer advertising, manufacturer advertising, store displays, the modern Kellogg package, the cellophane window, are methods that all manufacturers use. I have never seen any yet that have not used the same methods. The Kellogg Company has used them in pushing its whole wheat biscuit and in creating a demand for it. I do not recall a customer bringing the Kellogg biscuit back for any reason at all.

RE-CROSS-EXAMINATION.

THE WITNESS: I am supervisor of the stores, but I do not know about prices. I just look after the stock. I do not examine the changes in prices. I cannot tell what any of the prices are in any of my stores on these two items.

GEORGE W. CREIGHTON.

Deposition taken at Dallas, Texas, February 14, 1933.

Direct Examination.

The Witness: I am thirty-six, a buyer for Sidney Myers, Inc., wholesale grocers, who have a working agreement with Weingarten, Inc. They also have a cash-and-carry soliciting trade from all independent retail grocers in Houston and surrounding territory. Weingarten has large super-stores, cash-and-carry retail. There are eleven of them, all located in Houston.

I know a product called Kellogg's Whole Wheat Biscuit, and have known of it approximately a year and a half. It is carried regularly by Sidney Myers and serviced by them to Weingarten and other retailers. It is in considerable demand at present among our retail distributors. There has been a large increase in demand within the last six months, which I would say is traceable to missionary work done by Kellogg, canvassing from house to house, and sampling; thus creating a consumer demand. I would say the product is stocked in every principal and chain store in Houston.

I would describe Kellogg's Whole Wheat Biscuit by saying it is a shredded wheat biscuit. In the last ninety days, we have handled the Niagara shredded wheat. Before that, we could not buy it, because they did not sell to the wholesale grocers. We tried to buy it, and they refused to let us stock it. Their own representative came down and solicited our business, asked us to stock it. I buy both items. I generally buy about ten cases of Niagara shredded wheat a month. I would say we sell, under ordinary circumstances, fifty cases of Kellogg's Whole Wheat Biscuit a month. In the past sixty or ninety days, they have put on several specials or sales in Whole Wheat Biscuit. Our purchases of that one item alone have run between three hundred and fifty to four hundred cases, moving out in our cash-

and-carry trade, where the retail grocer comes to our warehouse. We have four salesmen lined up at a table. The customers walk in and we sell them anything we can. Ordinarily, the salesmen are nothing but order takers. They write down what the customer wants. They pay us for them there and take it right out in their own cars.

I have never noticed a retail customer get one product and want the other. They will invariably say whether they want Niagara or Kellogg's Whole Wheat Biscuit. I have never had any retail customers return one product saying they got the wrong package. They take their own merchandise away. We deliver nothing. It is strictly cash-and-carry wholesale grocers.

We are not the exclusive distributors of Niagara shredded wheat to our general contact trade. All the National Biscuit Company trucks in Houston contact not only all chain stores, but also every independent retail store. They have their shredded wheat right in their truck ready to deliver, right out in front of the retailer's door right now. So I would say strictly we are in competition with the National Biscuit Company as a wholesaler of Niagara Falls shredded wheat; because we do not contact the retailer until he walks in our front door. Ten to one the National Biscuit Company route truck has already been to his front door before he has had breakfast. Shredded Wheat is the only National Biscuit item we stock.

The Weingarten concern operate self-service stores. They carry both makes of shredded wheat, Niagara and Kellogg's. They are both on display in the Weingarten stores. The customers serve themselves and take whichever they want.

CROSS-EXAMINATION.

THE WITNESS: Sidney Myers is a large grocery house. The original set-up was in business about five

years. I have been with them almost two years. Before, I was in Shreveport. We just do a cash-and-carry business. Any retail customer may come there and take away all the groceries he wants of any description. They are also connected with Weingarten, a group of stock-owned retail stores. We are their principal source of supply. The principal stockholders in Weingarten Stores and in Sidney Myers are probably the same. You could say that Weingarten constitutes a retail outlet for us, or that we are a source of supply for Weingarten. There is a community of interest there.

Weingarten stores have always stocked National Biscuit shredded wheat, but they have been supplied direct by the company, along with its cracker line, and that is still done that way. I would not say that Sidney Myers had no shredded wheat at all since I have been with them up to ninety days ago. They had it, but it was bought from Weingarten, not from the National Biscuit Company.

In my prior experience, I have purchased shredded wheat from jobbers in Shreveport. I have known shredded wheat all my life. I do not think I ever heard it called Niagara shredded wheat until the Kellogg Company came on the market with their Whole Wheat Biscuit. It was always called shredded wheat and always came in a package similar to Plaintiff's Exhibit 1. Up to the present, Sidney Myers actually stocks shredded wheat in our house. I do not know about actual handling of purchasers, because I am not in the sales department. If you came to that table and said, "I want a case of shredded wheat," and we did not happen to have it in stock, we possibly could take the order for it and have it delivered direct by National; but I do not know that it has ever been done.

The Kellogg Company in the last six months have been doing house-to-house sampling and had a deal,

whereby, for instance, a Weingarten store would purchase from Sidney Myers twenty cases Whole Wheat Biscuit. Then a representative of Kellogg would buy eight of the twenty, which they would take out and sell to the consumers, with the understanding they would receive one package free with the purchase of one. There has been newspaper advertising of the product, I think only as Kellogg's Whole Wheat Biscuit, not as Kellogg's shredded wheat. We publish catalogs and advertise the product as Kellogg's Whole Wheat Biscuit. We also list shredded wheat. The eight cases I used in my illustration, which Kellogg buys back, are purchased from the Weingarten store at the regular retail price. We actually sell them to the Weingarten concern at our regular price, which gives us a profit. They receive from the Kellogg salesman the regular retail price they sell them at for general distribution. About two hundred cases have been handled that way through Sidney Myers, in the last sixty days. When I speak of the proportion of ten cases National shredded wheat to forty or fifty Kellogg's Whole Wheat, I did not mean to say that was the proportion of Weingarten sales. The only outlet Sidney Myers has for National shredded wheat would be through the independent retail trade we serve in our cash-and-carry department, because Weingarten is supplied direct by National. That would also be aside from what the independents could buy from the National Biscuit Company trucks.

I never attempted to buy shredded wheat from National and failed, because, when I went there more than a year ago, I was instructed I could not buy it from National. About ninety days ago, their representative called on us, solicited our business, and said we could buy it. We immediately stocked it. I do not remember the man, though I met him.

The biscuit in Kellogg's package, Plaintiff's Exhibit 161, looks through the window like shredded

wheat. Personally, I think the window package is a factor in the sale of that biscuit. The sight of it through that window has some sales appeal, I think. It looks like shredded wheat, which makes it an easier seller. It looks like shredded wheat. I think it is a shredded wheat. As I said, I can describe it no better than by calling it shredded wheat. It could be sold to a customer who asked for shredded wheat, and he would think he was getting shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I would say he was getting shredded wheat. Referring to Plaintiff's Exhibit 161 and Plaintiff's Exhibit 1, I would say that the Kellogg's Whole Wheat Biscuit package was more modern in get up than the other. I would say the cellophane window was the most striking thing on it, being a comparatively new feature in food packages. I have never before seen that used on any Shredded Wheat Biscuit package. I think it would influence the sales of the product to the consumer. It would immediately tell them exactly by sight what they were going to get.

The Weingarten chain advertises directly to the public in the newspapers. They have advertised Kellogg's Whole Wheat Biscuit so. I would say we hope advertising of that kind would tend to create consumer demand for the Kellogg product, or we would not advertise it. When we do that, we always have a special price on them. Naturally, we expect to draw considerable trade on those items.

Sidney Myers handles the rest of the Kellogg line, which is a well-known line in the grocery trade. If the National Biscuit Company ever did any sampling like that I have described of Kellogg purchasing back their products from the retailer, I never have heard of it. It is a very common method of sampling. It is not new or something invented by the Kellogg Company.

RE-CROSS-EXAMINATION.

THE WITNESS: I have known shredded wheat all my life, and I have known it in the package Plaintiff's Exhibit 1 or a package similar thereto. There are many packages on the market today, old packages, which have retained the same or similar general appearance for a great many years. Royal Baking Powder is a very well-known package. Personally, I do not think the same appearance of a package for a great many years, so the public becomes familiar with it, attaches a strong value to the package. I think a person accustomed to a certain form or color of package readily takes to a brand new form of package. It is possible that good will attaches itself to a package known for many years, if it was able to maintain the volume of business it always had. The adoption of modern packaging methods to one method of advertising and the clinging to old, tried, well-known packages are both relied upon by some manufacturers as good merchandising. I would not say one was wholly bad or the other wholly good.

RE-DIRECT EXAMINATION.

THE WITNESS: A good many manufacturers have recently modernized their packages. For instance, General Foods modernized their Jell-O package recently. Standard Brands have just modernized their Royal Gelatine package. I do not know their theory. My reaction is that they are desirous of keeping up with the times, want the package more attractive, to have more sales appeal on the shelf, especially in this country where we have so many cash-and-carry stores. A customer comes in and nobody will say a word, unless she wishes to locate an item and asks the clerk. If a package appeals to her, even if she does not know what it is, I believe she would be naturally attracted to it.

That is what I mean when I say the cellophane window in Kellogg's package is an attractive feature.

In this section of the country, the self-service type of store is become more popular, as I notice in the ten years I have been here. The shift has been away from regular service stores to self-service.

RE-CROSS-EXAMINATION

THE WITNESS: There are still some service stores left, and they fill a very good demand on the part of the public. Kellogg modernized the product as well as the package. The color scheme on the new package of Jell-O is different, but not entirely. Red predominates on both packages, and yellow. The Royal Gelatine package used to be a dull red. Now, every flavor has its distinctive color.

On the sampling and buying from us, another concern that does something similar is the Rumford Baking Powder Company, which is worked a little different. I buy it at list price less regular discount. On Kellogg's biscuit, we have our cash-and-carry price, which we put out to all independent grocers. Kellogg's salesmen will come in and buy at my selling price. They do not get them from the retailer, because the retailer would want his profit on it, too. General Foods do that with their products. So does Standard Brands. Their salesman may come in and get it at our cash-and-carry prices and take it out and work the retail trade.

RE-DIRECT EXAMINATION.

THE WITNESS: Referring to the opposite side from the cellophane window, on Plaintiff's Exhibit 161, and Plaintiff's Exhibit 1, I do not notice a whole lot of difference in the general color of the biscuit shown on the Kellogg package and the biscuit on the Niagara Falls package. I would say that the biscuit on Plaintiff's Exhibit 148 is a great deal lighter than the biscuit on Plaintiff's Exhibit 161.

CHARLES F. FLORIAN.

Deposition taken at Dallas, Texas, February 14, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-one; manager of Weingarten Grocery Company, number 11 store, 3600 North Main Street, Houston. I have charge of that store, which we claim is a complete food market. It is a nice sized store. I think it is as large as any store in Houston. It is considered one of the largest. It is a self-service store. In the grocery department, a customer gets her basket and goes around and shops. In the other departments, they wait on her. In the grocery department, she pays for what she has when she checks out. She has to come in at a certain gate. After she is inside, she can go all over the store as she pleases, without being routed any particular way. I know a product named Kellogg's Whole Wheat Biscuit. It is a biscuit formed in a case. You have a glassine window you look through and see the biscuit. It is a shredded wheat biscuit. My store carries it. We also have the shredded wheat biscuit of the National Biscuit Company. We have handled the Kellogg product for some time. Those two products are displayed on our self-service shelves, just stacked on the shelf, no preference at all that I know of. It is just as easy for a customer to pick up one as the other.

We have had a very big demand for Kellogg's Whole Wheat Biscuit in our store in the last three or four weeks. We had a great sale on the biscuit. They had a campaign from house to house, and that seemed to cause some demand for it.

Referring to Plaintiff's Exhibits 161 and 1, I do not believe I would say either one was more novel in its get-up; except that, in Plaintiff's Exhibit 161, you can see the biscuit through the glass. I think that has

been a common feature in food packages recently, within a year or so that they put that out. I would think that window would have favorable effect on the sales of the product displayed through it.

Weingarten Stores advertise through newspapers and ads to the public the products carried by them. I do not think they have had Kellogg's biscuit in their ads, as far as I can remember. I have not seen any such ads to remember them. They advertise so many items I do not remember just what. We never had any customer bring either product back and say they had gotten them mixed up and wanted the other. We do not generally come in contact with them. They just help themselves. We very seldom wait on anybody. If a customer came back and brought something, saying she had made a mistake and wanted something else, I would know about it. I never heard of any cases of that sort, either with National Biscuit Shredded Wheat or Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I have been with Weingarten Stores eleven years, nearly all my business life. I worked before in Rosenberg, Texas, with the Rabinowitz Fair. I knew shredded wheat before I was in Houston. I did not eat it as a boy. I do not eat much of any kind of cereal. I suppose the stores I have been in carried shredded wheat in the old days. I know it was made before Kellogg's Whole Wheat Biscuit, and I have known that about a year. The big increase of sales in Kellogg's Biscuit during the last three or four weeks came very suddenly, due to the intensive selling, sampling, and advertising campaign of Kellogg. Prior to that time we were selling both products in our store. People come in and pick up Shredded Wheat like Plaintiff's Exhibit 1. We get eleven cents on

shredded wheat and ten cents on Whole Wheat. When Kellogg was sampling, I know they sold their package for ten cents and gave one free. They said they were sampling, and there was some kind of deal on. I imagine it is quite possible a customer wanting shredded wheat might pick up the Kellogg package, take it home, and say nothing about it. I suppose one looking at Plaintiff's Exhibit 161 would readily think that was shredded wheat in there.

RE-DIRECT EXAMINATION.

THE WITNESS: I think I am familiar with the rest of the Kellogg line, Corn Flakes, and the general Kellogg family of products. The predominant colors of Kellogg's food cartons are like that, the carton with green trimming and red letters. I do not think that fact would have any influence whatever in attracting consumer favor to a package put out by Kellogg.

We have had dried fruits in cellophane bags. I think cellophane increases the sale of products about five hundred per cent. That is true with regard to prunes, apricots, and candies. The latter increased so much that they are putting everything in cellophane bags. The first week we had it changed over, we doubled the sale on orders. I think the cellophane, as used in Kellogg's Whole Wheat Biscuit package really increased the sale of the package. The National shredded wheat is usually eleven cents in our store. They had a special on it one time for ten cents a package.

I do not know what the price was of the Kellogg package sold to the consumer with one package free. All I know is they had a campaign on and they said they were going to distribute some Whole Wheat Biscuit. At that time, I noticed an increase in consumer demand for Kellogg's biscuit. Whether it was the

price or what I really could not say. Whole Wheat Biscuit in our store outsells shredded wheat about two to one.

RE-CROSS-EXAMINATION.

THE WITNESS: It has outsold it here in the last eight or nine months, which I think may be due to the intensive advertising they have given it. I do not know why I think Plaintiff's Exhibit 161 is so good a package. They probably see the merchandise and know what it is. People like to see what they are buying. They see the ends of these biscuit in the package, it looks like shredded wheat, and they take it. I do not know whether they buy it for that. I suppose they buy it because they can see what it is. It does look like shredded wheat. I carry other National Biscuit products, crackers and cookies. The National has some cellophane packages, too. They have the round cellophane packages. I do not carry them in bulk varieties with cellophane on the package. I carry only in the package that a customer can pick up readily. There are a lot of cellophane packages in the biscuit line. A customer can pick it up and see what is in it. That is what they want to see, regardless of whole wheat or what it is. They want to look in your packages. I put a display there of candy with old type glassine bag. They take it and tear this out to see if it is the same as in the cellophane bag.

ROBERT H. PERLITZ.

Deposition taken at Dallas, Texas, February 14, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am an assistant buyer with the Schumacher Grocery Company, Houston, wholesale grocers. They have been in the wholesale grocery job-

bing business for fifty years. Just recently, because of present conditions, we took on a voluntary chain, the I. G. A., and are supervising the operation of about two hundred and fifty stores throughout the south Texas territory. We handle the I. G. A. stores and act as a supply depot for them; and, along with that, our other wholesale grocery business regularly.

We have jobber salesmen. For the I. G. A. we call them supervisors. They are not required to buy merchandise from us, but we give them all their sales help. Naturally, that kind of business comes to us. We sent them supervisors not to solicit their business for us, but to help them produce business. That in turn produces business for us. The same men also act as salesmen to the other retail merchants not in the voluntary chain.

Some of our orders come through the supervisors; others in writing or by telephone. A majority are taken by the supervisors, written out and filled from invoices. We also have a cash-and-carry department. The merchant or dealer helps himself to wholesale quantities in less than unit packages, less than cases, purchasing at will from those packages. It is a self-service wholesale.

I have heard of a product known as Kellogg's Whole Wheat Biscuit. I am familiar with Plaintiff's Exhibit 161, and have been as long as I have been in the grocery business, and as long as that package has been on the market for sale. We handle that package throughout our entire territory. We do not handle the National or Niagara shredded wheat at all, throughout our entire unit and have not for some time.

Our main offices are in Houston. We have branches located in ten other districts throughout Texas, extending from the southeast border to the southwest

border, the Rio Grande, or the Valley, at Beaumont, Austin, Cameron, LeGrange, Eagle Lake, Victoria, Corpus Christi, McAllen, Texas. Each one of these branches works as a distinct separate unit, so far as its merchandise is concerned. The salesmen or supervisors work out of that branch and sell and deliver out of it. We may stock that branch from our main warehouse in Houston; but the deliveries to the surrounding territories come directly from the branches.

Our office has not gotten orders for the old or National Niagara Falls shredded wheat recently or lately. Ever since the National changed its policy of distribution direct, we discontinued their line throughout our entire system. Perhaps once after the account was discontinued, some retailers may have thought we still had shredded wheat. If they did and specified that particular article, we no longer listed it in our cost book or carried it in stock. We would refer them to the National Biscuit Company, tell them they had their own trucks and would deliver from their store. Since then we have handled nothing but Kellogg's Whole Wheat Biscuit. Thereafter, they would specify Whole Wheat Biscuit. I have never encountered any confusion between the National shredded wheat biscuit and Kellogg's Whole Wheat, to my knowledge.

We never had any packages returned to us, for the simple reason we go out, take orders, write them on our invoices. The man in the territory taking the order writes it on the invoice as it is to be filled and shipped, specifying the quantity and the item. He specifies the Kellogg product as Kellogg's. There is a demand for it from our voluntary chain outlets, which we can gauge because they are regular. We get their accounts week in and week out. Some of the others may go to another place where they can get it cheaper

one week. We gauge that through our I. G. A. concern, which trade we handle exclusively. Our business on that item has shown an increase as time went on. There is a very good weekly demand for Kellogg's Whole Wheat Biscuit, which was created in the first place by extensive sales work of the Kellogg people on their products in our territory, which I know of; first, by advertising through newspapers direct to consumers; then, various sales helps to our sales force; then, sampling direct to the housewife, also by impressing upon the retailer the fineness of the product, and by sampling occasionally in the retail stores. Those are the most thorough methods, though they may be costly. Kellogg has used them extensively down in our territory. We have noticed a great increase by Kellogg in our business on all his general line of products.

CROSS-EXAMINATION.

THE WITNESS: The I. G. A. is Independent Grocers' Alliance, an organization just about nation-wide. They have headquarters in Chicago, operated by Mr. Frank Grimes, the originator of the idea. He selects his distributing points. Providing the wholesale grocery jobber is in harmony and he thinks it can be done, they get together and work out the territory. There is only one I. G. A. supplier in a territory. It all comes from Mr. Grimes' headquarters in Chicago. The chain stores are all independent grocery stores, each man running his own business. They get sales help from the alliance and in return practically give their business to whoever is at the head of it. That is part of the scheme, and to have mutual self-help between jobber and retailer. It enables the retailer to get some of the advantages of a chain member, although it is not strictly a chain store. As far as I know, all two hundred and fifty stores handle shredded wheat.

So far as I know, they get it from the National Biscuit Company. They are at liberty to buy from whomever they see fit.

I know and have known for some time the product in Plaintiff's Exhibit 1. We carried it in stock regularly up to the time they changed their manner of distribution. We enjoyed fairly good business on it, taking into consideration the other cereals. Our supervisors have to be very careful to specify Whole Wheat Biscuit in writing up orders. They have to specify it as it is for us to ship it correctly. If a supervisor got careless and asked for Kellogg's shredded wheat, they would ship Kellogg's Whole Wheat Biscuit. They would have not doubt as to what was meant, because they think Kellogg's is a shredded wheat biscuit. They have known it and been made familiar with it by Kellogg's methods. We have gained some very wonderful distribution on Kellogg's products in Texas. They have given us a real run on Whole Wheat Biscuit, as well as their other products.

I do not remember references in advertising to Kellogg's shredded wheat. Our voluntary chain stores have weekly advertised specials each Saturday. We have an advertising man who draws those up. Kellogg's is featured in those advertisements occasionally. The Kellogg agent does not help get that up. It is done strictly independently in our business.

I am assistant buyer in the main headquarters of our concern at Houston. It is just a family affair. I have been in and out of the business all my life. My father is with me. He is vice-president of the firm. My whole business career has been with that firm. I have been with them approximately three years, actively engaged, day after day. I am out among the retailers once or twice a week. I go out and see what they are doing. I probably have seen shredded wheat

in some stores, at a glance. I do not necessarily go to determine what they have in stock. I cannot say I have noticed how the two items are priced in retail stores. Our company suggests retail prices. I am not well enough acquainted with the retail prices to say what they suggest on Kellogg's biscuit.

There is no fluctuation in the price of Whole Wheat Biscuit; but, just as a retailer changes his price from Saturday to Saturday, a wholesale grocer will put out specials: sugar, one week, and something else another; not on Kellogg's Whole Wheat Biscuit. That is standard. We carry it right along at that price. I cannot say I have had a customer come in and ask for shredded wheat nowadays. They knew they can get it from the National. If they asked for it I would refer them to the National. We do not do any business with the National at all.

I came up here today at the suggestion of Mr. Wilde, one of the agents of Kellogg in Houston. I came here alone. Kellogg Company have not definitely promised to reimburse me for my traveling expenses.

RE-DIRECT EXAMINATION.

THE WITNESS: If our stores construct a new building, we have a set shape and form for the building. If not, we try to make them as similar as possible by painting on the outside and arranging aisles and shelves in the interior. Not all are self-service. I guess 60 per cent. of them are strictly self-service. The shift to self-service is going on quite rapidly. That type store is very much on the increase. I said Kellogg has been pushing Whole Wheat Biscuit for three months. I did not say less or more. Ever since they have moved into this territory they have been very active in pushing their goods, for the last three years, as long as I personally can determine. In our

territory I think they are gaining more distribution on Kellogg's Whole Wheat than on National shredded wheat. Kellogg has the largest sales, through distribution.

BARTON V. ANDERSON.

Deposition taken at Dallas, Texas, February 15, 1933.

Direct Examination.

The Witness: I am thirty and reside at 5823 Marquita Street, Dallas. I am a salesman for the Kellogg Company, with headquarters in Dallas, Texas. We have in our territory Dallas, seven counties surrounding, and San Antonio. As such salesman I have to do with the product known as Kellogg's Whole Wheat Biscuit. My duties are to hold the distribution of that product and to further promote the demand for it. The methods used are given to me by Kellogg sales organization in Battle Creek, Michigan, on different campaigns, sales promotion plans, and samplings. We have had house-to-house coverage on samples. They have used newspaper copy and a few store sales in combination with other Kellogg products, demonstrations. There has also been dealer advertising of our biscuit in this territory, newspaper copy by the dealer. In the San Antonio market, I would say the distribution of Kellogg's Whole Wheat Biscuit is 85 per cent. I cannot say as to Dallas, but I would think as heavy as San Antonio, or better.

There is consumer demand for Kellogg's Whole Wheat Biscuit in this territory. The predominant type of retail store here in which Kellogg's biscuit is distributed to the consuming public is cash and carry.

The features of the Kellogg package of biscuit which, to my knowledge, have had sales effect in pro-

moting it are: The name: Kellogg's, the form of the package, and the coloring of the package. The quality of the merchandise, when once used, would justify buying the product again, because he liked it and continued to eat it. There are more servings per package, and the biscuit is crisper. The arrangement of the package itself with the cellophane window has helped us, also. It is new to the consumer. I think the cellophane window has a favorable effect upon the sale of the product.

I have very little to do with restaurant or hotel trade. Kellogg's biscuit has distribution, I know, in hotels and restaurants in this territory. It is distributed to them mostly in individual cartons. That trade is serviced by our jobbers and by Mr. Baskett, our man who does work in the hotels and restaurants.

CROSS-EXAMINATION.

THE WITNESS: I have been with the Kellogg Company about three years and nine months, in Dallas and San Antonio. I have to do with all Kellogg cereal products, including Whole Wheat Biscuit. I meant to include the whole line, as far as my duties are concerned. We have created a demand for the Kellogg Whole Wheat Biscuit among consumers. There has been considerable effort on that item, and on all other Kellogg products in proportion. I would not think the Whole Wheat Biscuit competes with the National Biscuit shredded wheat in any substantial way. It is a product owned by the Kellogg Company and known as Kellogg's Whole Wheat Biscuit. The form is the same and it sells, I would say, in competition with it. The statement was not made to me in connection with my instructions from Battle Creek nor have I heard it made that the Whole Wheat Biscuit is to compete with shredded wheat. It is a competitive product, naturally. It was never stated to me that it was to

be used as a competitive item against shredded wheat. I was to create a demand, a new market for it. Or the word "new" was not used. It was to create a market for the Whole Wheat Biscuit.

I have personally used shredded wheat, and I was at one time a demonstrator and had four additional demonstrators for the Shredded Wheat Company, about six years ago, in Texas and Louisiana. I was engaged at that time in introducing shredded wheat. I found it was possible to create a demand for it at that time, just as I found it was possible to create a demand for Kellogg's Whole Wheat, with the same general class of trade.

I have had charge of house-to-house sampling of Kellogg's Whole Wheat Biscuit; and I followed the plan talked about here today, purchasing supplies from some dealer; selling a package to the housewife, not necessarily for ten cents, but at a price and giving her one package free. The only time I did that for Kellogg's was in San Antonio for about two and a half weeks. Others have done it for the Kellogg Company here, to my knowledge. I and my associates have conducted the same kind of campaign with other Kellogg products. I believe we had corn flakes in the Valley. I believe that is the only instance I can recall of that product and Kellogg's Whole Wheat Biscuit that I featured that way. It is not fair to say, however, that the sales efforts made by samplings within the last year or so on Kellogg products have been largely concentrated on Whole Wheat Biscuit. We sample other products; but there is no other product we have handled in that same way, as long as I have been with the Kellogg Company. I do not think having had that one product, Whole Wheat Biscuit, for house-to-house sales might be called concentration on that one item. I think they were pushing all their other items just as

hard as they were that, although they did not adopt that particular method for any other item.

RE-DIRECT EXAMINATION.

THE WITNESS: I severed my connection with the National Biscuit Company August 1, 1929, I believe, through the change by the purchase of Shredded Wheat Company. I was retained on the sales force for some months after they took over. I believe they bought it the latter part of January. I left them the last day of July. I was discharged, as also were other shredded wheat salesmen. My position with the Shredded Wheat Company at that time was division sales manager. Whether the duties I had been performing were continued or not, I do not know. The responsibility for sales was transferred to the National Biscuit men of this territory. The old shredded wheat organization was completely dissolved, and the selling methods of distributing were changed. The sales of shredded wheat since, as far as they have been promoted by the National Biscuit Company, have been promoted by their cracker salesmen and those handling the cracker line, also others placed as responsible for that sale of that product. I had no connection of any kind, directly or indirectly, with the Kellogg Company, prior to my discharge by National. The period between my discharge and Kellogg employment was something like fifteen days. I was hired by Kellogg the day after I left National. No others discharged by National at that time were taken over by Kellogg. My duties were such as have been described here today.

I know of the use of the Wheel of Knowledge in connection with the sale of Whole Wheat Biscuit in this territory. There was a chart with each two packages of biscuit. It was bound to the two packages with twine. I do not think the sales effort of Kellogg for Whole Wheat Biscuit has been greater in the last three

months than before. I have known of no time since I have been with them when they have not tried to push its sale.

RE-CROSS-EXAMINATION.

THE WITNESS: About six years ago I was engaged in demonstrating shredded wheat. Then I became district sales manager of Shredded Wheat Company and was there about a year, when the National Biscuit Company took it over, changed its method of distribution, and I and my sales force went out. There was nothing personal in my discharge by National; just part of their policy.

When I first came with Kellogg, their Whole Wheat Biscuit was called Kellogg's Shredded Whole Wheat Biscuit. I do not remember I was engaged in any particular sales campaign on it when I first went with them. For the past two and a half to three years I have been with them, they worked the biscuit along with the other Kellogg products, in the same way. I have not done any house-to-house work on it until recently. I had charge of men who did house-to-house work in the field. I had to take charge of the group who did that work, and was actually on the ground with them part of the time. The salesman approached the housewife with Kellogg's Whole Wheat Biscuit in his arm. He would show her the package, tell her it was Kellogg's Whole Wheat Biscuit, and offer her one package for the price at which we bought it from the retail store, and a package of our own merchandise free. Our instructions, or my instructions to my men were not to bring up Shredded Wheat on those occasions.

When I told Mr. Clarke the advantages of the Kellogg biscuit: smaller biscuit, fifteen to the package, more biscuit to the package, my comparison was between those two packages setting on the table: Kel-

logg's and National. We brought out the good features of our product to the housewife. If she brought up shredded wheat, the salesman would naturally show her the advantages of our product. We would compare it with shredded wheat and say it was toasted top and bottom and there are more biscuit to the package. It is not true that a comparison of that sort almost invariably results in a sale. I do not say that I think this product shown to the housewife is a brand new product, not comparable to anything else she knows. The bringing up of the subject of shredded wheat is in a minority of cases. It occasionally occurs, and then we point out the superiority of the Kellogg product. We tell the housewife it is Kellogg's Whole Wheat Biscuit. Possibly one of the salesmen may have told her it is a Shredded Wheat Biscuit. I would not say that was not done. I do not hear everything the salesmen say. I call it Kellogg's Whole Wheat Biscuit. If I were asked to describe it further, I would call it Kellogg's shredded wheat. It says on the package: shredded wheat, and on the other end: Shredded wheat in its most delicious form. So the housewife does get the idea it is shredded wheat biscuit. It is a shredded wheat biscuit. There are so many customers one finds who do not know shredded wheat or have never eaten it. In going from house to house, we do not find many who have never heard of it; at least, we gained the impression when we talked with them that most people have heard of shredded wheat. As a food, it has been pretty much of a household word for a great many years. It is quite natural that, when a reference is made to shredded wheat, Kellogg's Whole Wheat Biscuit is called Whole Wheat Biscuit or shredded wheat, purchased under that name frequently. It is not so in every instance. People do call for Whole Wheat Biscuit. The customer would go in and get the product and not have to ask for it. Usually, in the cash and carry business, she picks out what she wants.

There are still some service stores left in this part of the country. It is quite natural for her to come to a store or by telephone ask for Kellogg's Shredded Wheat. If she has been sold on this product, she would ask for Kellogg's Whole Wheat Biscuit. I know she would ask for Kellogg's shredded wheat, and she would get our Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: Packages like Plaintiff's Exhibit 168, with the following on the top: "How you can obtain the Kellogg's Story Books of Games. Send this package top, together with ten cents in coin, to Kellogg Company of Battle Creek, Michigan, and we will mail you one of the new Story Books of Games. The entire series of four Story Books of Games may be secured for four package tops and thirty cents in coin," have been distributed in my territory.

I did my first house-to-house work for Kellogg in this territory on Whole Wheat Biscuit along the first of November, 1932. Before, we would have the two-and-one combination, about two and a half years ago, house to house, including Kellogg's Whole Wheat Biscuit, two packages sold and one free.

RE-CROSS-EXAMINATION.

THE WITNESS: The Kellogg Company or grocers at its instigation have not, in my territory, offered a combination of two or three different Kellogg products, together with a free package of Whole Wheat Biscuit. I know I have not used any of it. I have used other Kellogg products, but I have not used the Whole Wheat Biscuit as a free package.

RE-DIRECT EXAMINATION.

THE WITNESS: Not as yet. There is no policy against using it, whatever. We are to use whatever product we want to. Mr. Wilde tells us what product we can use.

ADOLPH H. WILDE.

Deposition taken at Dallas, Texas, February 15, 1933.

Direct Examination.

The Witness: I am thirty-six, and sales manager for Kellogg in Texas, having been such for about two and a half years. For more than a year, I was in Oklahoma City in the same capacity. I have been connected with the Kellogg Company twelve years. My territory is the entire State of Texas, except El Paso, Texarkana, and a few surrounding counties, about twelve marginal counties which are covered by other districts. El Paso is covered by the Denver District, and Texarkana is in the Memphis district. I direct sales for the Kellogg Company, carrying out the policies laid down by Battle Creek. It has been part of my duties to promote the sale of the product known as Kellogg's Whole Wheat Biscuit in my district.

We have used the usual methods we apply to any other new product that might come out, as well rounded a campaign as we can devise, with the exception of sampling. We have not sampled Kellogg's Whole Wheat Biscuit as much or as thoroughly as we might do in the case of some other newer products we have introduced in my time with the Company. We have sampled by selling two full-sized packages and giving one package free, because we wanted to put the whole package in the hands of the housewife. We have had a newspaper advertising campaign, with thorough coverage of our entire district, and our usual methods of obtaining tie-ups with the dealers. We explain to them what we are doing. When the campaign starts, we usually run a large ad and a series of smaller ads. Before the larger ads appear, we suggest to dealers that they tie in with the larger ad on their regular weekly advertising. We also solicit dealer tie-up advertising when we

do house-to-house work, which started some two and a half years ago in this State. We were using originally one free with two sold. We changed that in Texas last November, when we started using one free with one purchased. The dealer tie-up means that he mentions our product in his weekly ads, newspaper or circular. The larger outlets usually carry both. The wider their distribution, the better response we have to the tie-up.

Kellogg's Whole Wheat Biscuit is distributed in Texas largely through jobbers. Some of the large nation-wide chains, such as A. & P. and Western States, are served on a direct basis. We have the old-line jobber, who has been of great assistance to us since the change in National Biscuit Company policy on the marketing of shredded wheat. We did not feel they should continue to carry the National Biscuit product because it was being offered to their customers direct in competition to their own sales forces. We were good enough salesmen to point out to them the foolishness of having a sales force and it was necessary to fight a national distributor of any product, shredded wheat or any other, shredded wheat being the one we were naturally attacking. We were very successful in obtaining quite a few exclusive jobbers, especially the larger outlets, such as Radford, Wooten, Walker Smith, and Waples Platter, all large outlets in Texas, with a number of branch houses.

I regard those arguments to the jobbers for pushing the Kellogg line, where there was competition, as perfectly legitimate. It was a policy announced by the National Biscuit Company, in a letter openly announcing their policy of going to the trade, which put them in competition with jobbers and with the old-line jobbers, practically all of whom had salesmen traveling from place to place. In pursuing these methods of pushing our Whole Wheat Biscuit, we had the benefit

of those salesmen who traveled around or through the rural districts. It had a very material effect on our biscuit business.

Gradually, the demand created largely by our own efforts increased. The larger independent outlets in major markets, such as A. & P., the last to persist in not handling our product, finally stocked it. As our distribution increased through increased consumer demand, our sales increased by leaps and bounds.

We use two types of campaigns. In the territories where we do not have good distribution, we first have to get it to a certain point before we can really cash in on the better-known forms of advertising. Beginning last November, we went into markets where we did have a good distribution with more aggressive methods, with very good results so far.

We have also used the offer of The Kellogg's Store Book of Games you referred to on the top of the package, approximately twelve months ago. One of those booklets was given free with two packages, in Texas, in addition to those offered on the package top. We used the Wheel of Knowledge with two packages. I understand on the Coast they gave it with one package. That was up to the district manager at Battle Creek. We held our cost down. We figured our package sale would increase by giving one book with two packages rather than one.

The offering of those devices had the effect of bringing the product to the attention of new customers of the Kellogg Company, because we told the public about the Wheel of Knowledge, which we used, also, on the rest of the Kellogg line.

We have used in Texas demonstration methods of bringing Whole Wheat Biscuit to the attention of new consumers, meaning by demonstrations the store sales conducted by our salesmen. If we sell our jobber a large quantity of biscuit and it does not move out as

readily as we thought it would, we often have our salesmen use this as a free package on his Saturday store demonstration sale. We sold three of Kellogg's other products and gave this free with them. That could be any product we were overloaded with in any particular market.

Those methods have been used in this territory on Whole Wheat Biscuit since the first of the year. They are rather scattered; I do not believe we have had more than ten such sales in Texas, using Whole Wheat Biscuit as the free package.

About eighteen months ago, we began experimenting with cellophane. We felt reasonably sure the public was becoming cellophane-conscious. They bought very readily in stores products displayed in cellophane bags. They began marketing beans, prunes, dried fruits of various kinds with small slits extending around the package. We felt the public bought that thinking the product was in cellophane. That was the whole idea, as I see it. We began using our cellophane-window package for display purposes at first, only. It was expensive. We found evident ready acceptance by the public of that package. I believe, personally, the Whole Wheat Biscuit package is the most outstanding cereal package on the merchant's shelf today. The cellophane front has been of great assistance to us in Texas.

I think the easy-opener method as on Plaintiff's Exhibit 161, the feature of a weakened dividing line around the top of the package to be pushed in with the thumb, opening the package easily, which was advertised on two-thirds of our products in Texas, has been of big assistance in selling. I think I have covered the ground pretty thoroughly on devices in connection with the Kellogg package, except that it has the same family scheme as all the rest of our products; and the name

Kellogg's, of course, is no detriment to new consumers trying the goods.

If we are to judge by the introduction of our other new products, especially in Texas where the cash-and-carry store is predominant, we very often have floor displays of our new product with just the name Kellogg's. Long before we sample them or tell them about it by radio or in newspapers, the housewife is picking up that product. Even in the hard times of the last two years, there is a ready acceptance of new products. We are pretty happy with sales increases we have been able to show the last two years on Whole Wheat Biscuit. The various campaign methods and package features very decidedly create a demand for the product. Self-service stores and voluntary chains have assisted us. The demand in those stores has increased steadily. By the use of more aggressive methods adopted last November, we fully expect to continue that increase.

The Atlantic & Pacific Tea Company is a large organization in our territory. They are the controlling factor in the retail business for the City of Dallas. They do the largest volume of business here. They cover practically all central and eastern Texas and extend out as far as the Texas upland, about two hundred and fifty miles. We find they want to know what is going to be done to create consumer demand on a product before stocking it, especially on new products. We found them especially hard to sell Kellogg's Whole Wheat Biscuit to. Ever since they have been in Texas, I have been trying to sell them, about three and a half to four years. We could not sell them. The Dallas unit finally stocked it, the entire stores services from the Dallas branch, about two hundred and fifty stores. They extend way up into Oklahoma. They stocked it last June, and they have carried it since. The Houston unit stocked it early in January, 1933, and seemed very much satisfied with it as they have repeated. With the

Whole Wheat Biscuit, the A. & P. wanted to know what we were doing, wanted us to quote figures of what others were doing with our biscuit. They were largely swayed by figures we quoted them as to what other retail outlets were doing. The A. & P. are both service and self-service. My opinion is that the greater percentage of their business is cash-and-carry, although they have clerks if customers desire to be waited on. The customers wait on themselves. That is the predominant type of store in the major markets in our territory. I would say that type of store is increasing. Large sums of money have been spent promoting the self-service idea in Texas.

I would say that, in San Antonio, the percentage of distribution of Kellogg's Whole Wheat Biscuit is about eighty-five per cent. coverage of the entire retail stores; about seventy-five per cent. at Houston, and about seventy per cent. at Dallas, seventy at Fort Worth. Those proportions are increasing in those respective markets. We could very materially increase them by going after that. The outlets stocking our biscuit in Dallas control ninety-five per cent. of the total business, so we are not worrying about widening our distribution at this time. We would be willing to advise Battle Creek to appropriate more money toward a sale or any kind of campaign, radio, newspaper, or sampling from house to house, to sell more Whole Wheat Biscuit. It is necessary to have a certain number of outlets, before your advertising is effective. Your money would be largely wasted advertising a product which did not enjoy distribution. In Texas we would not hesitate to turn loose with anything we would do anywhere. The distribution in the stores would affect the advertising behind the product; but we have now reached the point where we would advise Battle Creek to give us anything they desire, and we would receive the full effect of their advertising. Even if radio ad-

vertising were used, we would receive its full effect, because they could go to this or that store and buy it.

We have a fair distribution of individuals in Texas. The consumer demand, however, is away ahead of our cafe business. We feel we should increase our restaurant business materially this year by going after it more aggressively, working the cafes a little more regularly. The National Biscuit policy of direct contact with their trade makes it difficult to reach the cafes as we would like to. The National's representatives see especially the larger cafes oftener than we are able to do with our present sales set-up. Nevertheless, we are making nice inroads in the biscuit business in Texas; we are making progress in cafes. We find a larger number of cafes enjoying a very good business on our product. We are in direct competition, in our territory, with the National, as far as Shredded Whole Wheat Biscuit is concerned. We are both selling like products.

Co-operate advertising is used by a lot of manufacturers, but it has not been used by the Kellogg Company. By that I mean special outlets are selected by the manufacturer and are paid to feature a given product, mention it in the regular weekly advertising they run, either in newspapers or circulars, and display it prominently in the stores. That is against our national policy and is not done with any other Kellogg product. Aside from that, we have used all the standard, established and best-known methods of introducing the products, as far as I know.

CROSS-EXAMINATION.

THE WITNESS: I would not say that Kellogg's Whole Wheat Biscuit is designed to compete with shredded wheat biscuit. We are in the cereal business, and that field presented to us an opportunity to increase our general business, and to help our entire line

by the addition of shredded wheat biscuit. It is not like shredded wheat biscuit. I think we have a better product. As far as the general physical description of it goes, it is whole wheat biscuit, made in long filaments like shredded wheat biscuit. It varies in the processes that make it a decidedly different product. I differ from what you want me to say here, that it fills the same wants, for this reason: I maintain we have increased materially the consumption of shredded wheat by having entered the market ourselves. I think we have a better product and that our intensive methods have opened new outlets. There is no question in my mind that, in doing so, we are competing with shredded wheat. Except that all cereals compete with each other more or less, there is no other product the Whole Wheat Biscuit competes with. We offer ourselves competition by the aggressive methods we are using to put the biscuit over in Texas. We are possibly not increasing total cereal consumption as much as we are increasing the sale of Whole Wheat Biscuit. I would say we are affecting shredded wheat very materially by using the tactics we are using in getting it before the public. If they like our biscuit better than the other, our business grows. Our business has grown, and we now enjoy a very satisfactory business on Whole Wheat Biscuit in Texas territory. I would not say that is quite largely at the expense of shredded wheat. I would say it affects shredded wheat more than it does any other cereal. We have no doubt a lot of present consumers who have been past consumers of shredded wheat, by the introduction of our business methods.

It was necessary to sample our product. In approximately fifteen towns in Texas last year, we sampled with a full-sized package of corn flakes, house to house. That was Kellogg's Corn Flakes, not a new product; an established product, we were trying to

increase the sales of. Wheat Crispies was something new. We sampled them in the small-sized packages. We started them that way. That is the way I started Kellogg's Whole Wheat Biscuit in San Antonio, when I was then a salesman. I sampled those. In our recent campaign we used only the large-sized package.

Texas is predominant in this way: For instance, Post Toasties, a corn flake, outsells Kellogg's Corn Flakes. In the twelve years I have been with Kellogg, we have made progress in tearing down the established business on that product. We have thrown thousands of small-sized samples in Texas. A careful supervision and check-up shows we have increased the sales of Post Toasties while distributing our own samples approximately 15 per cent. That would have been true if we had sampled our small-size Whole Wheat Biscuit. We would have increased the sales of shredded wheat, instead of tearing it down.

The Kellogg Company encourages the ladies in their organizations to have demonstrations of the Kellogg product. I could explain that plan in detail to you, but we have an expert over here who does nothing else but that. Those things are sometimes featured in the newspapers as a semi-social event. We interest the housewife in the promotion of things of that sort, as to the sale of our entire line. Brownwood is in our territory. There was an event such as is referred to in the clipping, Plaintiff's Exhibit 180, from the *Brownwood Bulletin*. The newspaper offered that as a co-operative donation to us. That necessarily is a news item, done as that. In addition, he enjoys a large number of our schedules on various other products, and he gives us the support of reading matter co-operation. He gets it up himself. I would think that was about the middle of last year, September or October. They call it Shredded Wheat Biscuit in this article.

They are not our copy writers. Our friends of the press write it. Persons outside of our organization often refer to it as Kellogg's shredded wheat biscuit. They do not do it often in dealer advertising. That has been broken down by the National Biscuit people, who have used, we will say, questionable methods in warning them against the use of "shredded wheat biscuit." I would not be surprised if told you had a great number of tear sheets from all parts of the country in which Kellogg's shredded wheat is featured; but you cannot find many from Texas, because you evidently had an aggressive bunch of fellows here, right on their jobs. I do not know whether you would say they threatened our customers with dire consequences, but they discontinued calling it shredded wheat. One of our best customers in the state discontinued very suddenly. I do not think you could have got by with very much of a threat with him, but you did scare him. You did not get the customer away from me, but you did succeed in having him stop calling it shredded wheat, which we were perfectly willing he should do; because we try to establish our product as a Whole Wheat Biscuit and are having fair success in doing so.

I remember the old Kellogg package, Plaintiff's Exhibit 166, called Shredded Whole Wheat Biscuit for about three or four years. It must have been at least four years ago. I have heard rumors, but I do not know for sure why *shredded* was dropped at that time. I know it was dropped in 1930, and it became Kellogg's Whole Wheat Biscuit. I do not remember packages resembling Plaintiff's Exhibit 174, with picture of a dish and Kellogg's Whole Wheat Biscuit on both panels, coming down to Texas. The first package coming to Texas had a bowl on one side, very definitely. I do not remember a package with a bowl on both

sides. I do not recall what it had on the other side. My recollection is hazy about that.

Plaintiff's Exhibit 165 was a later package than Plaintiff's Exhibit 166 and is substantially the shape and size of the present package, although it is still called Kellogg's Shredded Whole Wheat Biscuit. When these packages were put out, no such intensive or aggressive efforts were made to introduce it as we have made in the last two years.

I do not remember Plaintiff's Exhibit 174 being in Texas at all. The single panel is the only one I remember; but I do not recall what was on the back panel. Whole Wheat Biscuit on the other side; but what else I do not recall.

Plaintiff's Exhibit 168 with the cellophane window started the early part of last year; but we did not offer it for sale generally until about four months ago. It came sometimes two to a case for display purposes, and was marked not to be sold, for display purposes only. After 1930, our packages were marked Kellogg's Whole Wheat Biscuit and we endeavored to sell it as Whole Wheat Biscuit, avoiding calling it shredded wheat biscuit. Our educational efforts on the public have been devoted to making them conscious of the name Whole Wheat Biscuit. We have been working toward our present point, where I feel perfectly at liberty to tell Battle Creek we can use any method of advertising this product they desire to use, and have a full and proper distribution.

Looking at Plaintiff's Exhibit 1, a newer package than Plaintiff's Exhibit 168, and different, designation: A shredded wheat product, on one end, and: Shredded Wheat in its most delicious form, is not, I think, now, helping us in our endeavor to make the public conscious of the name Whole Wheat Biscuit. It does not assist much in that way. I think we have an established business in Whole Wheat Biscuit.

Today, we find a growing percentage of the retail grocers who refer to it as *biscuit*, and that is gradually extending to the consumers. I do not think the consuming public refer to it as shredded wheat nearly so much as we experienced when we started our own more aggressive methods of advertising to get it over to the public. People know that Kellogg is making shredded wheat. They do not call it shredded wheat. I can feel safe in saying that even telephone orders today are for Kellogg's Whole Wheat Biscuit. It says shredded wheat on the Kellogg package; but we do not want to have it known as shredded wheat. The more we can get it over as Whole Wheat, from a sales standpoint, the more effective our advertising is and will be.

We get both kinds of package, cellophane and non-cellophane. It costs me approximately fourteen cents a case for the cellophane package for Texas consumption, which is rather steep. That is left up to the district manager. We are specifying it all cellophane packages to certain sections of the district. Where we feel we can use the other to good advantage, we order the package similar to it. I could not picture to you just how the non-cellophane package looks. We have some in the new-style package. I did not observe and do not know when the package was changed with the picture of the dish and two biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: It might be unsafe to say that Plaintiff's Exhibit 165, on which the product is called Kellogg's Shredded Whole Wheat Biscuit, is no longer sold in this territory, because small stores may buy a case and move it very slowly. It may remain on their shelves for an indefinite period. I do not know whether the Kellogg Company still maintains a small

volume of it under that name; but I do not know of any being sold by the company in my district.

We did not have anything to do with the composition of the ad, Plaintiff's Exhibit 180. That is an article, and the papers run them for us practically all over Texas. They are worded differently in the towns. Referring to our records this morning, we found two hundred and ninety-three towns in which that type of co-operation was obtained. In a larger percentage of them, articles of that nature appeared, as a matter of newspaper courtesy.

The practice of dealer advertising referring to our product as Kellogg's Shredded Wheat is distinctly on the decrease. We did not take any actual steps on that; but our whole campaign of advertising has been directed at establishing the Whole Wheat Biscuit, as we do on various other products we introduce, so we can get out here and do things for Whole Wheat Biscuit and not sell shredded wheat biscuit. I do not recall seeing any advertising referring to our product as shredded wheat, recently. As I told Mr. Vilas, the sampling by Kellogg's might possibly have stimulated the sale of National Shredded Wheat. It is a matter of policy, arrived at through general experience in selling Kellogg's Corn Flakes in Texas; and I thought there might be a similar effect on this product. We did put out some small samples; but I quote this to show you we cannot be sure of any deductions we might make. The man we sampled through at San Antonio is today one of the outstanding outlets for Whole Wheat Biscuit; and that sampling was done about four years ago.

From the testimony today, as far as concerns the two major markets, there can be no doubt that sampling by selling one full-sized package and giving one free is very, very effective. It has increased the consumer demand very materially.

In my opinion, the entry of Kellogg into the shredded whole wheat biscuit field has increased the total volume of that product used. I do not think there is any doubt that the two companies together are now selling more shredded wheat biscuit than the National was selling before. With two aggressive manufacturers in the field, you will market and sell more.

RE-CROSS-EXAMINATION.

THE WITNESS: In Texas, I would say they are selling twice as much, because the per capita sale of shredded wheat was way below the consumption on the coast or in New England. I should think our entering this market has not affected the National Biscuit sales to anywhere near the extent of our present volume, which is partly new consumers and partly old shredded wheat consumers.

RE-DIRECT EXAMINATION.

THE WITNESS: I think our package with the color scheme of our line, and by changing our packages occasionally and making them more modern, helps the sale of our product. We believe in changing the package, not the color scheme necessarily. Our biscuit is better, due to the more economical size. That has a large bearing on the situation, in my estimation. The biscuit is used by every member of the family, not a product only one individual of the family may like. The biscuit is smaller, an economical feature, and a very good selling point; also the fact it is toasted on both sides, browned on both sides, quite a factor in selling our biscuit. There are more biscuit in the actual weight of the package.

RE-CROSS-EXAMINATION.

The Fort Worth Wholesale Grocery Company, jobbers, are one of our customers. The bunch of pink

sheets, colored pink, dated September 19, 1932, Plaintiff's Exhibit 181, is an authentic weekly price list put out by that concern. On page 4 is a column headed: Kellogg's Line, in which they feature: Shredded Wheat, twenty-fours, $1.95; and, down below: Other Cereals, thirty-six's, Reg. $3.60. The Reg. stands for *regular*. That is the term they use on there: regular pack, to distinguish it from individuals—the family size. That price of $1.95 per case varies. Both Kellogg and National Biscuit had deals last year. If you reduce the second item one-third, that would produce $2.40 for thirty-sixes, twenty-four of them, as compared with $1.95 for twenty-fours carried under Kellogg Line.

BARTON V. ANDERSON (Recalled).

Deposition taken at Dallas, Texas, February 14, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have produced some pairs of various competing products here today. Kellogg's All-Bran and Post's Whole Bran, Defendant's Exhibits 31 and 32, are recognized in the trade as competitive products.

Defendant's Exhibits 33 and 34, Uneeda Graham Crackers and Brown's Graham Crackers, bought in this market by me, are directly competitive packages. They are placed on the shelves of the market, side by side. It is the same product made by different manufacturers.

Defendant's Exhibits 35 and 36, Sunshine Dutch Rusk and Holland Rusk, I bought them in this market and they are directly competitive products.

Defendant's Exhibits 37 and 38, Brown's Vanilla Wafers and Uneeda Vanilla Wafers, were bought by

me in this market, and they are directly competitive packages.

Defendant's Exhibits 39 and 40, Van Camp's Spaghetti and Thrift Spaghetti, bought by me in this market, they are directly competitive packages.

Defendant's Exhibits 41 and 42, Swans Down Biscuit Mix and LaFrance Biscuit Flour, I bought them in the market and they are directly competitive packages.

Defendant's Exhibits 43 and 44, Uneeda Assorted Biscuit and Sunshine Specialties Assortment, bought by me in this market, are directly competitive packages.

Defendant's Exhibit 45, package of Baker's Coconut, was bought by me in this market, as was Defendant's Exhibit 46, Premier Spaghetti.

Defendant's Exhibits 47 and 48, Van Camp's Kidney Beans and Premier Beans and Pork, were purchased by me in this market and are directly competitive packages.

Defendant's Exhibits 49 and 50, Van Camp's Spaghetti and LaChoy Shredded Sprouts, were bought by me in this market and are directly competitive packages.

Defendant's Exhibits 51, Van Camp's Hominy; 52, Beech Nut Pork and Beans; 53, Battle Creek Fig & Bran; 54, Van Camp's Hominy; 55, Beech Nut Spaghetti; and 56, Baker's Sweet Potato Shredlets, were purchased by me in this market.

Defendant's Exhibits 57 and 58, Dunham's Original Shred Coconut and Baker's Coconut Shredded, were bought by me in this market and are directly competitive packages.

JOHN WILLIAM BASKETT.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty. I call upon cafes and institutions for the Kellogg Sales Company, with whom I have been four years next month. Before then, I worked a short time as window display man for Palm Olive Peet Company. I now calls upon hotels, restaurants and institutions, which I have been doing since I went to work for the company. I solicit orders from them.

I am familiar with the product known as Kellogg's Whole Wheat Biscuit and have been since about the time I have been with Kellogg. I cannot say I was conscious of it before. My territory is, roughly, the State of Texas, the Dallas district. I have sold Kellogg's Whole Wheat Biscuit in that territory to the class of institutions I mentioned. It is sold in the individual size to restaurants and hotels, and in standard-sized packages usually to institutions, except some which use it in the individual size. The distribution of Kellogg's Whole Wheat Biscuit in my territory in individual size cartons, to restaurants, hotels, cafes, and the like, is seventy out of a hundred. The product is generally displayed in restaurants on the back bar, the pie case, or places they have for displaying fruits and canned goods. Also, there is nearly always a display of packages of various goods set up in view of the customers, with the idea of causing them to buy it, a permanent cereal display on the back bar.

I have knowledge of the general practice in restaurants, hotels, etc., in serving Kellogg's Whole Wheat Biscuit. I have seen them serve it. They usually take the end of the carton off. They do not cut it as they would do a box of bulk cereals, which

would destroy the biscuit. They just cut or tear off the end of the package. Sometimes it is set down for the customer to take them out. More generally a bowl is set in front of the customer, the waitress takes the end off the package, puts the biscuit into the bowl in front of the customer. Sometimes they do not bring it right in front of the customer; but, more generally, they perform the operation in front of him. Sometimes they touch the biscuit with their hands in putting it into the plate. When they do not use the hand, I do not know how they get the biscuit out of the package.

I am familiar with shredded wheat of the National Biscuit Company. We encounter it in some of the restaurants we service with Kellogg's biscuit. It is more frequently in the individual package, of which they have more than one size. Each package contains two biscuit. I have encountered both the larger individual carton, Defendant's Exhibit 59, and the smaller carton, Defendant's Exhibit 60, in my trade in Texas. I have known the larger of the two longest. Since my experience in calling on the cafe trade is the first I remember seeing Defendant's Exhibit 59. I have seen Defendant's Exhibit 60 a year or a little more. I do not remember just exactly when it came out. Here it came out after the Kellogg package, Kellogg's individual, quite a little while after. The smaller one, Defendant's Exhibit 60, is seen by far more in the markets now. It has a larger distribution than the larger individual carton of the National Biscuit Company. I thought, until recently, the larger package had been discontinued with the advent of the smaller one, which is far in dominance over the larger one, in the Texas market.

The only change in size I know of is that represented by the biscuit in cartons, Defendant's Exhibits

59 and 60. I see no other difference between them, except as to size.

The Kellogg individual cartons are distributed to the trade I service through the wholesale grocery companies. I take orders for them and transmit them to the wholesaler for selling. Many of the orders in my territory are transmitted to the wholesalers direct. It is not possible for me to get them all.

I have not encountered in the wholesale trade any instance where Kellogg's Wheat Biscuit in individual cartons has been returned to the wholesaler on the ground the National Biscuit carton was intended to be ordered. I only know one instance of National Biscuit being returned because Kellogg's biscuit was wanted, in Fort Worth, Rainey's Eat Shop. Mr. Rainey died since that happened. He favored our biscuit, before that smaller size came out. He asked for Kellogg's Whole Wheat Biscuit, and the other was sent him. He returned it and said he wanted Kellogg's. They sent it to him a second time. The salesman for the wholesaler finally told Mr. Rainey they were sent to him so he could give a larger serving for the money to his customers. Mr. Rainey told him he did not want it because he wanted to give the same amount of cream he did with his other cereals. He sent it back two or three times before he finally got Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: My experience with the Kellogg Company is my only experience with food products in the business, since my student days. I have clerked in grocery stores. I do not believe I was ever really conscious of knowing shredded wheat when I was a kid in school. I still am not conscious. In small towns, I would not swear they had it in a store in that par-

ticular place. I did not always live in Texas. I came from Kansas. We usually had corn flakes. I think a person usually has corn flakes on the shelf. We used cereals at home, but I do not think we had shredded wheat.

When I stated I did not see any differences between Defendant's Exhibits 59 and 60, I did not see the word *sample* on Defendant's Exhibit 59. The printing on the packages is in different form; the smaller package, Defendant's Exhibit 60, being printed horizontally, and the other vertically. I did not purchase these packages, and I do not know where they got them from. We got them in a retail store, Wyatt's Store, Tenth and Lancaster, at Oak Cliff, not in a restaurant.

(Photograph of interior of Wyatt Self-Service Store referred to, in Dallas, was marked in evidence as "Defendant's Exhibit 61.")

My duties include Texas generally, except El Paso and some other places. I cover the same territory Mr. Wilde has in his jurisdiction and travel through it. I do not believe I could tell you how many cafes and restaurants there are in that territory. It would necessarily be a rough estimate, since there are many little districts. In calling on them, it is not possible to work the entire territory clean and get to all the important markets. There are places I have not been to. I should think there are two thousand over this territory. I do not try to visit all from time to time. I try to make a complete canvass of the more important ones, including hotels and the restaurants in the larger cities, along the main streets. In my visits to restaurants, I encounter shredded wheat. My product is in competition with it in a great many of them. They are both displayed in the individual package. I could not say the practice of serving either product in indi-

vidual packages is universal, but by far the majority of the places handling their product do serve it in individual packages. It is occasionally served in a dish. I do not know of any instance where it is served with the display of the package at all. It could happen. I never experienced in a hotel ordering shredded wheat and having it brought to me from the kitchen in a dish. I do not order shredded wheat often, but I cannot recall that it happened.

I learned of the Rainey instance by talking to him one morning. He brought up the subject himself, wanting to know why they did not handle our biscuit up there. He knew they did, because he finally got it. Mr. Rainey shot himself with a shotgun in a hunting accident, which had nothing to do with his being unable to get Kellogg's. He ordered and specified Kellogg's Whole Wheat Biscuit, that he needed to satisfy a particular customer. He knew what he wanted. I did not see the order; it was purely conversation, taking place about two years ago.

My idea of seventy per cent. distribution is just an estimate, what I think about it, going around in my experience among the trade. I do not claim I have actually visited or solicited every possible outlet of that kind in my territory. I do not find the larger sample package, Defendant's Exhibit 59, generally in the cafes in my territory; it is mostly Defendant's Exhibit 60, the smaller size.

RE-DIRECT EXAMINATION.

THE WITNESS: I would not say I do not encounter the larger size at all. I find it from time to time. The only reason I assumed the larger size was discontinued is that I find those on display seem quite old. I have not encountered any new supplies of the larger ones.

Defendant's Exhibit 1, has, in the little panel, instead of *sample*, as on Defendant's Exhibit 59, *individual service*. That is the type of National individual I formerly encountered in my trade. There are wholesalers in this territory who service the restaurant trade, with sales representatives who carry Kellogg's Whole Wheat Biscuit. They are services by others than myself. I am not the only person selling Kellogg's Whole Wheat Biscuit to the restaurant and cafe trade.

MRS. W. L. HOLLAND.

Deposition taken at Dallas Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, appearing here as a witness on request of a friend of mine, Mrs. Wilde. I know and have been using Kellogg's Whole Wheat Biscuit. I have used it about two years. I have used so many Kellogg products I used this, too, and I first found it in a cash-and-carry self-service store where I go and help myself, where I buy other Kellogg products. I found it on the shelves of the store, bought it and used it, and liked it. I have continued to use it since. Kellogg's Whole Wheat Biscuit is a shredded whole wheat biscuit. A long time ago I used to use another one. I do not even know the name of it. Since I used Kellogg's biscuit, I stopped using the other one, because there are more in a package, just the right proportion or serving. It is the right size for anyone's breakfast.

CROSS-EXAMINATION.

THE WITNESS: When I say the other one, I mean like Plaintiff's Exhibit 1, the one I used. I remember that. It is a good while since I used that. I called Kellogg's biscuit shredded wheat biscuit, because they

are all shredded. This is shredded and the other one, too. I do not know why I used the expression shredded to Mr. Clarke, as to that product. I got this first one I had a long time ago, the first one I used, the first one I knew as shredded wheat, a long time ago. I knew it as shredded wheat, and Kellogg's biscuit is very much like it. It is a smaller bisquit, with more in a box. That is why I immediately thought of it as a shredded biscuit. They look very much alike to me, except there is more in a box and a smaller proportion than the other. I am in the habit of using all Kellogg Products; I do not know, just why. I have used them in my home, all kinds of flakes, rice, and so on. I have bought them in stores where I deal. I did not notice whether these biscuit are in some of these stores, too, nowadays. I find the other Kellogg products by themselves and help myself to those I want. That is all I was interested in.

MRS. J. A. SHARP.

Deposition taken at Dallas, Texas, February 15, 1933.

Direct Examination.

The Witness: I am a housewife, invited here today as a witness by Mr. Wilde. I know Kellogg's Whole Wheat Biscuit and have used it, off and on, for several years. I saw it advertised, in the papers, also on the grocery shelves. I tried some of it, liked it, and have continued to used it. It is just a shredded wheat biscuit. It is made of shredded wheat. I have known of another shredded wheat biscuit, Plaintiff's Exhibit 1. I have used that before I used Kellogg's biscuit. I believe I find that in almost all the stores with which I deal. I deal with A. & P., Piggly-Wiggly, and all the chain stores, self-service stores, where I go in, go around the counters, and take what I want. I believe I use almost all the Kellogg products. I like them.

CROSS-EXAMINATION.

THE WITNESS: I have known Plaintiff's Exhibit 1 for a long time, before I knew Kellogg's biscuit. I do not remember how long; but I have noticed it on the market quite a while. I have had it at home, too. When I saw Kellogg's biscuit I thought it was similar to the other, enough similarity, so I readily described it as shredded wheat. They said Whole Wheat Biscuit, but I thought it was shredded. I called it shredded. I do not know why I called it shredded wheat biscuit so quickly. Just because it is shredded wheat in my mind. That is what I would call it. That is what it is. That is how I think of it when I see it. I talked to Mr. Clarke just for a minute in the other room before I came in here. I was not asked then if it was a shredded wheat biscuit.

I have known Mr. Wilde for several years. I have been a user of Kellogg's products for some time. I do not believe he called my attention to this Whole Wheat Biscuit. When I purchase it, I find it along with other products. I also see Shredded Wheat on the shelves. I find it in packages like Plaintiff's Exhibit 161, lately, with the window inset. I do not remember how long I have been using the Kellogg biscuit, but it is always since it has been on the market, several years. I get it at chain stores, A. & P. and all of them. I guess I trade regularly at the A. & P. stores. I trade at the Piggly-Wiggly quite a little. I believe I buy it most of the time at Piggly-Wiggly stores and Safeway stores. There is an A. & P. store in my neighborhood. I do not know how long I have been buying it there, a year, anyway, or six months, something like that.

RE-DIRECT EXAMINATION.

THE WITNESS: Piggly-Wiggly stores are a large chain. I do not believe I know them in any other city except Dallas.

MRS. B. SONNTAG.

Deposition taken at Dallas, Texas, February 15, 1933.

Direct Examination.

The Witness: I am a housewife, appearing today at the invitation of Mr. Anderson, of the Kellogg Company. I am not conscious of any prejudice or favoritism one way or the other, as between the National Biscuit Company and Kellogg Company, that would influence or color my testimony.

I know the product, Kellogg's Whole Wheat Biscuit, as shown in Plaintiff's Exhibit 161. I think, about six or seven months ago, there were some house-to-house boys bringing samples around. I bought two packages, and they gave me one. That was the first time I ever used it, the first knowledge I had of Kellogg's biscuit. I used those packages, liked the biscuit, and have continued to use it since. Other members of my family have used the biscuit since. It is a shredded wheat biscuit. I had used before the other shredded wheat biscuit, but not for several years, because we did not care to eat them at all. I just did not care for them. When Kellogg began making it, I began using shredded wheat again. I bought Kellogg's biscuit from Piggly-Wiggly, which are self-service stores. I go into the store, pick up packages, and wait on myself. There are quite a few Piggly-Wiggly stores in this market. I use Kellogg's Pep and Whole Wheat Bran all the time. I like those products. I find Whole Wheat Biscuit in Piggly-Wiggly Stores right with the other Kellogg products, in that same section.

Cross-Examination.

The Witness: I have known National Biscuit Company's shredded wheat for a number of years. I

recognize the package, Plaintiff's Exhibit 1. During all the years I have known that, I have known it as shredded wheat. I think that is why I so readily defined Kellogg's biscuit as shredded wheat. It looks like the other, resembles it in many ways. I like the Kellogg's shredded wheat better. When the boys came to the door with their Kellogg samples, I do not remember what they said. I remember I bought them because they were Kellogg's products and I would, they said, find the biscuit different, which I did, because they were so much crisper. I do not think they told me Kellogg's biscuit was a shredded wheat biscuit. They sold it as Whole Wheat biscuit. They made some comparison. I do not know what with. It has been so long ago I do not recall. When they said I would like the biscuit and find them better, they compared them with the old shredded wheat biscuit I was familiar with. That is what they must have said if they said I would like them better. They sold them as better than the old Shredded Wheat, I guess, that I was familiar with.

RE-DIRECT EXAMINATION.

THE WITNESS: When I bought the biscuit and tasted them, I knew they were not like the other shredded wheat biscuit. It was a better flavor, and they were browner, tasted browner and crisper. Their size was smaller. They went into my bowls much better. I did not have to break them in two to put them into my bowls. I noticed that the first time I used them.

RE-CROSS-EXAMINATION.

THE WITNESS: I heat them for quite a while sometimes. When I first open the package, I do not have to heat them so much. I put them into the bowl and put them on the table. There are six in my family at the present time. I take them out of the package in the

kitchen or pantry, heat them if necessary to restore their crispness, and then put them in the bowl and on the table.

RE-DIRECT EXAMINATION.

THE WITNESS: When the boys came to me with the Kellogg package, I am sure the Kellogg Company was mentioned at the time. I bought them because I had used Kellogg's other products and knew they were good. I had confidence in them.

MRS. RUBY McDADE.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, appearing here at the invitation of Mr. Anderson a friend of mine. I am not conscious of anything that would prejudice me for or against either the National Biscuit Company or the Kellogg Company or color my testimony in this case.

I know Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 161. I use it from time to time. Our family is small. We do not use it very much. They brought it to the door, to buy two packages and get one free, which is the first time I had heard of the product. I bought it, for the main reason a cousin of mine was selling them, distributing them through the whole neighborhood. I bought them, used them, and liked them very much. I would describe the Kellogg biscuit as being shredded wheat biscuit. I have known, also, of the National Biscuit Company's shredded wheat biscuit, like Plaintiff's Exhibit 1. I have used the National product. I do not continue to use them regularly. I had been using them for some time

before Kellogg's biscuit came to my door. I have known this old product for a long time. It has been some years since I used the National shredded wheat. I used them once in a while. We never did use anything regularly. Not having used it for some time, I used Kellogg's when it was brought to my door in these packages. I have used Kellogg's Wheat Krispies, and Kellogg's Corn Flakes. I had heard of the Kellogg Company before these biscuit were brought to my door.

We usually trade with Killingsworth, a home-owned chain store, self-service. I do not remember where I find Kellogg's Whole Wheat Biscuit in that store. I think they have the same kind of products all along on the same shelves.

CROSS-EXAMINATION.

THE WITNESS: I have known shredded wheat biscuit for a long time, about fifteen or twenty years. It has been on the market, always in a package like Plaintiff's Exhibit 1, with a picture of Niagara Falls on it. I remember that. We have had it in our house from time to time, not regularly. The same is true of Kellogg's Whole Wheat Biscuit. We do not use it every day, and we never had it until my cousin came over to my house. I bought it from him because he is my cousin and I wanted to encourage him. Then I bought it again. We use it maybe once or twice a month, because I use other cereals, too. I describe it as shredded wheat, because there is shredded coconut and shredded cabbage. It is just like shreds. I saw right away when it was shown to me that it was just like any other shredded product. I really cannot think of any other shredded product in biscuit form like that. That is the only product I can think of, put up in that form. When I see the Kellogg biscuit through the window in the package, I recognize it right away as a shredded

wheat biscuit, naturally. We serve them in our home two or three ways, sometimes scalded. Sometimes we put half a cup of boiling water, salt, pepper, butter, and serve it with cream. We do that in the kitchen and serve them to the family. There are three in our family.

RE-DIRECT EXAMINATION.

THE WITNESS: Kellogg's shredded wheat biscuit is smaller than the other. It goes a little easier in the dish we use. I noticed the difference in size the first time we used Kellogg's.

RE-CROSS-EXAMINATION.

THE WITNESS: When my cousin came to the door he did not open the Kellogg package; just asked me if I would buy them, and I did. He did not have to make any selling talk to me. I wanted to help him out.

GEORGE F. ROSELLE.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am fifty-one. I am district manager of the Eastern Division of Waples Platter Company, distributors of groceries on a wholesale basis, also manufacturers, coffee roasters. They distribute to retail stores. They service northern and northwestern Texas, southern Oklahoma, and part of New Mexico. We have men traveling in the territory, about eighty or eighty-five. Those men contact the retail stores as regular customers and take orders. My organization handles this product, Kellogg's Whole Wheat Biscuit. They have handled it, I would say, four or five years. I would describe it as whole wheat

biscuit. It is a shredded wheat biscuit. We offer it as a whole wheat shredded wheat biscuit.

We do not now handle any other shredded wheat biscuit except Kellogg's Whole Wheat Biscuit. We have handled another shredded wheat product, this particular product, Plaintiff's Exhibit 1, about three to four years ago. We have discontinued handling that product, because of a decline in sale and profits with us. We did not want to carry the two lines. We had taken on the Kellogg line before we discontinued the National. Since then, we have handled nothing but Kellogg's Whole Wheat Biscuit. We service our trade with that biscuit and have never had any rejections by the trade of it that I know of. We register our orders, but we do not carry them numbered. We do sell this piece of goods by the factory numbers. It is so entered. We list that in our cost book by number. If our trade asked me for Kellogg's shredded wheat, I would supply that package to them. I could not give you the volume of our business in Kellogg's Whole Wheat Biscuit accurately, because we have not segregated it. We have had a growing business. We consider the volume we handle large. It would be most difficult to estimate how many retail stores we service as wholesalers; several thousand, though. I would say a large proportion of them buy Kellogg's Whole Wheat Biscuit from us. I could not tell you to what extent.

CROSS-EXAMINATION.

THE WITNESS: We distributed Shredded Wheat like Plaintiff's Exhibit 1 many years back. I have been with this house off and on for twenty-seven years. I would say that, during all that period, up to about five years ago, or about three and a half years ago, we carried the shredded wheat of the Shredded Wheat Company. Then we discontinued it. Prior to then we

had had it continuously. We stocked it, but we have handled that off and on. I do not know it has ever been a volume seller with us. I have known about it, however. It was a fairly well-known product, I think, in our market, known as shredded wheat. We were handling both kinds when this was discontinued. We had a decline in business on that particular piece of goods, Plaintiff's Exhibit 1. On Kellogg's biscuit, they had a more attractive price. Kellogg's Whole Wheat Biscuit, with us, gradually supplanted Shredded Wheat Company's shredded wheat.

The Kellogg Company advertise their product. They have, as far as my house is concerned, created some market for it. We have call for them. We do not, out and out, engage in chain store business, that I know of. I cannot answer as to whether we are interested in any organization or combination or association of retail stores. I do not know the inner workings of the organization. I am not trying to hold out on you; just trying to answer your question honestly. If I knew, I would tell.

I cannot say that there is a more or less cohesive group of stores looking to my house as sponsor for certain goods, for this reason: We contact thirteen or fourteen chain institutions in Dallas; but we have no stock investments or ownership in them. Those men favor us in a substantial way. We have no direct relationship with that group. There is no other group that I know of, that we have any direct working relationship with. I cannot speak for all the houses in the organization. There are two divisions, eastern and western. I am speaking for the eastern division. As far as that is concerned, there is no particular relationship with any group of retailers, other than the general contact.

The shredded wheat we discontinued carrying some years ago is, as far as I know, still carried in

Dallas retail stores. They obtain their supplies, I understand, from the National Biscuit Company and through jobbers. We do not have it. I would not say our house has handled any shredded wheat in the last two or three years, because I do not know what has gone into our western division houses. It may be we have handled some shredded wheat in the last two or three years. If we have, it has been in very limited proportions. If we should have a call for it, we would more than likely be glad to send and get it. We would be glad to do it as an accommodation. I do not know we have in the last two or three years, secured supplies of shredded wheat from the National or one of its branches. We may have. I am not the buyer, but I have supervision over sales. I have handled it. If we have a demand for one, it is our custom to go out and buy it, because we want to serve our customer. When we have a call for just shredded wheat and nothing else, we ship them Kellogg's. As far as I know, the shredded wheat you mention is not under that name. Our classifications call for certain products. If we had a call for shredded wheat biscuit, we would ship it. If we had class for this, I would not know how to classify it. If they called for shredded wheat by one of our salesmen, I would tell them we do not have it. If he called for shredded wheat, I would ship him the Kellogg product. I would only know when a customer calls for shredded wheat through our salesman's efforts. He can make or lose a sale. If he loses it, we would not know it.

In running a survey, our men told me frankly they just have calls for shredded wheat biscuits. That order is filled with Kellogg's shredded wheat biscuit. I think possibly we fill the order occasionally with the product made by the National Biscuit Company. If they ask for it, I do not know they want that, unless it would be specified. I would imagine they would

say they did not want Kellogg's. If we filled an order with Kellogg's Whole Wheat Biscuit and the customer did not want it, he would be apt to say so.

RE-DIRECT EXAMINATION.

THE WITNESS: Our retail customers usually know what they want. If we shipped Kellogg's biscuit to one and he did not want it, he would reject it. The salesmen are instructed to make it clear when they call what biscuit we are handling. I have no doubt at all that the trade and we understand each other as to what is meant by shredded wheat. When we ship Kellogg's Whole Wheat, we would naturally assume that the hotels and restaurants, when they say shredded wheat, naturally mean Kellogg's shredded wheat. We would naturally assume that.

I do not think a wholesaler could continuously palm off on the retailer anything the retailer did not want. If he tried it, the result would be dissatisfaction in business and loss of business. If an order was filled by shipping goods the retailer did not want at all, he would have the right to reject them. The practice of substitution between wholesaler and retailer is not prevalent. If he has had any experience, the retailer is not an unskilled buyer who does not know what he wants. If an order should have come to us from a retailer specifying he wanted the other shredded wheat, we would have sent out, got it, and filled that order. If the retailer told me he wanted the National product, such as Plaintiff's Exhibit 1, specified that, I would send out and get it. The stock number I spoke of is on Kellogg's. Sometimes our salesmen order it by number.

It is my understanding that the National Biscuit Company are going direct to retailers and servicing them in connection with their cracker sales. What

the other jobbers are doing I do not know. I also understand the cracker salesmen are salesmen of the National shredded wheat.

If my salesmen are traveling our trade or soliciting orders for Kellogg's Whole Wheat Biscuit under any other name, it would be my assumption that the National Biscuit salesmen are also traveling the retail trade and soliciting orders for their products, and that those retailers are being solicited by my organization to buy the Kellogg product and by the other organization to buy the other biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: We have something to do with Helpy-Selfy Stores, a chain store, local only, in Fort Worth, a stock company, as I understand. My company has no financial interest in it, that I know. I know they have served that chain of stores ever since its inception. The chain was formerly organized by a former Dallas man, Mr. Long. He made the investment. Later on, there was, I understand, a merger between Helpy-Selfy Stores and Alexander Bales. They are now operating under the trade name. As to stock investments and other loans I cannot tell you. I do know our company services those stores. We do not have our man in the Helpy-Selfy organization. There is a man who serves them as president of the organization who was formerly in the service of Waples Platter Company, a very able man. When he left us, his relationship was severed in its entirety. It would be natural that he would have good will for our company and patronize it. As to his investments either way, I just could not tell you. I have had no occasion to inquire.

H. G. WILLIAMS.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I individually own and run the Topic Cafe, in Dallas. That is my only business. It is a sort of second-grade restaurant. It is pretty hard, in my estimation, to get a first-grade restaurant. If Mr. Wilde says it is a first-class restaurant, I would not take issue with him. I do not want to overstate the matter, but I guess it is as good as the average. It is at least a B cafe. If Mr. Wilde calls it A, I have no objection.

I have had that place since 1913. I know Kellogg's Whole Wheat Biscuit and handle it in my cafe. I think I have handled it since it came on the market here, in the small cartons, like Plaintiff's Exhibit 183. That is the only size carton I carry Kellogg's in. I do not remember ever having or seeing any in a carton like Plaintiff's Exhibit 161. My best recollection is I have carried it in this small carton only, since the time they first appeared in this market. I sometimes buy them through a salesman of Kellogg and something through a jobber. There are regular jobbers for restaurants who have their salesmen call on me regularly. I put in orders through them and through Kellogg salesmen. I do not know whether I ever telephone orders direct to the jobbing house. Several people call on us every morning. We seldom find it necessary to telephone for anything. We have our lists and get everything we want. I do not remember the exact words I tell the salesmen, but I suppose I would say: Kellogg's wheat biscuit. When I order them, I always get them. I never have had any confusion about getting the Kellogg product. I do not remember any time I have ordered it that I have ever

gotten anything else but this product. We generally put all kinds of breakfast cereals around on pie cases, display boards, and so forth, so they will be visible to our customers just like any other commodity. Some of them might not see it. They might say, "I will take some shredded wheat." Others might say, "I will have some Kellogg's biscuit." I never paid any real particular attention. I have had them just point and say: "Give me some of that." We never have any complaints from customers when Kellogg's is served to them. The way I try to have all cereals served is to cut the package and set them in the bowl. When that has not been done, it was because of new not properly trained help. Sometimes I work there at night myself. Many people eat cereals at night. I take it and cut it in his presence. He knows what he is getting. Letting him pour it out, I do not know there is any difference.

CROSS-EXAMINATION.

THE WITNESS: I do not know whether I carry this item on the menu. I do not think I made these menus myself. I had another place at that time. My wife probably made them. I think I would put just cereal with cream. I do not think I would specify any cereals. I do not believe I carried shredded wheat on my menu. I have carried shredded wheat like Defendant's Exhibit 59, also like Plaintiff's Exhibit 1. I do not know whether I have any on hand now or not. I would have to look. There is no reason why I should not have both. I have no prejudice in the matter whatever.

If I had both on my shelves and my customer asked for shredded wheat, I do not know what I would serve him. I would ask him what he wanted. I or the girls would ask him. The way I see it, there are two kinds of shredded wheat. I have known shredded wheat like Plaintiff's Exhibit 1 a pretty long time, longer than I

have known Kellogg's Whole Wheat Biscuit. I have been in the restaurant business too long. I have had this place since 1913. I have been in the same block and changed buildings a time or two. During those years I carried shredded wheat biscuit. Customers asked for shredded wheat and got that. At present, if a customer asked for shredded wheat, he might get the National Biscuit Company product or the Kellogg product.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know which brand I personally like best. I do not eat very much shredded wheat. The only thing is I can see the individual package is generally fresher and I like it a little better myself. I have no prejudice in the matter at all, of any kind; but I prefer Kellogg's.

RE-CROSS-EXAMINATION.

THE WITNESS: I know I can get this shredded wheat in the individual size, too.

RE-DIRECT EXAMINATION.

THE WITNESS: I have never had any complaint at any time I have served the Kellogg package on an order for shredded wheat or whole wheat, or wheat biscuit. I have never had any customer say that was not what he wanted.

DUNCAN MONROE INMAN.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have been conducting my own cafe in Dallas. I say it is a C cafe and some people say I am B. We do not get the prices they do. We do not have a chef and so forth.

I carry Kellogg's Whole Wheat Biscuit in the individual package only, like Plaintiff's Exhibit 183. I have handled it about two years. I put it on the shelf and list it on the menu. It is within the customer's sight on the shelves. They ask for shredded whole wheat. I very seldom serve one of them. The three girls I have there often serve them. They open it up and put it out in the bowl, right back of the counter where you eat it, so the customers can see what they are doing to it, and just dump it in the bowl right there, or sometimes they break it in two, if it is an old or crippled person. That is just service for them.

When we serve Kellogg's Whole Wheat, we have no complaints from the customer. They never say it is not what they want. They just say they want Whole Wheat Biscuit. If they do not complain, we assume they are satisfied.

One carton of National shredded wheat just came in. Regardless of which they have, if I can buy them at the same price, it is all right. If I am out and the Kellogg man comes along, I will buy several dozen from him at one time. If the coffee man comes along, I just order one dozen shredded wheat, and he sends me whichever he wants. I think they charge about thirty-five cents a dozen for it. I do not ask for any terms, and I do not care which I get. I am going where I buy the cheapest. I think I have them like Defendant's Exhibit 59 on my shelf right now. I have some of that and some other product. I have no biscuit that size. I might rather have little biscuit. They might not get enough out of that one. If a customer does not get enough out of that, they might buy also a doughnut and a cup of coffee. I have never asked for either specially. I would rather serve Kellogg's than the other, because I might sell a doughnut or cup of coffee on the side. My customers are all working men with good appetites. They are all hard workers. I do not know whether

Kellogg's Biscuit is smaller. I do not think I have opened half a dozen packages of them in my life. I understand one package holds two and the other three. Defendant Exhibit 59, I think, holds three biscuit.

CROSS-EXAMINATION.

THE WITNESS: I do not have Plaintiff's Exhibit 60, I think. I would not be positive. I think one of the two biscuit is a little bit larger, that I serve. I am not positive. From time to time, I have both Kellogg's Whole Wheat Biscuit and shredded wheat biscuit on my shelf, for them to order whichever I happen to pick or the girl. They ask for shredded wheat, but they do not say National or Kellogg's. We have it on the menu as shredded wheat. I get fifteen cents for either product. It makes no difference to me which I give and it does not appear to make any difference to my customers. We never have any complaint, that I know of.

DAVID H. BERGEY.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer for Durand-McNeil Horner Company, wholesale grocers and sponsors of a voluntary chain, the Shield Quality Stores. We service that chain, also other stores not in the chain. We do a regular jobbing business to the grocery trade, also to the hotel and restaurant trade. I have heard of a product called Kellogg's Whole Wheat Biscuit and have known of it about nine to twelve months. I never knew of any similar product under any other name. I did not know it when it was called Kellogg's Shredded Whole Wheat Biscuit. Kellogg's Whole Wheat Biscuit is a regular stock item, which we service to our trade

on demand. We get calls for it right along. There is a regular demand for it. I would describe it as a shredded wheat. We handle another kind of shredded wheat, Shredded Wheat, or Shredded Wheat Biscuit put out by the National Biscuit Company. We carry both kinds. There is no confusion in our house in ordering those two brands. They are separate and distinct, listed that way, and sold that way. We have never had instances where one was returned to us with the statement they wanted the other kind. I am familiar with both packages. I do not think the Kellogg package has any similarity to the Niagara Falls package.

I recognize Defendant's Exhibit 4 as our regular package of Kellogg's Whole Wheat Biscuit. I am familiar with the other Kellogg packages. I would say the color scheme of this package is the same and the signature is the same, on the Whole Wheat Biscuit as on the rest of the line. There is a similarity to all other packages.

Looking at Plaintiff's Exhibit 161, with cellophane front, I have only seen that on Kellogg's Whole Wheat Biscuit. I have handled those packages. We have them now in stock and can service them to our customers out of the store. I think it lets the consumers see what they are getting, also lets Kellogg show what their whole Wheat Biscuit is. I would say it was an advantage. There must be a consumer demand in the retail trade for Kellogg's Whole Wheat Biscuit, because we get calls for it right along. I have no other knowledge about it.

The voluntary chain we service is about two hundred and twelve stores. We handled Uneeda Baker's Triscuit about a year and a half or two years ago. We discontinued it. I am familiar with its physical characteristics. We sold it as a cereal. Maybe that is why we did not sell much of it. I would describe it as a

pressed shredded wheat wafer or cracker. I have not handled it in recent years. The sales for Niagara Falls Shredded Wheat are not as big in recent years as they were some years back. I would say that is due to the fact there are more brands of cereals of all kinds on the market. There is more consumed; but there are more brands and more new products on the market, so it cuts down the sales of all brands, as far as the sale of any one particular brand is concerned. I think the sales of cereals now, as a unit, are greater than they ever were, but I think it is split up among more units, brands, or varieties.

We used to purchase Shredded Wheat from the Shredded Wheat Company at Niagara Falls. In our particular instance, when National Biscuit took over, for some unaccountable reason your business stepped up, going through our own channel, which I think was due to our men being anxious to get more business out of these stores, and maybe the National Biscuit men did not give it the attention it might have had. That business seemed to go over to the service grocer, which is what happened in our case.

Cereals is a separate and distinct line of selling. I do not think a cookie and cracker man can sell cereals as easily as those who specialize on it. I would expect more cereals to be sold by a regular salesman of cereals than by a cracker salesman.

We sampled Kellogg's Whole Wheat Biscuit to our salesmen. We do not do any direct sampling to the stores but sell them entirely through our salesmen. When Kellogg first came out with it, they gave us a round of samples. We gave each salesman two packages, one to eat and take home; one to carry and show. We do that with all new lines we take on. We give the salesman all the selling points we know or the factory passes on to us, so they are equipped to go out and sell it to the stores.

Our house handles Kellogg's Whole Wheat Biscuit in the individual two-biscuit cartons. We sell them to hotels, restaurants, and institutions. On all cereals, the individual cartons are fairly good sellers. I find there is a demand for Kellogg's Whole Wheat Biscuit in the individual size. It is immaterial to us. We sell it either way, whichever they specify. The hotel or restaurant usually specifies individuals. We also handle individual packages of Niagara shredded wheat. The hotel and restaurant orders come for those individual-sized packages principally. They usually specify which they want. We sell more individuals than large packages to the hotels and restaurants. There are two classes of trade on that. Eighty-five per cent. of our business is with service stores and fifteen per cent. is the hotel and restaurant trade. About ninety-eight per cent. of the cereal business in individuals goes to the restaurants. I think that either company, by putting their institution men on the chef's service and acquainting them with their product, could step up their business to practically a hundred per cent. individuals to restaurants, hotels, and institutions. I am sure the Kellogg men have been working with chefs to increase that individual sale.

We have rather a good bit of conflicting items in our business. In the big majority of the goods, there is practically always more than one making practically the same item. It does make competition a little more keen, and it would split up the volume. I could not say as to whether competition in shredded wheat has been more or less keen since Kellogg came into the field. I think it has brought the consumer's attention more to that class of cereal, with two companies working on a similar product.

CROSS-EXAMINATION.

THE WITNESS: I sell some Shredded Wheat and some Whole Wheat Biscuit to restaurants in the large

package. I fill orders according to the specifications. If anyone specifies a large package, he gets it. Of our sales, that is a comparatively small percentage of the proprietors of cafes and restaurants, speaking of our company only. I have been in the grocery line twenty-two years, always in the wholesale end. That is all I know. I have never conducted a retail store.

All I have told you about consumer demand is from the point of view of their demands upon us through retailers. If I find that retailers are purchasing goods from me in considerable quantities, my inference is that they are taking them away from them, and that there is, therefore, a demand. I do not give you experience from contact with the consuming public direct. I described Kellogg's Whole Wheat Biscuit as shredded wheat, because it is shredded wheat. I myself know shredded wheat as a product that was put out by the old Niagara Falls company. I have known it for a great many years. I handled shredded wheat of the Shredded Wheat Company of Niagara Falls for a great many years before I ever knew of Kellogg's biscuit. I have known it as shredded wheat biscuit for the entire twenty-two years of my experience and longer than that. I used it as a consumer in my home.

XQ. 114. Is that not why you could not think of anything to describe that as, other than as shredded wheat biscuit? Is not the fact that you have known that product under that name for twenty-two years or more the reason why it leaps into your mind when you see it?

A. That is the first thought that leaps into my mind, the expression "shredded wheat," yes.

XQ. 115. That is the only expression that immediately comes to your mind when you see it?

A. That it is shredded wheat, yes.

THE WITNESS: I have seen that through this glassine front, shredded wheat. It looks like the old

shredded wheat biscuit that I have known so long. It looks as if the shredded wheat shreds are baked together, and it is browned, dry, and crisp. It has, also, the same pillow shape as the old biscuit I have known, in general, and it looks generally like the other biscuit. It is very natural for any one who would see it to say "That is a shredded wheat biscuit." I have only known this Kellogg product about a year. They brought it in, asked us to take it on and promote it, which we did. I still continue to carry the Shredded Wheat made by the National Biscuit Company, as a wholesaler, and distribute it to our retail clients. Our voluntary chain-stores, known as the Shields Quality Stores, also carry it. We service some of our stores, but they have the authority to purchase on the outside, if they can to advantage.

RE-DIRECT EXAMINATION.

THE WITNESS: Our stores carry the National Biscuit cookies and crackers. I know they can also obtain shredded wheat direct or from the National salesman. I do not know the sales of this shredded wheat of the National Biscuit Company; but I know, if you diversify your line, you do not get the results you do when you specialize. I do not know whether the National Biscuit Company has a cereal division of men who are devoting their time to the sale of cereals; but I know that the National Biscuit Company salesmen will take orders for Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: There is no confusion in our house between Kellogg's Whole Wheat Biscuit and shredded wheat. I do not think there is any confusion there. I can distinguish the two packages. If one of the two

were served to me in a dish without a package, I still think I could tell them apart. My testimony as to confusion with reference to those packages relates to my own house and my experience there. I would not make a mistake, and I do not think our salesmen would make a mistake. It may be possible that there are occasions when customers ask for Kellogg's shredded wheat. Questions like that would go through the order department, which I am never in contact with. I have nothing to do with making sales. I purchase the necessary goods, see that purchases are kept at the proper level, and promote them through our salesmen, give them all the selling points, and the differences, and so on, so that they will have it all clear in their minds, when they go in to sell. I have nothing to do with the filling of orders, and I am not personally familiar with the way orders are received and given. When Kellogg's Whole Wheat Biscuit was first put on the market, before the salesmen knew the difference, and until it was made clear to them, there was a little confusion, which lasted about a week. It was natural for them, seeing the biscuit through the window of the package, to call it shredded wheat biscuit. It was natural for us to sell it as that. That was the first thought that came into my mind. As far as our own salesmen and force are concerned, there would be no confusion any more; although I could not say that the trade does not sometimes call it Kellogg's shredded wheat. Our customers call up or send in orders for shredded wheat. I would fill such an order with the National Biscuit Company's product, which is what I know as shredded wheat. An order for shredded wheat would call for just shredded wheat and nothing else. If they asked for Kellogg's shredded wheat, we would give them Kellogg's Whole Wheat Biscuit.

I handled this Triscuit package about two years ago. I could not recall whether it was that package or not. I know it was an old shredded wheat product. We sold it as a cereal at that time. The way I distinguish that is that we have all our merchandise in the house split up into departments. If it had been featured as a cookie or cracker, it would have gone over to the National cookie and cracker division. Another buyer altogether handles that. We handle stocks of cookies and crackers.

When I said I thought the sales of shredded wheat were not so great as they were in past years, I have reference to the Niagara Falls outfit. I am only speaking of our experience. In my opinion, that was due to the increasing of the various cereal products on the market. I would say that that is the reason why Shredded Wheat with us was down. Another explanation might be that the National Biscuit Company was distributing shredded wheat direct to retailers, and it did not pass through the wholesalers as it had. That would answer it too, yes. I would not think that another possible answer to it would be the competition with the Kellogg's Whole Wheat Biscuit. I do not base that on the fact that I favor either company, because we handle both products. I base that on the fact that, with similar products on the market, the sale of one does not affect the sale of the other very much.

Kellogg's Whole Wheat Biscuit, as I have described it, will fill the same want as Shredded Wheat Biscuit, and it is a competing item; I would not say a more generally competing item than the general run of cereals. There are other cereals on the market of different competing brands that are practically the same. I did not say other brands of shredded wheat. I had reference to Post Toasties and Corn Flakes, two identical things, which compete with each other. I

would say, that being so, that Kellogg's Corn Flakes sells at a lesser volume than it would if it had the field to itself without that competition. If there were not the demand for Post's products, it would go to Kellogg. If there were no such thing as Post Toasties, Kellogg would have the field on that brand. When one company has had the field for many years, and another product substantially identical comes on the market, it would to some extent, I think, affect the sales of the original. It splits the volume.

The representatives of Kellogg visit me. When I place an order, I place it through a local representative here. They came and showed me the Whole Wheat Biscuit. They told us they were out with a new package, and they showed us a cellophane front, brought out the fact that it was a twelve-and-a-half ounce package with the little biscuit, and asked us if we would take it on. We usually support any big manufacturer with a nationally advertised reputation, on any product. I do not recall whether they said anything about shredded wheat at that time. There was no comparison of the package containing fifteen biscuit instead of twelve at the time they originally sold it. That representation has been made to us since. We naturally run into that, because the retailers, especially the hotels and restaurants, like to know how many pieces are in a package, so as to take care of service. So it was an obvious and natural thing that the package and the biscuit itself should be compared with Shredded Wheat.

The Kellogg Company originally sold us their whole wheat flake, and no sample or anything was ever shown. They came, told us what they were doing, asked us if we would not take it on. They said they were working with it. We have confidence in the Kellogg Company. I think, if the National Biscuit Com-

pany asked us to do the same thing on one of their products, we would certainly do as much for them. The whole wheat flake falls into the same class as corn flakes, similar to Wheaties and Rice Krispies.

RE-DIRECT EXAMINATION.

THE WITNESS: It falls in that class, corn flakes and wheat flakes.

If Kellogg was advertising its biscuit, sampling it to the consumer direct, demonstrating it in stores, having store displays, and dealer advertisements of the product, and was also advertising the product to the public, I would not think that those efforts and methods of the Kellogg Company would have any depressing effect on the sale of shredded wheat as a whole. If a third company came in and concentrated on shredded wheat as vigorously as you have assumed the Kellogg Company did, I think those efforts would tend to raise the sale of the product as a whole. I would think that the more concerns which are pushing the sale of a product, the more the sales would tend to rise, depending on the use of intelligent sales methods. I think that would be true of any product. If the Postum Cereal Company were also pushing and advertising the sale of corn flakes, that would help swell the total volume. I do not think the retailers are now making any effort to substitute one product for another. They are selling what they have on consumer demand.

RE-CROSS-EXAMINATION.

THE WITNESS: I know that from what we hear at stores. We have talked to the store managers as they come down. We get them to feature our particular house brands up there, telling them to what extent to sell what they have, instead of trying to carry

everything that Tom, Dick and Harry comes in and asks for. It is possible we might find even some of our own retailers occasionally passing out a package of whole wheat biscuit when shredded wheat was asked for. I do not think it is the policy of any grocery chains to try to substitute. I think they sell the stuff there is a demand for.

I have a general idea of the issues in this case, which I learned from talking with Mr. Clarke this morning, and I have read it in the paper also. I read in the paper that the National Biscuit Company sued Kellogg about shredded wheat. I testified for the Kellogg Company. I am not interested in either party, and I do not take sides with either. I am just as good a friend of the National Biscuit Company as I am of the Kellogg Company. I understand that the controversy relates to the question as to whether the name of the Kellogg product should be written with capital letters or small letters, Kellogg's shredded wheat. I know that, and I mean what you mean by that. In at least twenty-two years of my own experience, I have known all about the one shredded wheat and that shredded wheat became a household word in the United States for that particular article. That is true.

ROBERT WHITFIELD.

Deposition taken at Chicago, Illinois, March 15, 1933.

Direct Examination.

The Witness: I am a wholesale grocer and have been in that business about nine years. I am one of the buyers of the Central Wholesale Grocery, a cooperative organization having a chain of retail stores that it services about three hundred and eighty

stores. It does not service any stores outside that chain.

Our organization handles Kellogg's Whole Wheat Biscuit, carries it regularly in stock, and services it to its stores. It has handled Kellogg's Whole Wheat Biscuit approximately three years, as far as I know it. There is a regular demand for it from our stores.

We handle the other product, the National or Niagara Shredded Wheat, and have had that for a number of years. I do not find any confusion in orders as between those two products. They order either shredded wheat or Kellogg's Whole Wheat Biscuit. I could not say if we have orders for Kellogg's shredded wheat. I suppose we do, but I do not really know. If an order comes in for Kellogg's shredded wheat, Kellogg's biscuit is supplied.

We have meetings with the men of those stores. I really cannot say whether it is the policy of the organization to substitute anything or not, one way or the other. Kellogg's Whole Wheat Biscuit was introduced into our organization by being sold to us, and we, in turn, informed our retailers that we handled it, through a bulletin.

I recognize Defendant's Exhibit 4, which is a carton of Kellogg's Whole Wheat Biscuit. I am familiar with the dress of the rest of the Kellogg line of packages, Corn Flakes, Pep, and so forth. I would say there is a family resemblance or connection between this Whole Wheat Biscuit product and the rest of the Kellogg line as to coloring and dress. It also has the Kellogg trade-mark.

CROSS-EXAMINATION.

THE WITNESS: The Kellogg whole wheat carton, like Plaintiff's Exhibit 161, is the only one of the Kellogg packages that has the cellophane window, the one

in which Kellogg's Whole Wheat Biscuit is displayed to the public.

I have been familiar with shredded wheat ever since I can remember. It has always been sold in a package similar to Plaintiff's Exhibit 1, and it has always been known as Shredded Wheat.

I do not think some of my customers, in filling an order for Shredded Wheat, would mention anything about the Kellogg biscuit. To me, if anyone asked for shredded wheat, they would get Shredded Wheat. If they asked for Whole Wheat Biscuit, they would get Whole Wheat Biscuit. If a person asked for Shredded Wheat, I would know right away what they wanted. There would be no question of handing them anything else.

I am the buyer for this Co-operative General Grocery, called the Central Wholesale Grocery. We do not have any name for the chain, no uniform name for the stores. They have their regular front. They are service stores. It is a voluntary organization of service stores who centralize their buying through my house.

Our stores are stockholders. Every member is a stockholder. There are three hundred and eighty. I imagine they all stock Shredded Wheat. I do not think they all stock Kellogg's Whole Wheat Biscuit. We carry it to service our stores with. We have a regular business that requires us to stock it. We do not carry stocks of other National Biscuit products. They are delivered to our members direct. Some of our stores are customers of the National Biscuit Company and probably also obtain their Shredded Wheat along with their crackers. Our organization is recognized by the National Biscuit Company for its discount, and our Central warehouse receives the discount, based on the purchases of all our members.

RE-DIRECT EXAMINATION.

THE WITNESS: I think it is about a year ago since they brought the package with the cellophane window in and showed it to us.

EDWARD A. NOVAK.

Deposition taken in Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer and manager for the General Grocers Cooperative Organization. I have been in this cooperative business eight months. I was in the grocery business before that for twenty-nine years, as buyer and manager in the wholesale grocery business and for myself. I have had no retail experience.

The organization I am with now just services its own members. It is what you call a voluntary chain. The stores have no particular dress. They carry their own name, or they run under our name, the General Grocers. There are one hundred and forty members in the organization.

We carry Kellogg's Whole Wheat Biscuit and have, I think, ever since we opened up here. We find there is a demand for it from our members, which is increasing right along. We started with a few cases, and we are now buying it in larger quantities.

We do not handle the other product, the National or Niagara Shredded Wheat. We used to handle it. When we first organized, sometime in June we got in ten cases. Then we found out the National Biscuit Company delivers it to the grocers and merchants for the same price, so I discontinued handling it, because I could not save the merchant any money on it.

Kellogg's Whole Wheat Biscuit is ordered from my house by my customers under the name Whole Wheat Biscuit. We do not get any orders for it as Kellogg shredded wheat. If we did, I would naturally fill it with Kellogg's, as long as they asked me for Kellogg's. If they asked me for Kellogg's Shredded Wheat, I would send the Kellogg's Whole Wheat Biscuit.

We have conferences with our members. I know that the demand for Kellogg's Whole Wheat Biscuit was created through the specialty men that Kellogg have out with the trade. They have a list of our members, and they go in and contact our members, and put the biscuit in in that way.

Substitution is not practiced in our organization. Assuming that the Kellogg Company, through its specialty men, goes from house to house of consumers and samples or distributes free packages of Kellogg's Whole Wheat Biscuit, that it conducts demonstrations, and also has the benefit of dealer advertising, and also advertises the Whole Wheat Biscuit itself to consumers, that it has the cooperation of the trade in displaying various selling helps, such as displays of Whole Wheat Biscuit, posters and window displays, I think it is only natural that it would increase the business, where they did have demonstrations. I know for a positive fact that the Kelloggs have had demonstrations in stores just on the Whole Wheat Biscuit. Those demonstrations increased the demand for the Kellogg product. That is what increased our demand.

The stores also ask their customers if they will not try something new, which would have an effect of increasing the sales, bringing it to the attention of new customers, also. Several of our stores give that form of cooperation to the Kellogg Company, and it is regarded as legitimate.

CROSS-EXAMINATION.

THE WITNESS: I do not mean to be understood as saying that our member stores no longer carry Shredded Wheat. They get it direct from the National Biscuit Company. I simply meant that, because they can buy it as well as we could, we discontinued stocking it. The only reason I would stock it is because I would save money to our members. Ours is a purely hundred per cent cooperative organization. We serve only stockholders of our group. We do not service other stores in general. Our group consists of a hundred and forty service stores, located all over Chicago. Our headquarters happen to be in Cicero, now. We have had calls for shredded wheat. When we do, we tell them to get it direct, referring them to the National Biscuit Company, because we do not buy it. When we have a call for Shredded Wheat, we know by that expression right away what the customer has in mind, this package, like Plaintiff's Exhibit 1. I have handled that package for thirty years. You know it is shredded wheat, that is what every one has known it as for a great many years. The expression "shredded wheat" was made a household word by the Shredded Wheat Company.

I see Plaintiff's Exhibit 10, with the representation of two biscuit in a dish on the end. I do not remember that carton so much as I do Plaintiff's Exhibit 1. I could not say if I have ever seen shredded wheat advertised with two biscuit in a dish. I remember distinctly that package, very well.

RE-DIRECT EXAMINATION.

THE WITNESS: I have known of the Kellogg Company making a pillow-shaped or puffed shredded wheat biscuit since, I think, 1920. We used to handle quite a bit of Kellogg products. I have a picture of the front

of our building at 912 Randolph Street, displaying a package of Kellogg's biscuit. I remember the package of flattened biscuit they used to use. I remember that, as early as 1920, or around that time, they brought out a puffed or pillow-shaped biscuit. I remember when that biscuit product came out. There has not been much of a movement on it until the last few years.

RE-CROSS-EXAMINATION.

THE WITNESS: That 1920 biscuit looked as much like shredded wheat as the present whole wheat, except it was a little bit smaller. Otherwise, it resembled it. I do not know if we handled it when it was called Kellogg's Shredded Whole Wheat Biscuit. We handled it before the package Plaintiff's Exhibit No. 165, and we handled that, so we have handled the Kellogg product for some years. At the time we handled this, we also stocked shredded wheat. We stocked the two of them at that time. I used to buy the National product at that time from George Green here in Chicago, the district sales manager of the National.

ROY B. LOVERIN.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am store manager for the Kroger Grocery Company. I have been in the grocery business about thirty-five years, and with this company three years. The Chicago branch of my company is all I am familiar with. They have three hundred and fifty stores under their control. As store manager I have direct relation with all those Chicago stores. My position includes training the clerks, students, to be future clerks and managers.

The Kroger stores carry Kellogg's Whole Wheat Biscuit, which is a regular stock product with them. There is a consumer demand, to my knowledge, for that product in the Kroger stores. The Kroger organization put sales effort behind the sales of that product. I frequently get window posters and big placards that stand up in the window or in convenient places, advertising the different Kellogg products: Corn Flakes, Whole Wheat Biscuit, and things of that nature. I think those efforts have an effect on the sale of Kellogg's Whole Wheat Biscuit. They are especially well gotten up. I know of no particular reason why they should not.

Our stores handle Niagara Falls Shredded Wheat. It is usually asked for in our stores as Shredded Wheat. I can sell Kellogg's Whole Wheat Biscuit in my store better. When a customer comes into the store, my instructions to the clerks are that, if she asks for shredded wheat, she gets Shredded Wheat, without any question. However, we try to show her something new on the market, when there is something new that is all right, even though it is similar in character to the other product. We show her the difference between the two products and let her make her own decision. We do that with the Kellogg biscuit. I do not know that we do it for every customer. If she comes in the store during a rush hour, we naturally do not. We do it often with the customers who come in. That is not regarded in the trade as illegitimate. If we only knew one kind of product in the world, we would all be eating the same kind of food, I presume, just corn meal and mush, or something of that kind. Our company does not regard it as improper, unless the woman comes in and asks for shredded wheat, and then, without telling her anything about it, you would give her a package of the Kellogg product. That would be improper. Our organization does not do

that. If anything new comes on the market, we always do that, if we have an opportunity, and we do it with the Kellogg's Whole Wheat Biscuit.

Q. 20. If we assume, Mr. Loverin, that in addition to that sales cooperation which you give the Kellogg Company, the Kellogg Company also advertises its Whole Wheat directly to the consumer through periodicals and papers and so forth, and that it also employs specialty men who distribute the product directly to the consumer by going from house to house and selling one or two packages and throwing in a third package free, and that it also has store demonstrations, and that it has window displays, and that it also sends out post cards to lists which it gets from the retailers, of their customers, and sends to those customers coupons which are redeemable by buying one package of Whole Wheat Biscuit and having another one free; if you assume that it does those things, would you say that it has the effect of increasing or decreasing those sales?

A. It would have the effect of increasing them.

THE WITNESS: It is done frequently that way, cards, solicitors, and everything else. Our firm notices it has considerably increased. I consider the Kellogg Whole Wheat Biscuit as a product that is increasing in public popularity. Before I was located where I am now, I was in the Evanston Store, opening up a new store. The manager, Mr. Howard, marveled at the vigorous demand for Shredded Wheat and Whole Wheat Biscuit, even in the off season. He could not understand why we sold so many Whole Wheat Biscuits and Shredded Wheat Biscuit at that time of the year, when people should be eating corn flakes.

If two concerns are advertising Whole Wheat Biscuit to the customer, that would absolutely tend to increase the demand, rather than to decrease it. We

have had considerable to contend with in that regard. New concerns have come out with new bread. The more advertising they do with that, the more we sell of our own, in spite of having our competition with their bread.

CROSS-EXAMINATION.

XQ. 25. Mr. Loverin, you were speaking of the introduction of new products, some other products. Now, just tell us the practice in your stores when a customer comes in and asks for shredded wheat. You said that is what she gets; but what does your grocer or your clerk or manager offer her in place of Shredded Wheat?

A. We do not offer anything in place of it. We bring the package of Shredded Wheat out and we bring one of the Whole Wheat Biscuit out, and these are now put up with the cellophane front, like this one.

THE WITNESS: We show her the difference between the biscuit, have a sales talk, and tell her about it being toasted, one on one side and one on both sides, it having fifteen biscuits in the box instead of twelve, and so on. Then they put it on the counter and let her make her own decision.

I have no grudge against Shredded Wheat Biscuit, but we do push the Kellogg's Whole Wheat Biscuit. I do not know if we get a little better profit out of it or not. The two products both sell at the same price. I presume the sales talk that our manager puts up so well results in selling a great many of the Kellogg's Whole Wheat Biscuit instead of Shredded Wheat. Anybody that has eyes at all can see the difference between them. When you put them up side by side, you can see the difference between them. It fills the same want. If, in filling the order, I sell a customer Whole Wheat Biscuit instead of shredded wheat, I

obviously have sold him something that fills the same requirements. So, although I say I do not practice substitution, I am nevertheless able, very frequently, to sell Kellogg's Whole Wheat Biscuit to a customer who has asked for shredded wheat; but there is a reason for our wanting to sell our Kellogg's Whole Wheat Biscuit, in that we want to sell them not only those biscuit, but a larger line to sell from. We know, if we can sell her our whole shelf full of Kellogg's products, we are more likely to sell her than if we are just selling her this, Plaintiff's Exhibit No. 1. Also, she is more likely to come back and ask for more.

I find that customers who habitually buy Kellogg's shredded wheat are habitual buyers of other lines of cereals. They trade off. People get pretty tired of just eating nothing but shredded wheat. I have known shredded wheat, like Plaintiff's Exhibit No. 1, during all my thirty-five years' experience. I presume the Shredded Wheat Company has spent vast sums advertising shredded wheat. I have seen some advertising. They use some of the various methods of advertising recited by Mr. Clarke in his questions. As far as the dealer is concerned, I have never had any advertising matter on the shredded wheat. I have seen it, however, in magazines and booklets. I never saw any demonstrations. I never saw any of the little machines they set up to make shredded wheat biscuit. My experience has always been in the wholesale end of the business, not at all in the retail. I am manager of a retail store now. Real live customers come in and buy merchandise there. I am manager of just the one store, located at 209 East 79th Street, on the south side, farther south and west than the Jackson Park district. So I am now in the retail grocery business. We are a service store, making deliveries, receiving a few telephone orders, and doing a cash business, with no credit.

On a telephone order, if a customer asked for shredded wheat, he would get shredded wheat. There would be no chance of selling the Kellogg line at that time.

The result of the advertising and popularization of shredded wheat biscuit has been to make it a very well known product, in my experience. I guess almost everybody knows that shredded wheat is. In fact, for thirty-five years they have known it by that name, and they would not ask for shredded wheat by any other name.

They never ask for Kellogg's shredded wheat biscuit. They ask for Whole Wheat Biscuit or Kellogg's, or they point to it and say: "Give me one of those Kellogg's up there." I do not think I have ever had a customer ask for Kellogg's shredded wheat. I serve several customers every day, and it would not be impossible. If I would say anything, I would say yes, but without absolute knowledge. I do not think I ever paid particular attention to whether they asked for just Kellogg's shredded wheat.

Both products are displayed prominently in our stores. I have a counter that comes around where they are both displayed. They are perhaps fifteen feet apart.

We do not have people come in and help themselves in our store. They ask for what they want. We carry the Kellogg product in the package with the glassine window, altogether that way now. It came out originally without the cellophane. Those packages are displayed on our shelves so that the biscuit are visible and the customers can see them and point out what they want.

I cannot recall the time when Shredded Wheat like Plaintiff's Exhibit 1 was first put on the market. I cannot remember when it was not on the market. It seems to me I have always heard of shredded wheat.

It was a new kind of food product, and I knew people had to be really taught to like it and use it. I presume that is where the Shredded Wheat Company did pioneer work on that kind of food. Of course, the Kellogg Company are doing a great deal of advertising, themselves, educating people. The store managers are also showing them the difference. They are helping to introduce the biscuit, but I would think their task is made easier by the thirty-five or forty years during which the Shredded Wheat Company has made and advertised that type of food. I do not think there is any question about that.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know of my own knowledge that the Kellogg Company has encountered very great trade resistance through the charges made and the litigation conducted against its product. I do not know what this suit is all about.

Which product they get depends on who the customer is. A store like mine, you get to know the same people who come in day in and day out pretty well. Clerks who wait on them know them very well, and their likes and dislikes. After you have waited on them for awhile, you know if, when they ask for shredded wheat, they want shredded wheat. With people who do not come in regularly, you do not always know what they want. We get to know them and we give them shredded wheat if they ask for shredded wheat. If the other people who ask for shredded wheat want Kellogg's, they get Kellogg's, because we know the individual customers.

RE-CROSS-EXAMINATION.

THE WITNESS: We have some individual customers who ask for shredded wheat and expect to get Kellogg's biscuit. We know which they are. Sometimes we make a mistake and get the wrong one, and they tell

us about it, too. They get the shredded wheat and they tell us they want the Kellogg's. If we stop and think they use the other one, we give it to them. Sometimes it happens the other way about, that they get Kellogg's when they really want shredded wheat. They get in the habit, now, of just asking for shredded wheat; but the majority of them will specify either shredded wheat or Kellogg's. There are a few of them who have become familiar with it to whom we have sold the idea of Kellogg's Whole Wheat Biscuit in place of shredded wheat, who will ask for shredded wheat and expect to get Kellogg's.

RE-DIRECT EXAMINATION.

THE WITNESS: There is a general family resemblance between the coloring and the getup of Kellogg's Whole Wheat Biscuit and the rest of the Kellogg line, such as Corn Flakes. In the red and green colors, it has the same coloring in all their packages.

[redacted]

Supreme Court of the United States

[redacted]

No. 2

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

No. 36

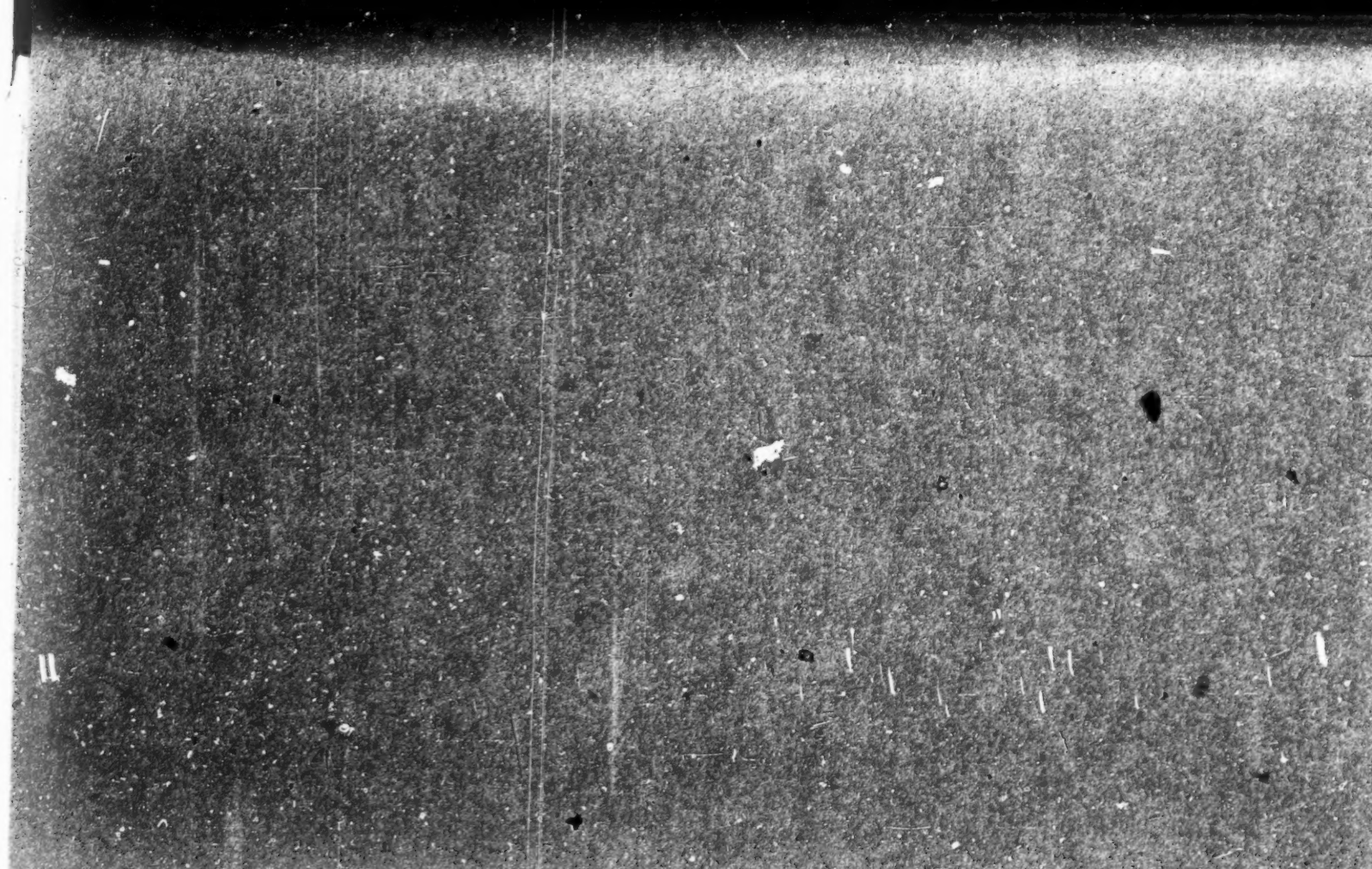
KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONS FOR CERTIORARI FILED { SEPTEMBER 10, 1937. MAY 23, 1938.



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Direct Examination	III	1712
Cross-Examination	III	1722
Re-Direct Examination	III	1728
Re-Cross-Examination	III	1729
Re-Direct Examination	III	1729
Re-Cross-Examination	III	1729
Re-Direct Examination	III	1729
Re-Cross-Examination	III	1731
Re-Direct Examination	III	1731
Saur, Mrs. Ulla—		
Direct Examination	III	1605
Cross-Examination	III	1606
Sawyer, Ray W.—		
Direct Examination	III	1953
Cross-Examination	III	1961

	Vol.	Page
Re-Direct Examination	III	1964
Re-Cross-Examination	III	1964
Re-Direct Examination	III	1965
Schmidt, L. P.—		
Direct Examination	II	1210
Cross-Examination	II	1212
Re-Direct Examination	II	1213
Re-Cross-Examination	II	1213
Re-Direct Examination	II	1214
Re-Cross-Examination	II	1214
Re-Direct Examination	II	1214
Schoch, Paul G.—		
Direct Examination	III	1930
Cross-Examination	III	1932
Schultz, Mrs. Etta M.—		
Direct Examination	III	1935
Cross-Examination	III	1935
Re-Direct Examination	III	1936
Schwager, George W.—		
Direct Examination	III	1587
Cross-Examination	III	1588
Re-Direct Examination	III	1590
Sessenden, William E.—		
Direct Examination	II	1270
Cross-Examination	II	1272
Re-Direct Examination	II	1274
Re-Cross-Examination	II	1274
Stearns, Charles R.—		
Direct Examination	III	1918
Cross-Examination	III	1920
Re-Direct Examination	III	1921
Skellenger, William E.—		
Direct Examination	III	1822
Cross-Examination	III	1825
Re-Direct Examination	III	1827
Re-Cross-Examination	III	1828
Sharp, Mrs. J. A.—		
Direct Examination	II	1347
Cross-Examination	II	1348
Re-Direct Examination	II	1348

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
113	Kellogg Package, Grocery Store, New York, Witness Bender	I	618*	...	...
114	Sheets (Two), Figures From 1927 and 1928, Tables of Amounts Expended by Advertising Shredded Wheat, Witness Oliva	I	620*	IV	45
115	Sheets (Four), Showing Expenditures by Media From 1929 to 1932, Witness Oliva	I	620*	IV	48
116	Cut-out, Flour, Witness Oliva	I	621*	Not printed	
117	Cut-out, Witness Oliva	I	621*	Not printed	
118	Cut-out, Witness Oliva	I	621*	Not printed	
119	Four Price Cards, Witness Oliva	I	621*	Not printed	
120	Eight Carton Inserts, Witness Oliva	I	621*	Not printed	
121	Window Poster, Witness Oliva	I	621*	Not printed	
122	Three Sheet Poster, Witness Oliva	I	622*	Not printed	
123	Shopping Bag, Witness Oliva	I	622*	...	...
124	Hanger Card, Witness Oliva	I	622*	Not printed	
125	Hanger Card, Witness Oliva	I	622*	Not printed	
126	Hanger Card, Witness Oliva	I	622*	Not printed	
127	Price Card, Witness Oliva	I	622*	Not printed	
128	Price Card, Witness Oliva	I	622*	Not printed	
129	Four Broadsides, Witness Oliva	I	622*	Not printed	
130	Recipe Book, Witness Oliva	I	622*	Not printed	
131	Restaurant Hanger, Witness Oliva	I	623*	Not printed	
132	Restaurant Menu, Witness Oliva	I	623*	Not printed	
133	Three Window Posters, Witness Oliva	I	623*	Not printed	
134	Window Posters, Witness Oliva	I	623*	Not printed	
135	Price Window Poster, Witness Oliva	I	623*	Not printed	
136	Panel Poster, Witness Oliva	I	623*	Not printed	
137	Postal Card, Witness Oliva	I	623*	Not printed	
138	Letter and Circular Distributed With Free Samples of Shredded Wheat, Witness Oliva	I	623*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
139—Three Bundles of Sheets of Newspaper Schedules, Witness Oliva	I	624*	Not printed	
140—Kellogg Package, Restaurant, Newark, Witness Fagan	I	635*	...	...
141—Kellogg Package, Grocery Store, New York, Witness Mund	I	638*	...	...
142—Kellogg Package (in Part), Restaurant, Hampstead, Long Island, Witness Parnell	I	641*	...	...
143—Kellogg Package, Grocery Store, Seaford, Witness Tuthill	I	643*	...	...
144—Kellogg Package, Grocery Store, Brooklyn, Witness Evans	I	651*	...	...
145—Kellogg Box, Cafeteria, Brooklyn, Witness Evans	I	652*	...	...
146—Menu, Cafeteria, Brooklyn, Witness Evans	I	655*	Not printed	
147—Kellogg Box, Grocery Store, Witness McCrum	I	656*	...	...
148—New Carton, National Biscuit Co., Witness Oliva	I	657*	...	...
149—Transcript of Annual Sales of Shredded Wheat, Witness Dunlap	I	675*	IV	50
150—Combined Schedule of Advertising Expenditures, Witness Dunlap	I	675*	IV	51
151—Kellogg Carton, Cafeteria, New York, Witness MacKay	I	682*	...	...
152—Kellogg Package, Restaurant, Fresno, California, Witness Schapansky	II	716*	...	...
153—Kellogg Package, Black's Package Store, Fresno, California, Witness Schapansky	II	717*	...	...
154—Kellogg Carton, Grocery Store, With Sales Slip, Fresno, California, Witness Schapansky	II	718*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
154-A	Kellogg Carton, Hotel Berry, Coffee Shop, Sacramento, California, Witness Sowles	II	727*	...	...
155	Kellogg Carton, Grocery Store, Sacramento, California, Witness Sowles	II	727*	...	...
156	Menu Card, Smith's Coffee Cup, Stockton, California, Witness Burkner	II	732*	Not printed	
157	Kellogg Carton, Smith's Coffee Cup, Stockton, California, Witness Burkner	II	732*	...	...
158	Kellogg Carton, Foster's Lunch System, San Francisco, California, Witness Baird	II	736*	...	...
159	Kellogg Carton, Grocery, Berkeley, California, Witness MacCool	II	739*	...	...
160	Kellogg Carton and Purchase Slip, Miller's Store, Witness Fatjo	II	743*	...	...
161	Kellogg Package, Santa Clara, California, Witness Van Artsdale	II	767*	...	...
162	Menu, Steamship Line, Ross, California, Witness Mears	II	1196*	Not printed	
163	Menu, Ship Monterey, Ross, California, Witness Mears	II	1196*	Not printed	
164	Menu Card, Restaurant Owner, San Francisco, California, Witness Dubac	II	1235*	Not printed	
165	Kellogg Carton, Large Size, Burlingame, California, Witness West	II	1190*	...	...
166	Kellogg Carton, Burlingame, California, Witness West	II	1190*	...	...
167	Kellogg's Window Display Carton, Burlingame, California, Witness West	II	1191*	...	...
168	Kellogg's Window Display Carton, Burlingame, California, Witness West	II	1191*	...	...
169	Kellogg Carton, Restaurant Owner, Witness Lee	II	1255*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
170—Menu Card, With Paper Attached, Restaurant owner, Witness Fierstine	II	1259*	Not printed	
171—Kellogg Carton, Witness Cooper	II	776*	...	...
172—Kellogg's Wheel of Knowledge, San Diego, California, Witness Cooper	II	776*	Not printed	
173—Kellogg Carton, Purchaser, San Diego, California, Witness Cooper	II	777*	...	...
174—Kellogg Carton, Purchaser, Los Angeles, California, Witness MacFarland	II	783*	...	...
175—Kellogg Carton, Los Angeles, California, Witness MacDuffie	II	787*	...	...
176—Kellogg Carton, Purchaser, Los Angeles, California, Witness MacDuffie	II	787*	...	...
177—Kellogg Carton, Purchaser, Glendale, California, Witness Anderson	II	792*	...	...
178—Kellogg's Individual Carton, Witness Lierley	II	798*	...	...
179—Kellogg Carton and Cash Slip, Witness Ruch	II	802*	...	...
180—Clipping, Brownwood Bulletin, Kellogg Sales, Witness Wilde	II	1333*	Not printed	
181—Fort Worth Grocery Co., Price-List, Witness Wilde	II	1339*	Not printed	
182—Kellogg Carton, Witness Bullock	II	882*	...	...
183—Kellogg Package, Witness Burke	II	884*	...	...
184—Kellogg Carton, Cellophane Front, Witness Mahaffey	II	889*	...	...
185—Kellogg Carton, Witness Tutt	II	900*	...	...
186—Kellogg Carton, Witness Reynolds	II	902*	...	...
187—Sales Slip, Witness Staloup	II	904*	Not printed	
188—Kellogg Carton, Witness Staloup	II	904*	...	...
189—Slip of Paper, Witness Hunsaker	II	907*	Not printed	
190—Kellogg Carton, Witness Hunsaker	II	907*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
191—Kellogg Package, Witness Guthrie	II	936*	...	...
192—Kellogg Carton, Witness Guthrie	II	938*	...	...
193—Menu Card, Witness Guthrie	II	938*	Not printed	
194—Page of the Wichita Independent, Witness Guthrie	II	938	Not printed	
195—Kellogg Package, Witness Branson	II	943*	...	...
196—Purchase Slip, Witness Branson	II	943*	Not printed	
197—Page of the Winona Republican Herald, Dated January 20, 1933, Witness Kolvoord	III	1411*	Not printed	
198—Newspaper Advertisement of the Decatur Home Stores, Witness Kolvoord	III	1415*	Not printed	
199—Old-Style Kellogg Folder Cut, Witness Kolvoord	III	1415*	Not printed	
200—Newspaper Advertisement, Reading Eagle, April 28, 1932, Witness Kelly	III	1443*	Not printed	
201-A—Newspaper Clipping, Kalamazoo Gazette, Witness Mahan	III	1476*	Not printed	
201-B—Sheet, Containing Same, Kalamazoo Gazette, March 2, 1933; Newspaper Clipping, Witness Mahan	III	1476	Not printed	
202—Price-List Put Out by the Kellogg Company, Dated February 1, 1933, Witness Mahan	III	1476*	IV	53
203—Paper Showing Picture of Kellogg's Whole Wheat Biscuit Containing Two Biscuit in a Dish to Be Addressed to Store Managers, Witness Mahan	III	1477	IV	55
204—Tear Sheet From the Battle Creek, Michigan, Moon Journal, October 21, 1932, Witness Mahan	III	1477	Not printed	
205—Hand-Bill Used by I. G. A. Stores, Witness Mahan	III	1477	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
206—Sheet From the News Telegraph, Dated March 10, 1933, Sharon, Pa., Witness Ander	III	1638	Not printed	
207—Page Twenty-nine of the Pittsburgh Press, Dated March 25, 1932	III	1638	Not printed	
208—Package of Hat Cleaner, Witness Rush	III	1727	...	...
209—Package of Camel Cigarettes, Witness Rush	III	1728	...	...
210—Copy of the Reading Eagle, May 5, 1932, Witness Miller	III	1846*	Not printed	
211—Page of the Reading Eagle, February 4, 1932, Witness Miller	III	1846*	Not printed	
212—Sheet Containing Ad of the Kellogg Company of the Reading Eagle, May 12, 1932, Witness Miller	III	1846*	Not printed	
213, 214—(Numbers Skipped, No Such Exhibits Marked.)				
215—Package Resembling Plaintiff's Exhibit No. 166 (a Kellogg Shredded Whole Wheat Biscuit Carton), Witness Hopkins	III	1871*	...	...
216—Package Resembling Plaintiff's Exhibit No. 165, Witness Hopkins	III	1872*	...	...
217—Cardboard Liner, Used by Kellogg Company in Whole Wheat Biscuit Cartons, Witness Hopkins	III	1872*	...	...
218—Easel or Study Advertising, Witness Hopkins	III	1874*	Not printed	
219—Sheet of the Reading Eagle, March 31, 1932, Witness Hopkins	III	1875*	Not printed	
220—Sheet of the Reading Eagle, March 5, 1932, Witness Hopkins	III	1875*	Not printed	
221—Sheet of the Reading Eagle, March 17, 1932, Witness Hopkins	III	1875*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
222—Copy of Modern Merchant and Grocery World, Witness Hopkins	III	1875*	Not printed	
223—Cash-and-Carry Bulletin, Witness Hopkins	III	1875*	Not printed	
224—William Montgomery & Co., Price-List, Witness Hopkins	III	1876*	Not printed	
225—Copy of Modern Merchant and Grocery World, February 9, 1933, Witness Hopkins	III	1876*	Not printed	
226—Standard Government Form of Bid, Witness Hopkins	III	1879	Not printed	
227—Price Bulletin of Provisional Contracts, Witness Hopkins	III	1879	Not printed	
228—Copies of Requisitions, Consisting of Six Sheets, Witness Ruckman	III	1912*	Not printed	
229—Advertisement, Minneapolis Journal, April 30, 1932, Witness Ruckman	III	1940*	Not printed	
230—Breakfast Menu, Hotel Paxton Coffee Shop, Witness Dubois	III	1947*	Not printed	
231—Menu, Main Dining-Room, Hotel Paxton, Witness Dubois	III	1947*	Not printed	
232—Room-Service Menu, Hotel Paxton, Witness Dubois	III	1947*	Not printed	
233—Board of Control Specifications, Witness Sawyer	III	1965*	Not printed	
234—Consolidation Agreement, Dated May 19, 1890, Witness Malone	II	958*	Not printed	
235—Copy of Certificate of Incorporation, Dated May 7, 1900, Witness Malone	II	978	Not printed	
236—Letter, Division Passenger Agent, Atchison, Topeka & Santa Fe Railway Co., April 13, 1933, Witness Malone	II	979	Not printed	
237—Certified Copy Resettled Final Decree in Shredded Wheat Company Against Humphrey Cornell Company	III	2005	IV	57

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
238	Menu Card, The Fenway Inn	I	251	Not printed	
239	Photographs (24), Illustrating Plaintiff's Operations	I	271	IV	63
240	Box Diamond-Shape Biscuit	I	271	Not printed	
240-A	Photograph of Two Biscuit of Plaintiff's Exhibit No. 240	III	2019	IV	111
241	Box of Cone-Shaped Biscuit	I	272	...	...
241-A	Photograph of Four Biscuit of Plaintiff's Exhibit No. 241	III	2019	IV	113
242	Box of Doughnut-Shaped Biscuit	I	273	...	...
242-A	Photograph of Two Biscuit of Plaintiff's Exhibit No. 242	III	2019	IV	115
243	Box of 3-inch Round-Cut Biscuit	I	274	...	...
243-A	Photograph of Two Biscuit of Plaintiff's Exhibit No. 243	III	2019	IV	117
244	Box of 2-inch Round-Cut Biscuit	I	274	...	...
244-A	Photograph of Three Biscuit of Plaintiff's Exhibit No. 244	III	2019	IV	119
245	Box of 3-inch Round-Moulded Biscuit	I	275	...	...
245-A	Photograph of Two Biscuit of Plaintiff's Exhibit No. 245	III	2019	IV	121
246	Box of Biscuit Baked in Automatic Machine	I	276	...	...
247	Sheet Tampa Morning Tribune, July 9, 1932	I	303	IV	123
248	Sheet The Tampa Daily Times, July 8, 1932	I	303	IV	125
249	Sheet The Saint Paul Pioneer Press, April 26, 1933	I	304	Not printed	
250	Digest of Style for Government Printing	I	304*	...	...
251	Stipulation Re Depositions in Connecticut Case	I	306	IV	127
252	Four U. S. Trade-mark Registrations of Plaintiff	I	315	IV	129

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
	No. 85,186, January 30, 1912	I	315	IV	129
	No. 178,725, January 15, 1924	I	315	IV	133
	No. 216,593, August 17, 1926	I	315	IV	131
	No. 213,456, May 25, 1926	I	315	IV	135
253	Twenty-seven State Registrations of Trade-mark Shredded	I	315	Not printed	
254	Certificate of Incorporation, Natural Food Co.	II	1004	Not printed	
255	Certified Court Order Supreme Court, New York, Authorizing Change of Name to Shredded Wheat Company	II	1005	Not printed	
256	Certificate of Organization National Biscuit Co.	II	1005	Not printed	
257	Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
258	Second Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
259	Third Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
260	Bill of Sale, 30th April, 1930, From Shredded Wheat Company to National Biscuit Co.	II	1005	Not printed	
261	Carton Purchased at Kenosha on December 24, 1932	III	2018	...	...
262	Sketches A and B Used in Cross-Examination of Witness Penty	II	1127	Not printed	
263	Report on Hot and Cold Cereals	II	1137	Not printed	
264	Report on Hot and Cold Cereals	II	1137	Not printed	
265	Slip Referred to by Witness Poole	II	1145	Not printed	
266	Package of Plaintiff's Reprocessed Biscuit	III	2018	...	...
267	Package of Plaintiff's Reprocessed Biscuit	III	2018	...	...
268	Package of Plaintiff's Biscuit, Part Reprocessed	III	2018	...	...
269	Bundle of Photographs	III	2018	Not printed	

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
270—Package Like Plaintiff's Exhibit 2, Kellogg's Shredded Whole Wheat Biscuit	III	2018	...	...
271—Defendant's Carton [redacted] Out September, 1932	III	2018	...	...
272—Carton Kellogg's Shredded Whole Wheat	III	2018	...	...
273—Decree in Case of Natural Food Co. v. Bulkley, et al.	III	2020	Not printed	
274—Carton Champion Flake Butters	III	2024	...	...
275—Dupont Company Price-List on Cellophane	III	2036	Not printed	

PLAINTIFF'S EXHIBITS UNDER RULE 46.

A—Publication of the Cyrus Curtis Pub. Co.	III	2019	Not printed	
B—Opinion of the Court of Appeals in Williams Case	III	2020	Not printed	
C—Decree of Court of Appeals in Williams Case	III	2020	Not printed	

DEFENDANT'S EXHIBITS.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
1—Letter of Mr. Sweet	I	340	Not printed	
2—Letter of Mr. Sweet	I	340	Not printed	
3-A—Letter of Mr. Sweet	I	340	Not printed	
3-B—Letter of Mr. Sweet	I	340	Not printed	
4—Kellogg Carton, Witness Hamilton	I	357*	...	...
5—Kellogg Carton, Witness Hamilton	I	357*	...	...
6—Package Kellogg Whole Wheat Biscuit	I	495*	...	...
7—Slip of Witness' Signature Torn Off Plaintiff's Exhibit No. 54, Witness Loughlin	I	502*	Not printed	
8—Box or Carton, Kellogg's, Witness Dodge	I	531*	...	...
9—Letter and Enclosure; News Release, Re: Suit Against Kellogg, Witness DeWeese	I	604	IV	137
10—Newspaper Article, Filing of Suit by Shredded Wheat Company, Witness DeWeese	I	604	IV	138
11—Quaker Muffetts Package, Witness Weinstock	I	667*	...	...
12—Package, Codfish, Witness West	II	1194*	...	...
13—Package, Baker's Cocoanut, Witness West	II	1194	...	...
14—Package, Kellogg's Whole Wheat Flakes, Witness West	II	1194*	...	...
15—Package, Kellogg's Muffetts, Witness West	II	1194	...	...
16—Triscuit Carton, Witness Powell	II	1266	...	...
17—Wheat Krumbles Carton, Witness Thompson	II	1275*	...	...
18—Poster, Wheel of Knowledge, Witness Thompson	II	1277*	Not printed	
19—Foster, Jumbo Kellogg Carton, Witness Thompson	II	1277*	Not printed	
20—Sheets, Ads, Witness Thompson	II	1278*	Not printed	
21—Kellogg's Corn Flakes, Witness Thompson	II	1285	...	...
22—Kellogg's All-Bran, Witness Thompson	II	1285	...	...
23—Kellogg's Pep, Witness Thompson	II	1285	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
24—Kellogg's Wheat Krumbles, Witness Thompson		II	1285	...	...
25—Kellogg's Rice Krispies, Witness Thompson		II	1285	...	...
26—Kellogg's Kaffee Hag, Witness Thompson		II	1285	...	...
27—Kellogg's Wheat Krispies, Witness Thompson		II	1285	...	...
28—(Number Skipped, No Such Exhibit Marked.)					
29—Kellogg's Whole Wheat Flakes, Witness Thompson		II	1285	...	...
30—Package of Tear Sheets From San Francisco and Oakland Papers		II	775*	Not printed	
31—Package of Kellogg's All-Bran, Witness Anderson		II	1339*	...	...
32—Package of Post's Whole Bran, Witness Anderson		II	1339*	...	...
33—Package of Uneeda Graham Grackers, Witness Anderson		II	1339*	...	...
34—Package of Brown's Graham Crackers, Witness Anderson		II	1339*	...	...
35—Package of Sunshine Dutch Rush, Witness Anderson		II	1339*	...	...
36—Package of Holland Rusk, Witness Anderson		II	1339*	...	...
37—Package of Brown's Vanilla Wafers, Witness Anderson		II	1339*	...	...
38—Package of Uneeda Vanilla Wafers, Witness Anderson		II	1339*	...	...
39—Package of Van Camp's Spaghetti, Witness Anderson		II	1340*	...	...
40—Package of Thrift Spaghetti, Witness Anderson		II	1340*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
55-B	Kellogg Carton, Restaurant, Chicago, Witness Holmer	I	504	...	...
56	Menu Card, Restaurant, Chicago, Witness Holmer	I	504	Not printed	
57	Kellogg Carton, Grocery Store, Chicago, Witness Ristig	I	512	...	...
58	Kellogg Carton, Food Shop, Chicago, Witness Korsen	I	513	...	...
59	Kellogg Carton, Grocery Store, Chicago, Witness Rachlin	I	515	...	...
60	Kellogg Carton, Grocery Store, Chicago, Witness Ritter	I	516	...	...
61	Kellogg Package, Grocery Store, Chicago, Witness Golden	I	517	...	...
62	Kellogg Box, Davie's Lunch, Chicago, Witness Skewes	I	520	...	...
63	Kellogg Carton, Restaurant, Washington, D. C., Witness Kleeman	I	528	...	...
64	Kellogg Carton, Grocery Store, Hagerstown, Md., Witness Schmidt	I	533	...	...
65	Kellogg Box, Restaurant, Hagerstown, Md., Witness Schmidt	I	533	...	...
66	Bill From Restaurant, Hagerstown, Md., Witness Schmidt	I	533	Not printed	
67	Kellogg Box, Restaurant, Hagerstown, Md., Witness Schmidt	I	533	...	...
68	Bill, Marked One Box Shredded Wheat, Grocery Store, Chambersburg, Pa., Witness Ludwig	I	534	Not printed	
69	Kellogg Box, Grocery Store, Chambersburg, Pa., Witness Ludwig	I	535	...	...
70	Bill From Restaurant, Chambersburg, Pa., Witness Ludwig	I	535	Not printed	
71	Kellogg Box, Restaurant, Chambersburg, Pa., Witness Ludwig	I	535	...	...

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
72—Sales Slip From Restaurant, Baltimore, Witness Johnson	I	548*	Not printed	
73—Kellogg Carton, Restaurant, Baltimore, Witness Johnson	I	549*	...	...
74—Kellogg Package, Lull Grocery Store, Kalamazoo, Mich., Witness Doyle	I	552*	...	...
75—Kellogg Carton, Sunshine Grocery Company, Kalamazoo, Mich., Witness Doyle	I	553*	...	...
76—Kellogg Package, Grocery Store, Kalamazoo, Mich., Witness Doyle	I	553*	...	...
77—Kellogg Carton, Grocery Store, Kalamazoo, Mich., Witness Doyle	I	553*	...	...
78—Kellogg Carton, Grocery Store, Battle Creek, Witness Doyle	I	553*	...	...
79—Kellogg Carton, Grocery Store, Battle Creek, Witness Doyle	I	554*	...	...
80—Kellogg Package, Grocery Store, South Norwalk, Conn., Witness Cavalier	I	612*	...	...
81—Purchase Slip, Grocery Store, Stamford, Witness Tuttle	I	614*	Not printed	
82—Kellogg Carton, Grocery Store, Stamford, Witness Tuttle	I	614*	...	...
83—Newspaper Schedules (Summary), Witness DeWeese	I	571*	IV	11
84—Compilation of Numerous Sheets Entitled "Advertising and Promotional Expense in the United States, Canada, and England," Witness DeWeese	I	571*	IV	41
85—Paper, Letter From Walter H. Page, Witness DeWeese	I	572*	IV	43
86—List of Publications Referring to Shredded Wheat, Witness DeWeese	I	572*	Not printed	
87 to 112—Books or Albums Containing Records of Shredded Wheat Advertising, Witness DeWeese	I	572*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
136—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat		II	1017	Not printed	
137—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat		II	1017	Not printed	
138—Batch of Advertisements of Plaintiff		II	1025	Not printed	
139—Odd Advertisements of Plaintiff in Woman's Home Companion		II	1035	Not printed	
140—Plaintiff's Pamphlet "Uneeda"		II	1035	Not printed	
141—Standard Government Form of Bid, Department of Interior		II	1043	Not printed	
142—Federal Specification for Cereals (Breakfast Foods)		II	1043	Not printed	
143—Defendant's Bid Naval Supply Department, Norfolk, Va., May 16, 1933		II	1044	Not printed	
144—Defendant's Bid Naval Supply Depot, Norfolk, Va., March 15, 1933		II	1045	Not printed	
145—Samples of Defendant's Early Advertisements of Kellogg's Toasted Wheat Biscuit		II	1047	Not printed	
146—Early Carton of Kellogg's Shredded Whole Wheat Biscuit		II	1048	...	...
147—Blank Carton Sanitas Toasted Corn Flakes		II	1050	...	...
148—Advertisements Kellogg's Shredded Krumbles		II	1052	Not printed	
149—Carton of Kellogg's Krumbles, Shredded Whole Wheat		II	1053	...	...
150—Carton Kellogg's Wheat Krumbles		II	1053	...	...
151—Carton Kellogg's Wheat Krumbles (U. S.)		II	1058	...	...
152—Letter May 3, 1933, N. A. Relfrich to Kellogg's Sales Co.		II	1059	Not printed	
153—Proposal April 8, 1933, to Navy Purchasing Officer, New York		II	1060	Not printed	
154—Price Bulletin of Provision Contract for May, 1933, Port of New York		II	1061	Not printed	

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
155—Bid March 3, 1933, Navy Purchasing Office, New York	II	1062	Not printed	
156—Bid June 8, 1932, Naval Air Station, Lakehurst, N. J.	II	1062	Not printed	
157—Bid February 23, 1933, Selfridge Field, Mich.	II	1063	Not printed	
158—Bid May 9, 1933, West Point, N. Y.	II	1063	Not printed	
159—Invitation for Bid August 22, 1932, Veterans Administration Home, National Military Home, California	II	1064	Not printed	
160—Invitation for Bids, October 25, 1932, Veterans Administration, Washington, D. C.	II	1064	Not printed	
161—Invitation for Bids, October 25, 1932, U. S. Marine Hospital, St. Louis, Mo.	II	1064	Not printed	
162—Bid March 21, 1932, Fort Benjamin Harrison, Ind.	II	1065	Not printed	
163—Bid September 8, 1932, Fort Hoyle, Md.	II	1065	Not printed	
164—Invitation for Bids, May 19, 1932, U. S. Property and Disbursing Officer, Trenton, N. J.	II	1065	Not printed	
165—Bids January 9, 1932, The Army War College, Washington, D. C.	II	1065	Not printed	
166—Bid August 18, 1932, Fort Moultrie, S. C.	II	1066	Not printed	
167—Bid November 11, 1932, Langley Field, Va.	II	1066	Not printed	
168—Bid January 19, 1933, Fort Crook, Neb.	II	1066	Not printed	
169—Bid March 25, 1933, Fort McClellan, Ala.	II	1066	Not printed	
170—Bid April 4, 1932, Fort Mason, San Francisco, Cal.	II	1066	Not printed	
171—Bid July 21, 1931, Fort Warden, Wash.	II	1067	Not printed	
172—Bid July 13, 1932, Quartermaster Supply Officer, Brooklyn, N. Y.	II	1067	Not printed	
173—Bid Marine Barracks, Navy Yard, Portsmouth, N. H.	II	1068	Not printed	
174—Invitation for Bids, Pennsylvania Department of Health, Sanitarium No. 2, Cresson, Pa.	II	1068	Not printed	

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
175—Specification for Cereals, Pa., December 10, 1932	II	1069	Not printed	
176—Specifications State of South Dakota	II	1069	Not printed	
177—Request for Bids, December 19, 1932, Maine	II	1070	Not printed	
178—Proposal, Rockland State Hospital, Orangeburg, N. Y.	II	1070	Not printed	
179—Invitation for Bids, March 13, 1933, Tennessee	II	1070	Not printed	
180—Order April 1, 1933, Wassaic State School, Wassaic, N. Y.	II	1071	Not printed	
181—Order January 16, 1933, Newark State School, Newark, N. J.	II	1071	Not printed	
182—Order March 23, 1933, Great Meadow Prison, Comstock, N. Y.	II	1071	Not printed	
183—Order January 14, 1933, Willard State Hospital, Willard, N. Y.	II	1071	Not printed	
184—Specifications Division of Purchases and Supplies, Springfield, Ill.	II	1072	Not printed	
185—Individual Carton Kellogg's Whole Wheat Biscuit	II	1072	...	...
186—Large Carton Kellogg's Whole Wheat Biscuit	II	1072*	...	...
187—Menu Card, Chicago, Milwaukee, St. Paul and Pacific	II	1074	Not printed	
188—Menu Card, Hotel Fort Shelby, Detroit, Mich.	II	1075	Not printed	
189—Bid March 13, 1933, Naval Supply Depot, Norfolk, Va.	II	1088	Not printed	
190—Bid February 11, 1933, U. S. Marine Corps, Navy Building, Washington, D. C.	II	1089	Not printed	
191—Bid of Price Brothers, May 18, 1933, Naval Home, Philadelphia, Pa.	II	1091	Not printed	
192—Plaintiff's Individual Carton, Large Biscuit	II	1098	...	...
193—Blueprint Diagrammatic Sketch Defendant's Mill	II	1107	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
194—Photographs (13) Illustrating Defendant's Operation	II	1111	Not printed	
195—Sample of Shreds First Time Through Rolls	II	1116	...	...
196—Sample of Shreds Second Time Through Rolls	II	1116	...	...
197—Sample of Shreds Third Time Through Rolls	II	1116	...	...
198—Carton of Fifteen Biscuit at 400 Degrees 1½ Hours	II	1117	...	...
199—Sample of Biscuit With Brown Band	II	1122	...	...
200—Sample of Biscuit With Green Band	II	1122	...	...
201—Sample of Biscuit With K Stamped Thereon	II	1123	...	...
202—Sample of Biscuit With Red Food Coloring	II	1123	...	...
203—Sample of Biscuit With Brown Food Coloring	II	1124	...	...
204—Sample of Biscuit With Green Strip on Top	II	1124	...	...
205—Sample of Biscuit With Green Strip on Bottom	II	1124	...	...
206—Sample of Biscuit With K Impressed Thereon	II	1125	...	...
207—Sample of Biscuit With Brown Stripes	II	1125	...	...
208—Sample of Biscuit With K Impressed Thereon	II	1125	...	...
209—Biscuit as Shown, Sketch A Attached to Exhibit 262	II	1130	...	...
210—Sample Diamond Shape Biscuit	II	1179	...	...
211—Sample Diamond Shape Biscuit	II	1179	...	...
212—Sample Biscuit With Band of Paper	II	1139	...	...
213—Sample Biscuit With Tag	II	1140	...	...
214—Sample Biscuit Enclosed in Envelope	II	1140	...	...
215—Large Card Carrying Samples of Plaintiff's and Defendant's Cartons	II	1151*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
216—Large Card Carrying Samples of Cartons of Defendant's Cereal Products	II	1151*	...	...
217—Defendant's Shipping Container Case No. 360	II	1152	...	...
218—Defendant's Shipping Container Case No. 324	II	1152	...	...
219—Window Display Card of Plaintiff	II	1152	...	...
220—Samples of Defendant's Cartons	II	1153	...	...
221—Photographs (2) of Store Displays	II	1153	Not printed	
222—Letter June 2, 1932, C. K. Brace, Manager, National Biscuit Co., Denver, Col., to All Jobbers	II	1154	IV	169
223—Chart of Kellogg's Shredded Wheat Biscuit Cartons	II	1155	Not printed	
224—Three Cartons Kellogg's Shredded Krumbles	II	1155	...	...
225—Advertisement Chicago Daily Tribune, June 2, 1928	II	1155	Not printed	
226—Advertisement The Battle Creek Moon Journal, May 25, 1922	II	1156	Not printed	
227—Open Letter of Plaintiff to "Dear Madam"	II	1157	Not printed	
228—Carton Complimentary Samples Shredded Whole Wheat	II	1157	...	...
229—Pamphlet Fifty Ways of Serving Shredded Whole Wheat	II	1157	Not printed	
230—Recipes for New and Delicious Energy Dishes	II	1157	Not printed	
231—Carton Kellogg's Battle Creek Shredded Wheat	II	1158	...	...
232—Registration No. 276,592, Battle Creek, Shredded Wheat	II	1158	Not printed	
233—Chamber's Journal, January 27, 1900	II	1158	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
234—File Wrapper and Contents, Trade-mark Registration No. 178,725, Shredded Wheat	II	1159	IV	171
235—File Wrapper and Contents, Trade-Mark Registration No. 213,456 Shredded Wheat	II	1159	IV	181
236—Book of Trade-Mark Registrations of Plaintiff	II	1160	IV	193
237—Collection of Correspondence	II	1161	Not printed	
238—Samples of Shredded Paper, Shredded Gelatine and Shredded Cellophane	II	1161	...	...
239—Reproduction of Kellogg Biscuit Prior to 1920	II	1162	Not printed	
240, 240-A, 240-B—Box of Split Peas, Lima Beans and Pop Corn, With Cellophane Windows	II	1163	...	...
241—Advertisements in Grocery World, Five Sheets	II	1165	Not printed	
242—Perky U. S. Patent No. 548,086, October 15, 1895	II	1166	IV	207

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
242	Book of Patents Issued to Plaintiff, Viz.:				
	Perky & Ford U. S. Patent No. 502,378, August 1, 1893	II	1166	V	1
	Perky U. S. Patent No. 520,496, May 29, 1894	II	1166	V	5
	Perky U. S. Patent No. 532,286, January 8, 1895	II	1166	V	11
	Perky U. S. Patent No. 532,480, January 15, 1895	II	1166	V	15
	Perky U. S. Patent No. 532,481, January 15, 1895	II	1166	V	21
	Perky U. S. Patent No. 532,697, January 15, 1895	II	1166	V	25
	Perky U. S. Patent No. 532,698, January 15, 1895	II	1166	V	29
	Perky U. S. Patent No. 533,551, February 5, 1895	II	1166	V	33
	Perky U. S. Patent No. 533,552, February 5, 1895	II	1166	V	37
	Perky U. S. Patent No. 533,553, February 5, 1895	II	1166	V	41
	Perky U. S. Patent No. 533,554, February 5, 1895	II	1166	V	45
	Perky U. S. Patent No. 533,555, February 5, 1895	II	1166	V	49
	Montgomery U. S. Patent No. 533,821, February 5, 1895	II	1166	V	55
	Perky U. S. Patent No. 548,086, October 15, 1895	II	1166	V	59
	Perky U. S. Design Patent No. 24,688, September 17, 1895	II	1166	V	61
	Perky U. S. Patent No. 571,284, November 10, 1896	II	1166	V	65
	Perky U. S. Patent No. 598,745, February 8, 1898	II	1166	V	77

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
	Perky U. S. Patent No. 614,338, November 15, 1898	II	1166	V	81
	Perky U. S. Patent No. 618,288, January 24, 1899	II	1166	V	87
	Perky U. S. Patent No. 667,892, February 12, 1901	II	1166	V	91
	Perky U. S. Patent No. 678,127, July 9, 1901	II	1166	V	109
	Perky U. S. Patent No. 678,625, July 16, 1901	II	1166	V	121
	Perky U. S. Patent No. 681,656, August 27, 1901	II	1166	V	135
	Burbank U. S. Patent No. 683,100, September 24, 1901	II	1166	V	143
	Burbank U. S. Patent No. 683,101, September 24, 1901	II	1166	V	149
	Burbank U. S. Patent No. 684,789, October 22, 1901	II	1166	V	155
	Burbank U. S. Patent No. 685,671, October 29, 1901	II	1166	V	165
	Perky U. S. Patent No. 713,795, November 18, 1902	II	1166	V	169
	Perky U. S. Patent No. 746,145, December 8, 1903	II	1166	V	173
	Burbank U. S. Patent No. 770,159, September 13, 1904	II	1166	V	181
	Horner U. S. Patent No. 785,554, March 21, 1905	II	1166	V	189
	Perky U. S. Patent No. 797,604, August 22, 1905	II	1166	V	201
	Smith U. S. Patent No. 1,195,114, August 15, 1916	II	1166	V	225
	Anderson U. S. Patent No. 1,334,429, March 23, 1920	II	1166	V	231
	House U. S. Patent No. 1,592,768, July 13, 1926	II	1166	V	243

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
41	Package of Swans Down Biscuit Mix, Witness Anderson	II	1340*	...	...
42	Package of La France Biscuit Flour, Witness Anderson	II	1340*	...	...
43	Package of Uneeda Assorted Biscuit, Witness Anderson	II	1340*	...	...
44	Package of Sunshine Specialtics Assortment, Witness Anderson	II	1340*	...	...
45	Package of Baker's Cocoanut, Witness Anderson	II	1340*	...	...
46	Package of Premier Spaghetti, Witness Anderson	II	1340*	...	...
47	Package of Van Camp's Kidney Beans, Witness Anderson	II	1340*	...	...
48	Package of Premier Beans and Pork, Witness Anderson	II	1340*	...	...
49	Package of Van Camp's Spaghetti, Witness Anderson	II	1340*	...	...
50	Package of LaChoy Shredded Sprouts, Witness Anderson	II	1340*	...	...
51	Package of Van Camp's Hominy, Witness Anderson	II	1340*	...	...
52	Package of Beech-Nut Pork and Beans, Witness Anderson	II	1340*	...	...
53	Package of Battle Creek Fig and Bran, Witness Anderson	II	1340*	...	...
54	Package of Van Camp's Hominy, Witness Anderson	II	1340*	...	...
55	Package of Beech-Nut Spaghetti, Witness Anderson	II	1340*	...	...
56	Package of Baker's Sweet Potato Shredlets, Witness Anderson	II	1340*	...	...
57	Package of Dunham's Original Shred Cocoanut, Witness Anderson	II	1340*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
58	Package of Baker's Cocoanut Shredded, Witness Anderson	II	1340*	...	...
59	Package of National Shredded Wheat Biscuit, the Larger Individual Carton, Witness Baskett	II	1342*	...	...
60	Package of National Shredded Wheat Biscuit, the Smaller Individual Carton, Witness Baskett	II	1342*	...	...
61	Photograph of the Interior of the Wyatt Self-Service Store, Witness Baskett	II	1344	Not printed	
62	Package of Post Toasties, Corn Flakes	II	905*	...	...
63	Package of Genuine Egg Noodles	II	905*	...	...
64	Postal Card of Clover Farms Store, Reads, "Valuable Coupon," Witness Walters	III	1402*	Not printed	
65	Jumbo Carton Display, Witness Kolvoord	III	1405*	...	...
66	Display Piece With Stand, Picturing a Saucer With Two Biscuit, Witness Kolvoord	III	1406*	...	...
67	Grocers' Display Piece Which Holds Carton Kellogg's Whole Wheat Biscuit, Witness Kolvoord	III	1406*	...	...
68	Sheet of Day Advertisements, Winona Republican Herald, January 20, 1933, Witness Kolvoord	III	1416	Not printed	
69-A and 69-B	Advance Sales Notice, Consisting of Two Sheets, Witness Chapelle	III	1418*	Not printed	
70	Package, Kellogg's, Witness Hatfield	III	1444*	...	...
71	Package of Shredded Wheat, Witness Hatfield	III	1444*	...	...
72	Individual Kellogg Package, Witness Tyler	III	1446*	...	...
73	Mat, Used in Newspapers in Printing, Witness Kolvoord	III	1449*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
74	Memo, Referring to Kellogg Carton, Witness Miller	III	1454	...	...
75	Small Individual Kellogg Package, Witness Gray	III	1529*	...	...
76	Kellogg Individual Package, Witness Gray	III	1529*	...	...
77	Other Package of Muffetts, Witness Lewis	III	1534*	...	...
78	Former Package of Muffetts, Witness Lewis	III	1534*	...	...
79	Copy of Bid, Woman's Relief Corps Home, Wenzik, Lewis	III	1536*	IV	142
80	Kellogg Package	III	1631	...	...
81	Shredded Wheat Package	III	1631	...	...
82	Forty-inch Advertisement, Martins Ferry, Witness Ander	III	1632*	Not printed	
83	Large Set-up Window Photograph Display, Witness Ander	III	1633*	...	...
84	A Smaller Set-up Window Photograph Display, Witness Ander	III	1633*	...	...
85	Copy of Bid, Tubercular Sanitarium, Cresson, Pennsylvania (Department of Health)	III	1641*	Not printed	
86	Copy of Bid, Specifies Kellogg's Whole Wheat Biscuit, Tubercular Sanitarium, Cresson, Pa., Witness Ander	III	1642*	Not printed	
87	Copy of Bid, Pennsylvania Soldiers' and Sailors' Home, Witness Ander	III	1642*	Not printed	
88	Package, Rippled Wheat, Witness Bell	II	954	...	...
89 and 90	Kellogg Deal Price Cards, Witness Mayman	III	1750*	...	...
91	Rose Carton, Witness Witherell	III	1764*	...	...
92	Chester Lowry's Blue Book Price List, Witness Beckham	III	1801*	Not printed	
93	Camden Price List, Lowry's Blue Book, Witness Beckham	III	1801*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
94—Advertisement From Reading Eagle, February 4, 1932, Witness Miller	III	1841*	Not printed	
95—Letters From National Biscuit Company to Jobbers, December 1, 1931, Witness Miller	III	1842*	IV	143
96 and 97—Two Circulars Carrying Advertisements of Kellogg's Whole Wheat Biscuit, Witness Moyer	III	1850*	Not printed	
98—Story Book of Games, Witness Hopkins	III	1863*	Not printed	
99—Wheel of Knowledge Ch[illegible] Witness Hopkins	III	1863*	Not printed	
100-A—File Copy of Standard Government Form of Bid, for Use by Navy Department, for Supply Department, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866	Not printed	
100-B—Standard Government Form of Bid, by Navy Department, U. S. Navy Yard, Washington, D. C., Witness Hopkins	III	1866	Not printed	
101—Standard Form of Bid, Dated January 12, 1933, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866	Not printed	
102—Federal Standard Stock Catalogue, N-C-191, Witness Hopkins	III	1868	Not printed	
103—Small Kellogg Carton, Purchased on Dining Car, Northwestern Railroad	III	1944*	...	...
104—Letter to the Kellogg Co. From the F. H. Cobb Co., Inc., Cortland, N. Y., Dated March 22, 1933, an Addendum to the Testimony of Mr. A. J. Twentyman	III	1952*	Not printed	
105—Case Used for Packing National Shredded Wheat, Witness Sawyer	III	1957*	...	....
106—Sketch, Diagram of Threads, Witness Malone, Made by Mr. Clarke	II	963	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
107	Sketch Diagram of Threads, Made by Witness Malone	II	963*	Not printed	
108	Photostatic Copy of Ad in the Denver Republican, Dated March 11, 1894, Witness Hurd	II	974	IV	145
109	Certificate of Incorporation Colorado Shredded Wheat, January 25, 1895, Witness Hurd	II	977*	Not printed	
110-A and 110B	Government Bid, Fort Logan, Dated April 11, 1933, Witness Copeland	III	1989*	Not printed	
111	Package of Egypt Stick Candy	III	1990	...	...
112	Second Sheet, Page Five, Denver Times, March 17, 1894	III	1990	Not printed	
113	Second Sheet, Page Five, Denver Times, March 10, 1894	III	1990	Not printed	
114	Third Sheet, Page Eight, Daily News, Denver, Colorado, July 17, 1895	III	1990	Not printed	
115	Fourth Sheet, Page Eight, Daily News, Denver, Colorado, July 14, 1895	III	1990	Not printed	
116	Fifth Sheet, Page Eight, Daily News, Denver, Colorado, July 27, 1895	III	1990	Not printed	
117	Sixth Sheet, Page Eight, Daily News, Denver, Colorado, July 7, 1895	III	1991	Not printed	
118	Seventh Sheet, Page Eight, Daily News, Denver, Colorado, July 10, 1895	III	1991	Not printed	
119	Eighth Sheet, Page Eight, Daily News, Denver, Colorado, July 28, 1895	III	1991	Not printed	
120	Copy of Record in the Case of Shredded Wheat vs. The Humphrey Cornell Co. and Frederick H. Towne, Witness Ross	III	1992	Not printed	
121	Photostatic Certified Copy of Majority Opinion of the U. S. Circuit Court of Appeals, Witness Ross	III	1992	IV	147
122	Copy of Petition for Rehearing, Witness Ross	III	1993	IV	159

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Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
123—Kellogg Carton Used From About 1910 to 1912, Witness Ross	III	1999*	...	...
124—Kellogg Carton Used From 1913 to 1914 to Some Time in 1915, Front Panel of Carton Entitled Kellogg's Toasted Wheat Biscuit, Witness Ross	III	2000*	...	...
125—Kellogg Carton Used From 1915 Until 1918 (About) or 1919, Front Face Reads "Copyright 1910 by Kellogg's Toasted Corn Flakes Co.," Witness Ross	III	2000*	...	...
126—Certified Copy of Mandate, Witness Ross	III	2005	IV	163
127—Shredded Wheat Company Chart, "Educational Exhibit of Shredded Wheat Biscuit"	II	288*	Not printed	
128—Book of Labels Illustrative of Jordan Testimony	II	1002	Not printed	
129—Book of 1929 Newspaper Advertising	II	1003	Not printed	
129-A—Book of 1928 Newspaper Advertising	II	1003	Not printed	
129-B—Book of 1929 Newspaper Advertising	II	1003	Not printed	
129-C—Book of 1930 Newspaper Advertising	II	1004	Not printed	
129-D—Book of 1931 Newspaper Advertising	II	1004	Not printed	
129-E—Book of 1932 Newspaper Advertising	II	1004	Not printed	
130—Board Containing Samples of Defendant's Cartons, Marked A to R	II	1006	...	...
131—Holder Containing Kellogg Poster Advertising Before Suit Brought	II	1016	...	...
132—Packages Prepared by Witness Jordan	II	1016	...	...
133—Form Letter to Newspapers Re Kellogg Advertisements	II	1016	Not printed	
134—Five Bundles of Retailer Advertisement of Kellogg's Whole Wheat Biscuit	II	1016	Not printed	
135—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat Biscuit	II	1016	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

come in, see the biscuit there, and say shredded wheat biscuit. They say that is the one they want. Both products are on the same shelves. They see them when they come in the store. They are both side by side. I do not think anybody ever picked up a package of Kellogg's Whole Wheat Biscuit for shredded wheat. I do not think there is any possibility for mistake.

I know where the shredded wheat are, and I have carried them a long time. People come and take them from the shelves, also. My experience before this store was across the ocean. I have been in this country five years in June. I have been with Loblaw all the time, always in Chicago. My customers can wander around the store at will. My customers know this article as shredded wheat. I really believe they now know the Kellogg product as shredded wheat, also. When they ask where the shredded wheat is, I just point out where it is on the shelf, so that, when they go there, they can take either one they want.

RE-DIRECT EXAMINATION.

THE WITNESS: Our store is one of a chain system of eighty-six, all in Chicago and suburbs. They are all of the same general type as mine. I think there is only one service store in the chain, the rest being self service. I do not know of any other self-service chain similar to ours in Chicago.

RE-CROSS-EXAMINATION.

THE WITNESS: All items on the shelves carry price tags. Both kinds of shredded wheat sell for the same price. That has always been the case. We have had advertising displays of Kellogg's biscuit, but we have never had any special price on it. We never had any combination of two or three items with it. We simply sell the various Kellogg products per package. We never had any demonstrations or anything like that.

LEO KEIL.

Deposition taken at Chicago, Illinois, March 15, 1933.

Direct Examination.

The Witness: I am and have been in the retail grocery business about five and a half years. I am with the Loblaw Groceteria, Jewell Food Stores, Inc., a chain organization of eighty-five self-service stores, where the customer comes in, takes a basket, goes through the aisles, and picks out what she wants. There is a turnstile at the door. Purchases are wrapped up, the customer pays for them, leaves the basket, and that ends the transaction.

Our store handles Kellogg's Whole Wheat Biscuit. We have handled it around three months. We also handle Niagara shredded wheat. Those products are on the shelf. Occasionally we display one or the other of them, if it is advertised. There is no preference at all which we shall display; but, if Kellogg's is advertised, we usually display it in the window and the store. The same thing refers to National Biscuit. When I say advertised, I mean the chain does consumer advertising of the product in the newspapers. If the chain carries newspaper advertising of Kellogg's, that is usually put on display to fit in with the advertisement. That is also true of the Niagara shredded wheat. Of the two, we sell most of Kellogg's, averaging around two to one over the Niagara Falls biscuit. I attribute that to the smaller Kellogg's biscuit, being toasted on both sides. The housewife prefers a smaller biscuit in serving it to children. Also, the cellophane-front package is more attractive. I think the total sales of shredded wheat biscuit are being increased rather than decreased on either one.

CROSS-EXAMINATION.

THE WITNESS: I do not also refer to Kellogg's when they ask for shredded wheat biscuit. Sometimes a customer comes in and asks for Kellogg's shredded wheat biscuit. Then I know what she wants. Occasionally, somebody will come in and ask for shredded wheat biscuit. If you refer them to the National, Niagara Falls biscuit, they will say: "Oh, no, I want that one which the Kellogg people put out." They regard Kellogg's as shredded wheat and ask for it in that way. Sometimes they ask for shredded wheat biscuit, and, when they pick it up, it comes to them they want Kellogg's Whole Wheat Biscuit. Those are the packages of Kellogg's that have the cellophane front with the biscuit showing through.

It is very natural for a customer who sees the cellophane front with the biscuit showing through to think it is shredded wheat. I have known the package, Plaintiff's Exhibit 1, for a long time. It is very well known in all grocery stores. I have worked in the A. & P. chain grocery service stores in Detroit. The store I now work in is one of the Jewell Tea stores. There are eighty-five of them. There are regularly two clerks besides myself, and we have an extra clerk on Saturday. Occasionally they assist the customers. We usually approach them and ask them if we can help them. Sometimes the customer will ask for assistance. We are there to help them if we can.

Our men occasionally assist customers in making sales of something they are not looking for. We carry milk or cream in our store. If we see a customer buying cereal, we suggest milk or cream to her. That is salesmanship. Our salesmen do not suggest one cereal as against another; but, if a woman buys milk, we will suggest and ask her if she has any cereal. We never suggest any particular item.

If a customer comes in and asks where the shredded wheat is, and we point it out, we do not, as a rule, attempt to offer Kellogg's Whole Wheat Biscuit or Shredded Wheat, one in preference to the other, because both are displayed alongside of each other. We usually refer them to the shelf, and they have their choice. There are occasions, once in a while, when we push one in preference to the other. It all depends on whether it is advertised. If the Kellogg Company is running some special advertisement of its Whole Wheat Biscuit, we just say it is being advertised at a special price, when there is some special price on it. As a rule, they are both sold in my store at the same price. To my mind, I think they are making a little more profit on the Kellogg biscuit, a little better break for the retailers.

When we give them a sales talk, we tell them there are fifteen biscuits to the package, the biscuit being toasted on both sides, and that it is a smaller biscuit than the Niagara Falls biscuit. It is necessary occasionally for us to make a comparison between the two in order to make a sale. I think the cellophane-front package has had a lot to do with Kellogg's Whole Wheat Biscuit outstripping the sales of shredded wheat biscuit in our store. It is also a more attractive package. It has quite a bit to do with it, and being more biscuit to a package, also. Occasionally our customers pick up a package and read what is printed on it. I do not really think the expression on the end of Plaintiff's Exhibit No. 161: "A shredded wheat product," and, on the other end: "Shredded wheat in its most delicious form," would have any influence on a customer who examined it. I think that she would know that already by looking in the window. She would not think that it was something that had the sanction of the old Shredded Wheat Company, nothing of that sort.

MR. CLARK: At this point, I have an objection I would like to put on this record: and that is that there is no basis for Mr. Vilas' assumption that everybody in the country knows all about the old Shredded Wheat and that, therefore, it ought to be assumed——

MR. VILAS: You have not had a witness yet who has not proved it. I cannot examine 120 million people, although I would be glad to.

MR. CLARKE: There are customers who look through the cellophane front and say, "That is shredded wheat"; but that does not——

MR. VILAS: You are testifying now.

MR. CLARKE: I will ask the witness if that is not so.

THE WITNESS: Well, yes.

XQ. 68. There are not very many people who do not know what shredded wheat is, are there?

A. Well, it is very seldom you run across a person that does not.

RE-DIRECT EXAMINATION.

THE WITNESS: I have had experience with demonstrations of products in grocery stores. I have not had any personal experience with demonstration of either of these shredded wheat products.

HARRY HAMILTON.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of the Jewell Food store located at 5038 West Madison Street, Chicago, one of about eighty-five chain stores, all the same type,

self-service, where the customer goes through a turnstile, picks up a basket, selects what she wants, takes it, has it wrapped, leaves the basket and goes about her business.

We handle Kellogg's Whole Wheat Biscuit. I imagine I have handled it about nine months. I have known of it longer than that, personally, I imagine about one year. That product sells regularly in our stores and has for the past nine months.

We also handle Niagara Falls Shredded Wheat. Both products are displayed in the stores. Kellogg's Whole Wheat Biscuit sells the most by a very great majority, four or five packages to one of the Niagara Falls. Those are sales all made on the self-service system, with no help from clerks at all. I attribute that predominance to the name Kellogg, for one thing, and the smaller size biscuit, and a much more attractive package, which goes a long way. Kellogg's has the most biscuit in the package. They are both displayed at the same price.

Once in a while the chain organization itself advertises Kellogg's biscuit to the consumers. I think they have done that once or twice. The Kellogg package I use has the cellophane front. That feature helps the sale of the Kellogg product quite a bit. I have heard quite a few favorable comments from customers about the cellophane front. They all liked it. It made a very favorable impression on them.

CROSS-EXAMINATION.

THE WITNESS: They like to look through the package, and they like—I do not know just how to explain it, but it is like a Cadillac looking like an old model T Ford. I think the old shredded wheat package has no value. They just pass it up like that. They know what shredded wheat is, what is in the package. I

imagine we did about 50 per cent. of the job in increasing Kellogg's Whole Wheat Biscuit sales four to one as against shredded wheat, and the organization did the other 50 per cent. We had a little display in the window and a little display on one of the tables, and put a price ticket on it. Kellogg's Whole Wheat Biscuit is the same price to the customer as shredded wheat.

XQ. 41. What else did you do? How did you introduce it when it was new in your store, to your customer?

A. I put a display up near the checking desk, where the girl could get hold of the package and draw a customer's attention to it.

THE WITNESS: I would tell the girl to say it was a new product in the market, with smaller biscuit. If the customer would take and liked it, she could get it there all the time. I told her to say that to about 90 per cent. of my customers. I did not in particular induce customers who wanted shredded wheat biscuit to take Kellogg's biscuit. Some of the girls perhaps did, on some very rare occasions. I do not think there have been any cases of that. I would not swear to it. I have never had the occasion arise when a customer came to a turnstile with shredded wheat and we introduced Kellogg's to her. When a customer came out with shredded wheat, we were selling shredded wheat then. We never asked her to try Kellogg's Whole Wheat Biscuit. We just let her go by. When, however, a customer would come by who had not selected any cereal, I asked her to try Kellogg's Whole Wheat. I never asked a customer to try the Whole Wheat Biscuit when she had selected the shredded wheat. For a short period, about three days, we displayed it prominently and had it right by the checking desk, so we could get hold of it promptly when we wanted it.

Then we put it on our shelves, and we displayed it in the window maybe once every two months. I also displayed shredded wheat in the window. Shredded wheat is advertised in the newspapers. I have known that package for some time. I am twenty-four. I did not know shredded wheat before I went in business. I have not been a user of it. I do not eat shredded wheat at all. I do not like it.

RE-DIRECT EXAMINATION.

THE WITNESS: I had a sort of hazy idea what shredded wheat looked like, but I tried it once or twice. It was toasted too much, seemed like straw to me, so I did not use it.

LOUIS JAMES HOY.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a chain store manager of a Loblaw Store at 3920 Lawrence Avenue, one of a chain of eighty-five self-service stores. A few of them are coming in now as service stores, but most of them are self-service, where there is a turnstile and the customer comes in, helps herself, and checks out at the turnstile.

We handle Kellogg's Whole Wheat Biscuit. We have had it about a year. We also handle Niagara Falls shredded wheat. The Kellogg biscuit sells better, in a ratio of two to one. Those two products are displayed in the stores. We put them on the shelves. From time to time we give special displays, a display near the check-out desk and in other places. I would attribute the increase of the sale of the Kellogg product over the Niagara Falls product to the cellophane-

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
	Webster U. S. Patent No. 1,592,797, July 13, 1926	II	1166	V	301
	Anderson U. S. Patent No. 1,621,863, March 22, 1927	II	1166	V	313
243	Valentine U. S. Patent No. 831,909, September 25, 1906	II	1166	V	319
244	Book of Patents Issued to Defendant, Viz.:				
	Valentine U. S. Patent No. 1,102,614, July 7, 1914	II	1166	V	331
	Kellogg U. S. Patent No. 1,159,045, November 2, 1915	II	1166	V	355
	Kellogg U. S. Patent No. 1,189,130, June 27, 1916	II	1166	V	357
	Kellogg U. S. Patent No. 1,197,297, September 5, 1916	II	1166	V	361
	Kellogg U. S. Patent No. 1,783,434, December 2, 1930	II	1166	V	351
	Hanford U. S. Patent No. 1,091,509, March 31, 1914	II	1166	V	373
	Valentine U. S. Patent No. 1,124,363, January 12, 1915	II	1166	V	411
	Valentine U. S. Patent No. 1,143,151, June 15, 1915	II	1166	V	417
245	Book of Miscellaneous Patents Issued to Others Than Plaintiff or Defendant, Viz.:				
	Cooley U. S. Patent No. 782,109, February 7, 1905	II	1167	V	437
	Williams U. S. Patent No. 820,899, May 15, 1906	II	1167	V	441
	Williams U. S. Patent No. 878,262, February 4, 1908	II	1167	V	445
	Williams U. S. Patent No. 896,964, August 25, 1908	II	1167	V	451
	Williams U. S. Patent No. 897,182, August 25, 1908	II	1167	V	455

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
	Williams U. S. Patent No. 931,243, August 17, 1909	II	1167	V	459
	Williams U. S. Patent No. 949,013, February 15, 1910	II	1167	V	469
	Williams U. S. Patent No. 991,584, May 9, 1911	II	1167	V	489
	Williams U. S. Patent No. 1,024,168, April 23, 1912	II	1167	V	493
	Williams U. S. Patent No. 1,062,627, May 27, 1913	II	1167	V	505
	Black U. S. Patent No. 1,210,589, January 2, 1917	II	1167	V	511
	Williams U. S. Patent No. 1,263,009, April 16, 1918	II	1167	V	513
246	Bid of Plaintiff May 8, 1933, Department of Interior, Washington, D. C.	II	1170	Not printed	
247	Bid of Plaintiff December 12, 1932, U. S. Marine Corps, Washington, D. C.	II	1171	Not printed	
248	Bid of Plaintiff March 17, 1933, U. S. Marine Corps, Washington, D. C.	II	1172	Not printed	
249	Bid of Defendant February 3, 1933, Marine Barracks, Dover, N. J.	II	1172	Not printed	
250	Advertisement, The Natural Food Co. in New York Daily Tribune, May 12, 1907	II	1176	Not printed	
251	Advertisement, The Shredded Wheat Co. in Trade, Detroit, April 9, 1913	II	1176	Not printed	
252	Package of Arrowroot Biscuits	II	1177	Not printed	
253	Package of Fig Newtons Biscuits	II	1177	Not printed	
254	Package of Hydrox Biscuits	II	1177	Not printed	
255	Certificate of Incorporation of The Colorado Shredded Wheat Co.	II	1177	Not printed	
256	Carton of Kellogg's Corn Flakes	II	1178		
257-A	Clarke Sketch of Cutting of Diamond-Shape Biscuit	II	1178	Not printed	

[redacted]—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
23[illegible]—Cuts Illustrating Cartons of Plaintiff's Wheat Biscuit and Triscuit		II	1179	Not printed	
23[illegible]—Box Plaintiff's Butter Thin Biscuit		III	2035	...	...
23[illegible]—Box Plaintiff's Uneeda Biscuit		III	2035	...	...
23[illegible]—Box Plaintiff's Geisha Crackers		III	2035	...	...
23[illegible]—Box Plaintiff's Premium Flake Crackers		III	2035	...	...

[redacted]'S EXHIBIT UNDER RULE 46.

A—Proceedings in the Patent Office	III	2021	Not printed	

Proceedings in the United States Circuit Court of Appeals are included in Vol. 3-A

ALEXANDER WILSON.

Deposition taken at Chicago, Illinois, March 15, 1933.

Direct Examination.

The Witness: I am twenty-five and manager of a grocery store. I have been in the grocery business about nine years. I am at present manager of a self-service store, Loblaw Groceteria. There is a turnstile as you come in the door. The customer takes a basket and goes around the store helping herself. There are clerks around the floor also, to ask her if they can help her find anything. Then the customer checks out at the turnstile as she comes back out and pays for the purchases. They are wrapped up for her, and the basket goes back to the rack for use by another customer.

My store handles Kellogg's Whole Wheat Biscuit and has had it for more than six months, I am pretty sure. We also handle Niagara Falls shredded wheat. Both those products are displayed on the shelf. There is no preference of either one over the other. We regard both of them as being equally displayed. Our customers pick out whichever one they want. Kellogg's Whole Wheat Biscuit in our store sells at least three to one against shredded wheat. The packages are lying there, and I think Kellogg's biscuit is in a more attractive package, with the cellophane front, and they are smaller biscuit. I think that has a lot to do with it. The business continues. I have had customers come in and ask where they can be found. Some woman sends her husband for it and some send their children. Some designate on the note: "Give the kids the small biscuits."

Cross-Examination.

The Witness: I say that the package with the cellophane window in it, showing the biscuit, is one of the features which makes the Kellogg package sell. They

front box. Both the National and the Kellogg biscuit sell at the same price in our store. I think the cellophane-front box is responsible for the stimulation in sales. I put a large display in the window and got a big response. I have continued that window display from time to time.

CROSS-EXAMINATION.

THE WITNESS: I have not put any special effort behind the Kellogg product, aside from the window and store displays from time to time. The window display was a pile of packages of Kellogg's biscuit, with the window side out or uppermost, showing the ends of the biscuit. I made no individual effort to show it to my customers. It was displayed on the shelf. Being a self-service, the people walk in and select their own merchandise. When it first came in a little more than a year ago, I do not remember having it near the checking stand to show to customers.

I have been connected with chain stores for more than twelve years, during which time I have known shredded wheat, and I recognize the package, Plaintiff's Exhibit 1, which is the old package that has been on the market so many years. People have always asked for that as shredded wheat. There is no other name that the public adopts when they ask for shredded wheat. When they do, I know that is what they mean, and that is exactly what they get. I have never given them Whole Wheat when they asked for shredded wheat. I have never made a special effort to distinguish between the two products. When people ask for assistance in my store, they receive it. If Kellogg is introducing a new product in my store, we make a window display of it, but we cannot leave it in the window more than three or four days. We have to change our windows frequently.

There was little interest in the Kellogg biscuit when it was first introduced on the market. People inquired for it and wanted to know what kind of product it was. The girls were instructed to try it, if they wanted to, so they could tell them what it was. I told them it was shredded wheat. That is what it is. It is something that fills the same requirements as the old shredded wheat. If a customer wants shredded wheat, she wants either that or this. They are both shredded wheat to me. They are both the same product made in the same way, and they look alike, but there is a little difference in the size, and it is double toasted. There is a difference in the color and a difference in the package, but the basis of it is shredded wheat, the same sort of product.

I do not know why I say Kellogg's biscuit is shredded wheat, except that it is. This product now made by the National Biscuit but once made by the Shredded Wheat Company, has always been called shredded wheat. That is what the public asks for. I do not think of anything else, because I have been educated to the fact. There were special bulletins with our own advertising, calling it a shredded wheat product, which is what it says on the box.

XQ. 56. What I would like to get from you, if I can, is a definite statement as to why you call this shredded wheat. And I ask you if it is not because that is the only name you have ever known that pillow-shaped biscuit by, during all your life.

A. Well, I guess it is, when you come to think of it.

XQ. 57. There is no doubt about it, is there?

A. No.

RE-DIRECT EXAMINATION.

THE WITNESS: I know what toasted Corn Flakes are. It is a pressed flake of corn, toasted. That would

be the only meaning I could get out of it. Shredded wheat, would mean, I think, the same kind of product, made of a kernel of wheat processed differently, shredded instead of flaked. I know of no other way to describe that product than by the name shredded wheat or shredded whole wheat biscuit. I do not know of any other descriptive name I could give it.

Uneeda Biscuit is a white-flour cracker, or soda cracker. That would be a descriptive name for Uneeda Biscuit. I know of no other name for shredded wheat than shredded wheat or shredded whole wheat biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: The name shredded wheat biscuit is descriptive of the biscuit. I do not know what *shredded* means. I have never been a farmer. I do not know what a corn shredder is. I am a city man. I do not know what it is to shred corn. I can imagine what it would do, but I have never seen it. I do not know how this wheat is made into what I call shreds. To my knowledge, the only way it could be made would be to be pressed out long and to be shredded with a shredding machine. I see these long strings. I would not think that pressing the wheat berry out into a long string like that constitutes shredding.

RE-DIRECT EXAMINATION.

THE WITNESS: I have never eaten Triscuit. I have sold a lot of them. I do not know what the product is. The description from the package: "Uneeda Bakers Triscuit, 100% whole wheat cracker, made of shredded whole wheat," would not give me any idea of what it was. I would say it was whole wheat toasted in biscuit form, whole shredded wheat.

MRS. BEULAH E. WILLIAMS.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. I was using these Kellogg's biscuits that I bought from a Loblaw store. I first received a card, telling me that I could purchase one box and get one box free, and I bought them at the Loblaw store. Then a gentleman called on me, asked me questions about the biscuit, how I liked it and so on. I said I was very well pleased with them. He came back a second time and asked me if I would come down here today and tell about how I liked the biscuit. I never saw the man before he came to my house.

The coupon card was one something like the one you show me, only it was from the Loblaw store. The substance of the matter on the card was that, by buying one box at the store, I would get one box free. I had seen Kellogg's biscuit before in the Loblaw store. My attention was attracted to it at that time on account of the glassine front, where I could see what kind of biscuit I was buying. I liked the looks of it much better than shredded wheat biscuit. The Loblaw store was a self-service store. I took the Kellogg biscuit in preference to the National shredded wheat; and my preference was because I had purchased a box like Plaintiff's Exhibit No. 1 sometime ago and found them wormy. I have two children, and it was not very pleasing. I never bought any more shredded wheat biscuit until I saw the ends of this biscuit. I did not pay much attention to whether it was National or Kellogg's. I just knew they were nice looking biscuits and toasted much better. Now that I know them, I like them a whole lot better, because they seem to be more crisp.

The children will eat all of a Kellogg biscuit, and I can give them another biscuit if they want more. They used to leave part of the shredded wheat.

I have continued buying the Kellogg biscuit. I have not bought any of the Niagara biscuit, like Plaintiff's Exhibit No. 1 any more. I lost my confidence in them. When you have children to feed, and you find little cobwebby worms on the inside of the package, it is not very appetizing. I buy Kellogg's Whole Wheat Biscuit. It is nice and fresh. That is why I was willing to come down here today. I noticed the difference in color. They are much more golden brown and much more appetizing to me than the Niagara Falls biscuit. In buying them, I wait on myself in these self-service stores. I think it is a wonderful idea to send out a card like that, because, up to the time I bought the Kellogg biscuit, I never knew there was anything different, except Plaintiff's Exhibit 1.

CROSS-EXAMINATION.

THE WITNESS: I had seen Kellogg's Whole Wheat in the store. If Kellogg's kept it a secret that they were making the biscuit, it would not do them much good or the public. Before I bought the Kellogg biscuit, I had not used the shredded wheat for quite some time. I had, however, been buying it off and on for many years. I have two children, the boy is eleven years old. I had been buying shredded wheat off and on for them for many years. I do not recall using it before I was married. I had not encountered a wormy package of shredded wheat until that time, but I had a terrible time making the children eat them. They were more than they wanted to eat and did not seem appetizing to them. I put them in the oven or poured boiling water on them to make them softer or more appetizing. Until the time I found the package wormy,

I had not had that experience before. Then I was off of shredded wheat, until I had this opportunity to get Kellogg's biscuit. Since then, I have been buying Kellogg's, and I will continue to buy them. I had bought the Kellogg's biscuit before I got this card. I went into the store and was attracted to it by the glassine front. I saw the biscuit inside was different, although I did not pay much attention to what kind it was. The salesmen in the store said nothing to me about it. I just walked in and took them home and tried them, because they were so much better looking than the other biscuit. I thought if I tried a package like Plaintiff's Exhibit 1, I would get them wormy again, but if I got a package of Kellogg's, I could see they were fresh.

MRS. LEAH WALTERS.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. I bought some Kellogg's biscuit, and I liked them so well, because it is so much easier to serve than the old shredded wheat biscuit. A man came to my house. I did not know who it was. He asked me how I liked the biscuit, and I told him I liked it much better than shredded wheat biscuit, that I knew it was not the old shredded wheat biscuit and I liked it so much better because they were easier to serve and so much crisper. He was talking about Kellogg's Whole Wheat Biscuit.

I first saw the Kellogg biscuit in Loblaw's, with this new glassine window, and it looked nice and crisp to me. The size of it took my eye. I bought several packages. Then they said if you buy one you would get a free one, and they sent a postal card, like De-

fendant's Exhibit 64, which you show me. I bought that and got a free one. I have several men staying with me, and they liked them so much better than the old ones they asked me where I got them. They are smaller, easier to serve, and much crisper. They take a different kind of plate, and you do not use anywhere near the cream that you do with the other dish, which means a whole lot when you have men staying with you.

I just met Mr. Clarke a few minutes ago. I had no conversation with him other than what he has just asked me, as to how I first became acquainted with the Kellogg biscuit, just a two or three-minute conversation.

CROSS-EXAMINATION.

THE WITNESS: Seeing the biscuit through the cellophane window certainly attracted me. Before that I did use shredded wheat biscuit, but I never cared about it, because it was not as crisp.

I have people boarding with me, two brothers that stay with me. I serve them with cereal for breakfast. They have been with me two years. I have been buying shredded wheat biscuit like Plaintiff's Exhibit 1, off and on. When I came home with this other one, they liked it very much better. It certainly took my eye, the Kellogg biscuit. I had known shredded wheat many, many years. It is an old product. Shredded wheat is like a household word to me. It has such a terrible color, and it has not the same crispness as the Kellogg biscuit has. It is just a darned big thing. You have really to put it in a soup plate and a lot of cream on it. You can put the Kellogg biscuit on a cereal dish and put fruit in between. With the Kellogg biscuit I save quite a bill on milk and cream. It is a less expensive product to serve. It is much better to see it on the table in a smaller dish.

RE-DIRECT EXAMINATION.

THE WITNESS: My boarders like it better. I would not go back to the shredded wheat biscuit. I have bought it at a self-service store each time, and waited on myself, in Loblaw's.

CLAYTON LOUIS KOLVOORD.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am the merchandise manager for the Kellogg Sales Company out of the Chicago office, covering Illinois and Wisconsin. I am twenty-five years old. I have been with the Kellogg Sales Company since my graduation in the summer of 1930. I have traveled. When I started with the Kellogg Company, I was at Rockford, Illinois, and traveled through Wisconsin, with headquarters at Rockford. I was then transferred to the Chicago office, where I have been about a year.

I have knowledge of the facts concerning the distribution of Kellogg Whole Wheat Biscuit in this Chicago territory, embracing most of Illinois, having worked with all of our principal men, and Wisconsin. I am familiar with the methods by which Kellogg's Whole Wheat Biscuit has been introduced to the trade and to the consumer in this district. In Chicago, we have used coupon cards, mailed to customers of various stores, telling them that they may take the coupon into the store and purchase a package of Kellogg's Whole Wheat Biscuit and will be given another regular-sized package free, like Defendant's Exhibit 64. I have used those with Clover Farm Stores and with Loblaw, another voluntary chain, all owned by the

Jewell Tea Company. It is a straight chain, under one ownership.

We used the cards on Loblaw's. Within three months time, we merchandised seven hundred cases of Kellogg's Whole Wheat Biscuit. Loblaw stores are self-service, where the consumers help themselves. They had floor displays and also the window display on the front, with a white poster with red letters picturing Kellogg's Whole Wheat Biscuit, featured at ten cents a package. They moved a great many, and they have featured our biscuits from time to time.

That method of merchandising has been used in other stores in our territory. We find display, the point-of-purchase merchandising very effective in selling the biscuit. People frequently come into a store and take the goods off the display, as they would from any other display, handing it to the clerk and paying him. It is a very effective method of introducing the merchandise to new consumers.

We have had a forty-inch newspaper mat featuring Kellogg's Whole Wheat Biscuit. We have a newspaper run it and ask the grocer to tie in to it of their own free volition. They have no advertising allowance with Kellogg; and they have featured Kellogg's Whole Wheat Biscuit and tied in with advertising in that town. The Kellogg Company carried the expense of the newspaper advertising, and the dealers tied into it by featuring store displays, also by using the Kellogg cuts in the newspaper copy for that night's issue.

We work practically all the towns in Illinois and Wisconsin on a house-to-house campaign, whereby we introduce Kellogg's Whole Wheat Biscuit to the consumer, who purchases two packages of Kellogg's Whole Wheat Biscuit and receives a package free, a very effective merchandising plan.

I personally supervise the crew. The men go from house to house, knock and introduce to the lady a pack-

age of Kellogg's Whole Wheat Biscuit, tell her that it is a biscuit smaller in size than the regular National Biscuit shredded wheat, toasted on both sides, and that they will sell two packages and give one package free. The lady would buy the two packages at the door when we were successful in interesting them, and get the third package. The grocer always received the profit on that. The goods were sold to him, and the merchandise sold to the consumer was all bought at the store, so that every package sold was just exactly as if the grocer had sold it out of the store. He would receive the repeat business, and that was very good.

I would say we have approximately seventy-five per cent. distribution of Kellogg's Whole Wheat Biscuit in our district, Illinois and Wisconsin, meaning that, out of about one hundred stores, approximately seventy-five carry the Kellogg product.

We have used various methods of window displays, including a large jumbo package featuring Kellogg's biscuit, with ribbons to display the feature, fifteen biscuits, double toasted, top and bottom; finer shreds, and so forth; whereby we have gone into towns and made window displays in the retail stores. The display we have before us with the jumbo carton, Defendant's Exhibit 65, is a typical window display of the Kellogg Company and one we have used. It is used in windows about as it is set up here, with the jumbo carton of Kellogg's biscuit at the top, and, under that, the picture of the saucer with two biscuit; and under that, the words "Whole Wheat Biscuit," and six ribbons running to six little legend cards:

1. Certified for food value by Medical Arts Laboratory, Philadelphia, Pennsylvania.

2. Convenient size. Fits the bowl. Kellogg's.

3. Six vitamins: A, B, C, D, E and G are present when served with milk and cream. Kellogg's.

4. Double toasted, top and bottom.

5. Finer shreds and finer flavor.

6. You get fifteen biscuit in each carton.

That is the way the display has been used in our district.

We also have a great deal of restaurant advertising material used to bring the attention of the consumer to the Kellogg biscuit. At my hand is a display used in restaurants, whereby the individual package of Kellogg biscuit is placed into the grooves and set up on the counter or ledge, where it is in plain view and sight of the consumer or purchaser. This piece of material, Defendant's Exhibit No. 66, has a picture of a saucer with two biscuit, and a banana on the biscuit. Under that, the words: "Try this new Kellogg's Whole Wheat Biscuit with bananas." The little stand above the picture of the plate is used to place a package of Kellogg's biscuit on, an individual package which sets right in there.

We have also this other counter display, folding, which sets upon the grocer's counter, with a full-sized package of fifteen biscuits placed on the stand. These displays, like Defendant's Exhibit 67, have been distributed through our district.

The reading matter on the front is: "Toasted both top and bottom; convenient size, fits the bowl; new size, new flavor, new process, made by Kellogg's in Battle Creek."

We have approximately a ninety-per-cent. distribution of Kellogg's biscuit in restaurants, in the individual carton. We have what we call an A. O.-5, which is made up of individual size, Kellogg's Rice Krispies, Whole Wheat Biscuit, Pep, and All-Bran, which the restaurants purchase. We also have the individuals which they purchase from their jobbers. Larger restaurants buy five or ten cases of Kellogg's

Whole Wheat Biscuit individuals, such as Thompson's restaurant in Chicago, handling Kellogg's cereals, where they buy a larger volume. A smaller restaurant buys an assorted package.

I do not know of any methods of creating consumer demand which the Kellogg Company might use on its Whole Wheat Biscuit which we have not used in this territory. I think it is fair to say that the Kellogg Company has used all the standard and best-known methods of bringing that product to the attention of consumers, such methods as advertising, displays, house-to-house canvassing, the coupon device, and newspaper advertising. Those methods have been followed up by advertising by retailers and other dealers, because it has created a consumer demand, and the retailers today are featuring Kellogg's Whole Wheat Biscuit in their advertising copy, paid for by the retailer. There is no advertising allowance made by the Kellogg Company.

CROSS-EXAMINATION.

THE WITNESS: Retailers feature Kellogg's Whole Wheat Biscuit by various means. They have a large mass floor display, whereby they build two or three cases of Kellogg's Whole Wheat Biscuit into a display, placed naturally at an advantageous place in the store where the customer sees it when she comes in. In some stores, the cellophane packages have been used. In other stores, the packages are like Plaintiff's Exhibit No. 161, except that it has a picture of a dish on both main panels. At the present time, that package, without the window, has been used more extensively in our territory. The package with the cellophane window is generally sold in the Chicago territory and many jobbers specify it.

We and our company have made a very extensive campaign over a period in the last few years to intro-

duce this Whole Wheat Biscuit. I have been familiar with it since 1930, and the campaign has been going on since then. I have been engaged in that line of work for the Kellogg Company since I came out of college. In my first summer I handled a crew selling biscuit from house to house in the City of Elgin and in the City of Rockford. At that time they sold two packages and gave one package free. That practice has been used in this territory and in Wisconsin. Kellogg's Whole Wheat Biscuit is a product that competes particularly with shredded wheat. The kind of trade and the demand that is filled by that product is the same sort of trade and the same sort of demand met by shredded wheat, the same consumers and the same want. That is, they want this same biscuit baked in this peculiar way, except that some people like our biscuit better, because it is toasted on both sides.

Our biscuit has certain features dwelt upon in Defendant's Exhibit No. 65, such as more biscuit in the package, and toasted browner on both sides. Those are the points we stress in introducing this biscuit to our retailers. In doing that, we have, of necessity, to compare it with shredded wheat. That is, we could not say it was more brownly toasted unless we said what it was we compared it with. We tell them it is a biscuit made of whole wheat that has been cooked and shredded and put up in biscuit form. We sometimes tell them it is shredded wheat. I regard it as shredded wheat, because it is made out of whole wheat, cooked and shredded and put up in biscuit form, and baked. In other words, it is made by a process similar in its essentals to the process by which shredded wheat biscuit has been made, and naturally produces a similar product, with the differences I have stated, which I think makes an improved product.

We are a competitor of shredded wheat, and our product fills the same want that shredded wheat does.

I do not think a design to compete with shredded wheat was the motive in manufacturing this biscuit, but to make a biscuit that the consumer would buy and use. The biscuit was not put on the market with the motive of making a shredded wheat competitive brand. We are putting the biscuit on the market to try to make as good and better a biscuit than they had. We have tried to have a consumer demand for our biscuit. Shredded wheat has been on the market for some time. I knew it before I was in business, when I was a child. Shredded wheat had an extensive distribution as a cereal at that time and still has. I understand that Kellogg's Whole Wheat Biscuit is put out to be a better biscuit than shredded wheat and to occupy some of the same field as shredded wheat.

The names of consumers to whom we send postal cards, like Defendant's Exhibit 64, were submitted to us by the store managers. They made up the mailing lists. We mailed out probably twenty thousand cards in the City of Chicago. We have made tabulations of returns. Loblaw's is a good illustration. They have eighty-five stores, and we sent out fifty cards per store. That figures forty-five hundred approximately. We sold seven hundred and eleven cases of biscuits, twenty-four's.

We got a great deal of co-operation from those stores in this campaign and from others, such as the Clover Farm Stores. They co-operate with us and accept our displays, our large carton displays. We have men around Chicago whose entire duty is to make store displays, just as any organization has.

When I directed this house-to-house campaign in Elgin and other places, I found it universally accepted by the housewife. We found very few women who did not like to be bothered with that sort of thing. Most of the housewives wanted to buy two packages and get one package free. That was an inducement to buy the

product. We found some that had not even tried our biscuit. Naturally, every housewife is interested in using new products.

My statement that we have a ninety per cent. distribution in restaurants would cover approximately fifteen thousand in the States of Illinois and Wisconsin. I wish to be understood as saying that, in my estimation, ninety per cent. of them carry and sell Kellogg's biscuit. That is an estimate on my part. I have no figures here. I have worked the restaurants in a great majority of the territory. Approximately seventy-five per cent. of the restaurant owners have used, at one time or other, the display stand like Defendant's Exhibit 66. They like it because it is neat and attractive. Those displays are furnished us by our advertisng department at Battle Creek, not devised by us here.

Referring to the jumbo carton, Defendant's Exhibit 65, containing a list of products of the Kellogg Company, that package is approximately a duplication of this Kellogg Whole Wheat package. It is a facsimile of the present package without the window. I have not examined the printed matter on the end of the jumbo package very closely. Having looked at it more closely, I can now tell you that on the end of the jumbo package are listed the products, corn flakes, Pep, Krumbles, All-Bran, shredded whole wheat biscuit, Kaffee Hag, and Rice Krispies, all Kellogg products. Our own men say that our biscuit is a biscuit made out of whole wheat that has been cooked and shredded and put up in biscuit form and toasted on top and bottom. They say it is a shredded wheat biscuit, which it is, and they do call it shredded wheat biscuit, because it is a shredded wheat biscuit. That is my opinion. Some of the consuming public call it Kellogg's Whole Wheat Biscuit. If they specify Kellogg's, they want Kellogg's. I have found from my experience in trav-

eling around with various men, that the retailers usually say Kellogg's Whole Wheat Biscuit.

I see the copy of the *Winona Republican Herald,* dated January 20, 1933, which you show me, Plaintiff's Exhibit No. 197, containing an advertisement by Paul Haake & Company. They have listed in there Kellogg's items, under the Kellogg Saturday sale: "shredded wheat, two packages for nineteen cents. Geography chart free." Generally, they specify the name Kellogg's Shredded Whole Wheat Biscuit. Very few ads are run like that. The trade name is usually put in there. In all the advertising copy I ever wrote for a lot of papers, we have always inserted Kellogg's Whole Wheat Biscuit," or "Kellogg's Rice Krispies."

RE-DIRECT EXAMINATION.

THE WITNESS: The Kellogg Company had nothing to do with this ad in Plaintiff's Exhibit No. 197. The grocer writes his own copy and turns it into the paper in which the ad appears. The Kellogg Company does not make the ad up.

I have heard of cases where they used the words "shredded wheat biscuit" and the National Biscuit Company salesmen have gone after printing men or grocery men who used it. They ask the grocer to feature the name when they advertise their products. They suggest to the grocer to feature it as their trade name.

At the present time, the Kellogg Company features the name Whole Wheat Biscuit, and has done so, as far as I know, for the last two and a half years, about. There has been no effort in that time to feature the name Kellogg's shredded wheat. The company's policy, as far as I can see, is that they are advertising a distinct and separate product, so there can absolutely be no mistake in the housewife's mind between our

package and the shredded wheat package. The National Biscuit Company advertise it as shredded wheat, and the Kellogg Company advertise it as Kellogg's Whole Wheat Biscuit. I have not seen any advertisements in the last two and a half years in which Kellogg have referred to it as shredded wheat or Kellogg's shredded wheat. All our mats are made with Kellogg's Whole Wheat Biscuit, all our newspaper ads and everything.

Only one incident I can recall is a forty-inch mat we ran in Harvard, Illinois, with a tie-up. The National Biscuit man there suggested to the grocer that they feature in that copy shredded wheat. The grocer showed the copy to me and I told him to change it to Kellogg's Whole Wheat Biscuit, it being a Kellogg-day sale, which he did do. The National Biscuit men tried to get the grocer to feature in a special Kellogg-day sale ad, the Kellogg's Whole Wheat product as Kellogg's shredded wheat. We were having a tie up in that town, and the nine grocers there were featuring Kellogg's Whole Wheat Biscuit that day. The National Biscuit cookie man suggested that they feature it as shredded wheat biscuit on the Kellogg tie up. The grocer showed me the copy, which we changed to read Kellogg's Whole Wheat Biscuit before it was submitted to his newspaper. I do not know the name of the National Biscuit man.

Wherever we have had tie-ups with the grocers, the National Biscuit people have tried to get in on these double-truck tie-ups, and feature their Shredded Wheat on this Kellogg-day sale, in various towns.

Displays in self-service stores and others of Kellogg's Whole Wheat Biscuit is a very common form of merchandising in the grocery trade today. Mass displays, floor displays are very effective merchandisng methods of bringing goods to the attention of both new and old consumers.

Of all the methods I have outlined, I think the point-of-sale merchandising in the store is most effective, with the large mass floor display, where the consumer actually comes right to the biscuit. It may be placed where she walks by it or in the aisle where she would walk into it. She sees it, looks the package over, and purchases it.

Naturally, the Kellogg Company encourages the sale of our biscuit in restaurants in the individual cartons, because practically all restaurants serve individuals. It tries to increase the individuals in the restaurant trade. As far as I know that is also true with regard to the Niagara Shredded Wheat by the National Biscuit Company.

I know of nothing that either the Kellogg Company or the National Biscuit Company could do further to increase the use of individual cartons in the restaurant and hotel trade that they do not do. They are well displayed. I do not think of anything else they could do. I cannot think of any expedient or device that the Kellogg Company has not already used that might help to increase the sales of its individual cartons in the restaurant and hotel trade.

RE-CROSS-EXAMINATION.

THE WITNESS: Regarding the occurrence in Harvard, Illinois, I said the National Biscuit Company salesman tried to feature his own product on a Kellogg-day sale at that time. I was there, conducting the sale. The National Biscuit Company salesman followed me. I was in the store when he was there. I found out about it after I came back. The grocer showed me the copy and told me that was what the National Biscuit Company man wanted him to do. That is the source of my knowledge.

RE-DIRECT EXAMINATION.

THE WITNESS: The grocer wrote his own copy. It was a special Kellogg-day sale, with the grocers on a double page, as we call it a double-truck, with a heading: "Special Kellogg-day sale," and then all the grocers featured in with the Kellogg products. I found the National Biscuit man had been there ahead of me. When I came back, I asked the grocer if he had turned in his copy and he showed it to me, with that ad, reading "Kellogg's" at the top. It listed shredded wheat. It was not our product, but it was listed among our products on that double-truck page. I told him that was a Kellogg-day sale and I would like to have all the Kellogg items mentioned. He changed it to read Kellogg's Whole Wheat Biscuit and turned it in to the printer.

RE-CROSS-EXAMINATION.

THE WITNESS: I saw the National Biscuit Company salesman, because he was right behind me. I did not hear him talk to the grocery man. I was not there. I have heard that that happened in other places in my territory. The grocers have told me it, and in traveling with our various men in various territories, they have also told me that. I learned it from my various customers and my various salesmen.

RE-DIRECT EXAMINATION.

THE WITNESS: I conduct my business in the territory on the strength of those reports and accept them as the facts on which I based the conduct of my business in that territory, because that man is in that territory and knows what is going on. There would be no incentive for him to lie.

RE-CROSS-EXAMINATION.

THE WITNESS: Referring to Plaintiff's Exhibit No. 197, the page immediately adjacent to the Haake Store

advertisement is a Kellogg ad with the heading: "Veterans of Foreign Wars Sponsor Sales of Kellogg products tomorrow." That is what I had in mind when I referred to that. The Haake advertisement is a part of the Veterans of Foreign Wars ad, right at the top of that ad. We were talking about the tie-ups of the Kellogg Company, and this tie-up had been sponsored by the Veterans of Foreign Wars.

We give cuts like the illustration of a Kellogg package on page seven, to the grocer. He supplies them with the copy to the newspaper men, and they run them.

I do not know the Decatur Home Stores in Decatur, Illinois. I have not worked that particular town lately.

Looking at the sheet marked Plaintiff's Exhibit 198, purporting to have been a newspaper advertisement of the Decatur Home Stores, with an advertisement of the Kellogg's Shredded Wheat, that cut is one furnished by the Kellogg Company.

I do not know the Capitol Grocery Company of Streeter, Illinois. I do not work Streeter. Another Kellogg man who lives there works that town. I do not know personally the Capitol Grocery Company with headquarters in Springfield, Illinois. The cut shown on the Kellogg package pictured on the mailing folder, Plaintiff's Exhibit 199, bearing date through November 26, 1932, is an old-style Kellogg cut, furnished by the Kellogg Company.

We try to have our men have the latest cuts. Once in a while a newspaper has files and keeps old cuts that various manufacturers put in. It may be an old-style cut. I cannot give you any possible estimate of how many old-style cuts featuring Kellogg's Whole Wheat Biscuit are now in existence, because most newspapers clean up their old files every year. There probably are a few remaining out in the territory, in the smaller towns.

(The portion of the *Winona Republican Herald* not offered by Mr. Vilas was offered in evidence by Mr. Clarke and was received and marked "Defendant's Exhibit No. 68.")

RE-DIRECT EXAMINATION.

THE WITNESS: Referring to Defendant's Exhibit 68, the *Winona Minnesota Herald,* advertisement of Jefferson Grocery, two packages Kellogg's Whole Wheat Biscuit twenty-two cents, that advertisement was paid for by the Jefferson Grocery.

Referring to the advertisement on page seven, "V. F. W. Sponsors selling Kellogg Products tomorrow," the mat is paid for by the Kellogg Company. In the next Consumers Market box, Kellogg's box, Kellogg's Whole Wheat Biscuit, and so forth, the sponsors are mentioned at the bottom of the ad. That ad was paid for by the Consumers Market.

Kellogg's day is where we go into a town, secure the cooperation of all the retail merchants in that town to feature Kellogg cereals for the one day, which is the reason for calling it Kellogg's day. They display them in their store and feature them in their advertising. We call it a Kellogg day. We have had a great many of these ads in different parts of our district.

CLYDE E. CHAPELLE.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a buyer for E. R. Godfrey & Sons Company, wholesale grocers. I have been buying for twelve years. I have been with Godfrey in the wholesale grocery business eighteen years. Before

them I was with John Altman. I think I have been twenty-one years all told in the wholesale grocery business. My father was in the retail grocery business. I have never been in it.

E. R. Godfrey & Sons Company sponsor a voluntary chain of stores, the Independent Grocers Alliance, with, I believe, three hundred and seven active stores today, located in central Wisconsin, from twenty miles north of Dubuque to the Kickapoo Bayou on the west, and as far north as Rhinelander, and up to the North Shore, to the edge of the Wisconsin Peninsula or Sturgeon Bay. We sponsor them, servicing them as wholesalers, and acting as a supply depot for them. We service other stores, outside that chain. We have perhaps a thousand other accounts on our books, as a guess. We do service other grocers, but no other chain.

Our organization handles Kellogg's Whole Wheat Biscuit. I believe we have carried it about two and a half years. We service that product to our retailer customers. We handle no other whole wheat biscuit or shredded wheat biscuit products besides Kellogg's. We do not handle the Niagara Falls shredded wheat of the National Biscuit Company, and we have not handled it since we handled Kellogg's biscuit.

We have never, to my knowledge, had a retailer customer return any Kellogg products to us and say it was not what he wanted. We have no mixups in the orders, to my knowledge.

We sell Kellogg's Whole Wheat Biscuit to most of our retailer customers. There is a continuing general demand for it in our house from our retailers. I call on the stores, and I have seen displays of Kellogg's biscuit. I cannot recall having been in a store when a customer was purchasing a package. I know of my own knowledge that our retailers buy this for the purpose of putting it on sale in their stores.

Our instructions go to the stores as to bringing to the attention of the general public Kellogg's Whole Wheat Biscuit. I think I can state those instructions are carried out quite well. We have our sales plan set up with advertising every week. We place an item like Kellogg's biscuit on sale, and the merchant gets a notice of the item. I brought one example of that along. Our contract with the retailer when he joins our voluntary chain states there will be so many items placed on a window poster. We also state in our contract that we will furnish a blue-print or cut of his window display. We also emphasize the fact that he must have inside store displays on the items that are advertised. I know these instructions have been carried out very well by most of the stores. They would build a window display and an inside store display on the items advertised. Kellogg's biscuit have been featured in those sales. We believe that cereals such as Whole Wheat Biscuit sell more rapidly in the spring than in the colder months. We feature them more often from now through the summer than at other times. The advance sales notice, Defendant's Exhibits 69-A and 69-B, is an advance notice of sales that will go out on the date specified. The memorandum is dated March 13, 1933, when it was gotten out in advance. The notice is that it is to be on sale at such and such a time, beginning and ending on a Friday.

I regard the methods I have outlined as very effective methods of introducing a new article like Kellogg's biscuit to the attention of consumers in the retail chain we service. I think demonstration in a store would be possibly more effective. I do not know of my own knowledge whether the Kellogg Company has ever used any demonstrations in any of those stores.

I would say that Kellogg's Whole Wheat Biscuit is toasted shredded wheat. That is the way it looks to me.

We have done our utmost to make the I. G. A. stores modern. They are not exactly self-service. We do specify open shelving to invite the consumers to help themselves to the merchandise. They are free to do that. We do not use a check-out system, such as a strictly self-service store does. We arrange for sales work in those stores by either the owner or his clerks. This market has been a very backward one for a modern check-out system until very recently. The Piggly-Wiggly self-service stores were in Milwaukee at one time with a check-out counter. It was very difficult for us to get people to go and select their own merchandise. You almost had to hand them a basket and tell them to go and get the stuff. In the last year or so people have been more anxious to help themselves than before. We have tried to make our stores answer both purposes. The self-service feature has been meeting less resistance than formerly.

When Kellogg's Whole Wheat Biscuit is mentioned on the sales notice, the grocer is required to give it window display and also a store display. We have little tables in the stores where the sale items are displayed on the inside, with the price marked on display. Some stores make more extensive or more massive display than others. By window display I mean packages with the price on display in the window, conforming to the price advertised in the sales in the newspaper advertising, hand-bill advertising, and window posters. In this case, that advertising would refer to Kellogg's Whole Wheat Biscuit, with the price.

We do not handle Kellogg's biscuit in the individual cartons and do not service the hotel and restaurant trade. In this territory, that trade is serviced by a different type of jobber. One jobber here specializes on hotel and institution trade. I also know some firms in Chicago who specialize pretty much in institution business. It requires a considerably different set-

up than the grocery business, different lines of merchandise, number tens in canned goods, and so forth. It requires the carrying of practically two stocks. Our organization does not handle Kellogg's biscuit in the small individual size.

CROSS-EXAMINATION.

THE WITNESS: The symbols on Defendant's Exhibit 69 indicate the percentage of gross profit the dealer will make on the item. It is a little difficult for the retail grocers. They do not figure as closely as they should, and we try to do as much of that for them as we can. That is part of our service. On the other side of the exhibit, three letters opposite the line represent cost to him per case in code. The symbols on the left-hand margin are code for the gross profit and on the other margin the cost to him per case. For instance, on the item of Kellogg's Whole-Wheat Biscuit, twenty-four packages per case, we show on the right-hand margin that he will sell them at ten cents a package and on the left-hand margin the gross profit. That is true all through the exhibit. I do not mean to be understood as testifying that our stores do not carry any shredded wheat. I said we do not carry it. There is nothing in our contract with the grocers preventing them from carrying anything like shredded wheat. I believe some of them do carry it. I would not make the statement that we do not purchase either shredded wheat or anything else from the National Biscuit Company. If our salesman should take an order for shredded wheat, we would pick it up either from the National or some other jobber.

When a salesman does take an order for shredded wheat, we absolutely know what he means by it. We know that means the biscuit made by the National Biscuit Company. Our price book would show you exactly. The items are all set up in code numbers. If a sales-

man wanted a case of shredded wheat, he would write in for that case of shredded wheat for a certain customer. If he wanted Kellogg's Whole Wheat Biscuit, it would come in according to number, not by name. Shredded wheat is not coded in our book. We do not carry it in our stock. The Kellogg biscuit is number 12093 in the code. That would be so many cases of that number. If he got a customer who wanted shredded wheat, he would take his order in so many words. He has no number in our code for that.

We do not carry National Biscuit shredded wheat or any of their line of cookies and crackers. The chain consists of stores owned by independent retailers, most of them service stores. A majority of them are on a cash basis. I think there are very few of them deliver. Some of them still run an old-fashioned service store. They still call for that service.

I have known the package of shredded wheat, Plaintiff's Exhibit No. 1, for a long time. I have not seen it for a great many years. I have known it as shredded wheat. I would think that is what anyone else would call it. If you asked me to describe Kellogg's Whole Wheat Biscuit, I would not know how else to describe it but as a shredded wheat biscuit. I do not know whether that is because I have known this shredded wheat biscuit for so many years the only item of its kind on the market, and always known it by that name. If Kellogg's wheat were chipped, I do not think it would appeal to me as shredded.

Shredded, to me means about the way that wheat looks, not in biscuit form, you understand, but in long strips. If it were in long wavy shreds, it would seem to me that it would be a shred or string, like shredded coconut or shredded soap. Shredded to me means a long narrow shred, like a long string. It does not appear to me that it is something that is cut off or torn.

I know the expression in Gilbert & Sullivan's opera, "The Mikado": "A thing of shreds and patches." Shredded clothes it seems to me would possibly be where the yarn was hanging down. I have seen a corn shredder. It cuts up the corn stalk.

I do not know the process by which shredded wheat is made. I did not know that the wheat berry, after being cooked, is pressed between rollers and comes out in long strings. Knowing that now, I would think that was a shred. I think that means "shred" to me. If I had never seen shredded wheat biscuit and had not known that name for so many years, I think I would immediately describe Kellogg's Whole Wheat Biscuit when I saw it as shredded wheat biscuit. It seems to me now that that would be the first thing that would occur to me. Maybe it has been so well placed in my mind that I am not able to think of anything else.

I would think I have practically known the old shredded wheat all my life. When it was first introduced, it was the first product of that kind I had ever seen. It has had that appearance, that size and shape. I would distinguish Kellogg's Whole Wheat as a product similar to shredded wheat. Our thousand or so outside accounts are retail grocers scattered throughout the state, mostly service stores of one kind or another. I do not know whether orders for shredded wheat come in from those stores or from our own group. I would much rather think that orders for shredded wheat would come from our group of stores.

I cannot recall ever seeing an order come in for Kellogg's shredded wheat. Our orders are taken by our own salesmen and are sent in by code number, so that would not be very likely to occur, unless a customer came in or called up.

As a buyer I am not directly connected with the selling end of my organization, except insofar as we have to act as our own sales managers for the various stuff we buy. I have said the methods used by the Kel-

logg Company in featuring Kellogg's Whole Wheat Biscuit would be effective in creating a demand for a new product. I would say the same if similar methods were used on shredded wheat. I have noticed the extensive magazine and newspaper advertising of shredded wheat. I do not recall seeing a demonstration of shredded wheat in any of the stores I happened to be in. I at once recognized the shredded wheat package and said I had known it for many, many years, which I do not suppose could have been brought about except by considerable effort on the part of the sponsors of that item. When a salesman gets an order for shredded wheat, it is filled with shredded wheat like Plaintiff's Exhibit 1. The shredded wheat representative has called upon me and informed me that the National Biscuit Company within the last six months had quite an extensive campaign of sampling shredded wheat in this neighborhood. The National Biscuit Company man had a jobber within the past thirty days, telling me they were putting out an advertising sampling campaign. He has not been successful in selling shredded wheat to my house. I would not like to answer the question as to whether that is due to any controversy or any feeling on the part of the Godfrey house towards the National Biscuit Company. There was possibly a misunderstanding of our cookie set-up that we had with the National Biscuit Company at one time. We do not carry any of their line. We do not buy any shredded wheat or Wheatsworth cereal, or anything of that sort now, and we do not recommend the National Biscuit line to our chain. Some of them carry the National Biscuit line. They get certain products direct from the National Biscuit Company. Included in that may be some shredded wheat, which the National Biscuit Company distributes along with its other items.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know that there are any rumors against the National Biscuit Company, as far as the retailer is concerned. Neither do I know that there are any rumors or feeling against the National Biscuit Company towards any other or with any other wholesale house outside our own. That feeling has not colored my testimony here today a bit. I am just trying to state the facts as I know them.

My organization has not used any method of pushing the sale of Kellogg's biscuit or introducing it to our retail houses, or having our retail houses introduce them to the public, that I regard as any way improper or illegitimate.

If I were a retailer and a customer came in and asked me for "a package of Kellogg's," I would have to ask him what Kellogg product he wanted. I have known of corn flakes a long time, practically the last eighteen years at least. I know Post Toasties, which, as far as I could describe them, would be a corn product flaked. If I had never heard of or seen a toasted corn flake in my life and was shown one of the Kellogg's Corn Flakes or one of the Post Toasties and asked what it was, if I knew it was made out of corn simply and if I was going to describe it to some one, I would say, "This is a piece of corn, flaked." I have never seen a business that would run itself, to my knowledge, or an item that would continue to sell without some kind of effort put behind it. Some items sold in the grocery business seem to move freely without a great deal of advertising or effort behind them, although they must and do have some. For instance, Fels Naptha soap and Cream of Wheat. I cannot recall any strenuous efforts behind those two items in the past few years. There are evidently tremendous amounts of money spent for national advertising, such as bill-boards, magazines, and so forth; but the work

in the retail store and house-to-house canvassing or sampling or advertising has been none to speak of in the last few years on those two items. It seems to me that those two items are outstanding in the consumers' acceptance of them. Those two items seem to occupy a high place in this market with the consumer.

RE-CROSS-EXAMINATION.

THE WITNESS: There is still considerable national advertising done for them. I was speaking of the intensive local effort. A nationally-advertised item might carry on for years, if they kept up the national advertising on bill-boards and magazines of great circulation, and items of that kind. It seems that way to me.

RE-DIRECT EXAMINATION.

THE WITNESS: Most of my retailer customers are buyers of Kellogg's Whole Wheat Biscuit, I believe.

RE-CROSS-EXAMINATION.

THE WITNESS: I am not in a position to say how many of them are buyers of shredded wheat. I would not know that. I know that many of them carry it, because the National Biscuit Company solicits their trade direct, every week at least, in the immediate vicinity of Milwaukee and the suburbs. They give them extremely good service, delivering it by their wagons. I do not want to be understood as intimating that shredded wheat does not have a very considerable sale in the district of Milwaukee. I do not know. I do not say that it has not.

Our house has a cracker line of its own. Along with that cracker line, we also have Kellogg's Whole Wheat Biscuit now. The cracker line is sold under the name of the I. G. A.

RE-DIRECT EXAMINATION.

THE WITNESS: That is a line something like the National Biscuit cracker line and it is competitive to them, I would say. I know of no way in which the National Biscuit Company uses the acquisition of the shredded wheat line to help the sale of their cracker line at this time. I have no direct proof that their shredded wheat product is sold by their cracker line salesmen. I have reasons to believe that they do, because they service the stores with their complete line.

MRS. MARIAN F. CONANT.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, and have a little girl. I came here today because a Kellogg man came to call at my door. I did not know him before at all. I use Kellogg's Whole Wheat Biscuit. I have used it more than three years, and I like it.

I had always used shredded wheat, and I asked for it, and the grocery man told me about this other product he had. I do not remember whether he had shredded wheat or not. Anyhow, he sent me Kellogg's Whole Wheat Biscuit. I liked it better than the shredded wheat, and I have always used it since. I believe he told me he had some other product than shredded wheat. My grocer never substitutes with me. He is a very reliable man to deal with. He often tells me, however, about new things, or if he is out of something, he will ask me if it is all right to send something else.

I continued to use the Kellogg biscuit after I tried them. I always ask for Kellogg's Whole Wheat

Biscuit now. I like the flavor of it, the size, and the way it is done up better. I liked the package. I always thought the shredded wheat package was not dust-proof. It seems to me that dust can get in at the top of the package there so easily. I like the way the Kellogg biscuit are done up in those little corrugated papers. I noticed that the National Biscuit Company shredded wheat would break up very easily. I think that is because the package is not done up so well.

It seems to me that the Kellogg biscuit is a better size, just enough to eat. It is nice for Mary Ann. I do not think she would eat a whole National shredded wheat biscuit. It seems crisper too; and it always seems to be fresher, but maybe that is because it is toasted. They advertise that it is toasted on both sides.

I am unbiased as between the two companies. I do not know anything against one company or the other, at all. I am only testifying because a man who was a stranger to me came to my door. I thought it would help him out if I came. He asked me if I used Kellogg's Whole Wheat Biscuit and liked it.

CROSS-EXAMINATION.

THE WITNESS: This man got my name from my grocer, Mr. Schaeffer. I asked him afterwards, and he said he knew I bought it and he told him. I do not know any of the Kellogg people at all. This Kellogg man asked me to come and tell my story here.

When I first used this Kellogg biscuit, I was living in a place near where I am today, just across from the Red Arrow Court, at least three years ago, maybe longer. I believe it was called Shredded Whole Wheat Biscuit at that time. Prior to that time I had bought shredded wheat for a number of years, because it is the only cereal I ever eat. I never cared about any

other cereal. I have used shredded wheat for a great many years in a package like Plaintiff's Exhibit 1. That was the only item of that kind I knew up to the time I met the Kellogg biscuit. I used it quite continuously for a number of years.

When I received this package of Kellogg's biscuit, I think I telephoned him and asked him for shredded wheat. I believe he said he did not have it, but he had Kellogg's Whole Wheat Biscuit, that was a shredded wheat. He said it was the same thing or something like that, on the same order, and he sent it up to me. It did look like shredded wheat, resembled it in many ways, was the same sort of material and the same kind of biscuit. I am not sure whether that package had a window in it like Plaintiff's Exhibit No. 161. The last package I got did not have it. It had a picture of a dish on it on both panels, like Plaintiff's Exhibit 161. I think I remember seeing the two biscuit advertised in a dish like that, but I do not remember whether it is one biscuit or two biscuit. Looking at Plaintiff's Exhibit No. 10, I really could not say I remember seeing two biscuit like that, I remember seeing biscuit advertised in a dish, I think, with fruit on it. I remember the package you show me with one biscuit in a dish. They always used to have the horses in front of the factory. Then they put the automobiles in front of it, modernizing the picture. You see I noticed that. I really know shredded wheat, too. I can remember that far back. It seems funny because that is the only cereal I eat. I always seemed to like that kind of cereal, even when I was a small youngster. I always had shredded wheat.

I serve Kellogg's Whole Wheat Biscuit to my youngster by taking it out of the package, putting it in a dish on the table with cream and milk, and she puts

sugar on herself. Sometimes I serve bananas with it. My husband eats it occasionally. He prefers a cooked cereal.

RE-DIRECT EXAMINATION.

THE WITNESS: My husband will eat Kellogg's Whole Wheat Biscuit. He likes it, but he really prefers cooked cereal. I could not tell whether he knew it was a new biscuit. I do not know whether I might have put it over on him as shredded wheat. He really is not so crazy about it.

When my grocer sent me the Kellogg biscuit I did not think he was sending me toasted corn flakes or bran or anything of that sort.

When I looked in it I saw absolutely it was the same thing, and I liked it better. I did not think he was sending me the shredded wheat package, that had first the horses and then the automobiles. I knew it was not that package. I knew it was a Kellogg product, immediately. I noticed a difference in the size of the biscuit and that there were more biscuit in the package.

MRS. O. W. DUMMER.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, and I have three girls. I am a user of Kellogg's Whole Wheat Biscuit. I have used it for years. I use all the other Kellogg products, like Rice Krispies, Corn Flakes, Bran, Whole Wheat Bran. I use those and the Whole Wheat Biscuit.

The Kellogg name on a product means a great deal to me. If I have any other package on the table, the children always say, "Well, what is the matter with

Kellogg's?" I dare not have anything else, because the children all have their favorites in the morning. The little one, four years, has Whole Wheat Biscuit. The oldest one has corn flakes. They all use Kellogg products.

Kellogg's Whole Wheat Biscuit first came to my attention through Steinmeyer's Grocery on Third Street. I had always gotten shredded wheat. I happened to ask for it and he said "Did you ever try Whole Wheat Biscuit? It is something new, and it is much better."

I said, "What is it like?" And he said "It is supposed to be something like shredded wheat, but it is better." He brought it out, and I have been using it since. This occurred at my home. He comes up to my house every week. That is how he induced me to get it. He is just a salesman at the grocery store, not connected with the Kellogg Company. Since I was introduced to the product I have been using it. You can find it in my house every day. I like it better than the old shredded wheat biscuit because it is a smaller biscuit, for one thing, and it is toasted nice and brown, more so than shredded wheat. It has more of a flavor. You can eat it without adding any fruit, just simply sugar. It has a wonderful flavor. You could not eat shredded wheat without any fruit or flavor of some kind. Shredded Wheat has more of a flat flavor; but Whole Wheat has a different flavor, sort of sweet. The package is easier to open and more sanitary.

CROSS-EXAMINATION.

THE WITNESS: The Steinmeyer Grocery is one of the largest here, both wholesale and retail, cash store. They take my order. When the driver comes to the door, he collects. The man comes to the house on Wednesdays, and the groceries are delivered on Fri-

day, collection being made on delivery. The Steinmeyer Company has used that method for a long time. They carry a large stock of groceries. I sometimes go to the store, and I have stores around me, too. I go to Steinmeyer's store mostly on Friday or Saturday. They carry shredded wheat. I know they used to carry it, but I am not buying it myself, now. I buy Whole Wheat there. I have not noticed shredded wheat when I have been in the store recently. I do not buy my staples when I go to the store. I pick those up in the neighborhood. My little girls come home from school, and they can go in and get the biscuit in the neighborhood stores.

I had been buying shredded wheat for many years. It is quite an old brand and comes in a package like Plaintiff's Exhibit 1. I would say I have known it for many years, practically all my life, and always as shredded wheat, always the same. I now ask for Whole Wheat, because it is a different biscuit. It looks like the old shredded wheat biscuit; but shredded wheat is not toasted as brown and is not formed into as small a biscuit. It does not have the flavor. I took Kellogg's biscuit as a substitute for shredded wheat. Kellogg's Whole Wheat Biscuit fills the same want as shredded wheat. When the salesman was taking my order, I asked for shredded wheat and he said, "Did you every try Whole Wheat Biscuit? It is something new which we have just gotten in. It is something on the order of shredded wheat, a smaller biscuit and you get more biscuit to the package." I do not know whether it was the same price or not. I pay either ten or twelve cents a package. He said it was Whole Wheat Biscuit, that it looked like shredded wheat, but was something different. Since I have tried it, we have used it. I do not use shredded wheat now. I could not use shredded wheat any more, because the

children would not eat it. They like it much better because of the flavor of it and everything. My family and I are Kellogg fans. They just sent in a Rice Krispies top for one of those little colored booklets. They have not got a Wheel of Knowledge yet.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know anybody connected with the Kellogg Company. A man came to the door. I was shopping in some store at Thirty-fifth and Fond du Lac. They had a Kellogg special of two or three or four products. It was cheaper than the price I usually pay. I put my name and address on there, and then the young man I met in the hall came up to the house and asked me why I bought it, whether it was a bargain or what I thought of the products. I told him I have been using these things for years, that only the Whole Wheat Biscuit was new and that I used that right now. Then he asked me to come down here. The man I met in the hall was one of the Kellogg salesmen. I never met him before. This incident of the grocery boy telling me about a new product has happened before. Whenever they have something new they always mention it to you. I am interested in new products. I try them, and if they are satisfactory, I keep buying them.

RE-CROSS-EXAMINATION.

THE WITNESS: I cannot say offhand what other products I have tried. When I order baking powder, I just use a certain brand, Calumet. If a person asked me to try the Royal, I would not try it. I am satisfied with the one. I have been using Calumet for years. I had been using shredded wheat for years, too. That is just it. He told me it looked like shredded wheat but it was a different biscuit. That is what made me try it. That is what put it across for me.

RE-DIRECT EXAMINATION.

THE WITNESS: I use Kellogg's Corn Flakes. I have tried the Post Toasties; but the children do not care about it.

RE-CROSS-EXAMINATION.

THE WITNESS: Other things my grocer has suggested to me in that way would be canned goods or something like that. If I want canned peaches, I have a certain brand, Del Monte. If I am not satisfied with Del Monte, I will try another. If I am satisfied with one brand, I will not try another. What made me try Kellogg's biscuit was that he said it is something new and you get more biscuits for your money. He said they were smaller, and I tried them.

RE-DIRECT EXAMINATION.

THE WITNESS: When I opened it and looked at it, the man had told me to try the new biscuit, when I asked for shredded wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: It did look like shredded wheat; but I could see it was a little different, smaller and toasted browner. After I tried it, I was more satisfied with it. It had more of a flavor than shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: If I asked for Calumet Baking Powder and a man told me he had a new one, I would not try it. I have tried it before. I have tried Dr. Price's, Royal, and Rumford's, and other different brands. I would not experiment further, nor would I with this biscuit. I am well satisfied with Kellogg's. I am not satisfied with the old shredded wheat biscuit.

We cater to Y. W. C. A. members and outside trade also. We handle Kellogg's Whole Wheat Biscuit in the individual cartons. We have handled the Niagara shredded wheat, but I have not bought any recently. In fact, I think I have only bought that once, since it is made in the small size. When I used to buy it in individuals, they were large biscuits, like the individual carton Defendant's Exhibit 72. I think I have bought them in the smaller individual cartons like Defendant's Exhibit 71 just once.

We have all our cereals, whether Grape Nuts, Pep Flakes, or what, some of each displayed on our counter, put out with a cereal dish and the carton right beside it. The customers help themselves to whatever cereal they wish. In the coffee shop we do not sell self-service. Kellogg's biscuit is all I have bought recently. I believe we still have some of the Niagara biscuit. We did have some recently. So far as the smaller biscuit are concerned, I can truthfully say I do not think the customer knows the difference between the two. With a larger biscuit, they would always take the small biscuit in preference to the larger biscuit. When Niagara shredded wheat was shown in a carton like Defendant's Exhibit 72, the customers would take Kellogg's biscuit in preference. I have not bought the short Niagara shredded wheat recently. I have had no complaints from my customers since I ceased buying the Niagara shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: I have ceased buying shredded wheat. I have not bought any recently. I have a few, but I am not building up my inventory on it, for no particular reason, except I have been buying Kellogg's assorted package. I get a large case of assorted individuals from Kellogg's, including their Whole Wheat Biscuit. I could not say how many of Kellogg's biscuit I have on hand. I have not bought any this month. The reason I am not ordering shredded wheat biscuit is that it will be more convenient to me to get my Whole Wheat Biscuit from Kellogg's. I hold no particular brief for Kellogg's biscuit nor any grudge against the National line. I am impartial, I think, as far as that is concerned. In my opinion, the customers could not tell the difference between them. If they did, I did not question. We put them out there, and I do not think they did. They are both very much alike.

I have been familiar with shredded wheat in the large package, like Plaintiff's Exhibit No. 1, for a considerable period of time. I have been in charge of the Y. W. C. A. cafeteria two and a half years. I had other restaurant experience in a hospital in connection with dietetics. I have had occasion to use shredded wheat in hospitals, so I have known that product for many years. If the biscuit were served outside the package in a dish, I do not believe the average customer could tell which one it was. People do not notice very closely.

RE-DIRECT EXAMINATION.

THE WITNESS: I think, if a biscuit were put alongside the plate in the larger carton, like Defendant's Exhibit 72, the average customer would notice the difference. I simply mean the customer would not notice the difference between the short shredded wheat and the Kellogg's. The Kellogg package and the Niagara Falls package do not look alike, but I think people know they are getting a small biscuit when they pick up that package. Knowing that, they do not care very much whether they are getting Kellogg's or Niagara Falls. That is what I mean.

RE-CROSS-EXAMINATION.

THE WITNESS: Before I used Kellogg's biscuit, I was using the old shredded wheat. It was O. K. then, because I did not know anything about Kellogg's biscuit, until I got the biscuit that was smaller and suited my needs better.

RE-DIRECT EXAMINATION.

THE WITNESS: It is common practice for my grocer to tell me about new products he has. I sometimes try them, and sometimes not. There are very few I try, because I have certain brands in the house. I use nothing but Calumet Baking Powder. Some canned goods I use are Del Monte's, some Roundey's. In this line I use nothing but Kellogg's. I have the Whole Bran, and even make muffins for the children out of it. I have the whole Kellogg outfit, the Whole Wheat, corn flakes, and the Rice Krispies.

MAURICE FISHKIN.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer, having been in business since 1927, and in no other business before then. I operate my own store and have one other with a partner. They are the Park Hill Food Market, 3903 Cityburn Street; and Fishkin & Zellin, 3500 West Fond du Lac. We sell fruits, vegetables, and groceries. They are semi-self-service stores. We have our stock arranged so the customers can wait on themselves, partly, if they want to. We handle in those stores Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 161. We have handled Kellogg's biscuit for about

six months. I know what kind of product is in the package. It is a biscuit toasted on both sides. I have examined them. It is smaller than shredded wheat, but it looks like shredded wheat. It is the same thing. It is certainly a shredded biscuit. I handle another product of that kind, shredded wheat. We never stock anything until we have to have it. We had a demand for Kellogg's biscuit among our customers. We never did anything to create that demand, except having demonstrations. There was more than one item. Those demonstrations on Whole Wheat Biscuit occurred quite a while after we stocked it. At the time we stocked Kellogg's biscuit we had done nothing to create a demand on the part of the public for that biscuit; but customers came into our store and asked for it. That is why we handled it. Aside from the demonstrations of Kellogg's products, including Whole Wheat Biscuit, we have never done anything else to create a demand for the product. We did not have enough money to bother with either one of them, Niagara Falls or Kellogg's. We simply hand out that product to people who ask for that biscuit. They either ask for shredded wheat or Kellogg's Whole Wheat Biscuit. Both of them are displayed on our shelves side by side. Neither one of them is any better displayed than the other. We have one row of each. They sell about the same as far as I can see, with regard to both stores that we have. We stocked the Kellogg product in response to a demand that, as far as we were concerned, had already been created.

CROSS-EXAMINATION.

THE WITNESS: The people come in and ask for it and we have to have it. I never put it in before that. I never saw the Kellogg salesman until this fellow came around to me. The first time he came around was three or four months ago, after we took it on, after

I had bought my first Kellogg biscuit. If we had only had two or three calls, I would not put it in the store. I have five or six hundred customers a day. When calls came as often as every day, I felt it was time to put it in, so I put a call in for the Whole Wheat Biscuit and stocked it.

I sell the Niagara shredded wheat, and I do not think this hurts the sale of shredded wheat any. I think we sell as many shredded wheat today as we ever did. Kellogg's Whole Wheat Biscuit did not take any customers from shredded wheat that I know of. I do not know. I do not wait on all the customers. I know the customers who bought shredded wheat, the ones, I know are distinctly apart. It is hard to say that it did not take any customers at all. I made no effort to call their attention to the Kellogg biscuit when they asked for shredded wheat. There was no reason to. We get the same price for both. I am twenty-five years old, and I have been in business for five or six years, my second or third store. I have been in business that long. I first started in business when about twenty years old. I do not carry the Kellogg product in a package with a cellophane window, but in a package with a picture of a dish on both sides. I have had some of the cellophane-front packages in Clyburn Street. I never brought it up, because I do not bring any displays of nationally-advertised goods on my floors. I have other things more profitable to sell. I put no cereals on the floor. They always ask for them. I do not take to displays of cereals, nationally-advertised products, because I realize the national advertising moves the stuff.

I described Kellogg's Whole Wheat Biscuit as shredded wheat, because it looks like shredded wheat, but it is a smaller biscuit. If people change to it, they do it because it is a smaller biscuit that goes further. The people who change to Kellogg's realize they are

getting something that fills the same want as shredded wheat. In fact, that is right.

When I got the Kellogg biscuit, I recognized it was like shredded wheat. It resembled it, except that it is toasted browner than shredded wheat, and is a different color. I realized it did resemble shredded wheat. When I answered Mr. Clarke's question and said it looked like shredded wheat, I did that because of my familiarity with this old biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: When I decided to stock the Kellogg biscuit, I just ordered it from the jobber. I asked him if he had Shredded Whole—Kellogg's Whole Wheat Biscuit. He said he had, and so I ordered it. The jobbers all had it, so I just ordered it. The customers do not wait on themselves in that department. We have a counter. I handle the Niagara Falls shredded wheat, but I do not handle any of the other National Biscuit products. We get the same discount on our shredded wheat as they allow on the cracker, because we are the Monarch Stores. They give us the regular discount. We get the cracker discount without buying the cracker line, on the Monarch Company. That discount is a bigger discount than is given to one who just uses Shredded Wheat alone. They will not give more than 10 per cent. otherwise. They give us 17½ per cent. If I were buying shredded wheat alone and were not in Reed & Murdock, I would get only 10 per cent. discount, unless I bought a hundred dollars worth. If I handled only shredded wheat and were not a Reed-Murdock store, I would get 10 per cent. discount on the shredded wheat. If I handled the shredded wheat and the rest of the National Biscuit line, and sold a hundred dollars worth, I would get 17½ per cent. discount, which I get although I do not handle the rest of the cracker line.

ELMER S. KELLY.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-eight. I am Milwaukee's representative of the Kellogg Sales Company. I take care of Milwaukee County, Washington County, Waukesha County, and the County of Ozaukee, comprising about twenty-eight hundred grocery stores, including the chain stores.

Kellogg's Whole Wheat Biscuit has been introduced in my territory. In the grocery stores we have, I think, approximately 50 per cent. distribution in this territory. The restaurant distribution will run the same.

I have personal knowledge of the methods and policies of the Kellogg Company used to introduce their Whole Wheat Biscuit to consumer demand and attention in my territory. We have not done any newspaper advertising to equal the consumer demand for it; but we have done promotional work, held Saturday promotion sales in several stores where we sold a combination of our packages, including one package of biscuit at a price. In some stores we would give away a book, and in some stores we would include a free package. In others we would just make it a price proposition. We have taken one of the chain groups here and have sent out coupons telling the lady to bring it back to this store with the purchase of one package and receive another package in return. We would then call on all the chain stores, making displays of our products, including Whole Wheat Biscuit, in a spot in the store where he would call the attention of the lady to it.

In one other group, where they handled Whole Wheat Biscuit exclusively, they are to run advertising

in their newspaper ads about once a week. They have taken our Whole Wheat Biscuit as a sort of private brand of their own. They display it in all their stores and sell it. Their business on that is very good. Up to date, for the first two months, I have about thirty per cent. of my quota for the year sold on Whole Wheat Biscuit. In the restaurant trade it is a little different. We made up a case of assorted goods and included Whole Wheat Biscuit in that. I know about it, because we packed the cases. We took all our restaurant size products in the warehouse here in Milwaukee and made up a case of our own, because we found some restaurants would want one and others another. When we packed a hundred cases of one item, it was too much for them. We always included twelve packages of Kellogg's biscuit in every case. The factory has since made their own combination. I think this is where we started it. That made distribution in the restaurants, where we sold a combination case and got distribution on the biscuit.

The national office of the chain stores got the lists from all their stores of names and addresses to send postal cards to. We asked them for at least seventy-five names per store. The clerks in the stores had their customers sign these lists. It looks like a petition of some sort. Then we sent those postal cards to those names. We have only done store demonstration work in connection with our Saturday sales. No house-to-house work has been done in this territory, not in the City of Milwaukee. We did it outside, in Racine and Kenosha, Wisconsin. We went from house to house, selling one package and giving another free, or selling two packages and giving one package free.

In the dealer advertising I spoke of, they used our cuts, referring to Kellogg's Whole Wheat Biscuit, a cut of the package. They used that as one of their items in the sale. A little different store over here em-

ploys forty men, house-to-house solicitors for the store. They have their regular routes, and goods are delivered afterwards. They sold our biscuit on the coupon idea, too, but the coupons were not printed on a postal card. They were left by these solicitors and picked up on their next trip back, calling for one package purchase and one free.

In our territory, we have some dealer cooperation in bringing the biscuit to the attention of the consumers where they mention Kellogg's Whole Wheat Biscuit to their customers, especially when we came out with it first. When we changed the name and called it Whole Wheat Biscuit, we called their attention to it again and ran an advertisement. We have window and floor displays in the stores of retailers, and we have also had dealers who will print their own posters and put it on the window, a cooperative group.

They ask for Kellogg's Whole Wheat Biscuit now. The various methods of which I have spoken would have the effect of calling the Kellogg Biscuit to the attention of consumers. That is where we received our demands for it and built up our sales by talking to the people. In the last food show, we sold that product in a booth. We had a chance there to contact the housewife and talk to her about Whole Wheat Biscuit, explaining better than we could do in going from house to house. That show was at the Milwaukee Auditorium for seven days. The attendance was about twenty thousand a day.

Kellogg's Whole Wheat Biscuit is serviced to retailers and restaurants in this territory through the jobber, except in special campaigns when we sold it to them direct from our car. We would purchase it from the jobber and sell it to the retailer at the same price we purchased it for. We had a campaign on Whole Wheat Biscuit where we sold nearly every good grocer in Milwaukee on it, just to stimulate a demand for it on

the wholesale grocer, when we made displays in the stores. We sold the goods to the wholesalers and turned around and helped to resell them to the retailers. We have furnished the trade with window displays, store-cards, and other selling helps. We put them in ourselves. The Kellogg men would go to these different stores where the retailers would permit them to put up window displays or posters, ledge displays, and over ice-boxes, placards or posters or empty containers. We have used the stands with the large or small display cartons. One we call the counter stand and the other one we use in the window displays. In sampling other products from house to house we would at times include a circular on Whole Wheat Biscuit. We sometimes packed a package of one individual biscuit in with a package of corn flakes, within a cellophane container. The business in Kellogg's Whole Wheat Biscuit in this territory is increasing. We had a considerable gain last year. We came in here from scratch and built up a business where it is in the thousands of cases in a year. The sales methods we have used to create consumer demand on the biscuit have been practically the same as those used on other Kellogg products, with the exception that, as times and periods change, we do different things. The fundamentals are the same as we have used on every one of our products.

In towns where we have already used newspaper advertising, we have had from fifty to seventy-five per cent. retail store distribution of Kellogg's biscuit. That is outside my own territory.

The sale of Kellogg's biscuit in individual cartons is pushed. When we call on the restaurants, we always ask them to buy a case of our Whole Wheat Biscuit. We have a sort of counter card, that a small individual size biscuit fits in, showing a dish with two of the small biscuits, with some sort of fruit. We use that in the

restaurant-counter displays. We ask them to print it on their menus, and we furnish them a little slip mentioning Kellogg's Whole Wheat Biscuit, that can be attached to their menus as a special for that morning. There is the regular percentage of self-service stores in our territory. In some places there seems to be a tendency for regular grocers to arrange their stores so they can either be served or serve themselves.

CROSS-EXAMINATION.

THE WITNESS: The device of placing a sample of Whole Wheat Biscuit in a package of corn flakes has not been generally done, just where we ordered it out specially. Where we did it, a customer purchasing a package of corn flakes would find a sample of the biscuit right on top. She does not know that until she gets it home and opens the package. It is inside the sealed package of corn flakes. In that way, she gets it home without knowing it.

I have been with the Kellogg Company almost nine years and in the Milwaukee territory seven years in October. When I said we started here from scratch, I had reference to the start of the sale of Whole Wheat Biscuit as a new product. Other Kellogg products had been introduced in Wisconsin prior to that time. I think we have been selling the biscuit approximately four years now. In that period we have acquired about 50 per cent. distribution. When we first started with the biscuit here, it was called Kellogg's Shredded Wheat Biscuit. Plaintiff's Exhibit No. 165 is the carton we started here with, called Kellogg's Shredded Whole Wheat Biscuit. I do not know whether that was the first carton. The first one, I think, was a narrower one, like the one you now show me, Plaintiff's Exhibit No. 166.

I do not remember when the word "shredded" was discarded from the product name. Maybe it was

in the last two years. Our campaign to establish Kellogg's biscuit in Wisconsin has been possibly a trifle more active since the change in the name. We have taken on in turn one product after another as they came. I did have some sales effort back of the biscuit three or four years ago, when it was called Shredded Whole Wheat Biscuit, in the regular way. We had it from store to store on our list of items. We did the same as we did with corn flakes. We did not sample it to the housewife. The sampling from house to house we have never used in Milwaukee. I am only familiar with the fact that it has been used elsewhere. We have not used it here, for reasons of tax and license, and things of that sort. When we sent out the coupons the retail store furnished the free package and was paid for it by the Kellogg Company. That work is just being done. We have used no newspaper ads in the Milwaukee territory. We do not carry ads in Racine or Kenosha at this time. At the time of our canvass in Racine and Kenosha, they were included in the Milwaukee territory.

I do not remember seeing any articles in the newspaper about Kellogg's Whole Wheat Biscuit in this territory about a year ago. Looking at Plaintiff's Exhibit 200, a sheet from the *Reading Eagle*, Thursday, April 28, 1932, and an advertisement ringed in red, I might have seen one or two that some of the fellows showed me. I do not recall it. I have seen one or two instances of that type of advertisement. Some of the boys doing promotional work might have shown them to me. I believe I knew that advertising of that kind was being conducted by the Kellogg Company. I did not see any advertisement or anything similar to it in the Wisconsin papers on that product. I never saw any ads in the Janesville papers. I have seen a copy of the *Oshkosh Northwester*, but I have never noticed a Kellogg ad in it.

RE-DIRECT EXAMINATION.

THE WITNESS: The sample of Kellogg's biscuit inside the package of toasted corn flakes was in a cellophane envelope, on which was something about giving a free sample of Whole Wheat Biscuit to try it. The name Kellogg's appeared on the envelope, just the same as it is on the package.

MRS. GRACE HATFIELD.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am assistant manager of the Cafeteria at the Y. M. C. A., 633 Fourth Street, in the basement. We cater to the public. It is arranged like a regular cafeteria, with the food right on the counters. We handle both Kellogg's Whole Wheat Biscuit and shredded wheat. Defendant's Exhibit 70 is the form of package of Kellogg's biscuit which we handle in the cafeteria. Defendant's Exhibit 71 is the form in which we handle National shredded wheat, in that size.

Those packages are in the regular cereal dishes, put right on the counter. They are not opened. The customer goes along and helps himself to whichever one he wants. I do not know how they sell, but I think that Kellogg's biscuit is preferred more than the National. I buy Kellogg's myself. I think the majority of people in our restaurant take Kellogg's. They simply take the plate with the carton, open the carton, and dump the biscuit out on the plate. I do not think we have handled Whole Wheat Biscuit so long. We have handled shredded wheat for years. We buy Kellogg's products through a wholesale house, Randy Peckman & Co., I think. I do not do the buying. They come in the cartons in a case. We buy a whole case.

CROSS-EXAMINATION.

THE WITNESS: We carried shredded wheat biscuit before we carried Kellogg's Whole Wheat Biscuit. We have carried Kellogg's products for some time, though. We hav carried shredded wheat biscuit for many years. I have been in the restaurant business ten years and think I have had it all that time. We used to buy it in the larger package and put it out in the dish some time ago. I have been familiar with shredded wheat longer than ten years. It is a very well-known product, has always been known as shredded wheat, and has always had the same general appearance.

RE-DIRECT EXAMINATION.

THE WITNESS: The small shredded wheat cartons, like Defendant's Exhibit 71, have been popular in the last couple of years or so. Otherwise we could put our corn flakes and stuff out in dishes. I do not think we have ever had the longer individual carton like Defendant's Exhibit 72. When they were larger, we served them just out in the dishes. We have had the smaller biscuit since we have been handling them in the individual carton. That has been about two years. When we handled the longer Niagara Falls biscuit, we had them in the large cartons. So far as I know, in this territory, we have only seen them in cartons like Defendant's Exhibit 71. I do not remember seeing them larger in the individual cartons.

MRS. MARGARET TYLER.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933

DIRECT EXAMINATION.

THE WITNESS: I am food service director at the Y. W. C. A., 610 North Jackson Street. We have a cafeteria and coffee shop, both of which I manage.

I buy my Kellogg biscuit through jobbers. I have bought some directly. If you do, you get them through the jobber anyway, so I have discontinued buying them directly.

When I bought the Niagara shredded wheat, I bought it through the jobber.

CLAYTON LOUIS KOLVOORD.

Deposition taken at Chicago, Illinois, March 16, 1933.

FURTHER RE-DIRECT EXAMINATION.

THE WITNESS: Today I purchased a package each of Kellogg's Whole Wheat Biscuit and shredded wheat biscuit at Lakota's Lunch, 602 North Third Street, a regular lunch room. Both the Kellogg's biscuit and shredded wheat were on display. I asked the lady for a package of Kellogg's Whole Wheat Biscuit, and for a package of National Biscuit shredded wheat. She started to put them in a sack, but I told her it was not necessary. I paid her for them and walked out.

Plaintiff's Exhibit 70 is the package of Kellogg's Whole Wheat I bought and bears my initials, C. L. K. My initials are also on Defendant's Exhibit 71, the other package I bought. There was no large-sized National shredded wheat in that restaurant. The Kellogg biscuit was on our little restaurant display, showing the bowl, and the sliced banana on top, the display we had out yesterday. The National shredded wheat was just on the counter. I did not see any display of it, or any of the regular size like Defendant's Exhibit 72.

I am familiar with the National shredded wheat in Chicago restaurants. I think you will find that, at present, most of the biscuits are the smaller size. I think possibly in the last six or seven months, those biscuit have been stocked, like Defendant's Exhibit 71. Be-

fore, the National biscuit was the long one in the long individual cartons, like Defendant's 72.

Defendant's Exhibit 73 is a mat, used in newspapers in printing up or making a cylinder for printing the advertisement about Wheel of Knowledge free with two packages Kellogg's Whole Wheat Biscuit. This is a cut submitted to the grocer when he turns in his newspaper ads.

RE-CROSS-EXAMINATION.

THE WITNESS: My jurisdiction includes parts of Wisconsin. I work out of Chicago. I go out into the various territories and work with various men on merchandising and advertising tie-ups. I was in Peoria two weeks ago, where we had a Saturday trade promotion sale. I worked with Mr. Hooper on the advertising. I get into Wisconsin. I have not been to Kenosha, Racine, or Oshkosh. I get to Janesville, Madison, Reedsburg and towns over there. I know of Swanson's in Janesville. I know Mr. Murphy, of the *Janesville Gazette,* one of the leading papers in Rock County and Janesville. It is a paper of some antiquity, a very good advertising medium. I am not familiar enough with Mr. Swanson to say for sure, but I assume he carries Kellogg's Whole Wheat Biscuit. I imagine he also carries shredded wheat. I have seen ads of the Swanson Grocery in the *Daily Gazette,* but I do not identify Plaintiff's Exhibit 14-Y on the interrogatories as one I ever saw.

RE-DIRECT EXAMINATION.

THE WITNESS: I have personally encountered the short National shredded wheat, like Defendant's Exhibit 71 outside Chicago. I noticed it at Bishop's Cafeteria, in Rockford, Illinois. I brought this package here from Milwaukee. I have seen the short National

shredded wheat in Chicago restaurants and in most of the Illinois restaurants where I have eaten. In the last six months, they have had the smaller-sized package like Defendant's Exhibit 71.

MRS. MARIE BENEDICT.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

Direct Examination.

The Witness: I am manager of Wrigley's Restaurant. We feed between three thousand and thirty-five hundred people a day. It is about as large a restaurant as any in Milwaukee and is located at 636 North Second Street. We call it a self-service, similar to a cafeteria but no rail. A person goes to the counter girl and asks her for what he wishes. She serves him the food from the one position. We have two steam tables. The cereals are served from what we call the fry station, at the end of the counter.

We handle Kellogg's Whole Wheat Biscuit, also National shredded wheat biscuit in the individual cartons like Defendant's Exhibit 70. We handle Kellogg's biscuit in the individual package. We handle the National or Niagara shredded wheat in the small sized carton, handle it the same as Kellogg's, like Defendant's Exhibit 71. I do not think we have ever handled the Niagara Falls shredded wheat in the short individual carton. I have been in Milwaukee a year and have handled shredded wheat that long. I would not say for sure whether it has been this short biscuit during that time. I have only been buying for six months. During that time, I am sure I have used the small one, like Defendant's Exhibit 71.

We have no special display of cereals. We just have them all out, shredded wheat and whole wheat and

bran, about fifteen different cereals, in individual cartons. The customers get them by asking the counter girl for the designated cereal. She takes it off the railing or counter in back and puts the carton in the cereal bowl. The customer opens the carton. They designate which one they want. If they ask for Shredded Wheat, they are served Shredded Wheat. If they ask for Whole Wheat Biscuit, they are served Whole Wheat Biscuit. I would say about the same proportion of each is sold.

A Kellogg man calls on me. I buy all my Kellogg cereals from him through the jobbers. The others I buy direct from the jobbers.

CROSS-EXAMINATION.

THE WITNESS: I have only been here a year. I had previous experience in the restaurant business in Minneapolis, in the same company. It is a chain restaurant, having restaurants in Minneapolis and Milwaukee. I have been in that line since July, 1931, two years.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know if we carried Kellogg's Whole Wheat Biscuit at Minneapolis. I had nothing to do with the buying. I worked nights for the company. I cannot answer one way or the other, because I am not sure. I did not pay enough attention to it at that time to know about it.

GEORGE MILLER.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am forty years old, a restaurant man. I have been in that line of business since 1910 and now conduct a restaurant of my own under the

name of Miller Brothers Restaurant at 4165 Cass Avenue, which I have had for eight years. It is not a cafeteria. It is a grade B restaurant. I serve cereals. They are under display. There is a lunch counter between the display of cereals and the customer. The cereals are stacked up in back. They are in individual packages.

I carry Kellogg's Whole Wheat Biscuit in the individual packages and have done so for about two and a half or three years. I carry no other Whole Wheat Biscuit. I do not carry Niagara shredded wheat. I believe I have carried it about three years ago, but not since then. The majority of my customers, when they want whole wheat, ask me for Kellogg's biscuits. A few ask for shredded wheat. When they say that, I say nothing, just present them the package with the bowl and the cream, the individual carton of Kellogg's biscuit. I never have any complaints from my customers. None of them says it is not what he wanted. If some customer who had never seen it before would ask what kind of biscuit was in it I would say Kellogg's biscuits.

CROSS-EXAMINATION.

THE WITNESS: I carry it on my menu as cereals. I do not list the Kellogg product. Cereals includes all my cereals. I do not have *shredded wheat* on the menu. My menu is on a large card permanently printed, one fold. We do not print a new one every day in the week. We do not mention Kellogg's shredded wheat or Kellogg's biscuit by name. We just say *cereals;* that means everything. On our shelves back of our counter, I have different kinds of cereals. I used to carry shredded wheat three years ago. I have been in that location since 1925 and in the restaurant business since 1910. I have always known shredded wheat. I have known it since before 1910 and right along until two

and a half or three years ago. Then I cut it out and took Kellogg's Whole Wheat Biscuit instead. I found them better, baked better and a better taste, to my fancy. The Kellogg salesman did not sell me that biscuit. I got it through my jobber. I took it for a trial. I used Kellogg's Whole Wheat Biscuit instead of shredded wheat biscuit, and it served the same purpose. It looks like shredded wheat. When my customers ask for shredded wheat, I serve them this Whole Wheat Biscuit. I present them the package. I do not sit down and explain to them that it is Kellogg's. When I have a customer who says, "Give me a serving of shredded wheat," I take this Kellogg package with two biscuit in and give it to him, without any explanation, and he accepts it.

RE-DIRECT EXAMINATION.

THE WITNESS: The customer opens the package himself sometimes. Sometimes we do it for him. When a customer asks for shredded wheat, I give him Kellogg's biscuit, because that is all I handle. No customer has ever told me it was not shredded wheat I gave him. There is a difference in size between Kellogg's biscuit and the Niagara biscuit. I serve the Kellogg carton with those regular cereal bowls.

(The witness was excused and left the stand. Later, during the early part of the testimony of the witness Douglas Rumball, the witness Miller telephoned with regard to the menu.)

MR. CLARKE: Just let us put on the record here that, in connection with Mr. Miller's testimony, since he left the stand he has telephoned and stated to Mr. Vilas and to me that he finds that his menu refers to Kellogg's Shredded Whole Wheat Biscuit; and it is stipulated that the defendant may here offer in evidence one of the menus as a defendant's exhibit.

MR. VILAS: Yes, and that some one connected with either the plaintiff or the defendant may pick it up during the noon hour and bring it back to the hearing room.

MR. CLARKE: Yes.

(The menu referred to was later produced, after the noon hour, and was received in evidence and was marked "Defendant's Exhibit No. 74.")

MORRIS GOURWITZ.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-eight, a grocer, with my own stores at 8405 Hamilton Avenue and 7624 Meyer Road. They are conducted under my name. I have conducted the Hamilton store nine years, and the Meyer Road store will be one year next month. I have had experience in the grocery business myself about ten years.

I handle in the two stores Kellogg's Whole Wheat Biscuit. As far as my knowledge permits me to explain it, it is a whole wheat biscuit similar to shredded wheat, smaller and a little darker, toasted nicer. We also carry shredded wheat. I have handled the Kellogg biscuit ever since they came out. It used to be Kellogg's shredded wheat biscuits. I put one case in and handled it then. I continued with it ever since. I cannot tell how long it has been called Kellogg's Whole Wheat Biscuit; but I know we have been selling more since it has. There is absolutely a demand for that Kellogg's Whole Wheat Biscuit, which is why we carry it in stock. We have never put any dealer push behind it. We sell it entirely on that consumer demand. The

customers come in and ask for Kellogg's Whole Wheat Biscuits, the same as they would for Kellogg's Pep or Kellogg's Corn Flakes. They ask for the other shredded wheat as shredded wheat. There is so much difference between the two that there is no confusion between them in our store. Shredded wheat is outselling Whole Wheat immensely; I should judge about sixty to forty per cent. The demand for the Kellogg product has been increasing, I believe, possibly due to the fact there is more advertising. More people seem to know about it.

CROSS-EXAMINATION.

THE WITNESS: I have been in this one place for nine years in May. I just worked as a grocery clerk before. I have been about ten years altogether in the grocery business, nine years for myself. During all that time, I have carried shredded wheat, as far back as I can remember. I do not know whether I knew it before I was a grocer. I have not been an eater of shredded wheat. At present I eat mostly cooked cereals. I do not eat either product. All the time I have been in the grocery business, I have had Shredded Wheat on my shelves. There has always been a certain demand for it. It has been a well-known product. People come in and ask for shredded wheat. The Kellogg Company put out this Whole Wheat Biscuit, which they once called shredded Whole Wheat Biscuit. It is a biscuit similar to shredded wheat. I mean it is the same sort of product, looks like it to a certain extent. It is not toasted as nice, and it is smaller. It is the same kind of food. As far as I am concerned, I guess all cereals will answer that same purpose. That is my personal taste. I do not know if it can be served as shredded wheat. If I were in the restaurant business, I could possible answer that better. It is similar to shredded Wheat Biscuit. It will answer the same pur-

pose, as far as I know, and so will Kellogg's Corn Flakes. They answer the same purpose if all you want to do is fill up their stomachs, Pep, Grape-Nuts, and everything else.

I cannot say how Kellogg's have created the demand for their Whole Wheat Biscuit, because I do not know what medium of advertising they have had or what efforts they made to create the demand. I know they put it in my store, and I am carrying it. People come and ask for it. They never ask for Kellogg's shredded wheat at all. If they ask for shredded wheat, I know what they want and I give them Shredded Wheat. I know that right away. It is pretty hard to tell if the forty per cent. of demand for the Kellogg product has resulted in a decreased demand for shredded wheat. We carry several items. I was ready enough to say it was sixty to forty, because I know how I order it.

Before Kellogg's Whole Wheat Biscuit, there was nothing else like shredded wheat on the market. At that time, shredded wheat, as a biscuit, had the field. So we can assume that, before Kellogg's biscuit came, shredded wheat sold a hundred per cent. As to whether the forty per cent. that Kellogg's now sell consists of former shredded wheat users, here is an answer: Five years ago, when I took the store, we had done approximately twenty-four thousand dollars, part of which time we had Kellogg's Whole Wheat Biscuit. We did sixty-seven thousand dollars last year; so you see our shredded wheat biscuit has increased, and so has Kellogg's Whole Wheat Biscuits. Our entire business has increased. I cannot tell you now whether that consists of new Kellogg's Whole Wheat Biscuit users or in part of customers who used to buy shredded wheat. We have been increasing our business every year since I have been in business, so I really cannot answer that question, as to whether Kellogg customers today, or

any of them, are former shredded wheat customers. Customers are peculiar. They will take first one item, and then, in two weeks or so, want something else. They take corn flakes, then start using Pep, then get tired of Pep and go to something else. My youngster at home will do that. They change around from one to the other. I do not know any particular customer who used to buy shredded wheat and who now buys Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: When I sell Kellogg's Whole Wheat Biscuit, I sell it in a carton. I just deliver the carton.

DOUGLAS RUMBALL.

Deposition taken at Detroit, Michigan March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-two and manager of a grocery store, Warren & Eastlawn Market. I have been connected with that organization two years, which is my entire connection with the grocery business, except when I was a youngster. I was in the office furniture business until two years ago. We have displays where the customers can help themselves and some do, but we serve them in most instances.

We carry Kellogg's Whole Wheat Biscuit and have since it was put out. We also handle the Niagara Falls shredded wheat. There is a demand for both those products in our store. If a person wants shredded wheat, she asks for shredded wheat. If she wants Kellogg's biscuit and knows the product, she will ask for Kellogg's Whole Wheat Biscuit. I have explained the Kellogg biscuit to customers, through information that was given to me. If they want something, maybe, in

the shredded wheat biscuit line, I explain to them both the lines we have. I tell them it is a new line, and, if they would like to try it, I am perfectly willing that they should. In these times, we have to sell almost everything. All the biscuit are sold in cartons. I tell them about the double-toasted feature of Kellogg's biscuit, which was explained to me.

I have experienced no confusion in our store between those two products, never had a customer return one and say she wanted the other. The last two months, I have ordered twice on Kellogg's Whole Wheat Biscuit to once of the shredded wheat biscuit. I have customers who come in and ask for Kellogg's Whole Wheat Biscuit. I have two customers who always take Kellogg's biscuit, since they have been out. I know practically all my customers and just about what they use. To be frank with you, I have never eaten either biscuit, so I do not know what either one of them is like. I know their appearance. If I had to describe Kellogg's Whole Wheat Biscuit, I would say it is shredded wheat. There is no difference.

I cannot recall any of my customers asking for Kellogg's shredded wheat. They may possibly do so. It is correct, then. If a customer asked for Kellogg's shredded wheat, I would give her Kellogg's Whole Wheat Biscuit. The name signifies that. In the last two months I have ordered twice as much Kellogg's as shredded wheat. I think we usually buy twelve of each or half a case, whatever it is. I think we get Kellogg's in twelves.

CROSS-EXAMINATION.

THE WITNESS: I buy shredded wheat in a small case of twelve, from the National Biscuit salesman. I have only been in the grocery business two years, with nothing more than childhood experience before, just working through deliveries. I was in the office furni-

ture business before. Mr. Tothill is running the butcher shop of the Warren & Eastlawn Store, and I am managing the grocery end of the business as an employee. I have no stake in the business. I handled Kellogg's biscuit since it was first brought to me, within my two years' experience. The man on the Kellogg truck brought it to my attention, and I stocked it. At that time, my customers had not been asking for it.

I have been familiar with shredded wheat, like Plaintiff's Exhibit 1, for the last two years. I have known it a long time, practically all my life. I am not an eater of that type of cereal; but it has been familiar to me through advertising and through seeing it in my home, ever since I can remember. It has always been called shredded wheat. It has been a very well known product. Up to the time Kellogg's biscuit came out, there was no other cereal like it, that I know of.

Answering Mr. Clarke, I said Kellogg's biscuit is shredded wheat. It is, in my mind. That is the name for it. I do not know anything else to call it. It is shredded wheat. If a customer asks what the biscuit is that Kellogg is putting out as a whole wheat biscuit, if I am looking at the package and see right up there Kellogg's Whole Wheat Biscuit, that will enter my mind, and maybe I will say it is shredded wheat biscuit. If a customer says "What is Kellogg's Whole Wheat Biscuit?" I will say right away it is shredded wheat biscuit; and that is what it is. Possibly that is because that old shredded wheat biscuit has been so well known for so many years, that particular biscuit. In the last two months, I have ordered two to one on Kellogg's. That last two months is the only time. Prior to that, shredded wheat outsold Kellogg's or may have been even with it. There was a time when shredded wheat had the field as that kind of biscuit, and then Kellogg

came in. We made displays of Kellogg's Whole Wheat Biscuit. Naturally, people are going to be asking you about any merchandise displayed. They came in and set up the display of packages themselves, giving us placards and other devices to attract attention to the biscuit. We do not advertise it ourselves, except to put it in our window with a price on it. We use the papers occasionally. I never had a Kellogg item in the newspaper. I never had a deal on, selling and pushing Kellogg products and giving one free.

I know two customers who always take Kellogg's. I do not mean you to infer from that that customers will sometimes buy Kellogg's and sometimes shredded wheat. These people will practically always ask for Kellogg's Whole Wheat Biscuit. I do not remember any customers who will buy one sometimes and the other another. I would say that the shredded wheat people usually stick to shredded wheat; but some of them have been switched over to Kellogg's biscuit since it was introduced.

In the last two or three years in which the Kellogg biscuit has come into my store and assumed a position as an article in demand, I would say shredded wheat sales have fallen off and Kellogg's has come in.

RE-DIRECT EXAMINATION.

THE WITNESS: I order Kellogg's twice as often, and some Kellogg man will come along and ask how long we had it in and if we would like it changed. In the two years I have been there, I never had a shredded wheat man ask me that. They do not only do that for Whole Wheat Biscuit but anything of theirs. If I ask them to change something for me, they readily do so. The National man, Mr. Rickit, comes in and asks me if I need Shredded Whole Wheat Biscuit. If I do, he takes it down.

RE-CROSS-EXAMINATION.

THE WITNESS: You are not to understand from that that the Kellogg people take back shredded wheat because it is slow. It is a pretty good mover.

RE-DIRECT EXAMINATION.

THE WITNESS: We have not had any demonstrations of Whole Wheat Biscuit in our store, just window and store displays. I think they give samples here. No, it was an open front in the box. That is the only thing we had to show, like Plaintiff's Exhibit 161. All the Kellogg's Whole Wheat Biscuit we sell are in the big cartons like Plaintiff's Exhibit 161. We do not handle the little individual-size cartons. Of the two biscuit, shredded wheat is the larger. I believe there is a difference in the number of biscuit in the carton.

RE-CROSS-EXAMINATION.

THE WITNESS: I think that was pointed out to me by the Kellogg representative. He never made any comparison to me, except in so far as to open the package and showed it to me. If he showed me it was fifteen to the box, it was necessarily compared to the shredded wheat biscuit, which is a larger biscuit and has twelve to the box. That is certainly so.

RE-DIRECT EXAMINATION.

THE WITNESS: I never had any customers tell me the Kellogg product was not shredded wheat biscuit, that I know of.

JOHN E. LURIE.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-three, a grocer, with two stores of my own, conducted under the name of Murray Brothers, Inc., at 8450 Grand River Avenue, Detroit, and 214 Washington Drive, Royal Oak. They are general markets, service stores, with self-service features where they can go and help themselves. The store in Detroit has existed nine years and the one in Royal Oak five years.

We handle Kellogg's Whole Wheat in both stores. We also have the other product, Niagara shredded wheat. I have handled the Kellogg biscuit since it came on the market. It was first called Kellogg's Shredded Wheat Biscuit. Since it has been known as Kellogg's Whole Wheat Biscuit, it is selling more rapidly now. There is a consumer demand for it. Some people ask for shredded wheat, and they get Niagara Falls shredded wheat. Some come in and ask for Kellogg's Whole Wheat Biscuit; and some people ask for Kellogg's shredded wheat biscuit. I give them then what they ask for, Kellogg's. Today, I think the two biscuit sell about fifty-fifty, half and half.

I give dealer co-operation to the Kellogg Company, window and store displays. Naturally, those displays help the sale of the Kellogg biscuit. If a customer asked what kind of biscuit is Kellogg's Whole Wheat Biscuit, I would say it is a shredded wheat biscuit. The consumer demand for Kellogg's biscuit has been created, largely, I suppose, through co-operative advertising and the advertising of Kellogg's Whole Wheat Biscuit by the Kellogg Company. We have done co-operative advertising of that product, carried by our stores and referring to it, in newspapers and circulars.

CROSS-EXAMINATION.

THE WITNESS: We advertised it as Kellogg's shredded wheat biscuit, when it was known as such and sold in a package like Plaintiff's Exhibit 165. I do not know if Kellogg was advertising it then. We did. When it first came out under that name, I do not know whether they did or not. The Kellogg Company have furnished us with cuts, whether for the biscuit or not I am not sure.

I have been at this one store nine and a half years. I have been in the grocery business all my life. It is safe to say that I have known those shredded wheat biscuit, like Plaintiff's Exhibit 1, all that time. I have always carried it, and it has always been a good seller. I know that the Shredded Wheat Company has advertised its product very extensively. We had displays of shredded wheat, and I think we have had demonstrations of it. Up to the time I began handling Kellogg's biscuit, I do not believe there was any other product on the market that resembled shredded wheat. As far as I know, that type of biscuit, shredded wheat biscuit, had the field, up to the time Kellogg's biscuit came in. Since that time, Kellogg's biscuit has commenced to sell and has reached a point where I should judge the sales are about equal.

I do not think the present users of Kellogg's Whole Wheat Biscuit are former users of shredded wheat. It is absolutely new business, I think, or a lot of it. I cannot say that is true, but I can say there are a whole lot of new customers for Kellogg's Whole Wheat Biscuit. I get new customers for shredded wheat. They are created, like Whole Wheat Biscuit customers are created. You keep on advertising it and sampling it, and you make new customers. I believe shredded wheat sales today are exactly as great as they were before the Kellogg product came on the

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been in the family ever since I can remember; I imagine, about ten years. The biscuit has not always been the same size. I have noticed a difference. We have had this other biscuit in the house. I knew the difference in the biscuit as soon as it was placed before me. My mother brought the Kellogg product in the house. When it was set before me, I distinguished the difference. I said it was not the same biscuit we had always had, and she said no, that it was a new biscuit Kellogg had put out. I tried it and liked it very much. I noticed immediately it was a smaller biscuit and a difference in taste. It seemed to have more of a flavor and more of a body to it, more compact, and I liked it a good bit better. We have continued to use it since. It has been in the house all the time.

CROSS-EXAMINATION.

THE WITNESS: Before that, I had been using shredded wheat, like Plaintiff's Exhibit 1, the one I have been using a long time. I have had it off and on in the house, but I have also had Kellogg products. I do not mean to say I have had Whole Wheat Biscuit for ten years. I have been eating shredded wheat off and on, about the same length of time we have had Kellogg's biscuit. I did not mean to tell Mr. Clarke I had been using Kellogg's Whole Wheat Biscuit for ten years. Prior to the time I used Kellogg's biscuit, I had been eating shredded wheat and had been familiar with it.

When my mother first set the Kellogg biscuit before me, I saw it was a smaller biscuit. I did not think the Shredded Wheat Company was making a smaller shredded wheat. I knew it was a different product, right away. I thought someone else was making them. My mother brought me the biscuit in a dish, so I did not see the package; but I was told about it. My

mother told me all about it. I knew when I got it that it was a different biscuit, so I was not really taken by surprise. I liked it very much better than the old shredded wheat biscuit. Since then, I have not been using the old but the new.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know any of the Kellogg people. I came to testify here today because somebody came to the house.

MRS. DOROTHY TIEDEMAN.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, no children, no other occupation. I use Kellogg's Whole Wheat Biscuit and buy it in large cartons like this. I have been buying that product about four years. When I went to a friend's house and stayed there overnight, I had it for breakfast. When I went home at noon, I went to the store and got a package. I noticed it was better than the product I had been using. I happened to see the box and bought some for myself. I have continued to use it.

I have used the other shredded wheat, before I used Kellogg's. I like Kellogg's lots better. It is smaller and toasted on both sides. I noticed those qualities the first time I ate it.

I do not know the Kellogg people. Somebody in the store asked me if I would come down today and testify.

CROSS-EXAMINATION.

THE WITNESS: That was Kroger's Store, where I do my purchasing. They also have shredded wheat,

like Plaintiff's Exhibit 1. I have been purchasing that there. I buy Kellogg's Whole Wheat. I do not buy the package like Plaintiff's Exhibit 1; but I used to. I have known it a good while. For quite a number of years before I knew about Kellogg's biscuit, I was buying shredded wheat biscuit. It is safe to say that I have known about that product pretty much all my life. It is an old product, well known. I had it at home when I was a little girl. It was always in the house then, and it was known as shredded wheat then.

The first time I knew about Kellogg's biscuit was when it was served to me while I was visiting my friend's house. I saw the box and went to Kroger's and bought it. I have been using that ever since. I do not use the old shredded wheat any more.

RE-DIRECT EXAMINATION.

THE WITNESS: I have always bought it in this solid-front box. I have never seen any of the cellophane-front boxes.

MRS. MARGUERITE L. BROWN.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, no other occupation, no children. I am a consumer of Kellogg's Whole Wheat Biscuit, having used it about a year and a half. I buy it in packages like Plaintiff's Exhibit 159. I have never had any of the cellophane-front boxes.

I first became acquainted with Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 159, in the Smith store. I saw it on the shelf and tried it, because it said Whole Wheat, that name attracting my attention. At one time I had used that other biscuit with Niagara Falls on. There was nothing about that that occurred

to me in connection with the name Whole Wheat. I did not even know that name. This seemed browner. I thought it meant whole wheat. I did not know. I have continued to use the Kellogg biscuit since.

I have tried the Niagara Falls biscuit, but they seemed soggier. I mean, it seemed to soak up the milk or cream quicker. I have continued to use the Kellogg biscuit and buy it at Kroger's. Smith's did not seem to have it any more. I also noticed that I like the size of Kellogg's biscuit better. The other is too large for us. The small size is just right.

I came to testify today because a man asked us over at the Kroger store and took our name. I do not know any of the other people.

CROSS-EXAMINATION.

THE WITNESS: It was a man in the Kroger store who asked us. I do not know whether he was a Kroger man. At that time I was in there to get something. They had a Kellogg special on, and the Kellogg man got my name and asked me if I would come down.

I had used shredded wheat, like Plaintiff's Exhibit 1, some years ago, I remember, at the Soo, up in Canada. We have not used it much since, because we had more or less cooked cereals. But I did use it years ago, and I am familiar with that package. I have known it as shredded wheat. I bought it a few times in Detroit. Then I saw the Kellogg product on a shelf, tried it, and liked it better. Since then, I have not bought any shredded wheat.

I do not remember examining the reading matter on the shredded wheat package. I see now, Only the genuine, Niagara Falls on the end, The Home of Shredded Wheat. On the bottom of the package I now see shredded whole wheat. I never noticed it before. I see: All the bran in the wheat, and: All the wheat, nothing added, nothing taken away. I never read it

before, I guess. I know, now, that it is whole wheat biscuit. I have found it out since then.

RE-DIRECT EXAMINATION.

THE WITNESS: I have continued to use the Kellogg product. I like the size of it.

FRANK W. MAHAN.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-two; district sales manager for the Kellogg Sales Company. I have been connected with them for eleven years, next June. I was retail salesman for two years and a half and have been branch manager since. I am district sales manager in this district now. I handle the entire State of Michigan, a portion of northern Indiana, and a small portion of Northwestern Ohio, including Toledo. Kellogg's Whole Wheat Biscuit has been on sale in my territory all the time I have been here, five years in April. When I first came here, it was the smaller box, and then in May or June of 1928, they changed to the present style of box and the name, Whole Wheat Biscuit. In this district it has been so known since May of 1928, as I recall.

I have knowledge of such work as has been done in this territory to create consumer demand for Kellogg's biscuit. We have done practically all types of promotional work you can do on cereals: house-to-house sampling. Occasionally, in towns, we have sold direct to consumers, house to house. We have poster displays in the stores, on the floors and in the windows. We have done some merchandising work with the grocers, with a small premium attached to the packages, such as a

book for children. We have sold this product in combination with a number of our other products, in stores on Saturdays. We have mailed samples to a list of selected prospects by R. F. D. and local city delivery. We have distributed coupons in towns, good for a free package with another package bought at the local grocery. I think that would cover all the times.

Those methods have been successful in introducing Kellogg's Whole Wheat Biscuit to consumers. A demand for that product exists among the stores in my territory. There are about thirteen thousand independent stores and approximately two thousand chain-store outlets in my territory. As nearly as I can estimate, I have about fifty-five per cent. distribution of Kellogg's biscuit among the so-called independent grocers, and a little less than that among the chain stores. Those percentages are growing right along. The business is increasing.

I know of Niagara shredded wheat. We are more or less directly in competition with that biscuit in selling Kellogg's Whole Wheat Biscuit. Generally speaking, the retail price of Kellogg's biscuit has been a little higher than that of the Niagara product.

I have used quite a quantity of the cellophane packages like Plaintiff's Exhibit 161, but not all the packages in my territory have been cellophane-front packages. The percentage would vary, because, at different times, our promotional efforts would require their use and other times, they would not. In some places we have had quite an extensive use of that type of package, and in other places we have not. At some time or other that package has been used throughout my territory. I determine the proportion of cellophane fronts and sold fronts used in my territory. The home office charges us with a portion of the additional cost of that cellophane-front package; so, if my local district orders the cellophane fronts rather than the other,

I am charged with more cost than when I use the ordinary non-cellophane-front packages. I prefer the cellophane-front packages.

The name Kellogg's have, of course, been a help in creating a consumer demand for Whole Wheat Biscuit. The rest of the products enjoy a good reputation among the consuming public; and that product, if brought to the attention of a consumer who has used other Kellogg products with satisfaction, helps us in the sale of it. There is an endorsement of quality to the name.

We pride ourselves on the good efforts of the merchandising salesman; but the methods we have used are methods that could be and have been used for the merchandising of any strange product. They are effective methods.

CROSS-EXAMINATION.

THE WITNESS: I am acquainted with the DuPont man who has sponsored most of the cellophane package development on all products in the world. I am sold on the use of cellophane as a merchandising aid on any product which can be properly wrapped in cellophane, to show the consumer what is inside the box. The advantage I claim for it is that the customer can see the product. In this instance he sees the ends of the biscuit through the window and purchases the product on the strength of what he sees. I would not say that entirely, but that has something to do with it, of course. They are not buying blind. They can see what they are getting. I think it adds to the salability of the package to see the biscuit inside.

I was never employed by the Shredded Wheat Company. I have been familiar with shredded wheat a long time, and our Whole Wheat Biscuit we sell competes with the shredded wheat biscuit.

The comparative volume of sales of the two products varies from month to month and one wholesale market to another. Without access to the distributors' books, I could not make even a guess. I did not hear any witnesses testify this morning. If one grocer said he sold two of one to one of the other, I would not want to say that is true of the entire territory I have jurisdiction over; but I do say that Kellogg's Whole Wheat Biscuit has distribution in commercial quantities in my district, in competition with shredded wheat. Possibly some of that distribution is at the expense of shredded wheat. I would think some of it was. I know that it is. I would expect to have some former users of shredded wheat among the users of our Kellogg's Whole Wheat Biscuit. The two products are similar and they answer a similar want.

The Kellogg Company has done newspaper advertising in my territory in a great many towns. We had a general newspaper campaign in the spring of 1932, in which little reading-matter heads with ad lines referring to shredded wheat biscuit were put in the papers. We ran a fairly extensive campaign. Plaintiff's Exhibit 200 was the general style of the reading type of copy run in newspapers in this territory.

Four or five different copies like that, carrying a headline and little reading matter, were run about a year ago in about eighteen towns in Ohio and Indiana.

We have very little to do with the bulk of advertising put out by grocers. At certain times when we are doing work in a town, we solicit definite support from the grocers. The bulk of retail grocer advertising is made up by them. We cannot contact with all advertisers.

I am acquainted with Gilmore's Self-Help Grocery, in Kalamazoo, Michigan. They carry our product. Plaintiff's Exhibit 201-A is the ad of the Gilmore store. I do not think we wrote that copy. I was not in

town the day this happened. We have made suggestions as to the type of copy to run, but we do not prescribe it in all cases. We do suggest copy. We never make advertising allowances to customers in cases like that, in our territory. There is no form or method that I know of, by which dealers are encouraged to advertise our products, by way of a discount or advertising allowance or extension of credit, or anything like that. I do not think I remember the incident, but I think this is Gilmore's ad. I do not know that I would care to identify it. There is such a store in Kalamazoo, and they advertise groceries in the *Kalamazoo Gazette*. I do identify it as a Gilmore ad, although I do not know definitely when it was printed.

(A full page of the same publication containing the same ad was also received in evidence as Plaintiff's Exhibit 201-B.)

I recognize Plaintiff's Exhibit 202 as a standard or regular price list furnished by the Kellogg Company to all regular customers. I do not think the paper is a forgery. I do not know whether it is a standard price list or not. We furnish price lists like this to our regular customers. There is a cut on there of Kellogg's Whole Wheat Biscuit package. The price sheet is dated February 1, 1933.

We have had a customer in Flint, Michigan, the Central Wholesale Company. I have not done much business with him recently. He could still be called a customer. The piece of paper you show me is a new one on me. I do not recognize it as having seen anything like that put out by them. I never saw anything like the second paper you show me, that I recall. I think there was one similar to this. This shows a picture of Kellogg's Whole Wheat package and two biscuit in a dish, to be addressed to store managers. I do not know whether this is identically the same one

I saw; but we have not used this in my district, to the best of my knowledge. One item in a letter is done occasionally. Usually they are in short paragraphs, in bulletin form.

(The sheet referred to was received in evidence and marked "Plaintiff's Exhibit 203," Mr. Clarke stating he would not question it was something done with the knowledge of the Kellogg Company.)

The *Battle Creek Moon Journal* is a well-known advertising medium, a paper of considerable circulation in Michigan, in Battle Creek. Some stores operating under the I. G. A. chain in Michigan are customers of ours. Our products are carried in the I. G. A. Stores in Battle Creek. They do considerable advertising as part of the voluntary chain.

Plaintiff's Exhibit 204 I recognize as an ad of the I. G. A. Stores in the *Battle Creek Moon Journal* of October 21, 1932. When I say I recognize it, I mean I probably did not see this particular one, but it is quite plain to me that it is a tear sheet from that paper, and it is their style of advertising. We did not prepare that ad. That is something the I. G. A. Stores put out themselves. They have their own advertising department.

I have heard there is such a store as E. H. Stillwell, of Kalamazoo, Michigan. I am not acquainted with it, and I do not know that they are one of the I. G. A. Stores. I have seen the style of handbill, like Plaintiff's Exhibit 205, used by the I. G. A. Stores. I do not know that I have seen this one. I recognize it as the style of advertising adopted by the I. G. A. Stores.

I told Mr. Clarke the business in Kellogg's Whole Wheat is a growing business. In 1933, the business grew over the year before it. In the current year, we

market, even better. So I do not think Kellogg has taken away any shredded wheat customers. So far as I know, it is a shredded wheat product. My own personal opinion is that Kellogg's Whole Wheat Biscuit is a whole wheat biscuit that has been manufactured of so-called shredded wheat and made into a biscuit; and I believe it fills or occupies a part of the field the Shredded Wheat Company occupied.

I call it shredded wheat biscuit because it has been sold to me in that form. It has been described to me as shredded whole wheat biscuit. There is the box there that tells you that. They called their shredded wheat at one time. I would still describe the Whole Wheat Biscuit which was formerly sold as Shredded Wheat, as shredded wheat today. I really could not think of anything else to call it when Mr. Clarke asked me that. It is a whole wheat biscuit which is shredded, so that is what it is. It is hard for me to tell you exactly what I mean by shredded. I take for granted that it is shredded, because it is like shredded coconut, cut up in long, fine parts. When I speak of a thing being shredded, I mean it is cut up. I never went to Niagara Falls and saw them make it. I do not know how the so-called shreds are made.

Assuming it is true that the wheat berry is pressed between rollers and caused to come out in a long string, that is a definition of shredded. It is not cut up; it is pressed, if you assume that to be true. That is my idea of shredding. I never saw a corn shredder and do not know what it does to corn. I have sold shredded coconut all my life, and I do not know how they get it into that form. I sell shredded codfish. I know what it is like, sort of torn up into little threads.

MRS. HARRIET YOUNG.

Deposition taken at Detroit, Michigan, March 17, 1933.

Direct Examination.

The Witness: I am a housewife, also musician. I am a user of Kellogg's Whole Wheat Biscuit and buy it in a carton like Plaintiff's Exhibit 159, I believe, but not with the new cartons with the cellophane front. I have been a user or consumer of Kellogg's Whole Wheat Biscuit about six months, first became introduced to it by noticing it on the shelf in the grocery. We were about out of shredded wheat, and I asked if that was a shredded wheat. They said yes, and I tried it and like it, because it is a smaller cake. I have continued to use it since that time. I like it because it is a smaller biscuit. I could only use one and a half of the other or larger biscuit. I use two of Kellogg's biscuit in a plate.

I came here today as a witness because a Mr. Mahan, of the Kellogg Company, came to the door. I did not know him before. The grocer, he said, had given him my name.

Cross-Examination.

The Witness: I first came to know Kellogg's biscuit by noticing it on the shelf of a grocery. I was doing my own buying, happened to be in the store. The package I then saw did not have a window showing the biscuit. It had a picture with the biscuit in a saucer. I asked the grocer whether that was shredded wheat. I did not know they were putting it out, before. He said it was shredded wheat put out by the Kellogg Company. Before that, I had been a buyer of corn flakes and of shredded wheat in a package like Plaintiff's Exhibit 1. That was the larger bis-

cuit. I had used that before Kellogg's. I started using Kellogg biscuit about six months ago. Since then, we have not bought shredded wheat, but we have bought Kellogg's. I use two of the Kellogg's and used to use one and a half shredded wheat before.

By new package, I mean the window package which I saw here for the first time. I do not recall seeing or buying a package like Plaintiff's Exhibit 148. I have a family, one baby and my husband. My husband uses shredded wheat. I put it in a pan with some butter, put a lid on the top and steam the butter into it. I put it right on the stove. If the oven is lit, I put it in. I serve it hot.

RE-DIRECT EXAMINATION.

THE WITNESS: My husband likes the Kellogg biscuit. He did not notice the difference specially, other than that I told him I was getting it because they were the smaller cakes. Every time he was getting one and a half.

MRS. ANNA LETCHER.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, have no other occupation. I have no children and my husband is dead. I am a user of Kellogg's Whole Wheat Biscuit. I buy it in cartons, like Plaintiff's Exhibit 159. I have been using that biscuit for two years, anyway. That is Kellogg's biscuit. It is a small square biscuit about that size, toasted on both sides. I first became acquainted with it over at Kroger's. That is the kind they sell. We looked at it, tried it, and decided it was the best kind to get. That is how I became acquainted with it. They said they thought it was better. They

had the other at the time, but we took Kellogg's. I liked it because it is more toasted than the other, smaller in size, and better. The other is a longer biscuit. We have continued to use it and still use it and like it.

I came here today because we were over at Kroger's and they asked our name and some gentleman came to my door. I did not know who he was and do not know any of the Kellogg people.

CROSS-EXAMINATION.

THE WITNESS: Before I met this biscuit in Kroger's store, I had not been using it. I knew about shredded wheat before that for a great many years. They are a well-known product, always known as shredded wheat; but we did not have it until we got this biscuit. We were at the house of some old friends one afternoon and they had Kellogg's biscuit. So then we went to Kroger's and got it. They told us they thought it was better. They had another product there, too, something on the order of Plaintiff's Exhibit 1. They showed us both; but we took what we wanted, Kellogg's. They told us it was smaller than the other, tasted better. I would rather have it, liked it better.

RE-DIRECT EXAMINATION.

THE WITNESS: I had already tried the Kellogg biscuit at my friend's house.

CHESTER WILLIAM CARR.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am twenty-two, not employed at present, a resident of Detroit, and a user or consumer of Kellogg's Whole Wheat Biscuit. That product has

answer what was asked me. He told me he would pay my expenses.

I recognize the old shredded wheat biscuit right away, and Plaintiff's Exhibit 1. I have used that a long time, for many years. I have always been familiar with it as shredded wheat. I recognize the picture of Niagara Falls. I have been there and in the factory. I have known that biscuit for a long time and have been a user of it in my home.

When I saw the Kellogg biscuit at the house of a friend, it looked the same to me as the shredded wheat biscuit I have always known, as far as appearance was concerned. It was a smaller biscuit and flavored a little differently, and I thought I liked it a little better. I have ceased buying shredded wheat and turned over to Kellogg's biscuit.

MRS. MABEL M. POCOCK.

Deposition taken at Detroit, Michigan, March 17, 1933.

Direct Examination.

The Witness: I am a housewife, with one child. I have used Kellogg's Whole Wheat Biscuit. My first package was the little individual package with two biscuit in it, sent a friend of mine through the mail. She liked it so well, she told me to try Kellogg's. Then I bought it in the grocery. I asked for Kellogg's Whole Wheat Biscuit. It was evidently something new when I asked for it. It was not in a package with cellophane; it was a package like Plaintiff's Exhibit 167. I have continued to use Kellogg's biscuit. I like the size of it, the smaller biscuit. I was previously familiar with the Niagara Falls biscuit and had bought it for years; but I prefer the size of Kellogg's biscuit and I have continued to use it.

CROSS-EXAMINATION.

THE WITNESS: I have used the Niagara Falls biscuit for years. I remember I ate cold cereal. From the time I was a child we have had it in the house. That has always been familiar to me and always known as shredded wheat. It has become a sort of household word, more or less.

It was not until I saw this little package that I knew the Kellogg Company was making it. I recognized it as the biscuit with which I was so familiar. I saw it in the small package, ate it, and liked it. To my mind, it was not quite as coarse in the shreds as the other biscuit. So, from then on, I became a user of the Kellogg product. I am no longer a user of shredded wheat. I do not think it has been as long as two years since I started using Kellogg's. Before that, I remember I used shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know anybody connected with either of the companies. I just came down as a friend.

JULIUS D. FRANK.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer connected with Frank M. Davidson & Company. I am president of the concern and have been for the last fifteen years. That is a wholesale grocers' organization. We sponsor the stores of the Minute Groceries, which have been in existence about a year and a half. We handle Kellogg's Whole Wheat Biscuit and have from the

time they started to manufacture it. It seems to me they put them out once as Kellogg's Whole Wheat Biscuit, and then they sort of discontinued them for awhile. We began to handle them from the time they have been on the market as Kellogg's Whole Wheat Biscuit.

We find a demand for them which is increasing right along. The Minute Groceries handle Kellogg's Whole Wheat Biscuit. Some of them carry the other brand, Niagara shredded wheat, and some of them do not. All or nearly all carry Kellogg's Whole Wheat Biscuit. They give dealer co-operation to the sale of Kellogg's biscuit and push them. They are advertised to the public under the name of the Minute Groceries. The biscuits are advertised under the name of Kellogg's Whole Wheat Biscuit. We have a man who takes care of arranging store displays or special sales for our group of stores. We have given store and window displays to Kellogg's biscuit in those Minute stores.

CROSS-EXAMINATION.

THE WITNESS: The Minute chain is about a year and a half old. Before, our house had not been a sponsor for any retail groceries. Those we developed in the wholesale trade. We continue to sell our trade generally, as well as to service those stores. There are about sixty-five or seventy in the chain. They come and go. They are independent retailers. They join our organization to participate in the combined buying power. We have uniform window displays and signs, and a green front for the stores; but the shelving and arrangement are left to the owner of the store. We have a man who makes it his business to help the merchants advertise and we get out circulars for them. We do not use the newspapers. Our house has been

in business about eighteen years, and I have been connected with it and with the grocery business just that time.

During that period, I have always carried shredded wheat. It is a familiar package, like Plaintiff's Exhibit 1. We list it just as shredded wheat. When shredded wheat is asked for, we furnish this, shredded wheat made at Niagara Falls. We give them that. The trade do not call them shredded wheat made at Niagara Falls; they just say shredded wheat. Sometimes they will return it and say they want Kellogg's Whole Wheat Biscuit. Most of them will ask for biscuits. Sometimes a foreigner will come in and not know just how to call for it. You have to bring out the package and show it to them. The average customer who asks for shredded wheat knows what he wants, and we know what he wants, the Niagara Falls shredded wheat. That has been the case for many years, and we do not try to substitute it. If he wants shredded wheat, we give him what he asks for. If he wants Whole Wheat Biscuit, we give him Whole Wheat Biscuit. There is sometimes confusion on the part of some foreigners and some people. Foreign stores usually do not handle cereals of any kind.

Sometimes people say they want shredded wheat. Then we ask them which kind they want, Kellogg's Whole Wheat Biscuit or Niagara, and we show them the packages and give them what they want. If we are in doubt, sometimes, as to what a man wants, we show him both products and let him make his selection. Not very often do we find they mean Kellogg's when they say shredded wheat. It has happened occasionally. To my mind, however, and to that of most of my customers, they say shredded wheat, meaning this product made at Niagara Falls.

RE-DIRECT EXAMINATION.

THE WITNESS: I service other accounts besides these stores we sponsor. We have a demand from those accounts for Kellogg's Whole Wheat Biscuit also.

JOSEPH L. MOLITOR.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer, under the name of Forester & Molitor. That firm has been in existence since July, 1922. I have been in the grocery business since 1908, also in the wholesale end, with Rohrig & Forester. Both Rohrigs died; then it was the present firm. I am just a partner in that concern. We run a cash-and-carry, also service, delivery, and charge. We have three salesmen who travel around Detroit. We carry Kellogg's Whole Wheat Biscuit, having had them ever since they came on the market. We find there is a demand for that product among the trade. I believe it has shown a little increase. I handled the product known as Niagara shredded wheat, at one time. I do not have any in stock right now and have not had any in for some time. I do not believe we bought over three shipments since the National took them over. I believe we had one shipment of ten or fifteen cases the latter part of last year.

The National service the trade with the Niagara product direct, most of them. That is one reason why we do not handle it. I have never experienced any confusion in my store between Kellogg's Whole Wheat Biscuit and the Niagara shredded wheat biscuit. When

the National took over shredded wheat, we did not stock it. When we had calls for shredded wheat biscuit, we would have a package of Kellogg's on our counter or the man had it with him, and he would tell them we do not have shredded wheat, but we handle Kellogg's, which we think better than shredded wheat, and it was what we considered a profitable line, where they would have to buy a certain quantity in order to meet our prices. I am referring to the Niagara shredded wheat buyer. Then, of course, it would be convenient to order the National shredded wheat, when they come around to sell their cookies. If any of our trade demanded shredded wheat and would not take anything else, we would just give it to them. Our business has only two independent stores. The rest are chain stores. All or most of our customers regularly carry Kellogg's Whole Wheat Biscuit. A lot of them do not. I do not believe I could state the proportion.

CROSS-EXAMINATION.

THE WITNESS: We threw out shredded wheat when the National took it over, because we could not profitably handle it when they were distributing it direct. I believe chain stores were then selling them two for nineteen. They cost us a dollar twenty-one flat, at that time. I do not know whether that is the case now. Once in a while we now have a demand for shredded wheat. At that time we tried to substitute Kellogg's Whole Wheat Biscuit for shredded wheat. We try that, and, if we cannot, we send out and get shredded wheat, if it is a good-paying customer. If not, we tell him we have not got it and let him find it for himself.

Having been in the grocery business since 1906, I knew shredded wheat almost from the start. I have handled a lot of it. Before National took it over, we

handled it very extensively all the time. It was a very well known product, and, if anyone asked for shredded wheat, there was never any doubt that they meant shredded wheat, like Plaintiff's Exhibit 1. I would say that it is fair to say that shredded wheat, during the first twenty-seven years of this century, became a household word, known throughout the country.

XQ. 45. My question now is: You find that the Kellogg Whole Wheat finds ready substitute for shredded wheat; do you not?

A. Yes, that furnishes a substitute.

THE WITNESS: If a person asks for shredded wheat, we try to give him Kellogg's. We say we do not handle shredded wheat, but we will give them Kellogg's, which we say is practically the same. I have told a lot of people it is practically the same, except there are fifteen Kellogg biscuit and only twelve shredded wheat biscuit. I tell my customers that, too. I have told a lot of folks. Sometimes I can sell Kellogg's to a customer who asks for shredded wheat, not invariably. Sometimes I have to give them shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I have not told them this is shredded wheat made by the Kellogg Company. We could not get by with that. I do not believe I could state truthfully how many accounts we handle. We are just a medium-sized wholesale house.

LOUIS LIGHTSTONE.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer, under my own name. I am owner. Ours is a cash-and-carry wholesale grocery, and a very little service. We just

serve Detroit and a little suburban. We carry Kellogg's Whole Wheat Biscuit. I think we have carried it since they started to manufacture it. We find there is a demand for it in our house. That demand is increasing. We carry the other product, also, Niagara shredded wheat. We find no confusion between the two in our house. We have never had either one returned with the statement they wanted the other kind. They get whatever they ask me for. One they order as shredded wheat biscuit, and this one is Keilogg's Whole Wheat Biscuit. That is the way they order it.

CROSS-EXAMINATION.

THE WITNESS: My customers are retail grocers. There is no difficulty in their minds distinguishing what they want. When they want shredded wheat, they say so. When they want Kellogg's, they say so. I have been in the grocery business about twenty-five or twenty-six years. I am quite familiar with shredded wheat biscuit. I have sold lots of it several years ago. I still carry it and sell it. It sells, but not so much as Kellogg's and no so much as it used to. I know the reason. It is distributed direct to our customers. I still stock about fifteen cases at a time. It is safe to say that I have stocked it under that form and name for all the time I have handled it, have been buying it right along.

EMMERAN ANDRE.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer. The name of my organization is Alter & Andre, in which I am a partner. That is both service and cash-and-carry, in the east side of Detroit. We carry Kellogg's Whole

Wheat Biscuit and have ever since it came out. There is a demand from our retail customers for that product. I think it is an increasing demand. We also handle Niagara shredded wheat. The National Biscuit Company now owns that product. In many instances, it services its retailer direct with that product. We still have some business left in the National product. I think that probably is from some grocers who do not handle the National cracker line and who look for me to furnish them with National shredded wheat. That is my personal view of it. I do not get around to the stores.

I experience no confusion between those two products. I think they are the same general kind of product. Kellogg's product is ordered as Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: It is ordered under the name Kellogg's shredded wheat. Some of our customers call it that. We handle about twenty-five cases of Kellogg's biscuit a month and seventy-five to a hundred cases of dozens, or bundles, of National shredded wheat. I have been in the grocery business for myself about two and a half years. I have been connected with it for twenty-two years. That has been my life experience. During all that time I have handled shredded wheat and have been familiar with it. It has been a familiar product to the trade and a ready seller at all times. My retail trade is familiar with it and has ordered it constantly. When our retailers send in an order for shredded wheat, that is what we give them. I would not say our business in shredded wheat has fallen off very much. It has continued pretty steady.

E. F. BRADEN.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocery buyer with the Kroger Company, a chain store and retail grocery organization, with approximately forty-eight hundred stores in the central and western States. We are the buying organization for the Detroit branch only, on certain commodities. My organization handles Kellogg's Whole Wheat Biscuit. We buy it direct from the Kellogg Company for our own Detroit branch stores. There is a steady demand on us for Kellogg's Whole Wheat Biscuit. A certain amount of it moves out of our warehouse every week.

CROSS-EXAMINATION.

THE WITNESS: There are approximately six hundred and ninety retail outlets under our Detroit branch. Shredded wheat is purchased, contracted for, in the general office of the firm, and it is sent out on store delivery, as we do not stock it in the warehouse. It is delivered with the other National Biscuit line, and our stores are serviced by the National Biscuit salesmen. We have handled shredded wheat for many, many years. It was handled many years before I came here. I have been familiar with it all my life. I would say there is a demand for shredded wheat. It moves with pretty good steadiness through our retail outlets; and it has always been the same, as long as I have been here. I have been in the grocery business three years, in this office here, with Kroger & Company.

are not yet selling more than a year ago, compared to the same period. We are slightly under. When I said 1933 over 1932, I meant 1932 over 1931, the two years. That is already compared to a similar period last year. This has been somewhat less than it was a year ago. In 1932 over 1931, there was an increase.

I said the retail price of Kellogg's biscuit, in some instances, is higher than that of shredded wheat. I got that information from a number of stores and seeing advertisements, from my own observation, and from information from salesmen. The differential in price is quite general. In very few instances the reverse is true. I have run across a few places where the retail price of the Kellogg biscuit is less than that of Niagara shredded wheat. It is apparently generally true that the wholesale price of Kellogg's is less than the price of shredded wheat, if you equalize the quantities. The Niagara product has a price structure that is a little different than ours, in that we sell through only one type of distributor. Some wholesale prices by regular wholesale grocers on the Niagara product are quite a little higher than ours. In many other instances, with direct contact, they buy their product a little cheaper than they can buy ours from the wholesaler.

RE-DIRECT EXAMINATION.

THE WITNESS: There are self-service stores in our territory, like the Piggly-Wiggly chain and that type, a few.

I have charge of and knowledge of the restaurant trade in this territory. We have some distribution in restaurants, but the percentage is hard for me to estimate. I do not personally contact many restaurants. It is just a moderate distribution. Certain area, as is the case with retail stores, are better than

others. It is not anywhere near complete distribution. It will probably run 20 per cent., just as an estimate. Most of our restaurant distribution is in the individual package. Our men are more or less after the sale of those. We push the sale of individuals in restaurants, as against the large package. We try to discourage the distribution of the big box in restaurants. The distribution to the retail restaurant trade is through the wholesale grocer, generally. The National service the Niagara product through their own organization, from their own wagons, also through wholesale grocers.

The Kellogg Company pushes the sale of its Whole Wheat Biscuit to the retail grocer through their own salesmen. I understand the Niagara shredded wheat is sold by a representative of the National Biscuit Company, along with their biscuits, also through other wholesale grocers.

The men who sell shredded wheat for the National handle the rest of the National cracker line, but not exclusively. I understand some of their men specialize on shredded wheat biscuit. That has been so in this territory possibly two years. Before that there was a time when the Niagara shredded wheat was apparently distributed exclusively by the cracker men here.

In most of the tests I have seen made, such as cigars, cigarettes, candies and macaroni and things of that kind, the use of cellophane has resulted in an increased sale of the product.

I think I am stating the policy of the company when I say my understanding is that we call all our products by distinctive names. We refer to them in all our correspondence, billing, and so forth, by the complete name. The name of this product under which it is pushed in this territory, is Whole Wheat Biscuit.

In answering as to decrease or increase of business on Kellogg's biscuit, I based my estimate on compar-

ing the year 1932 to the year 1931 and also the just elapsed period of 1933 with the same period in 1932. In the latter instance I found it to be decreasing.

RE-CROSS-EXAMINATION.

THE WITNESS: On the Kellogg biscuit package, it is spoken of as a shredded wheat product, and, on the other end, a reference is made to shredded wheat in its most delicious form. We call it Whole Wheat Biscuit in the correspondence, orders, and so forth. It is at times called shredded wheat.

It is my belief that I am telling the truth when I say it is a shredded wheat product. I do not think the Kellogg Company is deliberately lying when they print on their package that this is a shredded wheat product.

RXQ. 159. You do not recognize the expression "shredded wheat," used by the other company for their menus, as a trade name or something like that, do you?

A. What do you mean by a trade name? Do you mean what I think of the trade name? For instance, corn flakes is a trade name. That is the trade name of a product.

RXQ. 160. Corn flakes may be the trade name of a product, but it is recognized as a fully descriptive term, is it not? In other words, there are other corn flakes on the market, and the Kellogg Company has not stopped them?

A. Well, by trade name, do you mean something like Kodak or Uneeda?

RXQ. 161. Yes, I do.

A. Well, of course, my viewpoint in this thing has been slightly distorted, as you may realize——

RXQ. 162. Yes, I think so, or slightly colored?

A. But I never regarded shredded wheat as Uneeda Biscuit or Kodak, the trade name.

THE WITNESS: I do not regard shredded wheat as a trade name or as the name of a product. It does describe the product, in my estimation. That does not change it; but, as I say, my viewpoint may be somewhat distorted, due to my experience in the wholesale grocery, and so forth.

MRS. HELEN E. WAUGH.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with one child. I am a user of Kellogg's Whole Wheat Biscuit. I have used Kellogg's for years and years. I have used their Whole Wheat Biscuit for the last year. A friend of mine asked me if I had tried the toasted biscuit. I asked for it the next time I went to the store; Kellogg's toasted biscuit. That was like Plaintiff's Exhibit 159. I liked it. I had used the other biscuit, Niagara shredded wheat, lots of times, many years ago. As compared with it, I liked Kellogg's biscuit better, because it seemed browner and more toasted. I liked the size of it better, because I do not have so much left over. It takes the biscuit with cream. If you want another, you can have it. One is usually the right amount.

I came here to testify because one of the salesmen came to our house and asked me if I would come down. I did not know him before.

CROSS-EXAMINATION.

THE WITNESS: He did not even know my name when he came to the door. He asked me if I used Kellogg's biscuit and if I would mind testifying. He assured me there would be nothing to it if I would just

CHARLES E. DENISON.

Deposition taken at Syracuse, New York, March 20, 1933.

Direct Examination.

The Witness: I am thirty-nine, a storekeeper, owning my own store. I have been in the general grocery business about ten and a half years. I have owned the property two and a half years, rented it before that. I have a general grocery, post office, hardware, drugs, dry goods and like that. I have a delivery service with two trucks, and a pleasure car we use taking orders. There are three on the road most of the time. We take orders one day and deliver another. On a small route, we will take orders in the morning and deliver in the afternoon. Three-quarters of our business is done on the road and one-quarter in the store. On the road, our men take orders and deliver them at the houses. We have done that for years.

We handle Kellogg's Whole Wheat Biscuit, and have done so about since it has been on the market, three or four years; quite a while. There is a consumer demand for that product in my store. It sells right along. It is asked for as Whole Wheat Biscuit.

We also handle Niagara shredded wheat. It is generally asked for as shredded wheat. I believe the two products sell about the same in our store. Generally speaking, I think Kellogg's sells a little bit better. Over a period of time, they usually have more sales. They co-operate with us more than the shredded wheat folks do. Kellogg gives us sales lasting a week, because our routes take almost a week to cover. He lets us take two packages and give one free. We got rid of a dandy lot at that time. Our own wagons help to make that sale. We have those specials for nearly every week, usually. We buy about five or six different articles in on specials, or we want to

close out seasonable things. We use specials every week. We sold Kellogg's Corn Flakes as a special last week. It just happened one jobber had a specially good profit on it. I co-operated with him and put a sale on. The Kellogg Company does some sampling through us, our trade being through the country. About half the trade is off side roads into the country from the state road between Troy and Schenectady. They will come along and sample the state road, and they will not touch the side roads. They usually leave the samples with me. Mr. Niederman is nice about it. He knows my class of trade and, if he leaves me the samples, I will give them out. He usually co-operates and leaves them with me. I put them in the orders and see they get them. I usually get good results from samples.

Sometimes they bring them in and ask us to prepare the samples, but sometimes they are prepared by Kellogg. We have about three hundred customers and usually try to get enough samples for all. We regard that as co-operation from the manufacturer.

Both products are right on the shelf, along with the other cereals. Kellogg's is on one shelf, and shredded wheat is just above it, on the next shelf. Cereals are all in one section. The shelf just fits one package. I usually have the same type of goods alongside each other, like Cream of Wheat and Wheatena. On the top shelf I have Corn Flakes and Post Toasties. It happens the shelves are not all the same size. We have to have Kellogg's on one and shredded wheat on the next shelf up.

Since the Kellogg Company has been in the field with Whole Wheat Biscuit, I should not think I have noticed any falling off in the general demand for shredded wheat and Kellogg's combined. I should think it would be a little bit more, if anything, because we have had quite a few sales. I think more wheat

biscuits of Kellogg's or shredded wheat are sold than there were heretofore. Sometimes folks will buy Kellogg's biscuit and will then go back to shredded wheat, if they have used it for years. I have some customers do that. Sometimes, they will continue to use Kellogg's Whole Wheat. I know there is more of that type of goods sold. There cannot help but be, when you are pounding samples and sales onto them.

CROSS-EXAMINATION.

THE WITNESS: I cannot say that a considerable portion of the distribution enjoyed by Kellogg's Biscuit now is at the expense of Shredded Wheat. Naturally, they are trying to sell their product. Possibly it has detracted from the sale of shredded wheat in a few cases. I would not say at all that all the business which Kellogg enjoys on its Whole Wheat Biscuit is new consumers, who had never eaten it before. Some of our customers who have been users and buyers of shredded wheat will buy Kellogg's, and some of them will stay with it. Some of them will go back to shredded wheat. It is possible that Kellogg's Whole Wheat Biscuit, which looks like shredded wheat, occupies some of the field which was formerly occupied by shredded wheat. I have known this shredded wheat, like Plaintiff's Exhibit 1, ever since I have been in business. I recognize the package. The biscuit has always been about the same as it is today. For many years, it was the only biscuit of that kind; and it became a very well-known product. It was always a very good seller, but not as much as some cereals, and it was always known by the expression "shredded wheat." Since the Kellogg biscuit came on the market, I think the general consumption of that particular type of product, taking both as a whole, has increased. This co-operation I get from the Kellogg Company is

something I would naturally expect when they are bringing out something new; but most manufacturers do not continue to co-operate with you quite as much as they do on their cereal line. They are quite aggressive and push hard on all their cereal line. I do not believe their aggression is particularly strong on Whole Wheat Biscuit, because we have had other sales on other products, like Corn Flakes and Pep. We have had campaigns on their other products.

I think the last samples they gave us were the large package. We sold two for nineteen and gave one free, within the last two months. We possibly sold some to people who had been using shredded wheat; not a lot of it; because we deal with a few people who buy shredded wheat only and who never buy anything else. People buy it occasionally when there is a sale and probably go back to the other. I guess there was a time when they used the small packages for samples. It seems to me I can place that small package, with two biscuit. I know we had the small package of other cereals at times. Defendant's Exhibit 70 is the package I had in mind. I think I had some. It might have been one with one biscuit. That seems a little bigger than the one I had. I may be thinking of some other cereals. Pep and other things are about half that size. Maybe I had the wheat biscuit in envelopes, I think marked Kellogg's. The only packages, I guess, were like Pep and those things. I do not recall that one. It seems to be thicker than the samples I had.

Shredded wheat has had very little sampling campaigns. I have known that shredded wheat has been sampled from house to house; but I do not know that they co-operated through me. If they have, it has been quite a little while ago.

I know that shredded wheat has been advertised quite extensively through the years and that created

a large consumer demand for its product. We have a great many customers who always buy shredded wheat and do not take anything else. I would not say a great many. I have some customers who take only shredded wheat; but I cannot say a great many, because there are not enough who buy it. A case does me about a week, so I would not call it a great many. There are thirty-six packages to a case.

We have, for some time, sold Kellogg's a cent cheaper than shredded wheat. Sometimes the boys will mention that, if they prefer it. If you know your customer and she asks for shredded wheat, you put down shredded wheat. After so many years acquaintance with your customers, you cannot put down one thing when she asks for the other. I pretty nearly know their wants. Sometimes my clerks say it is a cent cheaper. That sometimes helps to sell it. I always try to work for the interest of my customers. I have made a lot of friends. I can make as much selling it at eleven cents as I do Shredded Wheat at twelve. For a couple of months we sold two for nineteen and got quite a bit of selling, on Kellogg's.

RE-DIRECT EXAMINATION.

THE WITNESS: As I said in connection with having my boys tell them Kellogg's is a cent less, I try to work for my customers. I mean I regard that as a benefit to the customer, to tell her she can get the product for a cent less. I never inferred, to my knowledge, that one was any better than the other. I do not know the boys ever have. When we have sales, we drive what we are selling. The price being a cent cheaper, we co-operate and are getting pretty good distribution on it. I consider it perfectly legitimate to have my boys say they can have another product a cent cheaper. I am looking to the interest of the customers, if they can buy a product somewhat similar for the same price.

RE-CROSS-EXAMINATION.

THE WITNESS: The products are similar.

RE-DIRECT EXAMINATION.

THE WITNESS: Kellogg's biscuit is a shredded biscuit, just as much a shredded biscuit, I think, as the other one; not quite as large but about the same total weight in the boxes, more of the biscuits in the box. I know what my customers want and invariably give it to them. Most usually, having dealt so many years with them, if they ask for a certain kind of soap, you do not give them something else. If a customer asks for shredded wheat, she gets the Niagara product. If they ask for Kellogg's shredded wheat, we give them Kellogg's. "Kell. W. Bis." is the way we get our orders on them. On the other we say "S. W." I have heard them say they want the other Shredded Wheat made by Kellogg. It is no fault of ours that they ask for it. I try to mention Whole Wheat Biscuit; but it is shredded wheat.

I do not know that I have had any confusion between those two products. Usually, if the word is split like that, we make sure what they want when we send it. When you go around to customers out in the country, you want your orders pretty nearly right. If we send them something not ordered, it means a trip of a mile or so to rectify it, which does not pay.

RE-CROSS-EXAMINATION.

THE WITNESS: I called Kellogg's biscuit shredded wheat so promptly because I think it is shredded wheat. It is wheat biscuit and shredded similar to Shredded Wheat. I called it shredded biscuit or shredded wheat right away, because it is shredded biscuit. We are just talking shredded wheat here. When you come into a store where there are thirty different cereals, shredded

wheat is only one of Kellogg's, whereas here, we are speaking of only shredded wheat biscuit. When I have a biscuit like Kellogg's and am asked to describe it, the only thing I can think of to call it is shredded wheat biscuit. It is shredded biscuit.

RXQ. 94. You call it shredded biscuit; and the only reason you call it shredded wheat biscuit is because it is like that biscuit that you have known for some twenty years that is called shredded wheat; is that right?

A. Well, yes, that is a reason.

THE WITNESS: I can think of another designation. We call them Whole Wheat. I do not know that I have ever spoken of it as Kellogg's shredded wheat biscuit. I will admit our customers sometimes do; but we call it Kellogg's Whole Wheat, and they will say shredded wheat made by Kellogg. That is so rare it is not worth speaking of. In my experience, they invariably ask for Whole Wheat Biscuit.

When Mr. Clarke asked me what kind of biscuit it was, I immediately said it is shredded wheat biscuit; and it is. I would not call it shredded wheat biscuit, because that is the name of your biscuit; but I would call it shredded biscuit. Shredded wheat is the name that the National product has always been known by. The National product is shredded wheat. It is possible to speak of Kellogg's as shredded wheat; but usually, they want Kellogg's Whole Wheat or Kellogg's shredded biscuit. They speak of the latter as much as the first.

When the Shredded Wheat Company or whoever originated this biscuit put it out, I believe there was nothing anywhere like it, then; because I was in business some time before I started getting Kellogg's. I do not know just how long ago it was. I have not the least idea how long shredded wheat has been on the market. I know it has been ever since I have been in

business; and I know it was always known as that product. It was always called shredded wheat. When anybody sees a biscuit made in the same manner, I do not know there is anything else you could call it. That is a shredded biscuit. I do not know that the boxes resemble each other. There is some resemblance when you go into detail.

RE-DIRECT EXAMINATION.

THE WITNESS: As a dealer, I find no confusion between the two products. If we are not sure of it when the customer asks one time, we ask a second time. There is no need for confusion.

RE-CROSS-EXAMINATION.

THE WITNESS: As far as I am concerned, there is no confusion between the two. I am satisfied they are made up in the two boxes with enough difference so I can sell them and not be confused.

BURTON A. MILLER.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am treasurer of the Hudson Food Products Company, a chain grocery store organization with twenty-one stores located at Schenectady, Saratoga, Glens Falls, Hudson Falls, Schuylerville, South Glens Falls, Altamont, and Scotia. I guess that covers them. They are not self-service stores. As a chain, they run combined newspaper advertisements and make window displays in connection therewith.

Our stores handle Kellogg's Whole Wheat Biscuit. I think Plaintiff's Exhibit 167 is the package.

We have no packages with cellophane fronts. I have not seen any yet. They might have gone through without my noticing, however.

There is a consumer demand for Kellogg's Whole Wheat Biscuit in our stores. It is asked for as Whole Wheat. We also handle the other product, Niagara shredded wheat, which is asked for as shredded wheat. There is no confusion between those products, to my knowledge. I have heard no complaint about it; and I have not heard of anybody returning any. As a rough estimate, I would say we sell about one-third as many Kellogg's biscuit as we do of shredded wheat. We advertise the product and various other Kellogg items. We have advertised it as Kellogg's Whole Wheat Biscuit. When we advertise it, we invariably give window displays on it. At times we make specials of some Kellogg items. There may be advertising on those items. You have six of them. We make a window display. Some of them you can and some you cannot. On the large packages, we make a display on the floor. Our window displays are our specials for that week. We have done that with Kellogg's Whole Wheat Biscuit. I know Kellogg's have also worked on it to create consumer demand. Samples have been sent around from time to time, and there has been newspaper advertising on Kellogg's Whole Wheat Biscuit, and Kellogg products.

The demand for Kellogg's biscuit in the last year has been slightly increasing. It is hard to say whether other cereals cut into the sales of shredded wheat and Kellogg's Whole Wheat. That is a new product, selling pretty rapidly. What cereal that particular product has been eating into I do not know. I know Shredded Wheat have not been as good as they were. I have not checked up to see what cereals they were eating into most; but other cereals of that kind are eating into the sale of other cereals.

We do not get from the National Biscuit Company as much co-operation in creating consumer demand for the product as we do from the Kellogg Company, which gives us more co-operation. We do not handle the rest of the National Biscuit line the cracker line. We just handle shredded wheat and the dog biscuits. We handle the whole Kellogg line of cereals. I cannot say now whether we get the the regular seventeen and a half per cent. discount on our purchases of shredded wheat. I do not know. I think we are, but I am not positive. I have not been doing the buying for some time. We buy the National shredded wheat from the National Biscuit Company. Kellogg biscuit is bought direct from the Kellogg Company. Generally speaking, on cereals, we do not deal with jobbers but all direct. The National happens to be in the same block with us. When we want their merchandise, we go over and get it. We do not handle the general cracker line of the National Biscuit Company.

We have Friday and Saturday specials of Kellogg. We advertise Thursday night and Friday morning for the Friday and Saturday business. Generally speaking, it is half the week's business. The displays are in the whole week. I think we had some Kellogg demonstrations years ago, but not recently, as I recall.

CROSS-EXAMINATION.

THE WITNESS: We advertise in three newspapers and we carry in those advertisements the usual Kellogg items. We do not advertise Shredded Wheat any more. We used to. When we carried Shredded Wheat, there was no other cereal in our store like it, because Shredded Wheat at that time was being featured by others at a below-cost price. Some of our managers thought we had to feature Shredded Wheat to meet competition. We thought that was error. Some five

CHARLES CONRAD BRAUNHARDT.

Deposition taken at Syracuse, New York, March 20, 1933.

Direct Examination.

The Witness: I am forty-eight, a grocery man, owning my own meat and grocery business, but not the building, consisting of two stores with a partition between, meat on one side and groceries on the other. I conduct both stores. I am a member of the Buy-Rite Stores, Inc., with twenty-two member stores, and of the Meat Dealers and Grocers Association, of Troy, New York, which has about two hundred stores. I would call them both voluntary chains. I have knowledge of the business of the members of the voluntary chains as well as my own stores. I am quite sure I know the products they carry.

I handle Kellogg's Whole Wheat Biscuit. It is carried by all the Buy-Rite Stores. I do not get over to Troy, to all the stores; but I am quite sure the stores of the Meat Dealers and Grocers Association also handle it, because the warehouse has it in. I am sure the Buy-Rite stores carry it and know the Meat Dealers have it stocked in their warehouse. I have carried Kellogg's Whole Wheat Biscuit since it first came out, several years ago. There is a consumer demand for it in my store. They ask for Kellogg's Whole Wheat Biscuit. Sometimes they call it Kellogg's shredded wheat product. When they ask for that, I give them Kellogg's. It looks like shredded wheat. It is a little smaller, as far as I know. I have never eaten any. I do not know what grain it is made of. It is supposed to be a wheat product. It is marked on the package. I handle the shredded wheat with the picture of Niagara Falls on the package. I have carried it ever since I have been in business. I have no confusion in my store between the two products. Customers ask for the Niagara Falls product as Shredded Wheat.

My store is a service store, haying telephone orders and making deliveries. On the telephone orders just come for shredded wheat as shredded wheat. For Kellogg's, they come as Kellogg's Whole Wheat or Kellogg's shredded wheat. I never had any trouble with confusion between them.

When Kellogg's first came around, I had window displays to help create a demand for Kellogg's biscuit. That is about all. And I put a price on it. The Buy-Rite and Meat Dealers and Grocers Association probably had advertisements; but I could not swear to that.

There is a fair demand for Kellogg's biscuit in our store. It is now moving better than it ever did, with me. In the last year, the demand has been increasing. I handle Kellogg's in a package like Plaintiff's Exhibit 167. I do not handle Kellogg's biscuit in packages with a cellophane front. I have never seen them. The last case of shredded wheat I got in looked like the new package, Plaintiff's Exhibit 148.

I buy Kellogg's Whole Wheat Biscuit through the Buy-Rite organization. The Kellogg salesmen come to our store, look over the stock and see how the goods are, inquiring whether we want any changes. They keep an eye on the stock and see whether it is fresh, replacing any that is not. I buy my Niagara shredded wheat a case at a time from the National Biscuit Company. I handle the rest of the National Biscuit cracker line. I get a seventeen and a half per cent. discount, if I buy on orders of more than a hundred dollars a month, presumably, because I think it is all figured in on the voluntary chain. If we would just get shredded wheat, I could not say how much the discount would be.

CROSS-EXAMINATION.

THE WITNESS: I have handled shredded wheat ever since I have been in business. I have always handled shredded wheat, in a package like Plaintiff's Exhibit 1,

and now, Plaintiff's Exhibit 148. I have always known it as shredded wheat. I have been in business about sixteen or seventeen years. It is safe to say I knew shredded wheat before that. I have seen it in grocery store windows. It is a very old product, the first product of that particular kind that was on the market. I know the Shredded Wheat Company has spent a great deal of money in advertising the product and making the public familiar with it as a new kind of food. I have seen it advertised. My customers have asked for it a great many years as shredded wheat.

To me, Kellogg's Whole Wheat Biscuit looks like shredded wheat. It does sometimes to my customers, too. I could sell the Kellogg product to fill the same want that shredded wheat fills. You could move either one, I presume.

I do not know of any confusion between the two, in my store. I have no difficulty in keeping the two packages apart. I give the customers what they say. If they ask for Kellogg's, I give them Kellogg's. Sometimes they look at the packages, see fifteen biscuits, and you know what people are nowadays. The pennies count. They see the picture of the two biscuit on the package, and sometimes they say they will try it.

I never noticed the picture on the back of the package, as in Plaintiff's Exhibit 148, as long as I have been handling it. All I am familiar with is the label; that is, the side with the picture of the factory on it and Niagara Falls there. I do not even know what is on the back, because I never eat it. I do not use either one myself.

I see Plaintiff's Exhibit 10, with the picture of the factory on the front. That was the old package. I do not recall the picture of the biscuit on one end instead of Niagara Falls.

In the last year, the consumer demand for Kellogg's biscuit has increased with me. I will sell three

of shredded wheat to one of Kellogg's biscuit: I have had Kellogg's, I think, for ten cents at one time. We cut shredded wheat with the chain store. When they make it nine and a half cents, we do, also. When they have it ten, we have it ten. We are enabled to do that through our voluntary chain. We sell Kellogg's for eleven cents, ordinarily.

RE-DIRECT EXAMINATION.

THE WITNESS: I sell the Niagara shredded wheat for eleven cents, and ten cents cash. Customers sometimes notice Kellogg's package and ask for that when they see the number of the biscuit. We have never done anything to create a consumer demand, other than the window display. I never had it on any hand bills, because I do not do that. I could not truthfully say whether the two biscuit are the same size. I am not a user of shredded wheat. I have never seen it out of the package.

We have had Niagara shredded wheat, I am quite sure, on advertising, as low as nine and a half cents. We have run cut sales on the Niagara as well as on the Kellogg; but Niagara shredded wheat has been advertised at some times at cut price, to my knowledge, which is a device for calling the product to the attention of the consumer. When people come into the store, nowadays, some can remember a difference in price, if it is only a penny. You cannot do that any more nowadays. The chain stores have got that all fixed. The price cutting is to meet chain store competition. We do not want to do it, but we have to.

During this controversy, there was a time when we cut out shredded wheat altogether and entirely. That was before we went with the I. G. A., when we had the general grocery store business. We were not carrying shredded wheat at that time, but only the Kellogg product. When we were asked for shredded wheat then, I told them the same thing, that we have not got or do not carry the National shredded wheat, that all we carry is Kellogg's.

People do not usually ask for Niagara Falls shredded wheat. They ask for shredded wheat, and we give them this. I absolutely regard the Kellogg product as filling the same want as shredded wheat. If I received an order then for shredded wheat, I asked them first. We gave them a chance to decide which they wished. I told them we did not have it, that, if they wanted Kellogg's, they could have it. I know of but very few instances where they refused to accept Kellogg's.

We do not deal with the State, just county institutions. Down our way, they do not buy on competitive bidding, do not issue specifications of what they want. The dietitian buys it in the Cortland County Hospital. I settle it on the phone. She calls up and buys Kellogg's, because there are more servings to the package. She can get a package of Kellogg's and serve fifteen instead of twelve, which evidently appeals to her idea of economy. She buys Kellogg's and insists upon it. We have specifications which come in for us to bid on, but we do not bid on them. I should imagine we do sell shredded wheat to some institutions. I know we do to the larger hotels. I have sold shredded wheat in a package like Plaintiff's Exhibit 1, for a great many years, with the exception of eighteen months or so. We are selling it now. We buy it in small quantities from the National. We had a car

at one time. After that, we bought it in shipments of fifty cases, or a hundred cases for hot weather purposes. I buy possibly twenty-five case lots for the small orders.

We sell the product to hospitals in large packages. I think it is fair to say that about half the restaurants buy the small individual packages and half of them the large packages. There are possibly thirty restaurants in this county. A lot of them we do not now service because of the times. I assume we service thirty at present, not including hotels, but there would be only a few hotels. I presume that would be a third of the total field. We are pretty stiff on credits now.

I have been in business thirty years the fifth of last January. During that time I have known shredded wheat, except about the last eighteen months. But during all that time I have known of it and heard of it. It has been a well-known product. We favored it until the National took hold of it. I was a good, strong shredded wheat fan until the National got it, after which there was some trouble. Shredded wheat was a good seller in proportion to other business. There was a constant demand for it. It is safe to say there is for both of them today. I think there is no doubt about the Kellogg product having gotten some of the trade that shredded wheat formerly had. There is no doubt that it has encroached somewhat on the shredded wheat business, substantially so because we favor it and we are pushing it.

RE-DIRECT EXAMINATION.

THE WITNESS: All competitors take every field they consider good. We consider the Kellogg Company better in their business methods. We thought it decidedly a life saver for the Kellogg Company to

bring out that product at that time. I do not know that I have followed the use of the individual cartons in restaurants in this district. I am not sure of the proportion. If both the National and Kellogg should express a desire to have the restaurant trade serviced as much as possible in individual cartons, I would be willing to co-operate; but I would not favor the National Biscuit Company at all. We would co-operate with the Kellogg people. We would not co-operate with the National Biscuit Company. I am the man who would have the say of it. I have never had a word from the National asking me to try to push the restaurant trade in the big packages. I do carry the Kellogg individual cartons for the restaurant trade. I know I can get as many of them from Kellogg as I want. I never dreamed of anything else. I would have no objection to having whatever check can be made to find out what the proportion is.

Shredded wheat was used as an inducement or lever to get our I. G. A. stores to handle the National line. They used all the pressure they could to get us to put their line in. They came as many as three in a line to see if we would sanction the sale of the National line in our stores. They showed us a pretty picture of what you can get by 15 per cent., which they raised finally to 17½, the same as the chain store was getting, quite an inducement to our stores to put the full line in. No threat was made in those negotiations to make us handle shredded wheat in order to handle the cracker line. I do not think we were handling it at that time, seventeen or eighteen months ago. The Kellogg product was then on the market and we knew of it.

RDQ. 140. Do you think that you would have been able to throw out the Niagara shredded wheat if the Kellogg product had not been on the market?

A. No, sir, we had to have a shredded wheat.

THE WITNESS: We would have to have a competitive line to keep from being squeezed. That is what forced us to go back to the National. We took something that was not theirs, and they were not in our picture. We went back at the National until we got them to our way of seeing the picture. We used them as a football, the same as they would if the shoe was on the other foot.

RE-CROSS-EXAMINATION.

THE WITNESS: We took on these other stores and gave them shredded wheat, as I call it, with the hope that, after we got them in the fold, we could convert them to Kellogg's. We have not tried it lately as much as we could. The idea was we could give them National shredded wheat at a competitive price, so we do not care which we handle. There was nothing by way of a threat to induce us to take on the other line, but they tried to show us figures and asked us to take their line, the same as I would do in selling anything. There was nothing unethical about that. The unethical part I referred to was about discounts. There was a big controversy between the chains and the independent grocers. That is all there was to it. That has been for some years, as long as I have been on the I. G. A. and a little longer. Concerns like the I. G. A. really have as their basis the fight of the independent against the chain stores. They attempt to give the independents the advantages enjoyed by the chain stores. That is their purpose.

RE-DIRECT EXAMINATION.

THE WITNESS: None of the conversion of customers from Niagara shredded wheat to Kellogg's has been done by substitution. We have never substituted. We just submit the name and brand they want.

It is regarded as perfectly legitimate for a grocer to introduce a new product to his trade, absolutely, to try to get him to use a new product. At the time we were making such converts, the Kellogg Company was not merchandising samples of Whole Wheat Biscuit to customers. We have never made any direct drive. It was not a matter of converting people from one to the other. I simply discontinued the National biscuit. If they wanted shredded wheat, we told them all we had was Kellogg's. The Kellogg Company have sampled the section and they gave week-end demonstrations in the stores.

RE-CROSS-EXAMINATION.

THE WITNESS: Our merchants include those who have to live, these days, and they have to have what they want. Taking the word substitution in its proper meaning, without any unethical association, the Kellogg biscuit will not fill the same demand that shredded wheat does, if the customer insists on one brand. If he calls for shredded wheat and we do not have it but can give them Kellogg's biscuit, we can give them shredded wheat. We consider them both shredded wheat. In that sense, we can use them both to fill the same want.

RE-DIRECT EXAMINATION.

THE WITNESS: We consider them both the same product. There are more biscuit in a package of Kellogg's than in the National. We do not handle Wheaties for the same reason. We have no Gold Medal products in our place, because we consider greater discounts to chains than to independents unethical. We cut them out. That is absolutely discount or price discrimination. Rebate in any form is price discrimination, whether it be advertising or what. It is discrimination as to buying goods.

RE-CROSS-EXAMINATION.

THE WITNESS: The Kellogg Company does not give us a penny of advertising allowances. We have to pay it ourselves. We are glad to do it. We are fighting for the independent to live, and he is going to live.

ABRAHAM P. DEWOLF.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer and have been in the retail grocery business about thirty years. I have my own store; did have two, but eliminated one last year. I could be described as an independent grocer. I am not affiliated with any voluntary chain. I am a member of the Board of Directors of the Rochester Grocery Company, a wholesale grocery owned by retailers, about twenty-five or thirty of us. We buy most of our supplies there.

We handle Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 167. I do not know that I have ever handled any with the cellophane front, like Plaintiff's Exhibit 161. I might have seen such a package, but I would not remember. I could not say exactly how long we have handled Kellogg's biscuit, but about two and a half years. There is a consumer demand for it in our grocery. Customers come in and ask for it, as Kellogg's shredded wheat biscuit. We created a demand for it.

We also handle the other shredded wheat product, National shredded wheat, but not a great deal. We got in some difficulties with the National in Rochester and cut down on their goods. For two years, we have not handled a National cracker. They used to have all our

business. After some discount disputes in Rochester with the Grocers Association, they cut out all the National product. The dispute with National was on crackers. After the National took over the Shredded Wheat Company, they got into the same dispute, so we naturally barred them all as much as we could.

That dispute was over the discount as between chain stores and independents. That time, the small independents got five per cent., the big independent about ten per cent. I got about twelve and a half. The chain stores were getting seventeen and a half. I happened to be on that committee. We threshed it out with a gentleman from Buffalo and somewhere else. We had several arguments on that. They finally came across, and I guess they still are coming. I understand they gave seventeen and a half to everybody. National Biscuit Company products were out of my store for two years, altogether. When they took over Shredded Wheat, with the feeling we had toward National, we put their stuff in the back room. When people insisted on taking it, they got it. If we could sell them something else, that was our business. When people asked for shredded wheat, we would give it to them, put the two packages on the counter, and try to sell them the other package. We put out the Kellogg package and the Niagara package and explained Kellogg's had two or three more biscuit, were of fine quality, etc. I did not regard that as unethical in any way, with the feeling I had toward the National. I felt I had a perfect right to do that. As a matter of fact, grocers have a perfect right to tell their customers about new products they have. We can recommend anything we wish to. We bought the goods and paid for them. We can push one article if we want to. That is normal.

The dispute with the National was generally known in Rochester. Our customers work with us. A good many customers feel the same way we do. They

thought it was unfair, when we explained to them about the discriminatory discounts. Most of the customers co-operated with us. Some of them would not. If they insisted upon a certain brand, they got it. We do that with coffee. If a man asks for coffee which is kicked around as a football and we do not make much money on, our coffee is introduced, and we try to sell it to him and convince him. We do that with all our goods, tell him about the other product and try to sell it to him.

The Kellogg Company advertise Whole Wheat Biscuit, and they have sampled it in our neighborhood several times, I think. We have several times given the product window and store displays. That is done with the idea of calling the customers' attention to the product. I think we have a sale today of three packages, at a certain price, one of Whole Wheat, one of Corn Flakes, and a third of some other product. The customer buys that by paying for two of the packages and receiving the other free. I know Whole Wheat Biscuit is one of the elements of the combination. Of the two products, I think Kellogg's sells the most in my store now. We have never had any Kellogg's biscuit returned. There is no confusion between the two products. We do not send it out now. We do quite a telephone business. If people ask for it, we never send it out without explaining it is Kellogg's. We never try to force anything. Good grocers know they cannot get away with trying to force things. It makes dissatisfied customers. Kellogg's outsells the National shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: Rochester was probably the center of this storm about discounts. That is where the trouble started. That storm is clearing up now. They handle some National products now. We cleared that up with the understanding with National that they

must create a demand for their goods. We left the opening that we were not in any way compelled to do so. If they could get back, they could do so. They are getting some stuff in my store now. The National does do some things to create demand. We keep on a friendly basis. They advertise, and they service our store and have demonstrations from time to time. Since they got back, I have had no demonstrations on them. I am handling shredded wheat now. Although I cut it out, I had some shredded wheat in my store always, but I did not push it. I had some customers who insisted upon it. There are always some to whom we could not sell the Kellogg biscuit. We did not put up any argument or force it. We merely worked it, put it in the background and worked on Kellogg's biscuit.

If we had not had Kellogg's biscuit then, I do not know that we would have had to keep the shredded wheat in front. In Rochester, when we work against a thing, we work against it. We have a lot to fight against. For instance, you have to look under the counter to find Chase & Sanborn Coffee. If somebody wants it, we reach down behind the counter, get it, and are nice about it. That is what we did about shredded wheat. If we had not had Kellogg's biscuit, we would have had to have had shredded wheat, if we did not have a substitute. That would be true, if we had nothing but this package. If we did not have a substitute we would have to have that. I have been in business thirty years. I have known shredded wheat during that time and at least that long. I have sold it for that number of years. It has always been sold in a package something like Plaintiff's Exhibit 1. It has always been known as shredded wheat and has always been about the same sort of biscuit. As a matter of fact, it has been a very well known product for many years and has always been asked for as shredded wheat. Sometimes my customers ask for Kellogg's biscuits. I do

not know that they sometimes ask for Kellogg's shredded wheat. We carry it as Whole Wheat Biscuit. If a customer asked on the phone for Kellogg's shredded wheat, I would send her that. Whatever they say goes.

If, during the time we were keeping it in the back room, a customer asked for shredded wheat, I would try to get her to take Kellogg's Whole Wheat Biscuit. I was successful in that. Through those means and other means adopted by the Kellogg Company, they have, I suppose, increased their use of that product here in the Rochester territory very considerably. I do not know anything about their business. Kellogg's Whole Wheat is selling a little ahead of shredded wheat, has been, with us, within the last couple of years. Before we had gotten into that fight, I had never seen Kellogg's biscuit. I think they came out about that time. They were not out very long before we got into this muss. We used Kellogg's product, to be frank with you, as more or less of a life-saver during that rumpus.

RE-DIRECT EXAMINATION.

THE WITNESS: This fight about price and discount discrimination was not confined to the City of Rochester, but it originated there. That is where the grocers got their backs up. I suppose the same form of discount was current around the country, because we started out and formed the Civic Defense League, got it up into Albany and all sorts of different places. We heard from them the discounts were about the same after we got to the meeting.

RE-CROSS-EXAMINATION.

THE WITNESS: Some of our customers sympathized with our position after it was explained to them. Some of them, of course, did not. The National did plenty of advertising on their side. As far as the customer was

or six years ago, we pushed Shredded Wheat before the National Biscuit Company owned it. At that time, I was buying through the Shredded Wheat Company office at Syracuse, their representative here. It came in pool cars through a representative in Syracuse. Since the National Biscuit Company took over shredded wheat, we have secured our supplies direct from them as we needed them; but we have not pushed it or made any special effort to sell it. Nevertheless, it does move. There is a well-defined consumer demand for shredded wheat and has been for many years, to the best of my knowledge, ever since I have been in business. It has always been a well-known product, sold in packages like Plaintiff's Exhibit 1.

We have had no controversy or difference with the National preventing our carrying their product now. We merely have always carried the cracker line of some other concern. We made connections with Sunshine, who gave us a lot of co-operation, and we have never changed. It is the same with many other lines. We carry one line and do not like to put in lines of two different competing companies. I think we get better results if we keep just one. Nevertheless, in this instance, we have both Shredded Wheat and Kellogg's biscuit.

I have been carrying shredded wheat because there is a demand. Otherwise, we would not carry it. If there was a consumer demand, we would carry it. I have never had any demand for Uneeda Biscuit. I have never found it necessary to carry Uneeda Biscuit or Nabiscos or other National products of that sort. We have carried the competitive lines in Loose Wiles. I have been stocking Kellogg's Whole Wheat Biscuit since about the first time it came on the market, four or five years ago, or maybe three. When it first came on the market, it was sold, to my knowledge, as Whole Wheat Biscuit. I recall packages like Plain-

tiff's Exhibit 165. I carried it when it was in that package, called Shredded Whole Wheat Biscuit.

When I told Mr. Clarke there is no confusion in my stores, as far as I know, my thought was that we never had a customer bring it back and say it was the wrong package. When a customer asks for Shredded Wheat, she gets Plaintiff's Exhibit 1, the original shredded wheat. When she asks for Kellogg's Whole Wheat Biscuit, she gets it. We make no confusion or substitution of one for the other. I am not in the store, but I have never had it reported that a customer ever came in and asked for Kellogg's shredded wheat. I am general manager of the stores but I am very seldom in direct contact with customers. I get around occasionally but have never heard that.

The Kellogg Company, as far as my experience indicates, has been more aggressive in pushing its Whole Wheat Biscuit and all its products in recent years than has the Shredded Wheat Company. They have given us co-operation in all lines including their shredded wheat. I would not say shredded wheat is not a widely-advertised product. It is widely advertised and well known.

ARTHUR J. TWENTYMAN.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer, with F. H. Cobb Company, which is a supply depot for the Independent Grocers Alliance a chain of ninety stores in seven counties, Courtland County being the main county. The Cobb Company also gives wholesale service to other independents. Half our business is that.

We carry Kellogg's Whole Wheat Biscuit and service it to all stores and institutions. It also goes

to our independent customers. We also handle Niagara shredded wheat. We did have confusion between those two products and cut out the National shredded wheat for eighteen months about eighteen months ago, because we considered the way they were doing business unethical. We have never had any grocers return either one product or the other. We put shredded wheat in again later on. There is a continuing demand from our retailers for Kellogg's biscuit. I have knowledge of how it is merchandised in I. G. A. stores. It is advertised to the consumers in those stores and they use store displays of the product. The Kellogg Company co-operates in creating consumer demand for it by sampling and by Saturday afternoon specials in their whole line. They had demonstrations not very long ago.

The Cobb Company also services Whole Wheat Biscuit to institutions, leading hotels, the Cortland County Hospital, also to county houses. The Cortland County Hospital insists on Kellogg's shredded wheat, because, they say, there are more servings to the package. There is a consumer demand for Kellogg's biscuit among hotels. We service all the restaurants in our section where the credit is O. K. We service them with Whole Wheat Biscuit in individuals, and sometimes in the original package, like Plaintiff's Exhibit 167, which I imagine is more economical or they get service right from the package. Generally the larger restaurants buy the large package. I think the restaurant demand is about fifty-fifty for the individuals and the large package, in my territory.

All our stores do not handle Niagara Falls Shredded Wheat in the I. G. A., as well as Kellogg's biscuit. Some of them do not handle shredded wheat, because of what they consider unethical business meth-

ods in the past. They simply will not handle it. The methods to which I refer relate to discounts.

A consumer will come in and ask for a package of shredded wheat. One of our customers was on the phone the other day. He said he tells them he just simply does not have Niagara, that he has Kellogg's and will give it to them.

Our I. G. A. stores do not give a deal on Kellogg's biscuit. We run it on our budget bills and window posters, and in our advertising. We give them window and store displays.

CROSS-EXAMINATION.

THE WITNESS: In this part of the State, within the last year or two, there was considerable controversy between the National Biscuit Company and the dealers over discounts. It got to the point where feeling ran pretty high in some sections, and the National did not fare very well for quite a while. While it is dying down, there is naturally still quite a bit of feeling among the dealers against the National, I would say, particularly the independents. That accounts for quite a number of them not handling National products now. That arose after the National Biscuit Company took over shredded wheat. Some of the I. G. A. stores and perhaps other independent customers do not carry shredded wheat at all. In those instances, when a customer calls for shredded wheat, we ask her which brand she wishes. I said I recently learned from a grocer who did not handle the National that, when a customer asks for shredded wheat, he gives them Kellogg's, simply stated he did not have the National, sent Kellogg's, and it was accepted by the customer, as far as I know. I do not know that of my own knowledge.

JOHN A. DeMALLIE.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, with only one store, located at 440 Parsalle Avenue, Rochester. I had that store for twenty-one years, except two years prior to last November that I was out of it. Since November I have been back. When I left, two years ago, I was not carrying Kellogg's Whole Wheat Biscuit. I do not know whether it was on the market then. When I came back, last November, I did not start putting it in, but I had calls asking me to put it in, and I did.

I also handle the Niagara Falls Shredded Wheat. The two products now sell about fifty-fifty in my store. The sales of the Kellogg biscuit must be growing faster than the other, because we started from nothing. That represents the consumer demand. I have not recently co-operated in any way with the Kellogg Company in introducing that product to the public. Simply the calls I had for it induced me to put it in.

I have never practiced substitution in regard to the Kellogg product. I do not see how it could be substituted for the Niagara Falls Shredded Wheat, because there is so much difference in the package. I do not believe you could substitute it, even to a child.

I procure my supplies of Kellogg's biscuit through the jobbers. I secure my Niagara Falls product directly from the National Biscuit Company. Consumers ask for Shredded Wheat or for Kellogg's Whole Wheat Biscuit. When they want the National product they call them shredded wheat; and the Kellogg product, Whole Wheat Biscuit.

I do not know of any sampling by the Kellogg Company in our neighborhood for the past six months.

They have not given me any store cards or displays on Whole Wheat Biscuit since I have been back in business. Before, I had quite a little display work in the store, on other Kellogg products, but not the biscuit.

I give store and window displays to Kellogg's biscuit. I show no partiality that way. I give them to both. I think there is a shredded wheat display in my window now. I have all the different cereals in the window, those and others. I do not discriminate. If you looked in my window today you would see all kinds of cereals in it.

I was in Rochester when the Civic Defense League was formed. I have heard quite a bit of it. I was out of business then, but I attended several of the meetings. That concerned discounts, alleged discrimination against independent wholesalers, who were getting smaller discounts than the chain stores were getting. The dispute was entirely on discounts, the independent dealers claiming they were giving a large discount to the chains. We wanted the same discount and fought it out until we eventually received it. Today we are all getting the same discount, 17½ per cent., while before they were 15 per cent. on down, depending on your amount of business. I knew nothing at that time about the situation in Rochester.

CROSS-EXAMINATION.

THE WITNESS: I am entirely independent, not a member of any voluntary chain. I carry the National goods, and they give me the full discount. I am not now associated with any buying exchange or association. I have been connected with the grocery business all my life, being born and brought up in it. During that period of time I have been familiar with shredded wheat and have visited their factory several times. I

carried it in a package like Plaintiff's Exhibit 1. Until the coming of the Kellogg biscuit, there was no other biscuit that competed with it directly for a great many years. When customers asked for it, they asked for shredded wheat. When they did I knew what they wanted and still do. There is no possibility of substituting one for the other in the packages. I would not say the biscuit resembled each other, except in color; not in size or amount. There is a difference in the number of biscuit in the package, and in the size. Aside from that, they both fill the same want, and I should say they looked a great deal alike. If I did not have shredded wheat in my store when they asked for it, I could say I had Whole Wheat Biscuit and might try to induce them to accept it instead. I might do that with almost anything, if I did not have what they asked for. I usually give people what they ask for.

If Kellogg's biscuit has grown from nothing in two or three years to selling fifty-fifty with shredded wheat biscuit, then Kellogg's must have, to some extent, supplanted shredded wheat with some of my customers. That is necessarily so. Some of my customers are now buying Kellogg's instead of shredded wheat.

ALVA F. NORTH.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer and have been a little less than five years this time, and two years at an earlier time, a total of seven years as a retail grocer. I am a member of the I. G. A., a voluntary chain, buying most of my supplies through our warehouse.

I deal with Brewster Gordon principally for odds and ends, and in the main I deal with the I. G. A. warehouse, which comes through Brewster Gordon.

I handle Kellogg's Whole Wheat Biscuit, such as Plaintiff's Exhibit 167. I have been handling it five years this coming nineteenth of July. I have handled it in cellophane-front packages, like Plaintiff's Exhibit 161. There is an increasing consumer demand in my store for Kellogg's Whole Wheat Biscuit.

I also handle the Niagara Falls Biscuit. Kellogg's sells the most of the two in my store, better than twenty to one. I order Kellogg's biscuit usually about once every three or four weeks, in five-case lots, twenty-four packages to the case. I order the Niagara product whenever the stock is low, but I buy it in smaller quantities, nothing like as frequently as Kellogg's, and only when I need them.

The customers have become acquainted with the products, and they will discriminate between the two of them. A good many ask for a box of shredded wheat. If I am not well acquainted with the customer, I do not know whether he wants Kellogg's, and I will ask him whether he wants Kellogg's or the Niagara Falls biscuit. I will give him whichever he wants.

We have telephone orders in our store and handle them in practically the same way. I do not know that I ever have one product returned to me with the statement that the other was wanted. The customers know the difference between them. I have co-operated with the Kellogg Company by pushing this biscuit. I tell new customers about having it. I will give you an illustration of it. A lady has come in and told me she prefers the smaller size. Then I speak to them about Kellogg's Whole Wheat Biscuit, which is a smaller biscuit. I explain to them that there is a difference in the number of biscuit in the carton. The customers evidently prefer the smaller biscuit. I give

window, store and counter displays to Kellogg's biscuit. I put the Niagara Falls product on the shelf. Because I buy in smaller quantities, it does not make as big a display in the window. Sometimes I use Kellogg's Whole Wheat or any other cereal that may make a background for the window. I have put as high as ten cases of Kellogg's Whole Wheat Biscuit in the window. That has the effect of bringing the product to the attention of customers.

I was not a member of the Civic Defense League in Rochester. I attended the open meetings. It was a dispute between grocers and the National Biscuit Company and related to discounts on the entire line. I was not getting what I thought was right, and the competition of my chain store next door to me. I knew I could not sell the amount to get the big discount. The Ontario Biscuit Company did give me the discount, and naturally I swung. They gave me the same discount they gave to the chain stores, and I swung my customer over the other company.

CROSS-EXAMINATION.

THE WITNESS: I am only carrying the whole wheat biscuit and the Uneeda Biscuit of the National line now. I do not carry the full line. I carry Uneeda Biscuit because I have a demand for it. I also carry shredded wheat biscuit because I have a demand for it.

It is safe to say that I have always had shredded wheat biscuit like Plaintiff's Exhibit 1. I have known it for a great many years, more years than I have been in the grocery business. It is an old and well-known product. For many years in the grocery business, it was the only biscuit like that that we had, until Kellogg's product came on the market. During the controversy with the chain stores and National, we did not throw out shredded wheat altogether. We still have a considerable demand for it. I purchased

it from the cracker man that called on me at that time. I am able to make a better profit from Kellogg's Whole Wheat Biscuit than I am from the National shredded wheat. I have pushed Kellogg's biscuit in my store, so much so I now sell twenty packages of Kellogg's to one of the National. I could not say if that is representative of the sales of Kellogg's biscuit in Rochester at the present time. I only know as far as my own store is concerned, where it is selling now twenty to one. It is safe to say that, since Kellogg's biscuit came into the market in recent years, a great many who now buy it are former shredded wheat customers. When a customer calls me on the telephone or comes in, I call her attention to both biscuit and give her what she wants. Seventy per cent. of my trade take it off the shelves. We are not necessarily a self-serve store; but it is in such a position on the shelves that they can help themselves. If they ask for it, I ask them which one they want, Kellogg's or the National. I also give them a chance to take Kellogg's if they want it. It is somewhat to my advantage if they do take it. Some of my customers go to the shelves and select the shredded wheat biscuit. Probably 20 per cent. of my trade telephone their orders. On that trade, when an order comes for shredded wheat, my practice is invariably to give them a chance to get Whole Wheat Biscuit.

CLARENCE E. ALBERTS.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am an electrical merchant and a user of Kellogg's Whole Wheat Biscuit. I buy it in a package like Plaintiff's Exhibit 167, the solid-front box. I have not yet bought any in a cellophane-front

box. I have been a consumer of Kellogg's biscuit about two and a half years. I saw it advertised. I have a youngster at the house, hard to please, like all youngsters. They eat certain things and get tired of them. We were trying to find something she would eat and like, saw the advertisement of Kellogg's biscuit, liked it, and bought some. We at first had difficulty finding a place to buy it. We tried to get it at the A. & P. store around the corner, which did not have it then. I mentioned it to the man and he said they had the Niagara Falls biscuit, like Plaintiff's Exhibit 1. He said that was similar to it. I went across the street and bought it at the neighborhood store, where I continued to buy it for almost two years. Then the clerk in the A. & P. called my attention to the fact that they had it. I have gotten them there since. I use and like it. The child seems to like it. Personally, I like the brown covering, the appetizing appearance and the different or nut-like flavor. I do not tire of it so easily. The size is smaller.

CROSS-EXAMINATION.

THE WITNESS: It is smaller than the other biscuit, shredded wheat, which I have used. I have only done buying since I was married. Until then, we did not use so much of it at home. I very seldom purchase it now. Before we had the Kellogg biscuit, I had used and known of shredded wheat. It was not a new product to me. I had been using shredded wheat for the little girl, right along. I was trying to find a food that would agree with her and that she would like to eat. I had tried her with shredded wheat.

I am a friend of Mr. Lewis, of the Kellogg Company. I have known him about a year and a half. I am here at his request to testify about this Kellogg product.

WILLIAM J. GRAY.

Deposition taken at Syracuse, New York, March 20, 1933.

Direct Examination.

The Witness: I am manager of the Onondaga Cafeteria in the hotel here, in Syracuse. I have been with them twenty-one years. We handle Niagara shredded wheat, also Kellogg's Whole Wheat Biscuit. Those products are served in the packages. They pick them up. We put them in bowls on the counter. When a guest takes one to the table, the girl takes it off the tray and opens the package. The guests pick up the packages, and they take the biscuit out.

Both packages are on the counter, not necessarily alongside each other. There may be other cereals between. We have always sold the Niagara shredded wheat in this long individual carton, except for a very short period. I did not think there were any short ones in the house, but one got on the counter, somehow, today. Our chef ordered shredded wheat biscuit. The dealer had trouble getting the long biscuit and said we would have to use the little ones he sent until the others arrived. Defendant's Exhibit 75 is the package that was brought up from my cafeteria. Defendant's Exhibit 76 is an individual package of Kellogg's biscuit, also brought from my cafeteria, I believe.

The short biscuit we got were in a carton like Defendant's Exhibit 71. We found that the biscuit in the longer cartons, like Defendant's Exhibit 75 sold the better of the two in our cafeteria. I have had to change the biscuit or give more biscuit to customers who expected to get these long biscuit. That was why we went back to the longer Niagara Falls biscuit. We do not handle the short biscuit because we had too many complaints about them. I have had no complaints about the Kellogg product.

Cross-Examination.

The Witness: The nature of the complaints about the short shredded wheat biscuit was that they thought they were not getting enough. They thought we were cutting down the portion. We have never had any complaints of that kind about Kellogg's. We have some customers who like shredded wheat biscuit and they know it. They take the shredded wheat biscuit and they will probably take Mr. Kellogg's Whole Wheat Biscuit when they are under doctor's orders to take those things. I do not suppose the doctor's orders apply only to Kellogg's Whole Wheat Biscuit.

I would not be surprised if some people would think Kellogg's biscuit is whole wheat and shredded wheat is not, notwithstanding that it says on the bottom "shredded whole wheat." People do not always read the packages. I think they are rather careless about that especially after they have known and used the product, and they take the package more or less for granted. They take it for shredded wheat, or whatever they want to.

I have operated this cafeteria thirteen years or so. Ever since we opened. I have been carrying shredded wheat. Before that, I knew it, probably and have known that biscuit all my life. I have been familiar with it in the individual and the large packages. When we first opened, we carried the large package, and put the biscuit in a dish, in the old days. We use more shredded wheat than Whole Wheat Biscuit. Since Kellogg's biscuit has been introduced in our restaurant, some people will help themselves to it.

When we had some of the smaller individual packages, some people returned the shredded wheat and made complaints, because they felt they were not getting a full portion. People never bring back the Kellogg package. to my knowledge. I assume they have gotten so used to looking for it, they take it.

RE-DIRECT EXAMINATION.

THE WITNESS: The proportion in which the Kellogg and the National sell is about one to three, I would say, in our place. Our customers seem to like the serving in individual cartons. We serve all cold or uncooked cereals in individual cartons. I would not be surprised if it has been ten years since we served any cereal out of a large carton like Plaintiff's Exhibit 1. We made the change in cartons for cereals because I think it is cleaner, and our customers seem to think it is cleaner. The individual cartons of Kellogg's and the National are just as easy to buy. We are serviced through a wholesaler. We have a purchasing agent or specialty man who buys through the wholesaler.

JOSEPH T. LEWIS.

Deposition taken at Syracuse, New York, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in charge of Kellogg sales in New York State outside Manhattan. My territory runs down to Poughkeepsie, from there north and taking in all the rest of New York State, no territory outside the State. The Shredded Wheat plant at Niagara Falls is in my territory. I have been with the Kellogg Company fourteen years and in my present position about eleven.

We handle the full Kellogg line: Corn Flakes, Pep, Rice Krispies, All-Bran, Krumbles, Kaffee Hag coffee, and Whole Wheat Biscuit, also the individual cartons comprising those. We service the jobbing, retail, and restaurant and hotel trade, and institutions, everything.

concerned, we told him our side of the controversy, and there was no National Biscuit Company man present to explain their side of it. We did not invite him in; we invited him out.

RE-DIRECT EXAMINATION.

THE WITNESS: At any rate, they came around to our side of the controversy and promised they would behave themselves. They had no idea that we, as grocery men, could throw it out as successfully as we did. They did not say we could not in so many words, but the agent told us we had to have those goods, that we knew our customers wanted them, and we had better not do that. But we told them. We did do it by co-operation. We all got together and pushed the National off the map. We put that thing over. If we had a little more of that co-operation, we would be better off. If the grocery men got together today, they could lick any manufacturer showing favoritism, I think, and I think they ought to; but it is hard to get a lot of men together and co-operating.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not think a retail grocer ought to be like a slot machine, just handing out anything a coin is pushed at him for. Then he is not a grocery-man. I do not think there is anything improper in explaining their side. I think we had the right of it. I have a store, do a very nice business, handle a nice class of goods, better class than most grocers buy. I buy a good bit of stuff from Sprague-Warner, Chicago, and feature those goods, being the only man in my territory having them. If I can get my customers to say they want those goods, they have to come to me. They cannot run to the chain stores or the other fellow. Sprague-Warner establishes an agency in each town. We have an exclusive agency.

RE-DIRECT EXAMINATION.

THE WITNESS: The other grocers could put in a competitive line of goods; but they cannot buy Sprague-Warner's peas or corn. They have their own label and their own line. Sprague-Warner have competitors to whom they can go to get competitive lines of products. If I could not get Sprague-Warner goods, I would certainly know where to go to get a line in competition with that.

We had some display work on Kellogg's Whole Wheat Biscuit, window displays. We got up a fair store display, also. That was when the other biscuit was in the back room, not that we had any feeling against the goods. It was a matter of feeling between the National and ourselves. When the old Shredded Wheat Company had it, there was no feeling there and no disputes over discounts as between customers. When it went into the hands of the National Biscuit Company, we felt they had discriminated against us and we had the right to fight back.

We do advertising, featuring certain lines and prices at different times. We have postal cards we send out every week to probably two or three hundred people, customers or prospective customers, with line specials. We do not get co-operation from the National Biscuit Company by samples, etc. Some grocers I know get an allowance for advertising, but I like to be my own boss. I pay for my own postal cards and do my own advertising. I have not looked for any allowance. I think there should be a price on the goods and all these allowances ought to be stopped. Then we would build up better business conditions, get away from all this petty larceny, by which one man gets seven per cent., another four, and another loses out. The quicker the manufacturer wakes up and does a legitimate business, the sooner we will all be better off. I do not understand that the Kellogg Company gives any advertising allowances. I never heard of it.

Whole Wheat Biscuit is a Kellogg item. We are instructed to sell the complete line and endeavor to get a full distribution in all retail stores. We are supposed to get full representation of every Kellogg item. Different products require different methods. On Whole Wheat Biscuit we have done sampling, newspaper work, store demonstrations, Saturday sales, and house-to-house selling campaigns, where we would sell an interested party a package at the door a package and give them a package. We went to considerable expense introducing it that way. It was rather expensive sampling.

We get dealer co-operation and advertising, but we do not pay anything for it, no advertising allowance whatsoever. The dealers pay that in mentioning Whole Wheat Biscuit. We get window and store displays. All those methods have been very successful in introducing Whole Wheat Biscuit to the consuming public. I think we have built up a substantial business in Whole Wheat Biscuit in our territory. That business is on the increase, still growing. I will say we have better than ninety per cent. distribution of it in the wholesale trade and about sixty per cent. in the retail trade in my territory; and better than seventy-five per cent. in the restaurant and hotel trade, which is serviced mostly in the individual cartons. About seventy-five per cent. of the restaurant trade is done in individual packages. Some restaurants still use the large packages, confined to cheap sections where there is no consumer preference, cheap restaurants, the railroad district, markets, and so on.

They may buy from wholesale grocers, if they wish, or from our salesman, if he happens to call. The cellophane-front type of package of Whole Wheat Biscuit, like Plaintiff's Exhibit 161, has been very helpful in building up business. I have had more than one-

quarter the volume of the biscuit business in those packages. When I sell a case, it will not be all cellophane fronts, just one or two packages, at the most, to a case. Those cellophane fronts cost me, as district sales manager, more than the other packages. It is charged to my sales promotion expense. I have to pay that myself, on the selling end of it. Because of that, we try to limit the cellophane fronts; but we are willing to spend money on them if they will produce business.

There are quite a few self-service stores in my district. They remain about the same, not growing, except in some markets, some of the chains have revamped their stores and put in self-service. Some have both types of service. A grocer said this morning that some department of his store was fixed so people could wait on themselves, but not for cereals.

I do not think there is, physically speaking, any confusion between Niagara shredded wheat and Kellogg Whole Wheat in this territory. In our organization, we emphasize the fact the Kellogg biscuit is to be known as Whole Wheat Biscuit and we do not want the word *shredded* used at all. I think it is a selling advantage to have it known as Whole Wheat Biscuit. We want to build the product and we have succeeded in doing so, making it known as Whole Wheat Biscuit.

We have window displays, posterettes, cutouts, cards, and everything that goes with our regular display material. They are similar to the selling methods we use on other Kellogg products. We use the Jumbo package display, with two biscuits reproduced, as on their package. Dealers co-operate with us very freely. We get window and ledge displays, have it featured in their handbills, etc. Generally, our biscuit sells for a cent or two higher than Niagara Shredded Wheat. They sell for ten, sometimes nine. Ours seldom sells less than ten, eleven, and twelve; sometimes, two for a quarter.

The Kellogg Company want us to sell the individuals in all restaurants. We are struggling for a hundred per cent. restaurant distribution on all cereals in individual cartons. There is an advantage to the Kellogg Company in having their goods reach the final consumer in a carton. It is more sanitary and a nicer appearance. You can assure the contents of the package being delivered to them in better condition.

Whole Wheat Biscuit and shredded wheat encounter competition of other cereal products. Muffetts have been very active during the past few weeks. They were active about two years ago and just recently they have revamped their package. Samples have been sent to each grocer. They are emphasizing the words *Whole Wheat Biscuit* in their new package. Defendant's Exhibit 77 is the older package, with the words Whole Wheat Biscuit in relatively small letters at the bottom. In the new one they brought it up and made it larger. This exhibit also shows Muffetts in a dish or saucer.

Defendant's Exhibit 78 is the newer package, just on the market within the last two or three weeks. It has *Quaker,* small, at the top, then Muffetts, and then the next most prominent feature is Whole Wheat Biscuit. Under that is a picture of the biscuit, and then under that: Enriched with sunshine vitamin. The Quaker Oats Company.

The old package was printed; Irradiated with ultra-violet ray. Contains sunshine vitamins. The new package says: Enriched with sunshine vitamins.

Triscuit, like Defendant's Exhibit 16, is in our territory and still used. It says: Uneeda Bakers Triscuit, one hundred per cent. whole wheat cracker pressed into cracker form. It is generally known as shredded wheat in cracker form; so shredded wheat is put out in two forms: one a biscuit, and the other a cracker.

The Kellogg Company has used newspaper advertising quite extensively in my territory. They have

had store demonstrations. Those are all regarded as effective means for creating consumer knowledge of and demand for a new product. The purpose of it is to create consumer demand for the product. Those are all general means used for creating consumer demand for all our line of products.

Comparing the Kellogg biscuit carton with the National shredded wheat carton, the interior of the package is fitted with a different kind of separator, a cushioned insert between each layer of biscuits, which I understand is put there to prevent breakage. The liner of our package is a patent coated stock, a green paper lining. The Niagara product is gray box board with no liner in the carton and no cushioned partition between the biscuit, although there is a partition.

In pushing the Kellogg biscuit in our territory, we emphasize the size of the biscuit, smaller and fits the bowl without having to break it. We have had comments it is just the proper size. Two is the proper serving of this biscuit and two of the other is too much. It is toasted on top and bottom, has a finer shred, eats better. The toasting on top and bottom brings out the flavor. It is a darker biscuit and three more biscuits in the package, a half an ounce more in weight. These methods of advertising and creating consumer demand have been very effective in building up a substantial business in my territory for Kellogg's Whole Wheat Biscuit. Another point is that the wholesale carton, containing twenty-four packages rather than thirty-six, gives a better turn-over. They like it better because they can keep them fresher. Those are handled through the regular Kellogg salesmen who handle the other Kellogg products. They are instructed to check the full Kellogg line and see if they are moving. It is up to them, whether they are on the floor, the counter, or where, to keep them moving. Packages are exchanged if they have been there too long.

We have a substantial institution trade in this territory. Kellogg's Whole Wheat Biscuit are used in Dannemora State Prison, Comstock Prison, Sonyea Rochester State Hospital, Syracuse University, Manlius School, and Auburn Prison. In prisons, it appeals very much to them because of the size of the biscuit. We receive invitations to bid on Whole Wheat Biscuit. Some of the specifications call for shredded wheat and some for Whole Wheat Biscuit. When the invitations to bid call for shredded wheat, we write the full name out as Kellogg's Whole Wheat Biscuit, fifteen biscuits per package, twelve and a half ounces to the package, and twenty-four packages to the case. We change the specifications, so it is clearly understood when they receive it what we are bidding on. When it goes back to the person sending it, it specifies Kellogg's Whole Wheat Biscuit fifteen biscuit to a carton and then quotes the price. Pretty nearly all our bids have been accepted that way. I have one here in my pocket. The general policy in this district is to amend those bids to specify the Kellogg product, so it is clearly understood. That is the real purpose of it. When this bid, Defendant's Exhibit 79, came to us originally, it called for eighty pounds corn flakes and ten dozen shredded wheat. It came in the mail, not by direct solicitation on our part at all. We added, after the words shredded wheat, Kellogg's Whole Wheat Biscuit, twenty-four twelve-and-a-half-ounce packages to the case, fifteen biscuit to the package. We filled in the name Kellogg after that line, on both items and returned it to the Woman's Relief Corps Home at Oxford, New York. This is a copy of it, March seventeenth. Similar bids have come in that are and have been filled on our orders.

I bid on a quotation from Comstock Prison, Great Meadows Prison, recently. We always had their busi-

ness. Last year we did not get it. We investigated and found Shredded Wheat had been giving them numerous samples to bring the cost down under ours, and we lost the business, a hundred-case order. We got a bid on Saturday and re-established ourselves. We never had any of these institutions return these bids to us as not covering what they wanted. We have the line drawn pretty fine on Army institutions. They say products similar to shredded wheat, or Kellogg's, either one, or may call for Corn Flakes. They establish a standard of purchase by that. I have in mind the Soldiers' Home at Bath. They ask for it that way. I bid on it and get it.

I am quite sure Defendant's Exhibit 79 came to us through the mails from the Women's Relief Corps Home. There was no solicitation on our part at all. I presume an invitation to bid went to the National Biscuit Company. I do not know. They go to all companies on their list of cereals.

The Kellogg Company makes absolutely no advertising allowance to advertise their Whole Wheat Biscuit. In this territory, we have had dealer co-operation and advertising paid for by the dealer. It is customary for the dealer to accompany that with advertising displays, window and floor displays, etc. We have had the Wheel of Knowledge and have built up a nice lot of business as a result of it. It is tied to a package. For instance, in the A. & P., we put them in at the factory. It is not touched until they open it up in the store. We put a poster in to use if they so desire. Only about half of them use it. It is a very quick and appealing premium, especially with children. We have used the Jungle-Land Books and the Singing Lady books, on account of the broadcast over the WHAM radio station. Kellogg's Whole Wheat Biscuit is referred to in the radio broadcast. All our cartons carry a full list of

Kellogg items, including Whole Wheat Biscuit. Each carton of a Kellogg product, Corn Flakes or anything else, carries on the side into the home the names of the rest of the Kellogg line.

We have been successful in getting Whole Wheat Biscuit into some of the chain stores. In Syracuse, we got the A. & P., American Stores, Community Stores, and Grand Union on larger markets only. Those are the principal chains in the city service. The A. & P. held me up for two years. When a consumer demand had been created, they let us in. The same thing applies to all.

CROSS-EXAMINATION.

THE WITNESS: I suppose Kellogg's Whole Wheat Biscuit is in direct competition with shredded wheat. As far as cereal products go, shredded wheat would be the principal item with which it does compete. I would not say Kellogg's biscuit is designed to compete with shredded wheat. It is similar in appearance. It answers the same call and can be sold where shredded wheat has been specified. It is fair to say it is designed to compete with shredded wheat biscuit.

The Women's Relief Corps Home is a State institution, required by law to receive bids for their supplies, every quarter. Defendant's Exhibit 79 is one of those requests for quotations, upon which we send in our bid and at times receive the award of the contract. When it reached me, the word Kellogg did not appear on it, nor did Whole Wheat Biscuit and so forth, now appearing in the blacker typewritten type. It read only: Corn Flakes, quantity eighty, unit of measure, pounds, and shredded wheat, quantity ten, unit of measure, dozens. The invitations to bid as received by me called for ten dozen shredded wheat.

Upon receipt of it, I filled in, under the column Brand, the word Kellogg in each item. They left the column open for the brand. They just have it open the way you see it written there. No more than Corn Flakes is specified there. That is typical of our practice in dealing with State institutions when they request it.

We have army bases in our territory and receive requests for quotations from them. If I recall correctly, they ask for biscuit, shredded and toasted I have none before me. I do not think they ever ask for shredded wheat. I have no recollection of it. When I get a bid invitation of that kind, I treat it in the same manner I have treated Defendant's Exhibit 79, specifying it is Kellogg's Whole Wheat Biscuit. They clearly understand what we are bidding on when they receive it. It is typical of State institution bids. We receive quite a number of those in the course of a year and obtain quite a number of awards of contracts on bids of that kind. They do not all include biscuit. Some of them use no dry cereal but Corn Flakes. I do receive quite a number calling for shredded wheat as this does. There is always a column for us to specify the brand. When the request for quotations is received, it frequently has, under Article, in the first column, the designation shredded wheat.

The figures of distribution I gave are my estimate of the entire territory over which I have jurisdiction; 90 per cent. of the wholesalers, 60 per cent. of the retailers. That is based on my observation. I travel about my district, and I have thirteen salesmen under me. Our salesmen are very particular not to use the word shredded in connection with the promulgation of sales. We do not want the word shredded used. We are very particular to specify that it is Whole Wheat Biscuit. That is the name of the product. Our purpose in doing that is to avoid any confusion with the

well-known shredded wheat. We want to establish it as Kellogg's item, under the name Whole Wheat Biscuit, without reference to shredded, or anything of that sort.

XQ. 175. Do you think that the present package of the Kellogg Company, like Plaintiff's Exhibit No. 161, which contains on one end of it the expression "a shredded wheat product," and, on the other end, "shredded wheat in its most delicious form," helps you in that respect to establish the identity of the product?

A. Well, I cannot say. It is pretty hard to point your finger at any direct result in advertising.

XQ. 176. You do not like the use of the word "shredded"?

A. No. I say, when we are talking about the biscuit, we refer to it exclusively as Kellogg's Whole Wheat Biscuit.

XQ. 177. Yes. You said you did not want to use the words "shredded wheat." And yet, on your company's package, the word occurs at least twice. I ask you if that does not hamper you in attempting to distinguish this as a whole wheat product, as distinguished from shredded wheat.

A. Well, I do not know whether it does or not.

XQ. 178. You had not thought of that?

A. No.

THE WITNESS: When I said the price of shredded wheat was two cents lower, I was referring to the retail price. I could not say what the comparative price to the wholesaler would be, because every wholesaler does not handle it, in the smaller towns. I was asked the prevailing price in this market, which is two for nineteen cents on shredded wheat. I do not know that the wholesale price of Kellogg's, pound for pound, is cheaper than shredded wheat. Ours is packaged two

dozen and the other three dozen to a case. The last was three-thirty on shredded wheat, which, reduced would make it two-twenty for two. Our price is two dollars and five cents.

I do not regard Triscuit as seriously competing in the cereal line. Muffetts were very good a year ago. They seemed to die out and just recently came back with a new package, and are making an effort to re-establish it.

XQ. 190. There is no confusion in your mind between Muffetts and Whole Wheat Biscuit and shredded wheat, is there?

A. Well, some people talk of them as another shredded wheat in ribbon form. I have heard that frequently.

THE WITNESS: It is ribbon form, a sort of flat, wound-up biscuit.

Practically all our sampling has been done with the full-sized package. Our method of doing that is not in all cases to offer to sell one and give one. We do give away full-sized packages as samples, without any sale at all. We just go from door to door. I cannot recall offhand how many packages we used that way in this territory. There are so many. When we give them, we procure the samples from our warehouse. When we sell them, we buy them from the retail grocer. When we have a campaign selling one and giving one, all we sell are purchased from the retailer in that locality. Those we give come from our own warehouse. The entire cost of that is charged to me, to promotional expense.

RE-DIRECT EXAMINATION.

THE WITNESS: Defendant's Exhibit 79 is addressed to the Kellogg Sales Company, 317 Union Building, Syracuse, New York. We are on the regular

mailing list of those institutions, governmental, private, and State. One line says: Bids cannot be accepted unless size, kind, and brand, and, if possible, manufacturer of each article is specified. They expect us to fill them in.

The first column is labeled check-mark. We do nothing with that. The second item is article. When that came to us, it had two articles, Corn Flakes and shredded wheat, specified. The next column is labeled Brand, and that was blank. I have never seen any of those lists filled in by the National Biscuit Company. I do not know whether they fill in any brand name there. I possibly could get you that information. The next column is marked substitute brand. I conclude that means "or equal." The next three columns are quantity, then unit of measure, and prices f. o. b. Oxford, N. Y., per unit of measure." That practice of our office filling in the brand name after the article named has prevailed about five years, that I know of.

Grocers call goods by the name on the front of the package. The Kellogg Company has been successful in impressing the name Whole Wheat Biscuit for this product on the trade. Practically every packaged product in the trade has some dominant name on the package. The Kellogg biscuit is known in the trade by the name Kellogg's Whole Wheat Biscuit.

If somebody who had never seen this Kellogg product asked me what kind of product Kellogg's Whole Wheat Biscuit is, I would say it was a shredded whole wheat. I do not know what else I would call it as a purely descriptive name. I never have heard of any other name. As far as Defendant's Exhibit 79 is concerned, there is no question whatever that, when it came to me, the two names Corn Flakes and shredded wheat were all that were listed under the column entitled article, and the brand names in there were left blank and I filled them in.

RE-CROSS-EXAMINATION.

THE WITNESS: I called it shredded whole wheat right away, because it is descriptive. If you take wheat, shred it, and make biscuit out of it, it is shredded whole wheat, in my mind, just as if you take corn and flake it, which is corn flakes. It has the appearance of going through rolls. It is shredded. In this particular case, it has the appearance of being fine shreds, about the same size as string. I am not a farmer, I do not know what a corn shredder is. When corn is shredded, I know it is torn into little bits. I know shredded wheat is not torn into bits. It is pressed out into a long string, and so is Kellogg's biscuit. It is natural for me or any one of the public who has known the product so long to call a product similar in appearance shredded wheat, because that is the only name that has been applied to it since it has been on the market.

I know that, years ago, a man named Perky got out this shredded wheat biscuit. Prior to that, at least before my connection with the cereal business began, I knew there had not been any article of food like it. Before my connection with the cereal business, I knew of this shredded wheat biscuit. I did not know anything else like it or any other name to call it by, not that particular product. That is the name it has always been called by. I do not know how your product is made; but I know it is a very similar product, made in a similar manner.

RE-DIRECT EXAMINATION.

THE WITNESS: I have heard of shredded soap, shredded coconut, and shredded codfish. I am familiar with them in a general way. Gordon's make a shredded codfish. As I know it, codfish comes in a big solid cake, or that is the way I usually get it. It is cut up

into fine assorted shreds. Shredded coconut is the same thing. It has the appearance of being rolled, but I do not know whether it is or not.

RE-CROSS-EXAMINATION.

THE WITNESS: Shredded codfish is not put through rolls and pressed out into a long string. But we have Wheat Krumbles. That is shredded. I never saw a package from Canada of Wheat Krumbles, called shredded wheat. Wheat Krumbles is a shredded product.

HAROLD W. BUSH.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer, a general wholesale house, with a small voluntary chain, called the Three B Stores, of which there are somewhere between eighty and ninety. We have many more wholesale accounts with independent stores. I have no traveling salesmen through my territory. We operate mostly by mail and telephone, the customers mailing or telephoning orders in. We send out circulars and sometimes solicit by telephone. I think we have between five and six hundred accounts, not all steady.

We handle Kellogg's Whole Wheat Biscuit, also the Niagara Falls shredded wheat biscuit. We sell a great many more of the Whole Wheat Biscuit. When we get an order for shredded wheat, we ask them to identify it, whether they want Niagara Falls shredded wheat or whether they want Kellogg's Whole Wheat Biscuit. We identify that as Niagara Falls shredded wheat in our office. We do not now have any confusion

between those two products. I never knew it to happen that they had to send one or the other back and say they wanted the other product. There is a substantial continuing demand for Kellogg's Whole Wheat Biscuit from our trade. I should say that demand comes pretty generally from the whole trade. We have not created that demand. It has come up in some other way; but I know it is an existing demand.

CROSS-EXAMINATION.

THE WITNESS: I do not know whether there might have been some confusion at some time or other. I know there is not now. I do not recall ever having had any. I take no orders, except on rare ocsasions. I am just one of the owners of the business and manager of it. I have been in the business since 1920.

XQ. 29. So that you recognize at the present time that, if or when you received an order for shredded wheat, there might be some confusion if you did not ask what was wanted?

A. Well, if they simply said shredded wheat, we would have to identify it, because there is some confusion, perhaps, in the minds of the buyers; although I do not know that.

XQ. 30. Yes, but you would expect that there might be some confusion, so you would ask them to identify which product they wanted.

A. Our clerks do.

THE WITNESS: When I say shredded wheat, I refer to this product which has been made at Niagara Falls for so many years. I have been familiar with it for a long time, have seen the package for many years. I have not visited the factory. I worked as a clerk in the grocery business, myself. I have been in the business longer than the ten years I told you. During that time, and ever since I went into the business, I have been

familiar with shredded wheat. Before Kellogg's biscuit was on the market, if I were asked for shredded wheat, I would have no doubt the party wanted shredded wheat like Plaintiff's Exhibit 1. There was then nothing else I remember that I could fill that order with.

XQ. 42. How long would you say that it has been that you have adopted the practice of inquiring of customers in order to avoid the confusion between the two?

A. I cannot remember when, and I am not able to give you the time when. But, if I might answer this at some length: When Kellogg's Whole Wheat Biscuit became quite a factor in the cereal business, we did, I believe, at that time—although I could not personally say from my own experience—have people call in and say shredded wheat, when, sometimes, they meant Kellogg's Whole Wheat Biscuit, or vice versa, perhaps. I presume that has occurred, not from my own experience, but I know it from hearing about it from clerks in the office.

THE WITNESS: I have no knowledge how long that has been the fact. It has been comparatively recently, within a few years. It was comparatively recently, I would say a few years, that it would arise when people would ask for shredded wheat and expected to get the Kellogg product. Prior to then, when the National began to distribute shredded wheat or handle it, we purchased it direct from the Shredded Wheat Company, and we, I presume, handled it in large volume at that time in comparison to the size of our business. It was always a good seller and in good demand up to the time they took it over.

I know the National distribute shredded wheat direct to the retailer, but I do not know why I sell more of Kellogg's. It seems to me the fact they do distribute it direct would be a fairly satisfactory explanation. I

do not know that there would be any confusion between the two products, because I do not use it in my own home. It is years since I saw a package of either biscuit opened. I am not readily familiar with the appearance of either. I saw shredded wheat, of course, years ago, but I do not use either one at my home and never sampled it.

RE-DIRECT EXAMINATION.

THE WITNESS: Up until National took over the Niagara Shredded Wheat business, the wholesalers distributed quite a good deal of shredded wheat. I know that was our experience. That has been for a number of years. I should say that business was cut off over night by the direct distribution. Our sales dropped off immediately or very soon thereafter, a very substantial drop-off. There was a time when I did not handle shredded wheat at all. I only handle a small quantity of it now, for the benefit of our out-of-town trade that may not have been serviced by their rigs, and may want some or have call for it.

ROBERT H. MOSES.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am secretary of Bentley Settle & Co., Inc., wholesale grocery, old-line. We have approximately fourteen traveling salesmen, covering a territory about a hundred and fifty miles north, thirty miles south and east, and about fifty miles west, of Syracuse, taking the biggest towns. We have approximately nine hundred active grocery accounts, about fifteen hundred book accounts.

We handle Kellogg's Whole Wheat Biscuit and service it through our active customers. There is a general continuing demand among our retailers for that product. We handle, also, the Niagara shredded wheat, like Plaintiff's Exhibit 1. I do not know it as Niagara shredded wheat. I have never had it referred to as that. All we ever called it was shredded wheat. I think our sale of Kellogg's is more now than of shredded wheat. Shredded wheat is now serviced by the National Biscuit Company direct.

Our order men take most of the orders. There are a few telephone calls. Orders come in for a product like Plaintiff's Exhibit 1 as Shredded Wheat. Orders come in for the other just as it is written here, Kellogg's Whole Wheat Biscuit. There cannot be any confusion. I do not handle the receiving end and would not know if any were returned to us with the statement they wanted the other product.

We have a service of between five hundred and fifty and six hundred stores, over which we have no control, financial or otherwise. It is merely the basis of an advertising idea. It has the result of bringing them in under certain benefits and certain discounts. I have done nothing myself to create a demand for the Kellogg biscuit. The demand comes to me already created, from the retail trade.

My fourteen traveling men carry Kellogg's biscuit in the catalogue. We are supposed to try to sell everything we have listed. We do not push this any more than any other item. They are supposed to get orders for any item we carry. Whole Wheat Biscuit is one of those items. Our men travel and cover their territory very effectively.

When the National took over shredded wheat, I do not know whether they cut out wholesalers and jobbers for a while. We carried along with them. We still do sell shredded wheat and list it. The present volume on

Kellogg's biscuit is not quite as large as the volume we used to have on Niagara shredded wheat; but it is a substantial volume.

CROSS-EXAMINATION.

THE WITNESS: In our catalogue, we list shredded wheat, thirty-sixes, also shredded wheat, individuals. We carry both kinds. We carry also the Kellogg individuals, I think. I know we carry the regular whole wheat, because I am clear on that. Most of the individuals are sold to hotels and restaurants by their men, I believe.

I have carried shredded wheat under the name for a long time. I have been actively connected with the business eight years. The grocery business with me has been more or less of a family arrangement. I have been in it all my life. The ownership is in my family, in that line.

The way it is listed in the catalogue, there can be no confusion between the two with our men. There are two products carried in our catalogue, and there is a distinction between them. When our men take orders, they should list it in the way it is carried in the catalogue. We have a few telephone calls from customers. When they ask for shredded wheat, we know what they want right away, and that is what they are shipped. They get that product, like Plaintiff's Exhibit 1. That has been so for many years, I imagine a great many more years than Kellogg's biscuit has been on the market. All I know is since the time when I became acquainted with this one. I became acquainted with Kellogg's Whole Wheat Biscuit comparatively recently. Shredded wheat is an old product. It has been carried under that name continuously for many years.

RE-DIRECT EXAMINATION.

THE WITNESS: My organization services also the restaurant trade. I am sure that trade is serviced prin-

cipally by us in individual cartons, as far as the regular shredded wheat is concerned. It is very, very small. In fact, I think there is only one account I know of, on individual shredded wheat, and that is all.

As far as the Kellogg Company is concerned, they have an institution man who covers that trade thoroughly.

RUSSELL BORDERS.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

Direct Examination.

The Witness: I am sales manager and assistant buyer of Otter & Company, wholesale grocers, Louisville, Kentucky. We are one of the old-line service jobbers, having six salesmen at the present time. We service all of Louisville and one man in the State covering a radius of forty-five miles from town. The center of our territory is Louisville proper. At present, we carry about eleven hundred accounts. In normal times it is about twelve to thirteen hundred.

We handle Kellogg's Whole Wheat Biscuit, and have handled it about two years, ever since they came out with it. When they first came in, I did not know exactly what the product was. I found out later on it is a small wheat biscuit, toasted on both sides, not a solid biscuit.

We have handled a biscuit of that general type and appearance, the original shredded wheat biscuit. It has been a year and a half since we had any. We handled those until the National Biscuit Company bought them over. Then we decided to discontinue shredded wheat. The National Biscuit Company was never known to deal fairly with the jobbers. We bought just one lot after the National took over. They made us

buy a hundred dollars' worth at a time, and we put Uneeda Biscuit with it to complete the amount so we could get a discount really worth working for. We had to buy a hundred dozen Uneeda Biscuit to make the required amount. Before they were all sold, the Uneeda Biscuit went bad, and they changed them for us. I know no jobber in Louisville handling the National Biscuit Shredded Wheat. I do not know about others. I do not know of any exactly.

I think I have carried Kellogg's Biscuit about two years. There is now a nice demand for it. The biggest portion of my town accounts buy it from me regularly. The country merchants do not carry that class of merchandise very much. They do not carry shredded wheat or but very few cereals of any kind. All my retail customers who carry whole wheat biscuit of that kind carry the Kellogg product. The demand for it has been increasing in the last two years. We have carried more than we usually do. Customers generally ask for Kellogg's Whole Wheat Biscuit. The Kellogg specialty men have helped to create that demand. When they put a new product on the market, it is customary for jobbers to ask a guaranteed sale, because it is hard to take a new product and carry it over. They used to come in, pay for it, give us a nice margin of profit, and take it out. That is how they created a demand for it. Kellogg's guaranteed sale on it when it was first put in. They picked them up and resold them to the retailer.

We have one man who calls on nothing but hotels and restaurants, and one man calling only on institution. As a representative of my house, he sells Kellogg's Whole Wheat Biscuit to the restaurant trade, the biggest majority of which, in one territory, handling them in the smaller individual cartons. We have only one customer I can recall right now carrying all his cereals in the large package. He is an old timer. He

is the only one carrying Whole Wheat Biscuit in the large cartons. I put in Kellogg's Whole Wheat Biscuit, I think, before we discontinued carrying Niagara shredded wheat. If Kellogg's biscuit had not been on the market at all when this situation arose with the National about shredded wheat, we would not have had any wheat biscuit at all, because the National Biscuit Company never would have played ball with the jobbers.

CROSS-EXAMINATION.

THE WITNESS: I feel strongly about the National Biscuit Company. That represents the feeling in Louisville. The National distributes direct to retailers. It has always been their policy on crackers and cookies, as has been understood for a great many years. When the National took over shredded wheat and put it with their other distribution, that cut out the jobbers. I could not say if the National is now offering jobbers a price on its shredded wheat. I have not been in contact with their representatives recently. Before all this, my house stocked shredded wheat, of the old Niagara Falls concern. We carried it a great many years. I have been with Otter & Company since September 13, 1913, twenty years this coming September, when they started. I had previous experience in the retailing end. I knew shredded wheat twenty years ago. I do not think it was a new product, even then. I do not remember any other wheat biscuit at that time. As I told Mr. Clarke, if it had not been for Kellogg's biscuit, I would not today have any Whole Wheat Biscuit. Quaker Oats came out with Muffets, which were, I think, solid. We carried them once but not now. They resembled shredded wheat in a way. They are a round biscuit. They never did do much. It was, I think, a sort of ribbon of wheat, bound up in round, cake-like form. We never did much with Muffets.

Shredded wheat was never a very big seller but a steady seller. There was a demand for it. When we cut out shredded wheat we had nothing. They called for Kellogg's Whole Wheat Biscuit by name. They did not ask for shredded wheat. When they call for Kellogg's shredded wheat, we do not give them Kellogg's biscuit. We tell them we do not have shredded wheat, but we have Kellogg's Whole Wheat Biscuit. That happens very few times. It is in contact on the telephone mostly.

When we decided not to continue carrying shredded wheat, we had some contact with a demand, some basis for it. We did nothing to help create a demand for Kellogg's Whole Wheat Biscuit, just let Kellogg create their own demand. I should think the present demand is a little greater than that for shredded wheat before we stopped carrying it. They have succeeded in creating a better demand among our clientele for Whole Wheat Biscuit than there was for shredded wheat, because I recall no time when shredded wheat had a specialty man on the trade. Kellogg has a specialty man on all their products. We carry their whole line. We have one man who does nothing else except service public and private institutions, like the Masonic Home, Home for Incurables, City Hospital, and such. We do not service State Hospitals because that is all bidding. They give you state warrants and we do not want them. We do not attempt to go into competitive bidding on state institutions. We do no local institutions, on specifications, receiving invitations to bid and submitting prices on bids. Most of them do that. I cannot recall any bid specifying shredded wheat. We get none calling for Whole Wheat Biscuit on institutions, so this particular item does not enter into it at all. I get all bids for cereals. I got a bid yesterday from Fort Knox, below

the river, which did not mention shredded wheat or Whole Wheat Biscuit. It is possible for us to make certain direct sales without bidding to army posts, on some items.

RE-DIRECT EXAMINATION.

THE WITNESS: At the time we discontinued National shredded wheat, we had not carried the National cracker line. I never did carry them. We had been carrying Niagara shredded wheat. When the National took it over, we dropped it, except we had one order afterwards. We had to take Uneeda to make up the amount, but we never did handle it before. We got a hundred dozen Uneeda Biscuit and they had to change about twenty of them.

I could not say whether we have handled Whole Wheat Biscuit in cellophane-front packages like Plaintiff's Exhibit 161. I just see the cases. We very seldom break a package. If we have to, we just cut the case in half and I see only the tops of packages.

We dropped Quaker Muffets because there was no demand. The name Kellogg's in our house we consider an advantage, because they are very square in their dealings.

CLARENCE PAUL PETERSON.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am forty and district manager for Kellogg's, having been in this territory about thirteen months. Previously, I was in Indianapolis a year. Before that I was in Europe three years. Previous to that I was in Minneapolis eight or nine years. I have been connected with the Kellogg Company fifteen years in June. My present district covers two-thirds

of Indiana, Peru, Kokomo, and everything south. We do not have the extreme border of Indiana, Vincennes, Terre Haute and Evansville. We have the whole state except the extreme west and extreme northern portion. We have all Kentucky, except fourteen counties in the extreme western part, and sixteen counties in Ohio, the two Virginias, western end, including Charleston, Bluefield and Buckeye. We really work in parts of five states out of Cincinnati.

I would say, roughly, approximately, there are perhaps between eight and ten thousand retail grocery stores in our territory. We carry and push the sale of the entire Kellogg line, Corn Flakes, Rice Krispies, Pep, Bran Flakes, All-Bran, Whole Wheat Flakes, Kaffee Hag, Krumbles. In Virginia we are selling a product known as Wheat Krispies.

About 65 or 75 per cent. of the wholesalers and around 40 or 50 per cent. of the retailers in our territory stock Kellogg's Whole Wheat Biscuit. Our distribution in the restaurant trade is approximately 65 to 75 per cent. There is apparently a consumer demand for it in our district. Our sales seem to increase.

To create that demand, we have put on promotion sales in stores on Saturdays. Practically every Saturday our men go into some grocery store and conduct a sale. We open up our packages, show our products, and sell direct to the consumer, which we find the most profitable way our men can spend a Saturday, conducting hundreds and hundreds of sales. In a town of twelve or fifteen stores we may conduct sales in eight or ten. We have special premiums and samples. We have had little books for the children: The Jungle Land Picture Books. We now have the Wheel of Knowledge, showing the states and their capitals. We have done some sampling, house-to-house work, introducing our biscuit, using the cellophane package, taking orders from the housewife to be sold

and delivered through the grocer, who gets the profit on them. We have worked house-to-house biscuit campaigns, selling the grocer a quantity of biscuit, going from house to house, selling the housewife one package and giving one free, which free package we buy from the grocer, paying him his profit. We call that sampling work. These campaigns have been conducted in various towns, not generally. We have mailed samples to selected lists of customers in various towns, secured from the grocer who gives us lists of his customers. With respect to all of this, I am speaking now of Kellogg's Whole Wheat Biscuit. We have sent out postal cards, telling the consumer to bring the postal card into the store and receive a free package with the purchase of one. They are also advertised to consumers by listing on the sides of cartons of other Kellogg products, so a customer buying a package of Kellogg's Toasted Corn Flakes would see a reference to Whole Wheat Biscuit on the side.

We call these Saturday sales demonstrations. On biscuits, particularly, we open the package, because we want people to see the biscuit, the size of it. A good many people are not familiar with our biscuit. Many of them tell me and our men have reported many people are not familiar with it. They think of it as a flat compressed biscuit or some kind of light biscuit, not as whole wheat biscuit. In opening a package, placing a bowl full on a demonstration table, we can immediately show the consumer what our product is like. Our principal selling points are the size of the biscuit, the double toasting, the fine shreds. It is a shredded biscuit. We show them the difference in size. Many mothers tell us it is more economical to serve. Children will sometimes not eat a big bowl of cereal, but they will eat a small bowl of biscuit and consume all the cream. Our double toasting seems to appeal to the housewife. I would say that, generally

speaking, Kellogg's biscuit is darker, a heavier toasted biscuit than the shredded wheat.

We have about 50 per cent. distribution among the chain organizations in our district. Krogers, at Cincinnati, stock biscuit. That is a well-known chain with four thousand eight hundred stores. We also have Schneider's chain, with eighty-seven stores, and Burke's stock the Kellogg biscuit also.

The sales promotion plans I have described as applied to Kellogg's Whole Wheat Biscuit are much the same as the sales efforts we put behind other Kellogg products. We go to a store every Saturday and conduct sales. The biscuit being one of our newer items, we perhaps feature them at our sales. We are doing the same with Wheat Krispies now down in the Virginias.

We have window and store displays. Before we conduct a display, we have an understanding with the grocer that we must have his co-operation. It is naturally very expensive. We place a man in a store on a Saturday to sell our merchandise. We would not accomplish much without the dealer's co-operation. He permits us to put up a display in his store, usually a window display, and instructs his clerks to co-operate with us.

We furnish the trade with sales helps, such as cards, placards and store displays for Kellogg's Whole Wheat Biscuit. We have a little counter piece that a package of biscuit fits into. That comes packed in the cases. We use it right in our warehouses in displaying biscuit. We have a coupon card we mail out. We have the cellophane-front packages that we have used to pass on to the jobbers for their salesmen. They cost us more than the ordinary fronts of the Whole Wheat Biscuit. That is a charge against the local sales cost here.

The company does not give any advertising allowance to dealers to advertise their product. The dealers do advertise our products. We work very hard to develop their co-operation. We naturally get it, they knowing that featuring our product means more sales. In 1932 we secured more dealer co-operation than in 1931.

We service the restaurant trade with individual-size cartons. We push very aggressively in this district the sale of individual packages of Whole Wheat Biscuit to the restaurant trade.

CROSS-EXAMINATION.

THE WITNESS: We do find, however, that some of the class C restaurants will buy the large package. They think they cannot afford the individual package. We have tried to prove to them that it is more economical. There is naturally a waste in serving from the large package. We will sell it to them, of course; but we do not encourage it.

In stressing all the selling points, fine shred, small biscuit, double toasting, and more economical, we are comparing our biscuit to shredded wheat. It is a shredded wheat. It is wheat shredded. I would not say it competes with shredded wheat biscuit. It may compete; but we have created a demand for our own biscuit, through our own efforts and our advertising. I would not agree with you that in creating that demand at least some of the demand for our biscuit is at the expense of shredded wheat; because I have had any number of customers tell me their shredded wheat business has increased, despite our having a biscuit on the market. I would not, however, go on record as saying that all the customers in this territory who buy Kellogg's biscuit have never used shredded wheat before. It is natural to assume that we have converted

some over from shredded wheat to Kellogg's Whole Wheat Biscuit. Insofar as we have done that, we have been competing with shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: We solicit business in State and county institutions and hospitals. Kellogg's biscuit have not been introduced generally to these institutions in our territory. State institutions, such as prisons, insane asylums, and so forth, do not use biscuit usually. We may sell a case or two for the officers' table, but not very many. In all our territory, I do not believe we sell biscuit to six state institutions. I do not know whether the National is more successful in selling them shredded wheat. I know of no case where shredded wheat has been sold to State institutions: insane asylums, prisons, poor houses, or hospitals, where we have applied to sell Whole Wheat Biscuit.

We have not yet covered 50 per cent. of this territory in our promotion campaign on Whole Wheat Biscuit. A great deal of our territory is not shredded wheat territory or Whole Wheat Biscuit territory, or any biscuit territory. That is true in Kentucky and in the Virginias. You can go into stores and not find biscuits in any form. You will not find the assortment or selection of cereals you find in cities, either the National or our own. We have not secured sufficient distribution to merit national advertising.

The policy of my office has been a more or less selective job of going into markets where are people who lead normal lives and are fairly prosperous. A great deal of our territory is in Kentucky and the Virginias, where people do not act or live the same as in Cincinnati. We do not select a market like that to introduce cereals. We have distribution of Kellogg's

biscuit in about 50 per cent. of the stores in the entire territory. We have made no special effort to increase it. Our effort has been to build the business we have already started. We should have a distribution of about 90 per cent. before general national advertising is put behind the product. The methods I have described have been effective in creating consumer demand in the stage of the campaign I have reached so far.

RE-CROSS-EXAMINATION.

THE WITNESS: There is, to some extent, between shredded wheat and our biscuit some competition. They are both biscuit and, perhaps, similar. We have an item. It is biscuit and shredded. That is, my idea of the treatment to which the biscuit is subjected in manufacture is that it is shredded. I would term them both shredded wheat biscuits. There may be some places we are pioneering, introducing it to people not familiar with it, but that is not the entire field we are trying to cover. So they are competing products. I told Mr. Clarke we are seeking our markets in places where we expect to find people who would use the product and were familiar with it. They are people, I imagine, who have been more or less familiar with shredded wheat for a good many years.

When I spoke of Saturday sales, I had reference to a sale of three assorted Kellogg products and giving one package Whole Wheat Biscuit free, done for the purpose of introducing it to the attention of the consumer. We got the free package in the grocery store, paying the grocer his profit for the biscuit. That is, when we conduct a Saturday sale, the grocer has a stock of our various products, among them being a case or so of Whole Wheat Biscuit. We keep track of how many we give away and pay him for them.

We do not always give away Whole Wheat Biscuit. We may use Rice Krispies, Pep, or Corn Flakes, whichever product we are trying to put over. If it happened to be corn flakes, we would give a package of corn flakes with the three. We have used that method with Whole Wheat Biscuit and other methods, too. I would not say we have used that as much as others. For instance, we have done a lot of house-to-house work, selling a package and giving one. We arrange to sell the retailer about what we think we can dispose of in his neighborhood. We pick up the free packages from the grocer. The sold package we take out of stock; that is bought, too, from the retailer.

The state institutions are not large users of shredded wheat. Two or three of them sometimes buy it. We sell those accounts all on bids. Once in a while, we pick up an order for a case or two, but not biscuit. As a general proposition, state institutions are authorized to get offers and receive bids for their supplies. We sometimes receive a specification in which shredded wheat is called for. In that event, we bid on Kellogg's Whole Wheat Biscuits. We write that in on the specification that calls for shredded wheat. We do that on any rice products, too. If they want Rice Pops, we bid on Rice Krispies. State institutions do not specify Rice Pops, but other institutions do. We have three army bases. We get specifications from them for shredded wheat. We have developed that business. They specify Kellogg's Whole Wheat Biscuit. We have done it in advertising. I presume the fifteen biscuit in the package are responsible for that. When those bids come out, they specify Kellogg's Whole Wheat Biscuit. They do not specify shredded wheat any more. Once or twice they have, in the past year. When they have, we have lost the business. The National Biscuit does get some of their business. If

we get a specification with shredded wheat, we correct it, by writing in our bid, with our name, quantities, and price. We sometimes get business with those bids, provided our price is equal to or lower than shredded wheat. I believe it is usually lower than shredded wheat on those bids.

HARRY J. HELMERS.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

Direct Examination.

The Witness: I am vice-president of Henry Helmers Grocery Company, an old-line wholesale grocer. We have three salesmen. In and about Cincinnati, we have the chain organization of Plee-Zing, from Chicago, with about a hundred and sixty wholesale stores. Retail, there are fifteen thousand. In Cincinnati only, we have fifty-six. We service those in the main. They are retail stores, having their own name on the window and under the name: Authorized Plee-Zing Distributors. They are located throughout the city.

We handle the product Kellogg's Whole Wheat Biscuit in our wholesale and retail ends and have handled them since their first appearance in Cincinnati, approximately a year ago. We also handle National Biscuit Shredded Wheat. We have no confusion at all in our organization, as between those two products. The orders for the Kellogg product are usually marked: Kellogg's biscuit. Our salesmen mark them that way. Kellogg's Whole Wheat Biscuit is the name. They mark them on their order blanks. They order the other as just Shredded Wheat, and then we know what to give them.

We have around five hundred accounts on the books of our wholesale organization that we sell to. All of them handle Kellogg's biscuit. There is, to a certain extent, a retailer demand in our organization for Kellogg's Whole Wheat Biscuit. I should say that demand was increasing over last year. We service very little to the restaurant trade. I would not be able to throw light on individuals, at all, because we have no restaurants or hotels. We give sales co-operation as wholesalers and push the Kellogg biscuit. We have had our salesmen carry samples to the retailer trade, a regular package, with a cellophane front. They offered it to the trade to sell.

When National bought out Shredded Wheat Company, they started out to sell the product direct. Their bread wagons would sell it direct to the retail grocer, leaving the wholesaler what business was left, which did not amount to much. Later on, it seemed as if they went back to the wholesale grocer. The wholesale grocers did not like the National Biscuit Company selling shredded wheat from the bread wagon, and I understand some discontinued it as much as possible. I do not believe National is selling any shredded wheat direct to the retail trade any more in this district. I believe all sales are going through the wholesale grocer at present.

We have not done much pushing of Kellogg's Biscuit lately at all. There is a continuing demand for it. We do not handle any crackers at all. We had to buy a certain quantity of shredded wheat per month to be allowed a certain discount. They had a sliding scale. For instance, you had to buy a hundred dollars worth per month, and you got about 10 per cent. Buying less, you got 5 per cent. Buying two hundred and fifty dollars worth, you might get only twelve and a half. That is not so now. We get our jobber's discount right off the invoice.

The National shredded wheat was an item pretty well cut around in the trade. It is really today, yet. It affects unfavorably the profits I have made on it. It might boost the sale of National shredded wheat a little bit; but it hurts the product. It affects it in the trade when the manufacturer gives a special price.

Cross-Examination.

The Witness: I did not mean to say that the National Biscuit Company cut the price on shredded wheat. I never mentioned that, because I do not know. I did not mean that the manufacturer cuts the price to the trade. We are always a little bit in doubt whether the manufacturer does not give the chain store a little allowance beyond the price he quotes in the newspapers. That is what I had in mind in answering Mr. Clarke. There is a feeling in my line that National makes some sort of special allowance to the chain stores to enable them to use shredded wheat as a loss leader. I do not know that, but we feel that that may be. The price cutting I know about is the cutting of the retailer prices advertised by the chain stores.

I do not know exactly whether the Plee-Zing Stores still sell shredded wheat at similar prices to match the chain store prices, by everybody cutting down a little bit of their margin. The chain stores offer shredded wheat at ten cents a box. The cost to the retail grocer is a dollar twenty a dozen, which we must charge for them to realize a profit. We feel, therefore, because the chain store offers them at ten cents, they are getting something we are not. We have no proof of it. We know that chain stores will sometimes use a well-known national item like shredded wheat as a loss leader, on certain items. Some retailers will advertise sugar at cost; others some nationally-known coffee or other staple at a price

which must indicate a loss leader. That is bait to get a customer into the store and sell a line of goods. That device has been used by chain stores for a great many years. Being wholesale grocers, we are always a little bit doubtful about the advertising allowance, because we have already found out from five or six concerns who admitted they do it. There is nothing would make us believe Kellogg and shredded wheat do not do it. I have never had any admission or proof that the National Biscuit Company do such things. That is from the prices we see advertised by these chains.

Our idea in any of these chains, like Plee-Zing, is to give the independent retailer some of the advantages heretofore enjoyed by the purchasing power of the chains. That is the purpose of it, and of the I. G. A., owned by Mr. Grimes, and other concerns of that nature. Plee-Zing estimate their stores at fifty thousand through the country. They prevail mostly east of the Rocky Mountains. It was sponsored originally by some individual or concern. I believe they are about eight years old now, formerly organized in St. Louis. I think they are run somewhat like the I. G. A. They give you a territorial license. You are authorized by the proprietor of the name and the idea to use them in a certain territory, and gather about you a more or less cohesive group of independent retailers who own their own stores. They club together and buy most of their staples from you, and, in return, you give them some sort of uniformity in their stores, with the name, and give them the advantage of combined buying power, advice on merchandising and help in their advertising. In that way, I believe they are on a competitive basis with the nationally-owned chain stores.

We also have a regular jobber's line with independent grocers who are not in Plee-Zing Stores, and we sell them just as we always have for many years.

The stores embraced by the voluntary chain do not get a better price than we give to the regular trade. They stand on the same footing. They do not participate much in the combined buying power, as far as retailers are concerned. We have not worked that out really, so far; but we are trying to now. The idea will be to give them a little advantage for belonging to this chain.

For instance, in our advertising group, we have about thirty-six advertisers in connection with the I. G. A. in Cincinnati. We go to a certain extent to take care of some of that expense ourselves and have them print bill-posters and hand-bills. Those who are outside, not in Plee-Zing, do not get that.

We stock shredded wheat now and always did. If shredded wheat was out forty-five years ago, we have always carried it. Our house was formerly a retail grocery, started by my father. He got bigger and felt he would like to invest his money in groceries, so he had to open up a wholesale department about twenty years ago. He was in the retail grocery business twenty-five years before that, so my family has had the business, retail and wholesale, forty-five years. I believe they have had shredded wheat at least as long as it has been on the market. I have been familiar with it all my life. I have been connected with my father's business twenty-four years.

I recognize the package of shredded wheat. I recognize the old package, Plaintiff's Exhibit 10, but I cannot recall when it carried the picture of a dish on the end. I myself do not get to see a lot of packages. We handle it in case lots, mostly. I have been familiar with the biscuit all this time, and it has sold readily to the trade. The Shredded Wheat Company were great advertisers and gave us the benefit of their national advertising.

When our customers ask for shredded wheat, we know what they want and give them what they want, because we do not classify Kellogg's Whole Wheat Biscuit as shredded wheat. I just feel like either one of them is a name. I imagine shredded wheat would be a trade name; of course, the same as Whole Wheat Biscuit. Shredded wheat has been a sort of household word so many years it is associated with this biscuit now made by the National Biscuit Company, in the minds of the public. That is the reason. When an order is taken, if you want to call it a biscuit, all right; but, if they say Shredded Wheat, that is all is said on the order. One case shredded wheat is the way the salesmen order it. It is not necessary to say National or Niagara Falls; it is just shredded wheat. I believe that has been so as long as I can remember in the business. That is why I told Mr. Clarke that, in our house, there is no confusion between the two. I could not say whether there may be confusion among members of the public. I recall the Kellogg package you show me, which enables the observer to look through the window and see what is in the package.

Our house does not publish a catalog. Some customers call us over the telephone, quite a bit. That is when we get orders for a case of shredded wheat. I would say shredded wheat is now moving with the greater rapidity of the two.

Jobbers do not usually carry a line of crackers. In a city like Cincinnati, we have the National Biscuit Company or Striefmann Company, from whom we can get them for a grocer; and they are daily going around to the grocer and giving him his supply. Ginger snaps and soda crackers are perishable. It does not pay to stock them in a warehouse. It has been the practice of people like bakers and the National Biscuit Company to service the retail trade direct for many, many

years. As far as I know, members of Plee-Zing Stores obtain supplies of crackers from the National or Striet-mann. That we do not concern ourselves with. We make no effort to dictate to members of the voluntary chain whose line of crackers they shall carry. We are approached by representatives of various manufacturers; but we have an advertising group and a board of control who get together every Thursday and decide what they will advertise the following week. We have an advisory council of twelve grocers once a month who run the meeting. We are only there to tell them right from wrong. We do not now have any arrangement to combine in purchasing crackers and get the combination discount. That is entirely up to the individual.

RE-DIRECT EXAMINATION.

THE WITNESS: We handle the whole Kellogg line of cereals. It is a very popular line with the grocer.

RDQ. 155. If you had the word under oath of the sales managers of Kellogg that they give no advertising allowances to the chain stores, would you not be inclined to accept that?

A. Well, from the sales manager?

MR. VILAS: You hesitate, do you not, Mr. Helmers?

A. Well, I do not know. We have Mr. Barton come in, and he will say positively they do not give any allowance.

RDQ. 156. Did you understand what I mean? If they testified under oath, do you think they would perjure themselves about it in an organization of that kind?

A. Oh, I would think I would take it for granted that they did not.

THE WITNESS: In connection with loss-leader sales of Kellogg products, it is natural that they do not

want to sell anything at too low a price. I told you I thought, where chain stores were advertising shredded wheat for a very low price. They may have had some concession from the National. I do not say on that one item. It might be shredded wheat, or Kellogg's, or Campbell's Beans, or a hundred different items.

Those concerns with which we are affiliated give dealer advertising and co-operation to Kellogg's Whole Wheat Biscuit, advertising, window displays, and so forth.

I believe Rolled Oats is the largest seller in the cereal line. In dry, ready-cooked cereals, I think Kellogg's Corn Flakes is the largest seller. Niagara shredded wheat has never anywhere near compared to them in volume. Compared with corn flakes, shredded wheat has always been a small seller. We handle Niagara shredded wheat in one-dozen cartons, wrapped in good heavy paper. We also handle them in three-dozen cases, also packed in a cardboard box. I have not noticed the word *original* on the shredded wheat cases since Kellogg came into the field.

The proportion of sales of Kellogg's Whole Wheat Biscuit and Niagara shredded wheat through our house is about five cases of shredded wheat to one of Kellogg's. We serve the entire city of Cincinnati and a few outlying districts. Our dealer members advertise. About thirty-six of them advertise with handbills. None of them uses newspaper advertising or anything of that sort.

RE-CROSS-EXAMINATION.

THE WITNESS: My house does not pay $1.20 a dozen for shredded wheat. That is the price to the retailer. If a national chain were able to purchase shredded wheat at the same price at which we purchase it, they could retail it at ten cents without any advertis-

ing allowance. They might do it any way. They might do it without the necessity of making advertising allowance or making a loss-leader of it. The trade knows that, on many items, the retail trade purchase direct from the manufacturer at the jobbing price. From what I can understand they all do. A national chain like the A. & P. is its own jobber, has its own warehouse, and acts as its own wholesaler.

We do not purchase corn flakes in great quantities. Pool cars come into Cincinnati. If we need anything in the Kellogg line, it is placed in that pool car. I have heard of Kellogg's Corn Flakes being sold at a low price as a loss-leader sometimes. It is a very popular item. In competing with that, it is like everything else. The wholesaler and retailer must work on a close margin to bring out that loss-leader. The price on corn flakes and shredded wheat would be about the same to us, on a regular. When I speak of specials on Whole Wheat Biscuit, I mean a cut price. If we would sell it to the retailer for a loss-leader, we would work somewhat closer. In ordinary dealings, the margin is about the same.

MR. CLARKE: For the purpose of avoiding recalling the witness Harry J. Helmers to the stand, it is stipulated that, if called, he would testify that, in the last year, his purchases of Whole Wheat and of shredded wheat have been one hundred sixty-one cases of Whole Wheat Biscuit and two hundred fifty-nine cases of shredded wheat biscuit, the figures being computed on the basis of both cases containing the same number of packages, viz: two dozen packages each.

MR. VILAS: Yes.

NORBERT THIEMANN.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am president of Thiemann Brothers, Inc., wholesale grocers, mostly a cash-and-carry outfit. We have some credit accounts, but mostly not. All our business is done over the telephone. We have about thirteen hundred accounts. We serve greater Cincinnati and surrounding country towns. We handle both Kellogg's Whole Wheat Biscuit and shredded wheat. We sell about three-quarters as much Whole Wheat as we do shredded wheat. When people ask for shredded wheat, we give them shredded wheat. When they ask for Kellogg's Whole Wheat Biscuit, we give them that. As time goes on, the demand for Kellogg's biscuit is getting greater. It seems to be growing faster than the other. I attribute that, in our particular business, to the specialty work of Kellogg with the trade. There was a time when I was there and we did not have the original or Niagara shredded wheat. I believe, some time back, the jobbers could not get it. National was going to deliver it from trucks. Some of our customers would not buy it from National, and they came around and sold to the jobbers again. The National Biscuit Company wanted to deliver it to all our members, we understand, in lots of three to six packages. Relations have been re-established with the jobber. We have been handling it again for a couple of years.

We have no confusion in our organization between the original shredded wheat and Kellogg's biscuit.

CROSS-EXAMINATION.

THE WITNESS: When I say we have no confusion, I mean in our organization. We know the products

apart, and we know what a customer wants when he calls for shredded wheat. I have been in the business ten and a half years. We have carried shredded wheat all that time, when the National was selling it direct; also when we first started out, we started from scratch. We are former newsboys and farm boys, and we started from a little up, taking on products as we were able to. It is safe to say that one of those items was shredded wheat, about five and a half years back.

XQ. 31. You knew there was such an article as that before that, did you not?

A. Oh, shredded wheat? You bet I did.

XQ. 32. That is a very old article?

A. Yes, that is a real old one.

THE WITNESS: I probably have not tasted either one. I do not like baled hay. There is no dispute that a lot of people like it. They like wheat products. Lots of them call for it. Other people call up and ask for Kellogg's Whole Wheat Biscuit. We have about thirteen hundred telephone accounts, and the larger part of our business comes in over the telephone, all of it. We only use a man to collect money and to get dead checks honored. When it is ordered over the 'phone, we deliver it and get cash. A lot of it is called for right at the plant, about fifty per cent.; and the rest is hauled out in the rural districts, and the farmer may go and get it. He comes right to our door and pays for it in cash and takes it away.

RE-DIRECT EXAMINATION.

THE WITNESS: I would say the National Biscuit company does not put as much effort behind the sale of shredded wheat as does the Kellogg Company behind its Whole Wheat Biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: I will not say that the old Shredded Wheat Company did not, in past years, put much effort

behind their products; but, in this field, Kellogg puts up more effort and has all the time we have been handling it. We carry the full Kellogg line. When I spoke of their specialty men efforts, I meant in pushing their whole line, including the biscuit. Their biscuit business is increasing. The Shredded Wheat Company hurt themselves when they took it away from their jobbers. I would not know about the original start of shredded wheat or the advertising of the Shredded Wheat Company when I was a young boy. They came back to the jobbers, because the individual merchants would not buy the product in some instances from the National.

RE-DIRECT EXAMINATION.

RDQ. 56. Mr. Thiemann, before you came on the stand, I asked you about the proportion of the sales of this shredded wheat and the Kellogg's, and you told me that you sold three packages of Kellogg's for every one package of shredded wheat. Is that what you meant to say on the stand here?

A. Yes. By that I mean that we will sell twenty-five cases of shredded wheat and we will sell seventy-five of Whole Wheat.

RDQ. 57. Of Kellogg's?

A. Yes.

RDQ. 58. And is that what you thought you said on the record?

A. That is what I intended to say. I said one-quarter to three-quarters, I think I said.

MR. CLARKE: That is all.

RE-CROSS-EXAMINATION.

By MR. VILAS:

RXQ. 59. Yes, and then, after you left the stand and went out in the hall with Mr. Clarke, will you tell us what happened out in the hall?

A. He just asked me what I meant by that and I told him then in figures that I mean twenty-five and seventy-five.

MR. VILAS: Yes.

RE-DIRECT EXAMINATION.

THE WITNESS: You just said to me in the hall that you had asked me to say what the proportion of it was and I had told you before I went on the stand we had sold three times as many. Then you asked me if that was what I thought I said on the stand, and I said yes.

RE-CROSS-EXAMINATION.

THE WITNESS: I came back to correct what I had said before, so it would not be confused.

NICHOLAS DIEHL.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, with four stores, at 5109 Vine, 2101 Vine, 3951 Spring Grove, and Gest and Wilder. They are considered up-to-date stores in the general grocery line, self-service type, one of them; and the others are semi-service and semi-self-service. I handle Kellogg's Whole Wheat Biscuit, and have, roughly, I would say about six months. We carry it in all four stores. We handle also National shredded wheat. One goes under the name Whole Wheat and the other shredded wheat in our stores. We have no confusion between them whatsoever, and the housewife has none. Kellogg's Whole Wheat Biscuit sells more in our stores, about three to one.

Kellogg Company asked me about three or four weeks ago to give them a list of names that they wanted

to send out postal cards to. He sticks up circulars, display cards, and asked me about floor displays, in which we co-operate because they always co-operate with us. Whole Wheat and shredded wheat sell at the same price. We use the cellophane-front package like Plaintiff's Exhibit 161, which is what created our sale. That really distinguishes that line of cereals from the other one by the cellophane front being in it. Since we had them I have used them every morning myself. Behind my desk I have a half pint of cream and I use two of those biscuit. If someone does not know what they are, I show it to them. I think, seeing the name Whole Wheat Biscuit, they do not know what they are unless the cellophane front was put in. I have had some people tell me they did not know what it was. Some of my clerks tell me they have never used them until they saw them in stacks on the floor. I have never used either kind before. I give the Kellogg Company dealer co-operation in display space and window display. I always do. I have not given space to it in the newspapers but on hand-bills. We have featured Whole Wheat Biscuit all the time. I think I have it on this week's circulars. We get no manufacturer co-operation at all from National Biscuit Company in selling shredded wheat biscuit, because we cannot buy them right, in the first place. You cannot buy them on trade discounts. They are selling them for nine and eight cents. We cannot sell these for nine cents and meet them. We feel we can buy Kellogg's right but not the other. I am not on the same basis as the large buyers. I feel National is giving better prices to the large buyers than to me. I know it, because they get seventeen and a half, and I could not get it. There is a demand for Kellogg's Whole Wheat Biscuit in our store, an increasing demand in all shredded wheat products. I used to sell one box a month of shredded wheat, and now we sell about six boxes, altogether, of shredded

wheat. The one store in particular where I am sells between four and five cases a month Whole Wheat Biscuit, and we still sell our one case of shredded wheat biscuit. We sell five to six cases a month of Whole Wheat Biscuit to one of shredded wheat in my store. We give Jack, the salesman who calls on us, his case every month. That goes out as regular as clock-work. That is just the one store.

CROSS-EXAMINATION.

THE WITNESS: Shredded wheat sells. In our store, we have five cases of Kellogg's and one case of shredded wheat a month, just in one store. I said we sell Kellogg's three to one in our four stores. That is clear. Shredded wheat is in larger cases. Each store buys individually. Of the Kellogg's, for all four stores, I would venture to say about twelve cases a month, and about three cases of shredded wheat with thirty-six to a case per month in all four stores. The store I am in sells a case a month. It does that despite the fact we do not push it or have co-operation. We do not feature it. In three of the stores both kinds of biscuit are right together. In one store they are in a different spot. Sometimes we have floor displays for Kellogg's and window displays. The salesman comes around and does that. The shredded wheat is not especially displayed. They can help themselves to it. It is on the shelf; but it is not featured on a window or floor display. We do not put it up unless the salesman comes around and puts it in. Notwithstanding that, we have customers who demand or help themselves to shredded wheat. They come in and ask for them. When they do, I do not necessarily show them Kellogg's Whole Wheat Biscuit. If I have not got it, I could.

We tell them there is a whole wheat biscuit made like it, with more in a box, and so forth. If I would

have it, I will take it from the back and show them what it is. The cellophane front is our display. They see the biscuit through the cellophane front of the package and help themselves or ask for it. They can see the picture of shredded wheat on the shredded wheat package. I will not buy anything from a picture, only what I see. I know of no other products having a cellophane front window. It is hard to think of any cereals having cellophane fronts, the same as Kirkman's soap chips have right now. I would not hesitate to buy Kellogg's Corn Flakes. I was raised on them. In general, I knew what they were; but most people do not know what shredded wheat is. We have some very smart people in our trade and some very dumb people. I have had them come in my store and not know what a string bean is, so there is nothing new about their not knowing what shredded wheat is.

The Kellogg salesman did not ask me for a list of my customers who use shredded wheat. He asked me if I wanted to take on the Whole Wheat Biscuit and give him a list of my customers. I gave him a list of my people that I send to. It is our mailing list, but, due to a flood of orders and everything, we have not had a chance to get it ready for him yet. So we have not had this competitive campaign on Whole Wheat Biscuit yet. He asked for it a while back. I have not yet given it to him. He delivered them to me, saving the cost of delivering them. He is willing to give me displays or demonstrations at any time. He made displays of them. They have salesmen, and they sent them over when that preliminary was on. Sometimes he would let him run the displays. He would even sometimes make them. We have had deals on, where they would sell one package and give away one package. I think that was when we first handled it. I think three packages were sold at regular price and one package Whole Wheat Biscuit was given away free. I do not remem-

ber whether the free package was purchased from me or not.

I buy my shredded wheat direct from the National Biscuit Company. I carry some of the National Biscuit crackers, not all. My cracker purchases together with shredded wheat do not give me a full discount. I am not a member of a voluntary chain. I belong to the Cincinnati Wholesale Grocers' Association. They were just put on the list for seventeen and a half per cent. discount. I can buy shredded wheat through them now, right; but that just started the first of the month. I do not know and I do not think I can buy shredded wheat from now on at as favorable terms as the chain stores can. I believe the chain stores get a special deal from the Biscuit Company, although I cannot prove it. I know what you mean by a loss-leader. It is possible the chain stores have loss-leaders. I would not think they would sell it below cost. I think it is against the law to sell below cost. When I ran a special on any product, they told me it was. I can sell Kellogg's biscuit for nine cents and break even.

I have been in the grocery business about five and a half years. In the early part of that business, before National had taken over shredded wheat, I carried shredded wheat and bought it through the jobber. We did not then have Kellogg's Whole Wheat Biscuit to compete with. We had no shredded wheat biscuit at that time, except shredded wheat. There was very little consumer demand for that at that time. We sold it. People came and asked for it. I really think there is more demand today than there was then.

HENRY MUELLER.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

Direct Examination.

The Witness: I am a retail grocer with one store, located at 3160 Jefferson Avenue, Coraville, Ohio, a suburb of Cincinnati. I am president of the Cincinnati Retail Grocers Association, treasurer of the Ohio Grocers and Meat Dealers Association, and a director in the Grocers Mutual Fire Insurance Company of Ohio.

In our store, we handle the product known as Kellogg's Whole Wheat Biscuit, in closed packages, like Plaintiff's Exhibit 167. We have not handled any of the cellophane fronts, like Plaintiff's Exhibit 161. We also handle National shredded wheat. Of the two, I am selling more Kellogg's Whole Wheat Biscuit, about three to one.

Q. 16. How are those products asked for in your store? What do they call them?

A. They just come in and ask for shredded wheat.

Q. 17. I mean, what product do you give them when they ask for shredded wheat?

A. We give them Kellogg's.

The Witness: Some of the customers who want Kellogg's say they want Kellogg's. Others just mention: "Give me a package of shredded wheat," the same as a customer coming in your store and saying, "Give me a loaf of National Biscuit bread," and others will say, just, "Give me a loaf of bread." People ask for shredded wheat, and I show them both packages and explain the difference between the one and the other. We have telephone orders for the Kellogg product, and also for shredded wheat.

Q. 27. When you get an order for shredded wheat over the telephone, just what do you do?

A. I send out Kellogg's.

Q. 28. You send out Kellogg's?

A. Yes, sir; unless they designate that they want the National Biscuit Company product. Then, we give them the National Biscuit Company's shredded wheat.

We explain to them and we give a little explanation. We do not just send it out that way. We tell them we have a new whole wheat biscuit, that they can try them, and, if they are not satisfactory, they can return them.

THE WITNESS: We have never had any people return the Kellogg product. We do not substitute anything in our store. If we do not have an article for a customer, we go out and buy it for him. We never substitute.

From the Kellogg Company we get co-operation in promoting the sale of Kellogg's Whole Wheat Biscuit, by window displays, counter displays, and literature which we put in with orders and give to the trade as they come in the store. We do not get that same kind of co-operation from the National Biscuit Company.

Kellogg's Whole Wheat Biscuit business is increasing in our store. I find there is a consumer demand for the Kellogg product in our store. It is growing each day. We buy National shredded wheat from the Cincinnati Wholesale Grocery Company. I cannot say whether it is sold at the same price to chain stores and independents. I can form my own opinion, but you hear a whole lot that is not so. Although I have been in the grocery business thirty-six years, I cannot understand how the chain stores sell National Biscuit shredded wheat at ten cents. I have seen it on a tag in the window while waiting for the street car in years gone by. I could not understand how they could do that, when it was costing me ten cents. Nobody can work for nothing and pay expenses. You can get a price on Kellogg's, about ninety-five cents a dozen.

National is about a dollar-fifteen. The chains are selling the National at ten and Kellogg's at twelve. That is something to understand. The one costing less they are asking a bigger price for. There certainly must be a nigger in the wood-pile, somewhere.

CROSS-EXAMINATION.

THE WITNESS: I have no grievance against the National Biscuit Company whatever. I carry about ten per cent. of their crackers, because we have a consumer demand for them and have never substituted. We do not push the National cracker. We are salesmen and sell anything good. We do not push them, because I could never understand why the National Biscuit Company lets other cracker companies give the retail grocer seventeen per cent. on a certain amount of goods. Just recently in the last four weeks, the National recognizes the wholesale grocer's discounts, but not in the twenty or thirty years gone by. I do not think I can buy them through the Cincinnati Wholesale Grocery, but I suppose they will go out and get them for me. As I am a member, I am buying Strietmann's and Loose Wiles goods at seventeen and a half per cent. discount, regardless of the amount. I can buy direct from the National Biscuit Company now, regardless of the amount; but that went into effect only about four weeks ago. The dollar-seventeen price I gave on National shredded wheat, is without the discount off. That is down to a dollar-ten. Then add on to that two per cent. I get it for a dollar-ten with the seventeen and a half off, a difference of about seven cents a dozen. I am buying Kellogg's at about ninety-five cents a dozen. I make more money on Kellogg's than on National shredded wheat.

It is natural with the push I am giving the Kellogg product and the co-operation they are giving me, that the sales of Kellogg's biscuit should increase in my

store. I am for anything that makes a profit to me. I am in business for Henry Mueller, not the manufacturer. If I would get a better profit from the National, I would push their goods. I told their salesman it surprised me the National did not fall in line with others. He said there was talk about it, but it takes time.

When somebody asks for shredded wheat, I give them Kellogg's, unless they insist on National shredded wheat, and explain to them there are more biscuit, that they are smaller, and, at the same time, it contains half an ounce more. I think that is a good selling point, and I succeeded in most cases. We have some customers, however, who say, "No, I want shredded wheat." I do sell shredded wheat. Having been in business over thirty-six years, I have sold lots of it. Until Kellogg came on the market with Whole Wheat Biscuit, we had good sales of shredded wheat. Until then, we had nothing else like it, to take its place. I never like to sell anything I cannot make a living profit on. Now that I have a chance to sell this small biscuit, with more in the package, and make a little more money, I am pushing that. I push anything else there is money in, too. I do not regard that as substitution, because I really explain it to the customer. We are willing to have them take it and bring it back if they do not like it. I think that is salesmanship. That is not substitution in my mind, because what I call substitution is this: If a person orders, for instance, Heinz' Ketchup and we send them Ritter's Ketchup, that would be substitution. If they order shredded wheat and I send them Kellogg's, not telling them about it, as long as I explain to them that it is not shredded wheat, that it is Kellogg's Whole Wheat Biscuit, that is perfectly legitimate and all right, I think. I make a little more money on it. The National Biscuit Company suffers for it. That is natural, I suppose. Take C & H package Coffee, they say, "Why not carry our coffee?" I say,

"No, there is no money in it. I push Henry Mueller's coffee. Give me some prices and profit, and I will push it."

When a person calls up and asks for a loaf of bread, we give them whatever we have the most of. If a customer says, "I want the National product," you bet your life they get it. If we have not got it, we send down and get it for them. That applies to butter and everything. A certain part of the trade demands a brand. Others, so long as the quality is there, are not particular what brand it is.

RAYMOND J. LIPPERT.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer, with a store of my own under the name of Raymond J. Lippert & Company, at 621 Monmouth Street, Newport, Kentucky. It is a service store. As to some of the goods customers can wait on themselves; as to others, they cannot. It is a medium-sized store. We have had it seven years.

We handle in the store Kellogg's Whole Wheat Biscuit, in a closed-front package, like Plaintiff's Exhibit 167. We have handled it at least four or five years. There is a consumer demand in our store for it. As far as I know, people ask for Kellogg's shredded biscuit or Kellogg's Whole Wheat Biscuit. I do not know whether they put the *whole* in there or not.

We have handled the National product, shredded wheat, but not now. We stopped handling it because the demand seemed to subside. It just sort of died out in our place. We had biscuit on hand. The demand was gradually getting less, and it just seemed it was

not moving fast enough. It began getting old and dusty, so I discontinued ordering it. I did not give any thought to what caused that. I am not interested particularly in Kellogg or the National. If an item dies out, we are not interested in finding out why. We would just replace it in favor of other stuff. After it was taken over by the National, it seemed there was less aggressiveness on the part of the company in pushing it. That is just a thought. I do not know it. I think the Kellogg Company aggressively push the sale of their Whole Wheat Biscuit. We do not feel that Kellogg fails to push it. For one thing, I am solicited more often by salesmen. That is one big thing, the salesmen coming around and keeping after it. They have displays. We have given them space for window displays. We have arranged them together. They supply the display matter. I do not know that they ever put any in for us. We ask to be allowed to do that ourselves. They will do it, if I want it. We have had store sales. Our store is comparatively small for the business we are doing, and we do not go in for extra displays, such as they might like to put out. We have had extra displays put up by the store men. We have had sales of the whole line of their products, including Whole Wheat Biscuit. We advertise in the papers and have advertised Kellogg's Whole Wheat Biscuit. We never had any advertising allowance from the Kellogg Company on that. In general, we do not practice substitution in our store. There might be a rare case where we might use our judgment putting in an article we think might be used by the consumer in place of the one he ordered. In that particular case, I suppose that would be substitution. That would only apply in the case of a regular delivery order, when we could not ask about it. We never substitute in the store, where people are calling for goods and where we have any opportunity to ask

them about it. We may have substituted in rare cases on delivery, there being no opportunity to ask them. We sell, I imagine, two to five cases of Kellogg's Whole Wheat Biscuit a month. I do not know. I would say the consumer demand for that product is increasing.

CROSS-EXAMINATION.

THE WITNESS: I suppose it is about two years since I have ordered shredded wheat from the National Biscuit Company. We have been without it all that time. I think the handling of the two lines overlapped. We did not have them both at the same time. We did not put this in until the other was put out.

After I got the Kellogg kind in, it outsold the shredded wheat. At the same time, probably two years ago, shredded wheat ran out, and we did not order any more. When our customers asked for shredded wheat, we told them we have not got it. We do offer to sell them Kellogg's Whole Wheat Biscuit. We do not pass Whole Wheat Biscuit on an order for shredded wheat. If they ask for shredded wheat, we may say we do not have shredded wheat, but we have Kellogg's Whole Wheat Biscuit. That is our invariable practice on that item. We do not let the customer get away if we can help it. If they want a package of shredded wheat and we do not have it, we try to sell them Kellogg's. We do not regard that as substitution, if a customer has the chance of choosing or deciding. We do not have very many telephone orders, just a few. It is mostly cash-and-carry. I know I do not just offer the Kellogg package in response to a request for shredded wheat. If the clerks are living up to their instructions and the general policy of the business, they do not. I do not think I know Mr. Donnelly, the gentleman at the table here. I do not think I ever saw him in my store.

XQ. 61. Would you be surprised if I told you that, about a week ago, Mr. Donnelly asked for shredded

wheat biscuit in your place and was handed a package of Kellogg's Whole Wheat Biscuit?

A. Without any explanation?

XQ. 62. Without any explanation, yes.

A. Yes, I would.

XQ. 63. You would not say it could not happen, would you?

A. No.

RE-DIRECT EXAMINATION.

THE WITNESS: I would say, in explanation of this incident, if it did actually happen in my store that the clerk, in handling or suggesting or getting down and handing out a package of Kellogg's to Mr. Donnelly, assumed he could see there was a difference. If he objected, he would say so, which he did in that case. She was not trying to deceive him.

I am not prepared to say whether, physically speaking, the product she handed out to him is a shredded wheat biscuit or not. I suppose it is.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not know particularly what this case is all about, I just know there is some dispute between the National Biscuit Company and the Kellogg Company about shredded wheat. I have known the product you call shredded wheat quite a number of years. There was a time when that was the only product of that kind on the market that we carried.

RE-DIRECT EXAMINATION.

THE WITNESS: In the incident just related with regard to Mr. Donnelly, he said that, as a matter of fact, he did not take the biscuit offered him. He just explained that to me off the record.

GEORGE W. SCHWAGER.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

Direct Examination.

The Witness: I am manager of the Otto Depenbrock Company. We are recognized by the manufacturers as the largest wholesale and retail grocery. We have a retail department. We are the largest wholesale house in Campbell County. We have retail outlets all in Kentucky. We have one very large store in Newport, and one in Bellevue, one at Cincinnati, at Finley and Linn Streets, under our jurisdiction. Depenbrock, as a whole, is a large family. There are also chains of Depenbrock over in Kenton County. There were two brothers, Otto and Henry. The two brothers died. The businesses were handed down to the sons. Those in Kenton County are owned by Henry Depenbrock's boys, and the business in Campbell County is owned by the widow, Mrs. Otto Depenbrock. That is the organization with which I am connected.

We handle Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 167. I am in a position to say there is a consumer demand for that product in our retail outlets. They also handle the National shredded wheat biscuit. Of the two, Kellogg's sells most, I would say, in our retail outlets. Offhanded, I would say it sells about two to one. I have no connection whatsoever with the trade. The policy in our store is that we have nothing but nationally-advertised brands. That is our aim, and we sell only the brands specified by the customer. If a customer comes into our store and asks for Whole Wheat Biscuit, the clerk would ask her what she wanted, and she would have to say either National or Kellogg's. That would be true if the customer said shredded wheat.

We handle some shredded wheat, but we do not handle any other National Biscuit Company product. We have eighteen or twenty clerks in the store on Saturday. This time of the year, with business as it is now, we have nine during the week. We have a large neon sign in our store, for Kellogg's Whole Wheat Biscuit, used in connection with floor displays. Not more than three or four weeks ago, we had a very elaborate display, and the Kellogg Company thought well enough of it to come over and take a photograph. We also have window displays. We have had window displays of Whole Wheat Biscuit of Kellogg. We do newspaper advertising a[illegible] have referred to Kellogg's Whole Wheat Biscuit in our newspaper ads.

We get a cent more for National shredded wheat than we do for Kellogg's biscuit. Kellogg's is ten cents, and shredded wheat eleven.

CROSS-EXAMINATION.

THE WITNESS: I would not say we have never carried National crackers, but not in three years I have been there. That is my whole experience in the grocery business. I am business manager of the stores. My attention is given to the entire works, wholesale and retail. Everything is under my supervision. My headquarters are 915 Monmouth Street, Newport, Kentucky. I hold meetings every Thursday night with all my clerks, to further the sale of merchandise. I do not actually move packages across the counter. I am not in the retail store; I am in the office. I am out through the store, pass through there probably many times in the day.

I do not know how it happens we carry National shredded wheat. We do not carry it all the time, have none right now. We have not had any for two weeks. We are out of it more often than we have it. I have

no answer for why we carry it, because I have no desire to carry it. We have to have all nationally-advertised brands, so we have to have some National shredded wheat. It is positively fair to say that we carry it because we have some demand for it. That is the answer to it. If we did not have a demand for it, we would not push it. We do not push it now. I am not particularly friendly to the National Biscuit Company.

Ours is a cash-and-carry, semi-service store. We are on the same plan as Kroger's Government Square Stores. Some things you can pick off the center tables, but you cannot get behind a counter to serve yourself. We sometimes find shredded wheat on tables in the center and sometimes Kellogg's Whole Wheat Biscuit.

We have trade ordering over the telephone. It is no different over the telephone than it would be over the counter. You would have to designate what you wanted. I would not know what you wanted if you asked for shredded wheat. We do not make any effort to send anybody anything they do not want. If they say shredded wheat, we have what they want. You would have to say Kellogg's or National, notwithstanding that we have a package in our store on which the only designating name is shredded wheat. We do not recognize we have two packages, either of which would fill that order, if the customer specified it. If a customer designates which of the two packages she wants, fully. We do not know which she wants, and we would not fill the order or accept it, until she designates which. We do not vary in any way from that practice. We have clerks, and they are human. If I ever catch them doing it, there is a different story attached to it.

Supposing at the present time there is a shredded wheat made by the National Biscuit Company, I do not ask them what they want. If they ask us for shredded wheat, National, and we are out of it, I tell them flat-footed we are out of it. If one of my clerks, when a

call came for shredded wheat, would pass out a package of Whole Wheat Biscuit, they would be going against the rules. It could happen. I would be greatly surprised if told it actually did happen within a week in my store.

The neon sign in my store says: Kellogg's Whole Wheat Biscuit, just like that box. That is prominently displayed in my store from time to time. It is an attractive display and attracts customers. I would say that this and other similar displays we use on Kellogg's biscuit have resulted in creating a demand for it. Speaking of outselling shredded wheat two to one, it is safe to say that that sort of display and pushing would have that effect. We have had it on other sales promotion and books and coupons have been given out. I would say the increase of Kellogg's over the National is accountable for by promotional work. We make no attempt to push the National, never put them out on display, just put them on the shelves, until somebody asks for it. We sell it a cent a package higher than Kellogg's. We have to, because it costs us practically ten cents. We buy it as a jobber. We are supposed to be on the same basis as the larger stores, chain stores, but they can buy it and sell it for a dime. We cannot. We buy five or ten cases at a time and get the regular jobbers' seventeen and a half per cent. discount. Still I say we cannot sell it for ten cents.

RE-DIRECT EXAMINATION.

THE WITNESS: National shredded wheat is offered on the market in competition with me at ten cents lots of times. It has been that more often than any other price. We cannot meet that competitive price.

RAYMOND P. BLANK.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, under the name of Charles J. Blank, the business of my dad, my brother, and me. We have just one store at 350 Warner Street, considered a large store. We have seven clerks, sometimes eight, when we are busy. We have most of the displays in front and some on shelving behind the counter. Special displays are in front. We have window displays in two ten-foot windows and one six-foot window. It is an old line service store, taking orders and extending credit, making deliveries, and taking telephone orders.

We handle Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 167. We do not carry it in cellophane-front packages like Plaintiff's Exhibit 161. We also handle the National shredded wheat, in the new style package, with purple grass in front of the building. Most of it comes to us in packages like Plaintiff's Exhibit 1.

Of the two products, we are selling about two of Kellogg's to one of shredded wheat. If a customer asks for shredded wheat or wheat biscuits, we usually ask if they want Kellogg's or the National. The customer most of the time asks for prices. If we happen to be selling Kellogg's a little cheaper than the other, they usually take the low-priced package. Our retail price is ten cents for Kellogg's and twelve cents for shredded wheat. I have seen shredded wheat advertised for ten cents time and time again. We could not very well sell it for that.

We have handled Kellogg's Whole Wheat Biscuit since last fall. A customer called up and asked

me for Whole Wheat Biscuit. I sent her shredded wheat biscuit. She said I was not sending her the right thing, that she wanted Whole Wheat Biscuit. I never knew they had Whole Wheat Biscuit before. I inquired at the wholesale house, and they said that Kellogg's had a whole wheat biscuit. I ordered them and sent her a package. She said that is what she wanted. There is some demand for them. We stacked them up in the store, put a ten-cent price on them, and they sold readily.

The Kellogg Company sometime ago, gave us some signs, and they also had a little window display in a small side window. We do not like to give them a big one, because we use it for ourselves. We have not had a neon sign. I would use one if they gave it to me and it did not consume too much "juice." I would put in anything that helps sell the goods.

CROSS-EXAMINATION.

THE WITNESS: I think the difference in price is the principal attraction to the consumer in our neighborhood. Our customers often ask for shredded wheat. Lately, they ask for whichever one they want. Some of them call for Whole Wheat Biscuit. They do not all call for shredded wheat. We do have calls for shredded wheat. We invariably ask them which one they want. The girls are instructed to ask whether they want National or Kellogg's. It would not do in our locality or in Newport, at all, to simply send or hand them Kellogg's without making any explanation. Our people will not stand for that. If they want Maxwell House Coffee, they want it and we cannot give them anything else. That has only been true since last fall when we put in Kellogg's biscuit. Before that, when they asked for shredded wheat, I knew what they wanted.

I have handled shredded wheat in our store and my father before me handled it for many years. Before that, when people asked for shredded wheat, I knew what they wanted. There was nothing else to ask for but that, until there was a competitor. In one sense Kellogg's Whole Wheat Biscuit could be looked at as a competitor now of shredded wheat made by the National Biscuit Company. In another way, it is a different size. Some people like a smaller one. That very difference in size is a competitive feature. It looks like it. We have been using it for a talking point. When we tell them they are smaller biscuits, some people take it for that. I would not say that Kellogg's biscuit supplants the shredded wheat. We are in a price neighborhood, and the price of it takes it.

Some people ask for corn flakes. They do not mean corn flakes, but, after you suggest the item to them, they take it, too. They do not always buy this shredded wheat biscuit because they want shredded wheat. It is just the way you approach the customer. If they ask for breakfast food and you grab a package and show it to them, they are very likely to buy it. I have used Shredded Wheat for a long time. A customer comes to me like that, and I will say "Which one do you want?" The three best customers for Kellogg biscuit have bought them since we had them stacked on the counter in the store. Before they bought Corn Flakes. They buy about six packages a week. I took particular notice of them. I would not say there were not many who used to buy shredded wheat, who now buy Kellogg's Whole Wheat Biscuit. I would say there are half a dozen of them, anyway.

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ANDREW PATRICK BARTON.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

Direct Examination.

The Witness: I am salesman for the Kellogg Sales Company. My territory embraces Hamilton County, of which Cincinnati is the county seat, and about twenty adjoining counties. I am principally a jobber salesman, calling on institutions and retailers, my duties embracing the promotional work on the whole Kellogg line, holding store demonstrations, merchandising our products as we contact the trade with premiums and things like that, and selling our products. The articles in the Kellogg line are Corn Flakes, shredded wheat—or Kellogg's Whole Wheat Biscuits, Rice Krispies, Pep Bran Flakes, All Bran, Whole Wheat Krumbles, and Kaffee Hag coffee. I travel the wholesale trade soliciting orders for that product, and I work right in the retail trade.

In promotion of sales of Kellogg's Whole Wheat Biscuit to the consuming public, we have had the Wheel of Knowledge, used in merchandising Whole Wheat Biscuit, giving one free with every two packages of Whole Wheat Biscuit; have had store demonstrations, pointing out the merits of our product. We have had attractive restaurant displays, showing ours is a smaller biscuit, fitting the cereal bowl. We have store displays, neon signs, and window posters. We have window side-bills of Whole Wheat Biscuit. We have done house-to-house work, sampling to the consumer. I have worked the coupon postal cards. We get lists from the grocery store and mail a coupon out to that list, telling them they can purchase one and get one package free. These methods have been effective in creating consumer demand to the retail trade.

we have shown an increase each month for the last six months.

I work in the restaurant trade. They use the individual size. In my territory, I would say the Kellogg biscuit has had a distribution of at least 50 per cent. to the restaurant trade. In the grocery trade, the stores I have contacts, I would say approximately 75 per cent. distribution.

The selling points we emphasize in pushing the sale of Whole Wheat Biscuit are that it is a smaller biscuit, toasted on top and bottom. It weighs a half ounce more to the package and there are more biscuit to the box. The smaller biscuit fits the cereal bowl better.

Cellophane-front packages are being packed with our goods for display purposes. The premiums, such as Wheel of Knowledge and others, also act as sales advantages or helps.

CROSS-EXAMINATION.

THE WITNESS: It is smaller than the other Wheat Biscuit on the market, by which I mean shredded wheat. In introducing the other package, they may ask what kind of shredded wheat it is. Of course, it is a shredded wheat biscuit, I presume. We point out the size of our biscuit. The comparison might come about through the grocery man. When we are showing our product with the cellophane front, or possibly an opened package, we will say: That is shredded wheat biscuit, and they will say: We have one shredded wheat biscuit. We may say: Our biscuit is smaller. I may bring out that fact.

When I say the biscuit is smaller, I am possibly comparing it with the shredded wheat biscuit already on the market. I presume our biscuit is in competition with the shredded wheat biscuit made by the Na-

tional Biscuit Company. I know it is in competition. I would not think some of the 75 per cent. distribution in stores is business taken away from the old shredded wheat, altogether. I do not know whether any of it is. Some business for shredded wheat is new outlets, I think. I do not claim a 100 per cent. of our sales are to new customers.

MRS. BERTHA McDOWELL.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

Direct Examination.

The Witness: I am a housewife. I have two daughters. I use Kellogg's Whole Wheat Biscuit in the house. I do not recall exactly when I started but it is quite a bit longer than a few weeks. Mr. Welsbacher, my grocer, happened to be out of shredded wheat biscuit and recommended Whole Wheat Biscuit. When he recommends something, I usually try it. We did and liked it very much. We are very well satisfied with it. I like the biscuit because it is smaller and suits me better. It fits my cereal dish so much better. I used the other, like Plaintiff's Exhibit 1, before. We usually split it or broke a piece off it. I like the taste of the Kellogg better than the other. I continued using it, and my daughters like it very much.

We were out of it, and I called my grocer yesterday. He told me about the card with the coupon. When it came, I ordered the two boxes of Kellogg's biscuit for the price of one. A gentleman came to my home, told me Mr. Welsbacher had sent him, asked if I was a user of Kellogg's biscuit, whether I liked it, and why. He then asked me if I would come down here today and tell about it. He was a perfect stranger to me.

CROSS-EXAMINATION.

THE WITNESS: The first time I got Kellogg's biscuit, I had been using shredded wheat biscuit, off and on, for some time. I have not gotten any whatever since I started using Kellogg's Whole Wheat Biscuit. I have known shredded wheat many years. It is a very old product. My mother-in-law used it right along. She lives on it today. It has been on the market quite a while and is a well-known product. I only used it occasionally. I had known it for some years before I ever saw Kellogg's Whole Wheat Biscuit. Up to that time, I had been buying and using it from time to time at my grocers, shredded wheat, like Plaintiff's Exhibit 1. When the grocer showed me Kellogg's biscuit, I was in the market for shredded wheat then. I asked him for shredded wheat. I do not remember whether he was out of shredded wheat; but he recommended Kellogg's, said he had a new kind of shredded wheat on the market. I tried it and was very well pleased with it. I was on the telephone. He calls me up. I have kept on using it since then. That was less than a year ago.

RE-DIRECT EXAMINATION.

THE WITNESS: When I ask for Kellogg's on the telephone now, I tell them I want Kellogg's Whole Wheat Biscuit. I specify that. My grocer is F. J. Welsbacher, whose store is on the Pike, Montgomery, Road.

MRS. JULIA KUHN.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with eight children, and I use Kellogg's Whole Wheat Biscuit all

the time. I have used it about two years. I first came to know it by seeing it advertised. I tried it right away and liked it very much. I used shredded wheat, in a box like Plaintiff's Exhibit 1, many years before. When I tried Kellogg's biscuit, I thought it was about the same. I used practically all Kellogg's since. It is nice and crisp, uniform to serve small children, not so large. Everyone likes it, all the children. I always get it, have some on my shelf right now. I use about two boxes a week. When I order it, I say: Kellogg's shredded wheat. My grocer never substitutes or tries to. If he does not have it, he will call back, tell me, and ask if I wish anything else. The name Kellogg's on the package means something to me. It is very attractive and I think it is healthful for the children to serve any of their products. I had used whole wheat, called All-Bran, and I use Rice Krispies, and the crackles.

CROSS-EXAMINATION.

THE WITNESS: I have had shredded wheat like Plaintiff's Exhibit 1 for many years. I have known and used it about fifteen years. Before Kellogg's Whole Wheat came on the market, there was nothing else like it at that time. I always had shredded wheat in the house and bought it almost every week. My family consists of my husband and eight children. I serve shredded wheat every other day or so to them. Berkey is my grocer. I used to go in there. Since I moved away, he delivers everything for me. I have dealt with him twelve or fifteen years. All my orders are by telephone.

I only buy shredded wheat, like Plaintiff's Exhibit 1, if he is out of the other. So I still use shredded wheat sometimes. I think I first saw Kellogg's Whole Wheat Biscuit advertised on a little card or slip the grocer sent me. I saw it and thought I might try it.

I do not remember what the ad said. It was something new, which was what attracted me. It is quite a while back. I went down to the grocer, bought them, and have been using them since.

I might have received last summer a sample of shredded wheat like this biscuit. If a sample comes in like that, the children usually grab it. I would not see it or know about it until I found the empty box. When they ring the bell, I am right there. I use the two products, one or the other.

RE-DIRECT EXAMINATION.

THE WITNESS: I prefer Kellogg's Whole Wheat. I like the small biscuits better on account of the children. I came here today, because a man came to my door several weeks back. I had never known him before.

RE-CROSS-EXAMINATION.

THE WITNESS: My grocer is not a chain-store market, just a little fellow, not connected with any grocery chain. He and his brother have two stores. One is across the river.

MRS. ELIZABETH FORG.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife and have one son. I am a consumer of Kellogg's Whole Wheat Biscuit, having used that product the last couple of years. I buy it in packages like Plaintiff's Exhibit 167. I like it very much, because it is a small biscuit, just enough, no waste to it; toasted on both sides, and my family relish it very much. I have been using it right along since I first bought it. It first came to my attention

through a small sample left at the door. I liked the sample. I ask for Kellogg's Whole Wheat, because I have used all the Kellogg products. They just continued with Whole Wheat Biscuit.

My present grocer never substitutes with me. If you ask for what you want, that is all, because he thinks people want what they want, and he does not ask them to take anything else. He never calls new products to my attention. I came here today because a man came to my door, asked about Kellogg's, if we liked it. I had never seen him before.

CROSS-EXAMINATION.

THE WITNESS: I do not know how this man happened to get my name. He did not tell me he got it at the grocery store. He said he was a representative of the Kellogg Company, asked me if I used the biscuit, and I said yes. He asked me how I came to use it, and I said through a sample, and I continued using it. It was a small sample, a little box, left at my door.

Before using Kellogg's biscuit, I had used shredded wheat, years back. I recognize Plaintiff's Exhibit 1 as shredded wheat. I did not use that so much, because I did not favor it so much. I knew about it for some time. It is a very old product. I liked the Kellogg product because it was smaller and toasted. I noticed the difference in the package. When I got to the grocery, I asked for shredded wheat. He had it. He had them both, Plaintiff's Exhibit 1, also. I started to buy the Kellogg product, along with the other Kellogg products I was accustomed to use. My grocer is Urban Lane, near my house, on Vine Street. I am on Rice Street. It is not a chain or cash-and-carry store. I telephone and get things sent over. My son and nephew are with me, and a baby of over five years, all users of Kellogg's biscuit. I serve it with cream and sugar, taking it out of the package in the kitchen and preparing it. I do

not warm it in the oven, just put it in a dish with cream and sugar on. It does not have to be in the oven, because it is toasted so nice on both sides.

MRS. RUTH GRUBER.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with three children. I am a user of Kellogg's Whole Wheat Biscuit, which I have used about five or six months. I have used Kellogg's products a long time. I first became acquainted with the biscuit by going to my grocer and saying I wanted something for a breakfast food. He said there was a new food and he suggested I try it. I did and have been using it since. I like it, the double-toasted biscuit, gives it a nice flavor, and I like the convenient size. The children like it very much.

I have used shredded wheat like Plaintiff's Exhibit 1. I think I like the smaller one better, the size, and it has a better flavor, because of the double toasting. I have used other Kellogg products. I always go to the store myself. I order it as just toasted wheat biscuit, Kellogg's Whole Wheat Biscuit. My grocer does not, as a rule substitute. I came here today because a gentleman came to my door and asked me if I would. I guess he represented the Kellogg Company. I never saw him before.

CROSS-EXAMINATION.

THE WITNESS: I assume my grocer told him my name. I suppose he gave him a list of his customers. Before I bought Kellogg's Wheat Biscuit, I had known shredded wheat. I have known it for a long time. It was a pretty well known product. When I was at the store and he suggested Kellogg's, I was not asking for

shredded wheat. I am pretty friendly with my grocer. I know him and his family. When they have something new, they generally tell me about it.

When I bought shredded wheat like Plaintiff's Exhibit 1, I asked for shredded wheat. That is the only name I have ever known it by. I never knew the Kellogg product as Kellogg's shredded wheat, never heard it called that. My grocer carried both items. I asked him if he had anything new in the way of cereals, and he suggested Kellogg's biscuit. He said it was a new cereal at that time. It has been quite a while ago. He said it was on the order of shredded wheat biscuit, and he did not recommend it or anything, just said it was a new cereal. I serve it to five people at home, with milk and sugar, sometimes with warm milk. The youngsters like something like that in the evening before they go to bed. I keep it in the pantry in a package. I take it out, apportion it, and bring it to the table in a dish. Mr. Lane is the grocer, a service grocery, not a chain store. It is near my home.

MRS. ELEANOR FREY.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with two children, and I use Kellogg's Whole Wheat Biscuit. I guess I have used it ever since it has been on the market. They put out samples. We liked it because it was toasted on both sides. We have continued to use it. I have used other biscuit of that same general type before; but we liked this better. It fits the cereal dish better, toasted on both sides, and is browner. We buy all Kellogg's products, like them, and use them all the time. For that reason, we bought Kellogg's Whole Wheat Biscuit.

We order it by phone. We ask for Kellogg's Whole Wheat Biscuit. My grocer does not substitute with me. When I ask for Kellogg's, I get it. The children seem to like Kellogg's biscuit very much. I appeared here today, because a man came to my door, a Kellogg man. I had not known him before he came to my door. He got my name from the grocer, because he knew I bought them.

CROSS-EXAMINATION.

THE WITNESS: Before I started using Kellogg's biscuit, I used shredded wheat, like Plaintiff's Exhibit 1, once in a while. I threw away the last I had, because they did not care so much for them after I bought Kellogg's, which they liked better. I have not used it for a long, long time. I did not buy them since I have been using Kellogg's biscuit. I used it years ago. I guess I have known it a great many years. I was through that plant twenty years ago, so I knew about shredded wheat. It was a familiar product to me under that name at least twenty years ago. Years ago when I ordered it, I asked for shredded wheat and got this package, like Plaintiff's Exhibit 1.

A sample of Kellogg's was left at my door, a small package. I liked it because it had the qualities I mentioned. I buy it at Lane's Grocery now, a small grocery store, not a chain store. I do not remember whether the sample said I could get it at the grocery. I just thought I could, because I knew he had other Kellogg products. I asked for it and got it. I had been a user of Kellogg's other products for some time. When they put out the biscuit, I started to use that instead of shredded wheat. Four people in my family use it. I serve it with cream and fruit, taking the biscuit out of the package and putting it on the table in a dish. We like it because it is smaller and one biscuit is just enough for one person. In my family, we do not care for the larger biscuit.

MRS. VERA WALTER.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

Direct Examination.

The Witness: I am a housewife, with one child, and I use Kellogg's Whole Wheat Biscuit, having used it about five months. We like it. It first came to my attention by my grocer suggesting it to me. I went in and bought some breakfast food, Corn Flakes or Bran. He asked me if I had tried it. That is how I came to use it. I like to try everything new that comes out, and he likes us to try it. I liked the size, especially for the baby, and it is well toasted, all the way through, and has a nice color. I serve it in a small dessert dish with cream and sugar. The child likes it. Since buying it, I have continued to use it. I order it sometimes on the telephone and sometimes at the store, as Kellogg's Wheat Biscuit. My grocer does not substitute to me. He gives us what we want. I have used another biscuit of the same general kind, larger, another shredded wheat biscuit, the first one that came out, like Plaintiff's Exhibit 1. I used that at one time, quite a while ago. I am not a user of that biscuit. I tried it quite a while ago. The Kellogg man came to my door and asked me to come down here today. I did not know him before. I do not know how he got my name. I have dealt with Mr. Mueller, my grocer, about three years.

Cross-Examination.

The Witness: I never bought shredded wheat from Mr. Mueller; do not know whether he has it. I have not used it for three years, or in that time. I have known of it and been familiar with it, used it. It is a well-known product and has been for a long time. At present I am using Kellogg's Whole Wheat Biscuit instead of shredded wheat. My grocer asked me if I

would like to try the new product. I will try anything once. My family find they like it. The size is nice for the baby. They will not eat the great big one. I like the size of it. The other qualities, being toasted and brown colored, mean a lot to me, too, because it stays nice and crisp until the last bit of it is gone. Mr. Clarke asked me what I liked about it, but he did not suggest anything. This suggestion was entirely my own. There are three in my family and we all eat this biscuit. We take it from the package and put it on the table in a dish. My grocer is Mr. Mueller. He carries the whole Kellogg line. His store is on Jefferson Avenue, near me. It is a White Villa store, not a chain.

MRS. LILLIAN SAUR.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with one child and a husband. I use Kellogg's Whole Wheat Biscuit, and have used it for about six months. I like it fine. The child seems to like it. I like it because one is just enough for my breakfast. Because of my weight, I do not take so much for breakfast. I like the way it is toasted. When I go to the store while they fill the order, I often see new products on the counters and ask about them. I get acquainted with them that way. I think that is the way I bought this. When I order it now, I generally go to the store and ask for Kellogg's Whole Wheat Biscuit.

I have used biscuit like Plaintiff's Exhibit 1, before I started using Kellogg's. I was a regular user of that, off and on. I like Kellogg's biscuit better, because of the size, small size, and it is appetizing because it is nice and brown on both sides. I use other Kel-

logg products, breakfast flakes, and bran. I use bran in baking, often. I came here today because some man whom I had not known before came to my door.

Cross-Examination.

The Witness: I suppose he got my name from my grocer, Mr. Mueller, whose customer I have been for fourteen years. I am his nextdoor neighbor. Mr. Mueller is well known in the grocery business, being president of the Retail Grocers Association. He has one of the White Villa stores and lives next door. I go in there as if I owned the store. I go around and help myself most of the time.

I have seen a box like Plaintiff's Exhibit 1 in Mr. Mueller's store. I bought it from him. I used it for many years before I bought Kellogg's. I have been to Niagara Falls and seen the plant, and I have known that as shredded wheat about as long as I can remember. I have not bought it for a good while. After I started buying Kellogg's biscuit, I did not go back to shredded wheat. I liked the size of the other better. I have not bought any since I first learned about the Kellogg biscuit, which I first saw at Mr. Mueller's store. I do not remember just how it was brought to my attention. I will often see something and ask about it. He told me the amount that was in it and the price. I do not recall his telling me it was like shredded wheat. I think they both sell at the same price. Just the two in my family use the biscuit. I prepare it with cream and sugar, sometimes a little fruit, bringing it on the table in a dish. The ladies sitting in the other room are just neighbors. I know just one of them.

MRS. MAUDE DEDRICH.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

Direct Examination.

The Witness: I am a housewife with two children, and my husband. I use Kellogg's Whole Wheat Biscuit. I have used used it about two years and like it very much, the crispness, the smallness, and the fact it does not get soggy. I like all Kellogg's things. I first saw it on a table in Good's Grocery, took it without anyone saying anything, because it was Kellogg's. After I tried it, I liked it so much I used it instead of the Niagara shredded wheat, which I had never liked myself, but my husband had. He does not use the Niagara, because he likes this on account of the crispness. I order it because I like the crisp, small biscuit. I did not get them and sent it back. I guess that is why Mr. Good sent me here. I sent back the big biscuit after I had ordered the small, crisp biscuit. I appeared here today, because Mr. Good said: "You are such an advocate of Kellogg's you had better go over, because you upset my store," because I sent back the big biscuit. His stenographer asked me to come over here today.

Cross-Examination.

The Witness: I have been trading with my grocer, Mr. Good, quite a while. Before I picked up Kellogg's biscuit, I bought shredded wheat for my husband. I never liked it very much. My husband uses shredded wheat. I have known about it for many years. It is an old product about which I have known for a great while. I have used shredded wheat about nine years. Up to the time I discovered Kellogg's product, we had shredded wheat. I would not use it. Different times I would have different cereals. I would ask for shred-

ded wheat and get that. I do not get shredded wheat now. I ask for Whole Wheat Biscuit, and sometimes I get shredded wheat. I ask for the smaller biscuit. Once the clerks sent me shredded wheat, which I sent back and said it was not what I wanted. I think it was in Mr. Good's store I first saw the Kellogg product. It was on display somewhere on the counter. I saw it in a package with the window, like Plaintiff's Exhibit 1 and got that kind of package, but I do not remember what package I first saw. The first thing interested me was the fact it was a Kellogg product. I do not think I asked Mr. Good about it at the time. I think I just took it home to try it. After that, I ordered it again.

One of Mr. Good's girls in his office called me and asked me to come over. She said it was about Kellogg's, and "You know how you have ordered it and tried to get it and upset us with this Kellogg's." They asked me to come over about the biscuit and testify. Mr. Good himself was impartial. He gave me what I wanted, which he is there for. He has both in the store. Mr. Good is a neighbor, and I have known him for years. He operates a very good service store, not a chain store. I order by telephone or go down there.

MRS. LUELLA KUHR.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

Direct Examination.

The Witness: I am a housewife and live with my parents. I am a widow with one child. Four of us in the whole household. We are users of Kellogg's Whole Wheat Biscuit. We have used it since within this year. We like it very much. There is a crispness about it I did not find in the others. I am partial to Kellogg's products. I like the size of the biscuit,

fitting better in the bowl. The girl likes it much better than the large one.

Once in my box of groceries there was a little pamphlet or slip. As soon as I saw the name, Kellogg's, I naturally wanted to try it. I have been using it ever since. Before that I used Shredded Wheat. I prefer Kellogg's biscuit. Our groceries are ordered over the telephone. I live out far, and go and call for them. I always say I want Kellogg's Whole Wheat Biscuit. He has it ready for me when I call.

CROSS-EXAMINATION.

THE WITNESS: I became acquainted with Kellogg's biscuit during the past year. I am not a recent convert. We used shredded wheat before that, except dad. He does not use many breakfast foods. I had known that shredded wheat before. It is an old product, well-known to me as shredded wheat before that time. Until I found this slip in my groceries, I had been using shredded wheat. It had been my custom to order it up to that time. I do not remember the nature of the pamphlet. I know it was something new in the Kellogg line. Until I had tried it I did not know particularly that it was something I could use instead of shredded wheat. As Kellogg put it out, I thought I would try it. I have used other Kellogg products and use them now: Kaffee Hag, Corn Flakes, Pep, and All-Bran. I thought I would try this one. I did and like it very much. I recognize it can be used instead of shredded wheat, and I have used it all the time instead of shredded wheat.

Henry Mueller, with the White Villa Grocery, is my grocer most of the time. He is quite well known in the grocery trade. I think he is president of the Retail Grocers Association. We deal mostly with him. We go to his store or telephone the order and pick

them up as I go by. I know Mr. Mueller pretty well. I remember seeing Kellogg's Whole Wheat Biscuit piled up on his counters. His shredded wheat is up on shelves. I do not remember seeing it displayed. We serve Kellogg's biscuit by dipping it in a tiny bit of hot water, then pouring cream over it, bringing it to the table, in a dish. I used Shredded Wheat before I used Kellogg's biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: We dip it in hot water because my daughter does not like cold food on a cold morning. She does not like hot milk. I find Kellogg's Whole Wheat Biscuit does not sop up hot water quite as much as shredded wheat. It is a little harder, which is another reason why we like it very much.

MRS. AUGUSTA FAHREN.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with one baby and a husband, no others in the family. I am a user of Kellogg's Whole Wheat Biscuit, having used it about three months. Mrs. Kuhr, the lady just in here before me, a friend of mine, recommended it to me about three months ago, when she was in my rooms. She asked me if I ever used this biscuit, and I said no. She said, "I know you will like them if you ever do try them." The baby was really delighted with it. The size was better and they are browner. We just liked them better.

We had used one box of shredded wheat biscuit made at Niagara Falls, and I did not like them at all, they were so stringy and dry. My husband did not like

them, they were so bulky and big. They never seemed to fit right in the dish. We did not care for them at all. We never had any of those biscuit for so long, until she came with Kellogg's, and I liked it. In fact, we liked all the other Kellogg products. I use them. I like All-Bran, and my husband likes Corn Flakes, always eats them. The baby and I eat biscuit and like them. We ask for Whole Wheat Biscuit. I insist on it, although I never had anyone give me anything else.

CROSS-EXAMINATION.

THE WITNESS: We also have had shredded wheat. We got samples of it, which I did not care much about. I tried a box and simply had to throw it out because we did not like it. It was so dry. That has been two or three years ago. I knew about shredded wheat long before that; had heard about it, but I was never really interested and had not been a user of it, had not tried anything of that kind to any extent.

I did not know about the small Kellogg biscuit until Mrs. Kuhr told me about it two or three months ago. She told me we would like it and said they liked it because it is so small and crisp. At that time, the baby was eating cooked cereals. She was never used to this dry food, because it is natural for a baby to have cooked foods at first. She got to the age where we could change to that. Mrs. Kuhr said it was better than shredded wheat. She compared it to shredded wheat biscuit. I buy from Mr. Mueller. Mrs. Kuhr lives right alongside me. She goes there two or three times a week, comes over and asks me what I need and gets my groceries for me. It is more than five miles from my house. Mr. Mueller is a good business man and has a reputation all over the city. He is the sort of man you can put faith in. If you ask him for something, you will get just what you ask for. We go

there once in a while, but not often. I never looked for and do not remember seeing in his store shredded wheat like Plaintiff's Exhibit 1. I was not interested in it. Whole Wheat Biscuit is all I am looking for. I serve it with milk, usually heating it first to make it taste better, and bringing it on the table in a dish.

I was never interested in shredded wheat, to be truthful. I did not try eating it that way. I warmed it in the oven, and it tasted like straw to me. I never had that criticism of Kellogg's biscuit. It does not taste like baled hay. I really like it.

MRS. SARAH OWENS.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

Direct Examination.

The Witness: I am a housewife with two children and a husband, no others in the family. I look after them and also keep a beauty shop. I am a user and consumer of Kellogg's Whole Wheat Biscuit. I suppose I have used it three or four months. I do not go to the grocery. It is handled by telephone. When he sent me the order, Mr. Mueller had a pamphlet in there that they were something new. I tried it the next morning when I called the order. I use Kellogg's Corn Flakes. I thought I would try that for a change. It was a Kellogg product, I saw. I like the Kellogg biscuit and have continued to use it. My child and husband both like it very much.

When I was at home, before I married, mother had the other biscuit, Shredded Wheat, like Plaintiff's Exhibit 1. I did not use it much at home. I thought it was too big; so I just used corn flakes. I have not used shredded wheat at all since I married. Since I was introduced to Kellogg's, I have continued to use

it and liked it very much. When I order it, I ask the grocer for Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I have known about shredded wheat. We always had it at home. It is a very old and well-known product, but I never used it myself. Mother always had it. It was served at my home for many years, to my knowledge. I am a customer of Mr. Mueller, whose store is a square and a half from me. He calls me and I give him my order every morning.

Three or four months ago, the pamphlet he sent me said it was new Whole Wheat Biscuit and smaller in size than shredded wheat. That is what I liked about it. There was a picture of a dish with two biscuit in it. I recognized I could use that instead of shredded wheat. I noticed it was practically the same, until I got the box. Then I saw there was a difference, that they were browner and smaller. We serve it at home with milk and sugar, taking it out of the package and breaking it up in a dish and bring it on the table that way.

Mr. Mueller told me you were having testimony and asked me if I liked one or the other. I said I liked Kellogg's. He asked me to come up and testify for Kellogg's. I said I would. He said nothing about shredded wheat. He just said the two companies were having a controversy. He did not tell me what it was all about.

RE-DIRECT EXAMINATION.

THE WITNESS: Women usually resent substitution very much. They do not like it. Rather than try it, they will send it back. They think, "Oh, very well, it must not be very good if they are trying to push it on you." It interested me when they sent the cir-

cular. Mr. Mueller is very good that way. Anything new he usually has lying on the counter and printed circulars near it. If you do not come in, he sends the circular with the order. He did that when I opened my beauty shop. He sent all those circulars around with the orders.

RE-CROSS-EXAMINATION.

THE WITNESS: I know how people are about substitution. I handle women every day. If they come in and ask for a Eugene Permanent and I try to substitute something else, they say, "Just why do you want to do that?" If you are out of it and tell them it is just as good, they may try it. Nine times out of ten they will say: "I liked my wave last year better." They like sometimes to try new things; but they do not like new things to be pushed on them. I introduce them by suggesting them. If Mr. Mueller sent me Kellogg's Whole Wheat when I wanted shredded wheat, I would think he was trying to put something over on me, because I would want the other.

RE-DIRECT EXAMINATION.

THE WITNESS: I would have the same feeling if I asked him for Kellogg's and he sent me shredded wheat. I prefer Kellogg's.

RE-CROSS-EXAMINATION.

THE WITNESS: I was on the stand, went out, was talking to the ladies, and just happened to make the remark that ladies do not like things pushed on them. Then I was asked to come back.

RE-DIRECT EXAMINATION.

THE WITNESS: Mr. Clarke did not suggest it to me. He was talking about an entirely different subject.

NAT C. REIS.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

Direct Examination.

The Witness: I am a retail grocer, doing business under the name of George Bilker, my son-in-law. I have been in the grocery business about fifteen years. We are all managers. We handle Kellogg's Whole Wheat Biscuit and have done so about two years. We had calls for it from consumers and that led to our getting it. We have continued to handle it. The demand for it has increased.

We also handle Niagara shredded wheat. We sell more shredded wheat than Kellogg's shredded wheat, in a proportion of about sixty-forty. Kellogg's is growing in demand the fastest. We have given dealer co-operation to the Kellogg Company in creating demand for their biscuit. We have advertised it on our direct mailing list and have given it window and store displays. We have explained to customers it is a new product. We always do that with any new product. Customers like to be told about new products. The Niagara they just call plain shredded wheat. They call the Kellogg product Whole Wheat Biscuit.

We have no confusion in this store between those two products. They call for them by brand name. Kellogg's Whole Wheat Biscuit is shredded whole wheat—that is, a shredded wheat biscuit, smaller than the other, with more in a package. I know of no way to describe it, other than to call it shredded whole wheat biscuit. I do not believe you could call it anything else. You could not mix up the dress of the packages. The Kellogg biscuit is in the same dress as the rest of the Kellogg line. There could be no confusion between

that and the Niagara package at all. We do not substitute.

We handle quite a bit but not all the National Biscuit cracker line. The Niagara item has been cut in price by the chains sometimes below our cost. That naturally interferes with our profit on that product. We sell Kellogg's biscuit for ten cents, and get eleven cents for shredded wheat. That is the chain-store price for shredded wheat. When it is cut, it is cut as low as nine cents.

The Kellogg Company co-operates with us in creating a consumer demand for its Whole Wheat Biscuit, giving us cut packages to open up and show customers what it looks like, also display material. They have not yet taken any lists for mailing coupons and things like that to customers. They have spoken of intending to. Customers experiment. When there is a new product on the market, they will be glad to try it.

CROSS-EXAMINATION.

THE WITNESS: I have been in the grocery business just about fifteen years, during which time I have been familiar with the old shredded wheat, made at Niagara Falls. It is a product we have always carried, a very-well-known item. I presume it was well-known at the time I went into the grocery business. My customers have always asked for shredded wheat. I never knew it by any other name. It has always had very much that same general appearance, the biscuit itself. They have changed the package, I believe. I display shredded wheat in the store along with the other merchandise. It is with the cereal right there, now. Shredded wheat still outsells Kellogg's product at present. I called the Kellogg biscuit shredded wheat, because the customers ask for it that way: Kellogg's shredded wheat. Sometimes they ask for whole wheat. When Mr. Clarke asked me what I would call that biscuit, I

said it was a shredded wheat biscuit. That was the only name I could think of to call it by. It is a process, more or less, that they have described. I have known this one biscuit, known as shredded wheat, continuously for many years. I first find out what the new product is, how it is made, and we call it by that name. It looks like the other biscuit and is like it. Because of that, I call it shredded wheat.

Shredded wheat, as now sold by the National Biscuit Company, known to me since I have been in business, up until the Kellogg product has been on the market, has about held its own in sales. It goes up and down. Kellogg's shredded wheat has not supplanted the National Biscuit shredded wheat in my store. There might be some customers who used to get shredded wheat and now buy Kellogg's Whole Wheat Biscuit. That could be possible. I would not say we put more sales effort behind Kellogg's biscuit than behind shredded wheat. We have had store demonstrations of both products. We are interested in selling more of every item in the store. We do not care who makes it. We make a little more profit on Kellogg's Whole Wheat Biscuit than on shredded wheat. There is a little better margin of profit for us.

When I said chain stores cut shredded wheat below cost I meant below my cost. I do not know whether it is below their cost. My store is not a member of any chain or voluntary chain. We are an entirely independent organization. We get Kellogg's biscuit through the jobber. We are not in a buying organization or association of any kind. National sells us shredded wheat direct. Their salesman services this store every week.

RE-DIRECT EXAMINATION.

THE WITNESS: Ours is a semi-service and semi-self-service store. We sell for cash and do delivering.

We have goods stacked on the floor so customers can help themselves and pay for them at the counter. We have a telephone business also. We have four 'phones, and five trucks for delivering.

RE-CROSS-EXAMINATION.

THE WITNESS: When our customers telephone, they ask for shredded wheat or for Kellogg's shredded wheat. We furnish what they ask for. If we are out of one, we do not send the other. We always call them up, say we are out of the item, and explain the nearest item we have. If a customer asked us for shredded wheat and we were out, we would tell them we have Kellogg's Whole Wheat Biscuit. We explain the nature of the biscuit and ask her if she would like to try that. If she would, we send it up.

RE-DIRECT EXAMINATION.

THE WITNESS: We do not regard that as substitution but as service to the customer. If she is out of something, we do not want her to stay out of it. She might need it.

WILLIAM M. STEPHENS.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocery manager, connected with Kroger's, as store manager. I have been manager for Kroger's for nearly nine years. Before that, I was in business for myself as a grocer for nearly three years.

I handle Kellogg's Whole Wheat Biscuit. It is just shredded whole wheat. I do not know any other way to describe it. We have had it a long time, I imag-

ine since it has been put out. There is a great consumer demand for Kellogg's Whole Wheat Biscuit.

We handle Niagara shredded wheat. Of the two, Kellogg's Whole Wheat Biscuit sells the most in our store, about three to one. I co-operate with the Kellogg Company in advertising or bringing Kellogg's Whole Wheat Biscuit to the attention of consumers. We have it on display at all times. They have given me demonstrations which I asked for. I think I advertised it once. The Kellogg Company has sent out cards.

We never had any confusion in our store between the two products. We handle the rest of the Kellogg line. We sell both products at the same price, but we make a larger profit on Kellogg's. We handle the rest of the National Biscuit line and get a discount on it, including shredded wheat. We are never allowed any advertising allowance by the Kellogg Company. There is shifting around by consumers from brand to brand or from product to product in the cereal line. Our store is partly service and partly self-service. I have sometimes as high as fifteen clerks on Saturday, quite a large store. I get a very few telephone orders. If I got a telephone order for Kellogg's shredded wheat, in order to save confusion or anything like that, we always ask a customer if they want shredded wheat or Whole Wheat Biscuit, because they might get mixed up. To avoid mistakes, we would naturally try to find out.

Of the two products, Kellogg's is growing fastest in consumer demand in our store. It has a very rapid increase. I buy that product direct from the Kellogg Company.

CROSS-EXAMINATION.

THE WITNESS: The store we are now in is in the basement of the Sears-Roebuck Building. The Kroger

Company operates the store in connection with the Sears-Roebuck stores, as Kroger Stores. They have three hundred and some in Cincinnati. Last summer, we had three hundred and eighty-seven in the Cincinnati branch. I am manager of this store, one of the three hundred and more.

I have known and carried in stock shredded wheat for a good many years, for a number of years before Kellogg biscuit was put on the market. People asked for it as shredded wheat at that time. Prior to the coming of Kellogg's biscuit, there was no doubt in my mind what they wanted when they asked for shredded wheat. Very few ask for shredded wheat. If they do, I get them shredded wheat. A majority of them will say: Give me Kellogg's. Most of them say: "Give me Kellogg's shredded wheat" and some say: "Give me Kellogg's Whole Wheat Biscuit." On telephone calls, I ask, when the customer says: "Send me a package of shredded wheat," since the Kellogg product has been on the market, there has been some doubt in my mind as to whether they wanted Kellogg's or the shredded wheat we carried formerly. Most customers who come in the store usually point out which one they want. We will get maybe not three or four telephones a week. We would naturally ask them which one they wanted. There is a slight possibility, we might, on the telephone call, send them the wrong product and get it back. We have not had any confusion. I have my first time yet to have any confusion. To that extent, I have avoided it by making sure. I did not tell you I did do that. I said we would. If such a thing should happen, that is what I would do. I am not telling you what did happen.

Within the last two or three years we have been handling Kellogg's Whole Wheat Biscuit. I have not displayed it until I got the neon sign. I have a number

of Kellogg products on the table surrounding the neon sign, among them Whole Wheat Biscuit. We have a supply of Whole Wheat Biscuit on the shelf back of the counter here, marked ten cents. I have shredded wheat here, too, on the shelf there, with a ten-cent sign on it. The sign has got knocked down and is not on it at the moment. There are three packages of shredded wheat on the counter, over back against the wall; so that, standing as we are standing now, you cannot see shredded wheat at all. That is all the stock of shredded wheat we have at the present time. We get it direct from the salesman. We give him the order. I believe he came in today. That ought to run us, three packages, until next week.

I do not know whether nine or ten packages of Kellogg's will run us until next week, also. It might or might not. I said three to one of shredded wheat. The Whole Wheat Biscuit may outsell it more than that. I think it safe to say right now it will run five to one; but, ordinarily, three to one. I guess that increase in Kellogg's at the expense of shredded wheat has taken place within the last couple of years. To a large extent Whole Wheat Biscuit has forged ahead of shredded wheat in our store. I know customers who used to use shredded wheat and now use Kellogg's. We do not get people's names; but a customer said to me the other day, after calling for a package of Whole Wheat Biscuit, she made the remark without my saying anything to her, that the reason she liked it better than the other was there are more biscuit to the package, smaller, and the kids did not waste so much. It was evident, from what she said, that she had been a user of shredded wheat and had switched to Kellogg's biscuit, during the period it has been on the market.

RE-DIRECT EXAMINATION.

THE WITNESS: If I had an order for just shredded wheat, I would give the customer shredded wheat. If

I sent out the Niagara Falls shredded wheat, it is entirely possible that a customer would send it back and say what she wanted was Kellogg's shredded wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: When a customer asks for shredded wheat, I do not endeavor to sell her the Kellogg product. Substitutions do not build me. I have not at any time tried any pushing with customers for this Kellogg product. It seems to be advertising itself around here very well. Our people come here and pick it up. We have some packages of the Kellogg product with the cellophane window. People come in and see that and pick it up. That advertises it.

RE-DIRECT EXAMINATION.

THE WITNESS: We do not mix up the Kellogg package with the Niagara package.

SAM J. FRIEDMAN.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have a restaurant of my own on Burnett Avenue, 3431 Burnett and 3421 Lambert. We seat about five hundred people and serve from three to four hundred on Sunday. I have from fourteen to sixteen helpers at times, in shifts. It is not a cafeteria, all table service.

We handle Kellogg's Whole Wheat Biscuit in the restaurant size. That is the only kind I carry. I have carried it six or seven months. I did carry the Niagara shredded wheat biscuit, every bit of six or seven months ago.

Kellogg's biscuit is served in the box. My girl hands out the box on the plate, and the customer dumps the biscuit. Sometimes the girl gives them service, assists them. At times we get calls for shredded wheat. The girls know we do not have it. They tell them we have gotten Kellogg's Whole Wheat Biscuit. Around the time of their advertising campaign, we got quite a lot of calls for Kellogg's Whole Wheat Biscuit. We had it, because we got it right at the time they had that campaign on. My customers accept it right along. I never had one complaint about it.

I prefer to serve my trade with dry cereals in the individual cartons. It makes everything uniform. Where others are serving, one might give more and another less. With the biscuit, of course, we know just how much to serve. I buy them from the Kellogg Company individually, so many of each kind to a carton, or so many small individual servings in a carton, including Whole Wheat Biscuit and the other products.

CROSS-EXAMINATION.

THE WITNESS: I have had this restaurant two years. I was never in any business at all before that. My entire experience with this product has been confined to two years. Before I carried Whole Wheat Biscuit, I had shredded wheat in large packages. I presumed I could get them in individuals, but I never inquired. I have a certain amount of calls for each kind of cereal. We have a busy breakfast business. Before the Kellogg biscuit, I served the shredded wheat out of the large carton in a dish. The Kellogg representative came around at the opportune moment when I was in need of some and he had this assortment to put up to me. I had used the other Kellogg products, always had them in the individual cartons, Pep, Corn Flakes, Rice Krispies, and all those things,

before the salesman called on me and showed me an assorted case of those things I had been using, including Whole Wheat Biscuit and these other Kellogg products. Then I did not buy any more shredded wheat.

My customers sometimes ask for shredded wheat, and I tell them we do not have it. We offer them Whole Wheat Biscuit. If they want to try it, they can. Sometimes they take it, and sometimes they say, "Give me something else." Sometimes a customer who asked for shredded wheat will take Whole Wheat Biscuit, after the clerks have explained it to them.

Around that time, I noticed they advertised over the radio, and then I began to notice there was some call for it. I have never seen a salesman for shredded wheat. I run over to the grocery and buy one of those large boxes. I got my shredded wheat from the dealer and handed it to my customers that way. I was a greenhorn at the time. I came here today, because a Kellogg man asked me how I served the stuff and so forth, and I told him. He wanted to know if I would testify.

RE-DIRECT EXAMINATION.

THE WITNESS: If a customer asked me what Whole Wheat Biscuit is, it looks like a little straw pillow. That is the easiest way to explain it to anybody. That is what I would tell anybody, because, if you can explain exactly, that is best. I think that comes pretty close to it. That is what it looks like. If I were asked what Niagara shredded wheat was like, I would say it is a larger biscuit, a larger straw pillow. That is the easiest way to describe it to a person.

ALONZO M. KING.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

Direct Examination.

The Witness: I am a restaurant man, cook and baker, and own my own restaurant, the Kingfish Restaurant. I have operated it since November. It was a going business when I took it over. It was stocked with Kellogg's different cereal products and nothing else that I remember. Kellogg's man was calling. There were Whole Wheat Biscuits there, and I have continued to carry them and order them through Kellogg's salesman, who comes around regularly once a week. Last Wednesday, for the first time, I had a man call about Niagara Falls shredded wheat. The National Biscuit man makes his regular call and I buy crackers and whole wheat flour from him. I have never handled any Niagara shredded wheat biscuit in this restaurant. I have continued to carry the Kellogg biscuit in individual cartons. They are displayed stacked in individual cartons on our back bar. They are served from the carton, more sanitary, and the customer knows they are new, not left from someone else. This is more vermin-proof.

I have been seventeen years in business. If served individually to the customer in the carton, he knows it has not come from a roach-infested opened package and does not contain a biscuit left by someone else. He opens it and takes the biscuit out himself.

As a rule, I buy the Kellogg assortment of individual packages. Being displayed there, Whole Wheat Biscuits, a man will ask for what he sees more often than what he remembers. They will more often call for something already displayed. I have had them call several times for shredded wheat, and I say I have

the Whole Wheat. I have had no objections in my place to serving Whole Wheat Biscuit in lieu of the other. All my cereals are from Kellogg's. That might not have been if they had not been stocked when I went there.

CROSS-EXAMINATION.

THE WITNESS: I have only been here since November. I bought the restaurant then right from the buyer. It is a lunch room, where we serve regular meals, lunches, and sandwiches, also a general line of bakery products. It has a counter and tables, not a cafeteria but table service. I have waitresses and myself, five of us in all working there. We are at 306 Sycamore Street, in the down-town section. I do not have a fancy trade, but quite a bit of wholesale house trade and printers, a large number of them, lunches, orders going out, and so on. I do not think you would consider cereals an important part of our business. We have some demand, not so very important.

When I came there, it was stocked with Kellogg products, and the Kellogg salesman had his regular call. I buy a case assortment from him at a time, including Whole Wheat Biscuit. I suppose there are a hundred and forty in the case assorted, maybe a dozen or more Whole Wheat Biscuit. We stack them on the back bar, where our customers can see them. We do have calls for shredded wheat. The restaurant man usually substitutes whatever he has, in case he has not what they asked for. We try to substitute; but we have made it a point to explain we do not have it and are giving him something in place of it, because a customer does not like to have something put over on him. I would leave it to him to say it is just as good. I never had a customer who asked for shredded wheat refuse to take Whole Wheat Biscuit.

The customers who come in and ask for shredded wheat possibly did not know there was a Kellogg's on the market. It has not been so long that I knew it. I have used shredded wheat a good many years. I have been in business seventeen years and knew shredded all that time. It was one of the first things I saw on the display counter, I guess. In most of the restaurants I have worked, we have had shredded wheat; and it has been very usual in my experience for customers to ask for shredded wheat. When they did, I knew what they expected to get. There was no question about it.

The Kellogg salesman asked me if I could come here today. I said I would. I did not know what it was all about. I had so much business today, I really did not have time; but, for the interest of all, if I have done any good either way or enlightened you, I am glad. I deal with one as much as the other.

RE-DIRECT EXAMINATION.

THE WITNESS: I still do not have a very good idea of what the case is all about. I have no prejudice either way, because I buy more baking material than I do Kellogg's. I do not buy any cereals from the National Biscuit Company. I ordered a case of Wheatsworth flour today. The cereal end of my business cannot be so important. Of all cereals I sell, neither Whole Wheat Biscuit nor Corn Flakes is anything like as good a seller as Bran Flakes or Pep, the big sellers. Compared with those, Shredded Whole Wheat Biscuit or Whole Wheat Biscuit is a small seller. That is also true of Kellogg's Whole Wheat Biscuit. Corn Flakes usually lead but not now. Bran Flakes and Pep are in the lead. I have to order a whole case of Pep now. I have worked in other restaurants where individuals have been used in selling cereals, individuals of the Niagara product.

JOHN J. EHRMAN.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

Direct Examination.

The Witness: I am owner of a restaurant, Ehrman's luncheonette, 241 East Fourth Street, Cincinnati. I handle Kellogg's Whole Wheat Biscuit there, in individual cartons. We have carried that product about a year and a half. It is shown up on the back board of the fountain. We have customers ask for it by name. When called for, we serve it by cutting a carton on the sandwich block, in view of the customer, at the soda fountain. We dump it out of the carton into the plate, not touching the product with the hands. I have never handled cereals except in individual cartons. If a customer asked for shredded wheat, we would have to show him up there it is Whole Wheat Biscuit. We have never had customers refuse to take it.

Cross-Examination.

The Witness: I do not know much about shredded wheat. I have heard of it. I have never handled it and do not handle it at my lunch counter and soda fountain. I have been there close to two years. I never was in the restaurant or lunch-counter business before; my first experience. I have never handled shredded wheat; but, when a customer asks for shredded wheat, I point out the Kellogg biscuit and he accepts that instead. I am located on the corner of Sycamore Street.

I buy my Kellogg cereals in the original assorted case of individuals, a hundred or so. I do not have a large or very important cereal business. I bought this restaurant. It went into bankruptcy and did not have any stock.

RE-DIRECT EXAMINATION.

THE WITNESS: The Kellogg man calls on me about once a week. Among the dry cereals, I think I sell most of All-Bran, Bran Flakes, and Corn Flakes. They all sell more than Whole Wheat Biscuit.

JENNINGS ATKINS.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I own my own restaurant and have been in it since July. I was not in the restaurant business before. It is the Bismarck Eat Shop, 5 East Court Street.

I carry Kellogg's Whole Wheat Biscuit in that restaurant. I have carried it ever since I have been in business. I also carry Niagara shredded wheat, a larger biscuit; both in the individual carton. I do not know which one is the larger biscuit. I have never examined that particularly. I do not know whether Kellogg's is bigger or smaller. Kellogg's Whole Wheat Biscuit is the far superior seller of the two products, in my place. It outsells Niagara shredded wheat two to one. My customers ask for it by name, as Kellogg's Whole Wheat Biscuit. If he wants shredded wheat, we give him shredded wheat, because, while times are hard, yet there is no use putting great sales effort into substituting anything else.

I buy my Kellogg products from the Kellogg salesman. He comes around regularly to visit me, every week or so. I have not, to my knowledge, had any calls from National Biscuit about shredded wheat. The biggest seller in my restaurant would be Kellogg's Corn Flakes, a much larger seller than Whole Wheat

Biscuit. I have been in other restaurants, and I have not seen any restaurants that sell cereals except in individual cartons.

CROSS-EXAMINATION.

THE WITNESS: Court Street is a down-town street in Cincinnati. The seating capacity of my restaurant is fifty-two. I have two counters and eight tables. My principal business is at noon; but we have a good breakfast and night trade. The cereal end of my business is important. When I first got the restaurant I found it stocked with both shredded wheat and Kellogg's. The stock of shredded wheat has lasted me until now. I still have it on hand. I have a supply of Kellogg's Whole Wheat Biscuit also on hand. I display them both. They are right under the counter. I do not have customers who have shredded wheat. I do not sell it. Not exaggerating, I have not sold four packages since I had it. For Kellogg's I have a display of four little posters with the little package on top. I have no cards for shredded wheat, but I have them stacked up where they can see the package.

I have not received calls, to my knowledge, from salesmen for the National Biscuit Company. I carry no National Biscuit products, crackers or other cereals. A Kellogg salesman came in and asked me to come down today and tell you what I know about which is the best seller.

RE-DIRECT EXAMINATION.

THE WITNESS: The Kellogg product outsells the other two to one. I have bought at different times from Kellogg's, but I would imagine that is the percentage. I told Mr. Vilas I had sold four packages. I have sold more than eight of the Kellogg's.

RE-CROSS-EXAMINATION.

THE WITNESS: I buy a case of assorted Kellogg's cereals.

DEPOSITIONS TAKEN AT PITTSBURGH, PA., MARCH 23, 1933.

MR. CLARKE: This morning, in the cafeteria of the William Penn Hotel, on the long counter, was a display, including a number of cereals, each in an individual carton, and each carton being in a plate of its own.

The last two cereals on the counter were a package of shredded wheat and a package of Kellogg's Whole Wheat Biscuit. There were only two of these packages on the cereal counter, and they were side by side, each package being in a plate.

I make this statement through the courtesy of Mr. Vilas, and I offer in evidence the Kellogg package as a defendant's exhibit.

(The Kellogg package referred to was rereceived in evidence and was marked "Defendant's Exhibit No. 80.")

MR. CLARKE: And I also offer the shredded wheat package in evidence.

(The shredded wheat package referred to was received in evidence and was marked "Defendant's Exhibit 81.")

MR. VILAS: Mr. Clarke's statement is accepted as a statement of fact.

MR. CLARKE: Thank you, Mr. Vilas.

GEORGE E. ANDER.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am district manager for the Kellogg Company and have been connected with them

about seventeen years. I was salesman in Illinois for several years, district manager at Omaha for seven years, and here the balance of the time, about three and a half years. My title is district sales manager, and I am in charge of Pittsburgh territory, including part of Ohio, half of West Virginia, the western half of Pennsylvana.

The product known as Kellogg's Whole Wheat Biscuit has been introduced into our territory. I have secured distribution on it in the better grade of stores in my district; I would say about eighty per cent. in the whole territory, of the A and B stores. Not so much in Pittsburgh. It would not be so great if we classed all stores, because many small stores do not handle cereals. A consumer demand has been created for the product in my territory.

To introduce Kellogg's Whole Wheat Biscuit to the consuming public and create a consumer demand for it, we have done a very extensive job, especially in surrounding territory, not so much in Pittsburgh. We have done house-to-house work in a great many towns, including Erie, Cumberland, Parkersburg and some of the larger towns, selling one package and giving one free. We have done a great deal of work on tie-ups. Defendant's Exhibit 82 is last Friday's ad at Martin's Ferry, forty-inch, advertising two packages of Whole Wheat Biscuit and a geography chart free, with a tie-up in every town. Those all refer to Kellogg's Whole Wheat Biscuit, using the tie-up.

We have held Saturday demonstrations, conducting them in hundreds of stores, featuring Kellogg's Whole Wheat Biscuit. We have also had tie-ups using Jungle Land Books and Books of Games. Last year we featured Whole Wheat Biscuit quite extensively, two packages and a book of games for children. This type of work was featured by a great many voluntary chains in their advertising, and we had a tie-up with

them at the time we worked the towns, using the forty-inch tie-up ad, so we would have a general coverage of advertising, also assuring us distribution in these voluntary groups even in the stores outside the towns we were working in.

We would follow up, in all those towns, with an advertising campaign three or four weeks later, putting up window displays similar to that a photograph of which is Defendant's ~~Exhibit~~ 83, and smaller displays like that, a photograph of which is Defendant's Exhibit 84.

We have made a practice of setting up floor displays in practically all stores as the salesmen called on the trade. That is a very effective way of calling the product to the attention of consumers.

Then we had the coupon proposition, securing the names of some retail customers, and mailing them this coupon, suggesting they purchase this package of Whole Wheat Biscuit and secure a free package. Those methods have had very good results in creating a consumer demand for Whole Wheat Biscuit, especially on the coupon.

In selling the biscuit here, we bring out the point we have a biscuit toasted on two sides, smaller-sized, one that will fit the bowl, and fifteen biscuit to the package. We follow that up with extensive work on the consumer. When we sell the retailer, we mention it is not merely putting a package on the retailer's shelf but the work on the consumer. We have tried to sell the product as Kellogg's Whole Wheat Biscuit.

We have worked the restaurant trade with a combination case we have sold quite a number of, getting introductory business, containing a few packages each of all our products. We also put up a number of displays in the restaurants, a small counter display, into which the individual-sized package fits. We always try to sell all our products in individual-size cartons to the

restaurant trade. It is more appetizing to the consumer. They will sell more. Checking up on individual packages, we find they do sell more. There is always a certain amount of waste in the large package, so it is advantageous to the restaurant man to carry the individual size. I think that policy has increased their sale lately. Quite a number of years back, we had quite a battle encouraging the individual size, but they are pretty generally accepted now by restaurant men. It is a general policy to use individuals in restaurants.

It is advantageous to the manufacturer to have the product delivered to the consumer in a carton carrying his name. They know the products they are getting, and the merchandise is usually fresher. There is no difference in a physical sense between the individual and sample package. They are both the same length, one labeled *sample* and the other *individual*.

To that degree, every individual package bought acts the same as a sample. If the sample has any value at all, and they try it out and like it, the individuals in a restaurant should have the same effect of inducing the customer to buy the large package for use at home. The Kellogg Company has no policy to discourage the sale of the individual package.

We very seldom meet the salesmen of the National Biscuit Company in the trade, as far as shredded wheat and Kellogg's biscuit are concerned. We push the other Kellogg products. We do not encounter a National Biscuit man in any way while pushing our Corn Flakes. We come up against specialty men of the same type as ours in connection with other products, but not National men. The strongest competition we have is on Corn Flakes. I have not found that the National Biscuit salesmen put anything like the push behind the sale of shredded wheat that we put behind our Whole Wheat Biscuit.

Practically all the jobbers handle Kellogg's Whole Wheat Biscuit. The majority of them push the biscuit. They do not push the Niagara shredded wheat to the same extent, because a feeling seems to exist among the jobbers that they are dissatisfied with the National's policy in the first place, selling various retailers direct, placing them under a handicap; therefore, they are anxious to push our biscuit. The Kellogg Company gets full wholesale service through its wholesalers, which is not true with regard to the National Biscuit Company.

We get very good co-operation from dealers in pushing Kellogg's Whole Wheat Biscuit. The independent retailers have given us splendid support. A great many of them bring out the point they are dissatisfied with the various National Biscuit discounts and so they are anxious to push our biscuit, so the prices will vary. They give us window and store displays and dealer newspaper tie-ups. It is known in the trade as Kellogg's Whole Wheat Biscuit. The Kellogg Company makes no allowances for advertising.

CROSS-EXAMINATION.

THE WITNESS: They do not make any, as far as I know. I am very confident they do not. I did not mean to be understood as saying that Whole Wheat Biscuit is not competing with shredded wheat. It would be competitive in a sense, but I would think, if Shredded Wheat did the work we do on our biscuit, it would not detract from Shredded Wheat biscuit. I do not think Kellogg's Whole Wheat Biscuit is supplanting it anywhere. I think we are creating an entirely new field for ourselves.

I think that is entirely consistent with my testimony that jobbers give no assistance to the National shredded wheat but do to us, and that retailers are all

willing to give us space, from this standpoint. National sells on a direct basis, by a different method of merchandising than Kellogg's, not needing the jobber, selling direct to the retailer. You have gone direct to the retail trade. Ultimately, the product reaches some consumer. It reaches some outlet. I may look at this differently. I figure it this way: On Corn Flakes, for example, if we had been alone in the field, they would not be the leading seller today that they are, I believe. By virtue of efforts of manufacturers attempting to interest the consumer, a big demand for corn products has been created. Years ago, wheat products were big sellers, and corn was not. I surely do not mean to say we are not in competition with other brands of corn flakes. In selling a different brand of shredded wheat, we are indirectly but not directly in competition with the other.

I did not hear the ladies testify. If they said they used shredded wheat until Kellogg's Whole Wheat Biscuit supplanted it on the market, there was a preference there. It would compete with shredded wheat; but I say, if they had done the same work we did, they would have created a better market for their product.

I know shredded wheat has for years done work, including newspaper advertising and so forth, to create consumer demand, and that shredded wheat is advertising today in the newspapers, in some instances on the same page with Kellogg's ad. Advertising products alone is out of the question. I agree with you that these two items are in competition with each other; and that, through our efforts, Kellogg's Whole Wheat Biscuit, in some instances, does supplant and take the place of shredded wheat.

When I told Mr. Clarke one of our selling points is that it is a smaller biscuit, I meant it was smaller than Shredded Wheat Biscuit. In making these talk-

ing points, I have compared it with shredded wheat. It is obviously a competing article.

When I said eighty per cent. distribution among retailers, I meant to include the entire district, in the grades A and B stores, the better stores, where the volume is. I do not refer to small holes-in-the-wall, just the better class of chain and service stores. I did not mean to be understood as saying the percentage applied in Pittsburgh. We have no such complete distribution as that in Pittsburgh. There was a survey made by one of the newspapers here, in which they found shredded wheat was the largest selling whole wheat cereal. I am familiar with that survey, made by the *Pittsburgh Press*, in which they found, based on two hundred interviews, that shredded wheat stood eighty-four-and-a-half per cent. among wheat cereals, and Kellogg's Whole Wheat twenty-four-and-an-eighth per cent. That was about five weeks ago. That survey was taken among two hundred independent retail stores and jobbers. Since then, A. & P. have stocked our Whole Wheat Biscuit, which would bring up the percentage somewhat.

Cumberland, Maryland, is in my district. Mr. Tomsko from there said there was a house-to-house campaign there and twenty-eight cases went through his store in one week. I am not familiar with it. I know our salesman who was working the town reported the man had done an unusual job on a Saturday sale. He had no special deal on at that time. No part of the twenty-eight cases was free goods, that I am aware of. My recollection of that is that we had just completed sampling that week, had spent about a week and a half on the house-to-house work, and this store featured the biscuit on Saturday in their advertising. I am not sure, but I think he had no sale of any kind. We never let a store operate a sale themselves. Our salesman is in the store and sells the merchandise him-

self. We were sampling the full-sized package, selling one and giving one. We bought some of them from his store and some from every store in Cumberland. I do not think that was part of his outgo that week, not for that Saturday. He said it was in the week. I do not think we would have over three cases we would pick up from this store, because we picked up from every store one to three cases. I am quite sure this party could not have had the benefit of more than three cases.

Sharon, Pennsylvania, is in my territory. I know the *News Telegraph* of Sharon, and Neighborhood Grocers. That is Rosenbloom & Company. It is really a voluntary chain, but it is an association of retailers and Rosenbloom Company is the jobber. I have not seen before the ad of Neighborhood Grocers you show me in the *Sharon News Telegraph*, March 10, 1933. I do not question that it is an authentic copy of that newspaper. The Kellogg Company had nothing to do with getting up that ad. We never encourage the advertising of our product as shredded wheat, as in this paper, with the name Kellogg's on it. We try to establish the name Kellogg's Whole Wheat Biscuit and show the difference. I have not seen one of those ads there. It is really an unusual happenstance in this territory. Practically every ad mentioning our biscuit has featured Kellogg's Whole Wheat Biscuit. Plaintiff's Exhibit 206 is the sheet you have shown me.

The Kellogg Company, about a year ago, had a considerable broadside of reading-matter advertisements on Whole Wheat Biscuit. Page 29 of the *Pittsburgh Press* for March 25, 1932, being Plaintiff's Exhibit 207, is one of the regular ads. The one I testified to before was a forty-inch ad I gave you before. This is a regular ad. That was run frequently last year in the Pittsburgh papers. I recall it.

I recall an ad, one of a series, such as you show me in the *Johnstown Tribune*, Plaintiff's Exhibit 12-CC, on the interrogatories. It is one of the Kellogg Company's series. I think that is a regular ad we ran the year before last, 1931. We had some advertising in Johnstown and several other towns.

We have a form of demonstration in stores, in which an assortment of three packages is sold and one package of Whole Wheat Biscuit is given away. I am not aware that our demonstrators have, in some instances, been calling it Shredded Wheat. I would doubt very seriously that that was the case, since we have instructed our men throughout to call it Whole Wheat Biscuit, to establish that name in the consumers' minds.

We have no women demonstrators at all, nothing but our own salesmen. It may have happened as you say in this instance, that they were asked what the product is and referred to it as a shredded wheat product. They might describe it as that, but they would refer to it as a name, as Kellogg's Whole Wheat Biscuit, and refer to it as the company does, in the same way, on the end of its present box.

The box like Plaintiff's Exhibit 161 was first introduced, I think, early last spring, a year ago, when I first saw the window package. At that time, I believe it was printed just as Plaintiff's Exhibit 161 is. I see there is a difference between that and Plaintiff's Exhibit 168. I would say Plaintiff's Exhibit 168, with the food value, is the earliest one. I believe it is the one we first had. I do not know when Plaintiff's Exhibit 161 first came out. We had these packages shipped to us, and our men distributed them in the stores, making displays with the regular merchants' own products. We have not used this open-faced package recently. They have not had any in the territory. They do use a package like Plaintiff's Exhibit 161, with the picture of the dish with biscuit in, on both panels,

and printed like Plaintiff's Exhibit 161. I would say that came out in this market late this last fall, along in November or December. I notice, as I hold it in my hand, there is a difference in the picture of the biscuit in the dish. Now, I think Plaintiff's Exhibit 161 was the early package, with the *certified for food value*. I am now reversing what I said before.

The package like the one I am holding in my right hand, Plaintiff's Exhibit 161, carries the same printing and is a comparatively new package. It is our current package. I guess it must be our last package. I notice the representation of the dish. I am not very familiar with it.

Prior to July, 1930, we were using Whole Wheat Biscuit in cartons like Plaintiff's Exhibit 165. In the middle of 1930, we ceased calling it shredded whole wheat and began calling it Whole Wheat Biscuit. Since that time we have done all our intensive work on that product.

RE-DIRECT EXAMINATION.

THE WITNESS: There was not a large volume built up on that Whole Wheat Biscuit. The A. & P. do not stock before there is a demand. The A. & P. Company stocked our biscuit in all stores out of the Altoona warehouse three and a half weeks ago, due to a demand created in that market for Whole Wheat Biscuit. Two weeks ago, they stocked them in their Pittsburgh stores from the Virginia warehouse, following, also, a demand for them.

In the restaurant trade, the small Niagara shredded wheat package followed our individual package. The small one, like Defendant's Exhibit 81, was first reported to me from Erie. They had distribution in Erie restaurants on the small-sized package in the early fall of last year. That was the first I had heard about it.

We have our salesmen in the territory make arrangements with some large retailer having a lot of Saturday customers, not doing a lot of telephone business. He arranges an ad to feature the sale, on Friday, and it refers to Kellogg's Whole Wheat Biscuit. Our salesman conducts the sale on Saturday, selling three packages Kellogg's products assorted, and giving one package biscuit free, acting as a salesman in the store all day long. The featured product is not necessarily the one given free in the combination. We try to have an assortment of four different products. As a rule, we give Whole Wheat Biscuit free. Some places, we have sold Whole Wheat Biscuit and given some other product free. Those sales have been regarded as very successful, and we repeat them. We aim to go to different sections where we can get good coverage, figuring we get four different products into the home by this type of sampling, all Kellogg's products.

We supply bids to institutions in our territory, in response to invitations. The two papers you hand me are copies of such bids, both relating to Whole Wheat Biscuit. One is a specification of Whole Wheat Biscuit, Kellogg's, from the tubercular sanitarium at Cresson. These copies of bids are in the same condition now as when we received them. We did not write in anything, except that, in the Western State Penitentiary one, we typed in the name when we returned the bid to them.

The bid from the Western State Penitentiary, Defendant's Exhibit 85, calls for twenty-four cases of shredded wheat biscuit, twelve and a half ounces, meaning either National Shredded Wheat or Kellogg's Whole Wheat Biscuit, so many ounces. Ours is twelve and a half ounces, and theirs is twelve. We typed in *Kellogg's Whole Wheat Biscuit,* twenty-four twelve-

and-a-half-ounce packages to the case. The bid went in that way, was accepted, and the order was filled.

The bid from Department of Health, Tuberculosis Sanitarium, No. 2, at Cresson, Defendant's Exhibit 86, specified itself the Whole Wheat Biscuit, Kellogg's. We typed in: Fifteen biscuit to the package, twelve and a half ounces weight to the package, Kellogg's. That was also accepted.

I think I have a bid from the Soldiers' and Sailors' Home at Erie, in which they specify Kellogg's Whole Wheat Biscuit. I have a notation here from Major Smock: "On two occasions during this contract when I ordered this item, I received Shredded Wheat." So they specify here Kellogg's Whole Wheat Biscuit. The jobber, Curtze & Company, shipped them National shredded wheat. I do not know whether the signature on the copy of bid, Defendant's Exhibit 87, is the signature of Adjutant Smock or not. He read that to me. That is the way it read when it came to me.

RDQ. 207. I think you told me that this Pennsylvania Soldiers' and Sailors' Home Award was filled by you, according to the specifications, with Kellogg's Whole Wheat Biscuit.

A. The Pennsylvania?

Mr. Vilas: It was not awarded to Kellogg. It was awarded to Curtze.

RDQ. 208. Ten cases.

A. Yes, but Curtze shipped them National Shredded Wheat in place of that.

Mr. Vilas: That is your inference from what you see written on the paper, is it not?

The Witness: Yes, I also called up Curtze & Company, and they looked up their records and found out that that is what occurred, that the

National shredded wheat was shipped. They had the records at Curtze & Company.

RE-CROSS-EXAMINATION.

THE WITNESS: In some instances we have induced institutions to specify Kellogg's Whole Wheat Biscuit. We have also had instances in which shredded wheat was specified. For example, in Defendant's Exhibit 85, Western State Penitentiary, the quotation request reaching us carried the item twenty-four cases shredded wheat biscuit, twelve or twelve and a half ounces in each, as per state specifications, G-36. I have no copy of that. That was a specification as to what shredded wheat should be like. It was either Kellogg's in the twelve-and-a-half-ounce package, or National in the twelve-ounce. The specifications, I think, did not mention them by name. My testimony on direct that this meant Kellogg's Whole Wheat Biscuit was my inference drawn from the fact that it specifies twelve or twelve and a half ounces to the package. I presumed the twelve-and-a-half-ounce package had reference to our Kellogg's Whole Wheat Biscuit. The part filled in on the typewriter in black: Kellogg's Whole Wheat Biscuit, packaged twenty-four twelve-and-a-half-ounce packages to the case, was filled in by me.

As a rule, the bids call for twelve or twelve and a half ounces. In many cases they refer to Kellogg's Whole Wheat Biscuit. In many instances in which we sold our biscuit to institutions, they specify it. We have an institution man who handles all this business. I do not get a chance to look at all institution bids.

I have seen army bids calling for shredded wheat. When we get such a bid, we specify what we have and make a bid on it. We frequently get the contract on a bid like that.

RE-DIRECT EXAMINATION.

THE WITNESS: We have distribution of Whole Wheat Biscuit in the Kroger stores in our territory, secured after there was a demand for the product. Their policy is similar to that of the Atlantic & Pacific Company. It is put in after the demand has been created. I think they run one hundred and sixty-seven stores now, out of the Pittsburgh warehouse.

RE-CROSS-EXAMINATION.

THE WITNESS: They carry shredded wheat and did so before they carried the Kellogg biscuit.

WILLIAM P. WELTON.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocery with a meat and grocery store, two clerks steadily. I generally have two to four. We take telephone orders and deliver and all accommodations. We have goods stacked up on the floor, so a woman can go around and help herself.

We handle Kellogg's Whole Wheat Biscuit and have done so between three and four years. We also handle the Niagara Falls shredded wheat. I have handled that quite a long time. Of the two, Kellogg's biscuit is now outselling shredded wheat. That represents a consumer demand. We sell quite a bit of it through advertising. The volume is increasing. The volume or demand for the shredded wheat product is decreasing, I guess.

When a consumer asks for Kellogg's product, they generally ask for it as Kellogg's Whole Wheat

Biscuit. The other product is known as shredded wheat. If a customer asks me for shredded wheat, she gets the Niagara shredded wheat. If she asks for whole wheat, she gets Kellogg's Whole Wheat. If she would ask for Kellogg's shredded wheat, I would have to ask her if she wanted Kellogg's Whole Wheat or shredded wheat, because there is a difference there. We do not substitute in our store. We give the customer what she wants. We belong to a voluntary group, in which the stores are uniform in name and set-up. They are Clover Farm Stores. It is laid out in different groups. In our group there are about a hundred and fifty members. Altogether, I guess there are about four or five thousand members, all under the name of Clover Farm Stores. I guess the rest of the groups carry Kellogg's Whole Wheat Biscuit, because it appears quite often in our advertising. We feature it. Where a product is featured in advertising, it is carried in the stores of the group. We display it and suggest it to the customers. Kellogg's Whole Wheat Biscuit has been displayed and suggested in that way. It is always displayed, and you can help yourself in the store. Lots of time, we have it in window displays.

The store and window displays always help in increasing the consumer demand for the product. When a new product comes into our store, we always make a display of it in the middle of the floor, in a sort of pyramid. We have a few right near the counter and suggest it to customers. We have Whole Wheat Bran now introduced that way, a five-cent article, in a bushel basket, right in the middle of the floor.

There is no confusion in our store between Niagara Falls shredded wheat and Kellogg's Whole Wheat. I have never, personally, confused the Kellogg package with the Niagara Shredded Wheat package.

We had shredded wheat for ten cents for a time, then eleven, and the current price is twelve. Kellogg's Whole Wheat Biscuit runs about the same. The last three or four years, I believe the National Biscuit Company has manufactured Shredded Wheat. Before, it was the Shredded Wheat Company of Niagara Falls. We handle a few of the National's cookies, crackers, but not their whole cracker line. I buy the shredded wheat through the Clover Farm organization. We get our discounts automatically.

Consumer demand for Kellogg's Whole Wheat Biscuit has been created through their own efforts, through advertising, putting their goods on the market, perpetual advertising and getting behind it. Their salesmen call on me, watch my stocks, and take my orders, straighten them up, help me make displays, sometimes, which helps sell the product.

I handle practically all the Kellogg line. It is pretty well known. The Kellogg name on Whole Wheat Biscuit is a great advantage from the standpoint of creating consumer demand. The Kellogg Company gives no advertising allowance to the retailers or our organization, that I know of. I do not think they do. I do not know. We never got any allowance at our store.

Customers in a retail grocery store tend to shift around from one item to another. You may have a woman buy one thing today and she may buy something else a day or two later. The largest selling cereal in my store now is Rolled Oats, then Kellogg's Corn Flakes. I think Kellogg's Post Bran will come next, then Whole Wheat. I do not mean Post's Bran, but Kellogg's Bran. We have them both. After that Kellogg's Whole Wheat Biscuit. Then I will say shredded wheat would come next.

We buy Kellogg's products through the organization.

CROSS-EXAMINATION.

THE WITNESS: My group buys through a jobber, the Fox Grocery Company, at Charleroi, Pennsylvania, who has a concession from the Clover Farm Stores. That is, they have a certain district assigned to them; and they act as nucleus or center of the independent retailers who call themselves Clover Farm Stores. I am one of the members. I secure from Fox Grocery Company nearly all my staple supplies.

We handle a few National Biscuit Company goods, which we get direct from the National Biscuit Company. The salesman calls on me. I do not buy National products through the Fox Grocery Company. I am at liberty, in my dealings with Fox, to patronize other manufacturers. They do not dictate that I shall not buy Strietmann's or somebody's else crackers. I have been in the grocery business about seventeen years. I have not been with the Clover Farm all that time. I have been an independent grocer all that time, service store, for myself. I have always been selling groceries or meats, longer than seventeen years, all my life. For at least seventeen years, we have had shredded wheat on our shelves, and I have been familiar with it, in a package something like Plaintiff's Exhibit 1. I recognize the package. I recall also having it in a package like Plaintiff's Exhibit 10, with a picture of a dish on the end. I remember that package some years back. It was used for quite a while, with a picture of Niagara Falls on one end and of the dish on the other. I cannot say I ever used that in making my displays of shredded wheat. I remember shredded wheat was a very widely advertised product up until this last few years. Then I do not think they advertised as much as before. During my experience as an independent grocer, it was a very well-

known and popular product. People asked for shredded wheat. When anybody did so, I had no doubt what they meant. We knew what they meant. That was the only product that answered that call, until Kellogg's Whole Wheat Biscuit came on the market, there was nothing else like it. There was a small round one put out, called Muffetts. We handled them, but not now. They fell down on the advertising, and the sale of it dropped. Muffetts is a round cake, and they were good, too. It was on the order of shredded wheat biscuit, made out of wheat.

The Kellogg biscuit come only one or two with the window, like Plaintiff's Exhibit 161, in a case; and the rest do not have the window. We use the window packages for display. They show the ends of the biscuit through the cellophane, so the customer can see what is in the package. We use those for display, but we do not keep them too long. If they become shopworn, we move them out. Both products, Kellogg's biscuit and shredded wheat, have the same display in my store at the present time, right up on the shelf, where the customer can go and take either one he wants. Kellogg advertised their biscuit so much, and we have it on our special slips, so we put it in the window, and then we put it on the floor display. We do make a special display at times for shredded wheat. We have sold them for a dime and did not make any money on them. I pushed them over the counter for ten cents.

We have suggested Whole Wheat Biscuit to our customers. We never suggest shredded wheat to our customers in preference. If they come in for shredded wheat, they will get it without any question. I never said: "Try Kellogg's shredded wheat," and showed them that. Kellogg's Whole Wheat Biscuit has, in my store, forged ahead of shredded wheat sales. I

could not say that any of my customers who now buy Kellogg's biscuit were former shredded wheat customers. I do not know what kind of breakfast food they have been using. Kellogg's biscuit being on the same line as shredded wheat, anybody who likes shredded wheat would naturally try one and try another one.

When I said there was no confusion in my store between the two, I meant I know them apart. I would not make any mistake between the two. If a customer asked for Kellogg's Whole Wheat Biscuit, I would not give her shredded wheat. I would make no mistake in reaching for the package. That is what I mean.

I do not remember the Kellogg product when it was marked shredded whole wheat. All I have known is Kellogg's Whole Wheat Biscuit. I do not recall any package like Plaintiff's Exhibit 165. The only package I remember seeing is one like Plaintiff's Exhibit 161, with a picture of a dish and two biscuit, and the name: Kellogg's Whole Wheat Biscuit. I have had it for a long time. I do not remember ever seeing the other. We are now selling the two items, I think, at the same price. I suppose I make about the same profit on both. My wife takes care of the figures on the financial end of it. I suppose the Kellogg biscuit shows me a little better profit than the shredded wheat.

HARRY L. SNYDER.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

Direct Examination.

The Witness: I am a grocer, with two stores, under the name of H. L. Snyder & Son. They are regular service stores, with telephone orders, deliveries

made, and credit extended. We have self-service features in the stores.

We handle Kellogg's Whole Wheat Biscuit in both stores. We also handle Niagara shredded wheat. We have had a demand for both those products in our stores. If a customer asks for shredded wheat, she gets shredded wheat. If she asks for Whole Wheat Biscuit, she gets Kellogg's Whole Wheat Biscuit. Our customers do call for those two products that way. They are priced both the same, twelve cents. We have had store displays and window displays on Kellogg's Whole Wheat Biscuit. The Kellogg salesman calls regularly on us, does not neglect us. We handle the rest of the Kellogg line. Kellogg products are well known. If the name Kellogg's on the package would do anything, I would say it would help the sale of it. If the customer had a good opinion of the other products, it might help a little.

In my store, I introduce a new product by making a display of it and calling the customers' attention it. If I can, I ask them if they have ever tried it and would like to try it. I have not had any packages of Whole Wheat Biscuit with cellophane fronts. Mine are with solid fronts. Some customers would shift around from product to product in the cereal line, and some would stick. I do not try to keep a record of that. I know they shift in some things, particularly coffee. Whether they do on this, I could not say.

CROSS-EXAMINATION.

THE WITNESS: I have customers who like a certain brand of cereal, crackers, or something and stick to it. They always insist on having the same thing. I cannot say that it would be true of shredded wheat. When a customer likes a certain thing, he will stick to it; for instance, Mother's Oats. They stick to that

all the time. I believe I can say I have some customers who stick to shredded wheat. I will not try to say for certain, because I do not keep track of or watch those things. I have been a grocer since 1900. I was out two years at one time and two years at another, but I was connected with the same business during that time, more or less actively connected with the grocery business during the entire thirty-three years. I have been familiar during that time with shredded wheat. I do not remember when it started or whether it was in the grocery line the first time I was. I was too young. I cannot remember a time when I had grocery stocks in the stores and did not have shredded wheat. It has always been in a package something like Plaintiff's Exhibit 1, and, to the best of my knowledge, it has always been a biscuit of the same size, shape, and general appearance. It has always been a pretty good steady seller.

I have never had any sales of anything at any time. I have had displays of shredded wheat. So far as introducing it is concerned, I would think the time for that has long since passed. People have called for that product, throughout my entire experience, by the name shredded wheat, as far as I can remember. I never knew it to be called for by any other name. I would think it is a name very familiar to the public, and I would suppose it has always meant this product made at Niagara Falls. I know of no reason why it would not. It might be possible some people would not know it was made there. It means that product to the public, however, and it still means it.

There is no doubt in my mind that the words shredded wheat mentioned would mean just exactly that shredded wheat; but whether that would be such as to make it the same as a trade-mark or not I am not sure. I would not attempt to pass upon that question.

I do not yet belong to any voluntary chain or buying group. They are seeking to open up in the City of Pittsburgh. If they conduct their business the way I think they should, I will go in. If it is the same as those in business now, absolutely not. I run my own business, absolutely. Nobody's else name will go on it. I run a service store, take orders over the telephone, and make deliveries. On Saturday, a good percentage of our orders come over the telephone; but about 60 per cent. on an average, or a little more.

We get orders for shredded wheat over the telephone, and that is the product they get. That is what has kept me in business for so long a time. We give customers what they ask for. As I told Mr. Clarke, if we have a new product in the store, we will display it and suggest it to customers. When Kellogg's Whole Wheat Biscuit was first put into my store, we had a display of it on the counter. I would not say I did not suggest it or show it to my customers. I might have. I could not say whether any of my present Whole Wheat Biscuit customers are former shredded wheat customers.

Of the two, I sell most shredded wheat now. I do not hesitate to say it is the biggest seller. That is not hard to tell. I could not give the exact percentage. I am a user of other National Biscuit products and carry them in the store. We carry the cracker line. The National name attached to any item might be a pretty good selling point to some people. I could not say. There is no question that the name National Biscuit Company would mean something to some people, the same as Kellogg's would. The name Kellogg's does not have a monopoly on good will. Nobody has. When people ask for Kellogg products, they also ask for Whole Wheat Biscuit. Nobody asks for Kellogg's shredded wheat. To my knowledge, nobody ever did.

CLIFFORD B. TRUNICK.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

Direct Examination.

The Witness: I am a partner of the firm of C. P. McLaughlin & Company, grocers, with just the one store. That is a regular old-line service store. Most of our business is over the telephone. We have two trucks for making deliveries, and we extend credit very extensively. We have some self-service features, When the department was remodeled, we installed a system, believing the women would wait on themselves more than they do. They cruise around somewhat and wait on themselves.

We handle Kellogg's Whole Wheat Biscuit and have had it, I would think, about four years. We also handle Niagara shredded wheat. We have handled that I think ever since I have been in business, thirty years. I have been there, anyway, twenty-five, and I know I have handled it ever since I have been there. There is a consumer demand for both products.

If a customer asks for shredded wheat, she gets the regular shredded wheat. As far as my clerks know, there is no other. Customers asking for the other product specify Kellogg's wheat biscuit or Kellogg's wheat. We have never had any confusion or mixup between those products in our store. Unless a customer specifies Kellogg's, he gets shredded wheat. If a customer asked for Kellogg's shredded wheat, we would give her Kellogg's biscuit. We never had any customers, to my recollection, send back either product and say they wanted the other. I cannot see where the name Kellogg's would hurt the sale of Whole Wheat Biscuit any. We handle Kellogg's Whole

Wheat Biscuit in the full-front package, like Plaintiff's Exhibit 167. I do not have any in cellophane-front packages like Plaintiff's Exhibit 161.

The last year and a half or so, quite a few new items have come in over the Triangle, which we joined when they started, and such items as we introduced have always met with real popular demand. We put them on display in the window and the store. Anything on the list we put in for three days, Thursday, Friday, and Saturday, for the sale. Circulars go out, specifying all the items on the list, about thirty at the present time. That has been an effective method with us of introducing a new product. We have given Kellogg's Whole Wheat Biscuit the same co-operation by the same methods I just described for introducing new products.

The Triangle is an association run through the Creasey Company. They have about two hundred members. It is a voluntary chain. Members put the insignia of the Triangle organization across the front of the store. The prominent name of our store is McLaughlin. The Triangle chain gives us certain buying privileges. We pay for advertising appearing in Pittsburgh papers, amounting to $7.70 a week, including a thousand hand-bills. I think it is two-forty or three-forty for the hand-bills and three something for advertising, a dollar extra for my own advertising. It amounts to $13.77 a week. Two ads are put in each week. I think Kellogg's Whole Wheat Biscuit have had the benefit of that service two or three times. No allowance for advertising has been made by the Kellogg Company to us. It might have been in the shape of a reduced price to the Creasey Company, but I would not have any knowledge of that, either way. I do not know whether they would reduce prices on our stuff. It has happened on different items. For instance, we had been buying College Inn direct from them. To get

an advertising offer from them, we bought it through Creasey, through Triangle, at seventy-five cents a dozen cheaper. We always had two prices for it, all the way from five per cent. up. We put on specials and sold quite a lot.

The Kellogg Company has conducted Saturday sales or demonstrations in my store on Whole Wheat Biscuit and the rest of the line. We sell shredded wheat at twelve cents and Kellogg's Biscuit at ten, or on special sales, two for nineteen. I think shredded wheat has been priced eleven cents occasionally by other chains, for quite a time, and, on special sales, ten.

CROSS-EXAMINATION.

THE WITNESS: I have been connected with the McLaughlin Company twenty-five years and am part owner of it now, have been for the last fifteen years. Before that I was in the dry goods business, about two years. At eighteen, I went to McLaughlin's. During that time, I have been familiar with shredded wheat like Plaintiff's Exhibit 1 or a similar package, and no change in the biscuit itself. It has been a very well known article and a good seller all these years. People have known it by the name shredded wheat and by no other name. That is really the only name we ever get shredded wheat. When our customers ask for shredded wheat, they get that at our store, and they get nothing else but shredded wheat.

If they asked for Kellogg's shredded wheat, they would get Kellogg's Whole Wheat Biscuit. I told Mr. Clarke the name Kellogg's does not do the product any harm. I mean that Kellogg is a well-known manufacturer, and it is an acceptable product to people seeing the name Kellogg's on it. The name of National Biscuit Company does not do any harm either. As far as we are concerned, we do a nice business with the National Biscuit. We also carry their cracker line.

Our package of Kellogg's biscuit is like Plaintiff's Exhibit 167. I have never examined the reading matter on that package. I see now on one end of the package: Shredded wheat in its most delicious form, and, on the other end: a shredded wheat product. I have not handled this stuff, but I have the other. I would not know what was on your package, either. I never get down to the fine matter myself. No doubt the trade would. In looking for recipes, they might look at the reading matter on the packages.

I know *shredded wheat* appears prominently on the plaintiff's package, and the expression: *A shredded wheat product* appears on the Kellogg package. They talk about shredded wheat. Is what is in that package shredded wheat? I mean by that a biscuit shredded, composed of shreds or threads of wheat. I have seen shredded coconut and shredded soap. It is forced through a fine hole of some kind, is it not? I would not say cut up in pieces, but more like macaroni or noodles. I have never been on a farm and seen a corn shredder operate. I have seen shredded wheat made. I know the wheat berry, after being steamed, is pressed into a long thread. That is my idea of a shred. I think that is a shred, so I think Kellogg's biscuit would be a shredded wheat. I would think the designation on the end of the Kellogg package: A shredded wheat product, would not be a misnomer, any more than corn flakes would be a flake. I would think it describes the item.

I have sold a lot of shredded wheat in a package like Plaintiff's Exhibit 10, with the dish on the end, which was used a good many years by the Shredded Wheat Company.

I do not think I first learned of Kellogg's biscuit through the Creasey Company. Their man tried to sell us the idea, as I recall, seven or eight years ago. I think at that time they called it shredded wheat, Kellogg's shredded wheat. It was called shredded wheat and is still referred to as Kellogg's shredded wheat.

When Kellogg's biscuit was first introduced into our store, that is, since we had any real sale on it, it came through the Creasey Company. I would not know whether the present sale of it is a new created demand or at the expense of shredded wheat. Their advertising might have some influence on some persons to try it. I think there is no doubt that a shredded wheat customer might be influenced to try Kellogg's Whole Wheat Biscuit. At the present time, shredded wheat outsells Kellogg's biscuit in our store, notwithstanding the difference in price.

RE-DIRECT EXAMINATION.

THE WITNESS: I have no doubt that shredded wheat like Plaintiff's Exhibit 1 is shredded wheat. I know I saw it made at Niagara Falls, and I know how it is made. That is what I meant when I called it shredded, and I do not think they have changed it.

RE-CROSS-EXAMINATION.

THE WITNESS: The great length of time this product has been called shredded wheat may have a little to do with it being natural for anyone to call Kellogg's biscuit a shredded wheat biscuit, because of the association of that name with that kind of biscuit; but I really think practically any business they are doing on it is the result of advertising. With the amount of advertising these people have behind them, they have undoubtedly created something in the public mind. I do not think it is easier to create a demand by the public for a biscuit like that because they already know of such a biscuit, as far as their own case is concerned, because they have not really created a demand for it.

On the Triangle buying, three times on those sales a cut of the package has appeared on the Triangle list, and we really sell at those times more on one or two

days than we do at other times in a month. It is not a repeating demand, so far as we are concerned. At those times we are offered a Wheel of Knowledge, and they took very well with the children. That helped move the product out. Previous to that, we never sold any at all; but we do have them repeat on it now. They call for the product as Kellogg's Whole Wheat Biscuit.

When shredded wheat was first made, it was, to my mind, an absolutely new product. There had never been anything like that. No doubt, the Shredded Wheat Company spent a vast amount of money educating the public to eat that product. It was called various names, like bale of hay, and excelsior. I called it a bale of hay, myself, when I first saw it. It was more or less held up to ridicule, and the Shredded Wheat Company, by intensive work throughout the years, has made it a household article throughout the United States. Almost every kid knows shredded wheat. So the problem of the Kellogg Company in advertising their product was made a little easier by reason of that fact. An amount of advertising would help any proposition. The people did not have something totally strange to them. They came out with a picture of their product in a dish on the carton, which at once suggested shredded wheat to the public. I do not see where the pioneer work has been done more for them on that than it would be on any other item, such as Corn Flakes, which were new at one time. No doubt, there are a dozen brands of corn flakes introduced. I do not know that there are so many of the Whole Wheat Biscuit. I only know Muffetts besides these two. It does not look like shredded wheat biscuit. It is round. It is not the same at all. Shredded wheat is larger, and Kellogg's biscuit is a smaller cake. In other respects they have the same appearance.

MRS. MIRIAM K. GRANGER.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

Direct Examination.

The Witness: I am a housewife, with a husband; no children, and no other members of our immediate family. I have no other occupation. I use Kellogg's Whole Wheat Biscuit and have used it about six months. It first came to my attention by receiving a sample package at my door. I liked it and have continued to use it since. In ordering it I ask for Kellogg's shredded wheat. When I do, sometimes I get another biscuit. My grocer is the A. & P. on Beverley Road. They stocked it about six months ago, and then they discontinued it for some reason. We had to insist rather emphatically on their stocking it again. They had National shredded wheat on their shelves, and they seemed to think one shredded wheat biscuit was sufficient for our use. Just within the last three weeks, Kellogg's biscuit has been back on their shelves.

I had formerly used National shredded wheat. I have been keeping house for six or seven years and used it during that time. Of the two products, I prefer Kellogg's. I have used no other since. I have kept it on my shelf ever since I had the sample. I prefer it because of the size.

I never had Niagara Falls biscuit delivered when I asked for Kellogg's except our grocer said he carries one shredded wheat and feels that should meet my needs. He did not try to sell me anything else when I wanted Kellogg's. He never tried to substitute. He did not understand why we preferred the other.

Cross-Examination.

The Witness: I prefer Kellogg's biscuit because of the portion, and I prefer it because it is so much

crisper. I had known shredded wheat for a long time before and always knew it as shredded wheat. I do not think I knew about it before my marriage. Mother liked cooked cereals. We never had raw cereals at all. I give this raw cereal to my husband. He used to use the other. He knew the difference. We were glad when Kellogg came out with Whole Wheat Biscuit and gave us something we liked better than the other.

The sample package just had two biscuit, left at our house. After that, I asked for it at my grocer's. Mr. Ander asked me if I would come down here today, because he knew we were interested in it. He moved in the same apartment when we came to Pittsburgh, and he knew we liked Whole Wheat Biscuit. I serve the biscuit just as it comes out of the box, no heating, just the same as shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: We moved to Pittsburgh, lived here for two years, then moved to Michigan and back. I have known Mr. Ander all the time. The sample delivered to our door was entirely independent, delivered by a sample man. I had never known of Kellogg's Whole Wheat Biscuit or talked to Mr. Ander about it before they gave me that sample.

GEORGE WILLIAM DRENNING.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocery man with my own store, conducted under the name of Clover Farms, a voluntary group. It is an old-line grocery, with telephone orders, making deliveries, and extending credit.

We have counters down the center and work in there. We have shelves out where people can help themselves. Our shelving is five feet high, with cereals all around the top, so they can help themselves, go around, pick out what they want, and put it on the counter.

I handle Kellogg's Whole Wheat Biscuit, having carried them ever since they commenced making them. I sell them in solid-front packages, like Plaintiff's Exhibit 167. I also handle Niagara shredded wheat. Of the two, Kellogg's sells the most in my store by about five cases to one. Niagara shredded wheat is not a very live item in my store. I do not sell very much of it. On the telephone, they call for Kellogg's Whole Wheat Biscuit.

If a customer just asks for shredded wheat, I ask them which one they want. We have no confusion in our store between the two. I have not had either product sent back with the statement they wanted the other. There is a consumer demand for Kellogg's Whole Wheat Biscuit. We have quite a demand for it. They mostly call and ask for Kellogg's.

Both the products are priced at twelve cents, placed on the shelf side by side. We have given the Kellogg Company dealer co-operation on Whole Wheat Biscuit in the way of store and window displays, and through Clover Farm advertising. Also, the Kellogg salesmen come along and give us cards and window displays.

We handle two or three numbers of National Biscuit Company besides Niagara shredded wheat. We handle some of their flake cracker. We also handle Colonial cracker line and some Loose Wiles. We get the same discount from National as we do from the other biscuit companies. National shredded wheat has been used by the chains as a price-cutting item. I have seen it advertised as low as nine or ten cents.

You lose money on it at nine cents. I could not sell it for that in my store at a profit.

Cross-Examination.

The Witness: We have had Kellogg's biscuit on special sales, Friday and Saturday, at eleven cents. We have no special deals in our store. I have been in business for myself about seventeen years, but in the grocery business all my life, since I was seventeen. I have carried shredded wheat all that time, always. It has been a well-known product for many years, always known as shredded wheat. The public, my customers, ask for shredded wheat. They used to. They still, some few, ask for it in my store. We have not had any display of shredded wheat whatever.

I have been with Clover Farms about fifteen months. They do not push the sale of shredded wheat. We have never had it on special sales. They do encourage the sale of Kellogg's biscuit. Before we handled Kellogg's, the shredded wheat was the only product like that, and it sold quite a little bit at that time. Since Kellogg's biscuit came into my store, it has supplanted shredded wheat, so it sells five to one. I attribute that, to a certain extent, to an aggressive pushing of the product by the Kellogg Company.

I have always carried Kellogg's products since I have been in business. I am a hundred per cent. Kellogg man. We have always handled everything they manufactured. We had Kellogg's Whole Wheat Biscuit before fifteen months ago. I have had it for several years and have carried it along with the other Kellogg items, ever since it was manufactured.

When people ask me for Kellogg's shredded wheat, I ask them which one they want, in order to avoid any confusion between the two. We give people the preference. If they want Kellogg's, we want them to have

it. If they just ask for shredded wheat, we are not sure which one they want. Then we ask which one they want, Kellogg's or National. Lots of times, mostly they select Kellogg's under that designation. If they ask for it, we give it to them. If they just ask for shredded wheat, we give them a chance to say Kellogg's, and they do take it very frequently. They frequently ask for it as shredded wheat. I have had people say we made a mistake and sent the wrong one, that it was not the one they wanted, after sending them the National. Sometimes a clerk would do it. It has also happened the other way, but it does not happen very often. It is to my benefit to sell Kellogg's. I make a little more on it than I do on the National.

RE-DIRECT EXAMINATION.

THE WITNESS: The reputation of the Kellogg Company in the trade for fair dealing and non-discrimination in discounts is fine. I do not like to say much about the National Biscuit Company. I do not like their deals in many ways.

RE-CROSS-EXAMINATION.

THE WITNESS: I am not a National Biscuit Company man now. When we handled the National line, we handled the full line and they did not treat us fair. They gave the chain stores the big discounts. We got five or ten and had to sell so many more packages before getting a better discount. The chain store was getting the discount for the large volume they were buying. Orders were taken from a lot of stores and all jumbled together and put in as a big discount. We had to sell more goods to get a better discount. At that time we had to sell a hundred dollars worth to get fifteen per cent.

RE-DIRECT EXAMINATION.

THE WITNESS: The chain stores could purchase enough to get that discount, because they had Morrison there. They were doing no more business than I but were getting a big discount and I got a small discount.

RE-CROSS-EXAMINATION.

THE WITNESS: The discount was based on the amount sold to one store; and they were selling large amounts to the chain stores and a comparatively small amount to me as the owner of one store. I found it difficult to purchase and dispose of enough a month to qualify for the high discount. There was a good deal of feeling among grocers about ten years ago. I was not interested in the Federal Trade Commission case on that point, but I knew of it. I did not testify in it. I am, now, as a member of Clover Farm stores, getting the benefit of their buying discount from the National, Loose Wiles, and Colonial. We always had it in for the National Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: Our requirements at that time were enough to fool them, but there were not enough buyers in our town to get it. I did not know that was one of the things involved in the Federal Trade Commission case, that they would not permit the independents to pool orders.

GEORGE WORRALL.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am president, treasurer, and manager of the Liederman Worrell Company, wholesale grocers, a regular old-line wholesale house, whose sales-

men travel the trade. I have been with them twenty-nine years. We have nine salesmen. We cover six counties in the western part of the State, from Allegheny River north as far Ashtabula, and two counties in Ohio. We service some of our customers from our other house at Greenville, Pennsylvania. We have connected with us Clover Farms, a voluntary chain that we service. We have a total of about seven hundred fifty accounts, of which a hundred and thirty odd are Clover Farm, the rest independent.

We handle Kellogg's Whole Wheat Biscuit. There is a retailer demand in our organization for that product. We also handle the National Shredded Wheat. I looked up the record this morning and found that we sold more of Kellogg's biscuit last year than we did of shredded wheat.

We buy shredded wheat from the National Biscuit Company. I understand we get the same discount the retailer gets. We buy it from the National Biscuit Company at the same price the retailer can buy it for. That means we just get a little more for it than they get. To my idea, the retailer has to pay more for it when he buys from us than when he buys it direct from the National Biscuit Company. Our organization does not take very kindly to that kind of deal. A jobber usually gets some concession over the retail buyer.

We feature Kellogg's Whole Wheat Biscuit at times in our advertising. I would say a very large proportion of our accounts carry Kellogg's Whole Wheat Biscuit. I cannot say for certain about all. All our Clover Farm accounts handle it. They advertise the product and sale of Kellogg's biscuit. They give store and window displays and other forms of advertising.

Clover Farm Stores do not carry many of the National line other than shredded wheat. Some do have

both lines. The hook-up of Clover Farm Stores is with the Loose Wiles Biscuit Company in a national way. At the time we were arranging a hook-up for our particular unit, they presented us a proposition, the National Biscuit, along with Loose Wiles at that time, and offered certain discounts. We accepted the proposition of Loose Wiles. National then went out and solicited business from our member stores at a higher discount than they had formerly given those same stores. That was after our decision to accept Loose Wiles was made.

Our Clover Farm Stores buy these goods direct from Loose Wiles or National, as the case may be. The arrangement was made by our Board of Control with the company they selected. Both propositions were presented to and considered by them, and they decided to accept Loose Wiles. That business goes direct to the retail stores and does not come through our house at all.

After that, the National Biscuit Company went out and solicited the business from our stores at a larger discount than they had formerly given the retail merchants. Some of the retailers fell for that, and some of them wondered why they could not do it before. I think it reacted against them in most cases.

As far as the product itself goes, we never had any confusion between National shredded wheat and Kellogg's biscuit in our retailer trade. I never had a retailer return either product and say it was the other he had ordered.

CROSS-EXAMINATION.

THE WITNESS: I did not mean to imply that it was a crime by the National to try to get business from Clover Farm Stores; but the trade wondered why they could not give the larger discount before we hooked up with Loose Wiles. The National and Loose Wiles

are competitors. If our Board of Control had not hooked up with Loose Wiles, they might have done the same thing. We could not make a hook-up with two people. It is natural for two competitors to sell their product where they can. That is what they are in business for. Notwithstanding the disfavor the National has in the eyes of my organization, Clover Farms, they have the right to sell their products. With many stores equally as good as ours, why do they hold them down to a lower discount? I did not say there was any crime committed by the National Biscuit Company in doing that.

When the Board of Control made the decision, it had the effect of a recommendation to the members of Clover Farm Stores to patronize the Loose Wiles Company. If they were loyal to the organization, they would not deal with any other cracker company. There was no rule prohibiting them from so dealing, but a moral obligation, the obligation of mutual co-operation under which they had entered the organization. They enter into a contract with Clover Farms or our organization; but that contract does not prohibit them from buying outside the recommendation of the Board of Control. The recommendation, however, has a good deal of weight with the members, so we are able to direct a great deal of prestige in favor of Loose Wiles or any other company we recommend. That applies to different hook-ups on different products. We have no hook-up with the Kellogg Company on their products, but we do favor the Kellogg Company. We feel that way. Practically all Clover Farm Stores carry the Kellogg products, including Whole Wheat Biscuit. I would imagine a majority of them carry shredded wheat, which is a product we have carried for a great many years. We always stocked it when the Shredded Wheat Company owned it, and it has been a good seller. We bought it often in cars from Niagara Falls,

until they notified us they would not let us have the discount, 17½ per cent. Almost any Clover Farm member who buys a reasonable amount can get that discount, because he is a member of the Clover Farm group, I guess. The National Biscuit Company is selling shredded wheat direct to the retailer instead of through the jobber. Kellogg's biscuit is the largest seller of the two as far as we are concerned, and we handle a lot more of it. That is accounted for, at least in part, by the fact that National services the retailer direct. I suppose they take a lot of business we formerly had. There is no question about that.

Up to the time National took over shredded wheat and started distributing it direct, Kellogg's biscuit did not sell more than National shredded wheat. It has only been in recent years. I would hardly say that Clover Farm Stores handle all Kellogg products under the recommendation of the Board of Control. Advertisement of an item in our weekly ads implies at once that we are interested in it. If we were advertising for them, we would pretty nearly have to have it in stock, so we could advertise for that business. We have not advertised shredded wheat.

We get considerable co-operation from the Kellogg Company in deals they give us and premiums of different kinds. They often have a prize of some kind. A year or so ago, they asked us to get a list of school children over our entire territory. We nearly swamped them with names, to which they sent out prize packages. A thing of that kind helps create demand for their line. When I speak of prize, I do not mean a prize or reward to our house for handling it. They make no advertising allowance. I think we pay them just the same as any other jobbing member.

When I told Mr. Clarke there is no confusion between the two products, I meant that there is no doubt

at all in my house as to which is shredded wheat and which is the Kellogg product. I have been in this location twenty-nine years. I have been in the grocery business a great deal longer than that. I have been in the wholesale grocery business about forty years. I do not recall just when shredded wheat was introduced; but I can hardly recall a time when I did not have it. It has been in a package like Plaintiff's Exhibit 1. It has always been the same product and always known as shredded wheat.

ALOYSIUS HARVEY.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the restaurant and confectionery business. I have been in the restaurant business seventeen years. We handle cereals in my restaurants, serviced in the individual cartons. I have two girl helpers, sometimes three. I also have two cooks. All the serving is done by the two or three girls in the store part. They open the individual cereal packages at the counter and at the tables. If it is at a far table, they generally open it at the counter. Anybody can see it. The customer can see if the package is opened.

I handle Kellogg's Whole Wheat Biscuit in the individual cartons, also their All-Bran individual size, and then the other cereals, like Post Bran, in the larger packages. I do not carry Whole Wheat Biscuit in the large package. We carry Kellogg's Corn Flakes. We carry the larger packages for them to take home, a sort of grocery service.

Kellogg's Whole Wheat Biscuit in the individual carton sells right along in my restaurant. I never had

a complaint about it or had a customer say it was not what he wanted. I handled Niagara shredded wheat, until the National took it over and reduced the size of the individual carton. This is one of the individual cartons of Kellogg's biscuit, Defendant's Exhibit 80. I used to handle National shredded wheat in an individual carton like Plaintiff's Exhibit 21, with two biscuit in the package. When the National Biscuit Company took it over, they gave me a smaller carton and cut the size of the biscuit down. I think it was smaller than Defendant's Exhibit 81. Comparing the two, that looks like the old one and this the new one. When the new smaller-sized carton, like Defendant's Exhibit 81, was given me, I no longer carried National shredded wheat. About that time I put the Kellogg biscuit in and have carried it ever since.

CROSS-EXAMINATION.

THE WITNESS: Prior to the time the National took it over, I carried shredded wheat for a great many years in my restaurant. It will be eighteen years next month since I took it over. Most of that time I think I have had shredded wheat, in the individual cartons with the same size of biscuit as were sold in the larger package. Shortly after the National took them over, they came out with the smaller biscuit. I did not buy any more after the first order. My customers were not satisfied with the size of the small biscuit. I had to open two boxes for one serving. There was not enough of it. When Kellogg came along with a package like Defendant's Exhibit 80, I took that on, notwithstanding that their biscuit is smaller than the old National shredded wheat.

I suppose the biscuit you take out of Defendant's Exhibit 80 is the same one. I identify the package, Defendant's Exhibit 80, as the one I am now carrying,

as far as appearance is concerned. I see the two biscuit in the box. That is the way it comes, with the partition between. That is the biscuit I am now selling. We are still serving the three of them. The package, Defendant's Exhibit 81, looks to be about the same size as the Kellogg individual carton. At our price, I still give the three biscuit and a little bran over. That is the way I served Kellogg's Whole Wheat Biscuit for the last year or two. I am not aware of the fact that I can get shredded wheat in a package like Plaintiff's Exhibit 21 now, containing the larger biscuit. I have not asked for it. I did not know I could get it.

I run a confectionery store, candy and baker's goods, bread. The restaurant feature is the dominant feature of it, the more important part. On our menu cards we do not carry any names. We make a list of our suggestions, cereal and coffee or grape nuts, something like that. We do not mention the cereal by name. We do not carry shredded wheat on our menu, no name of any of them. We have combinations, like toast, coffee, and fruit, or toast, coffee and cereals. When a customer takes it, he specifies what he wants. Sometimes he asks for shredded wheat and sometimes Whole Wheat, I guess. I pay no particular attention. Sometimes I wait on customers. No doubt they ask for shredded wheat sometimes. I fill such order with Kellogg's Whole Wheat Biscuit. I have nothing else. I do not buy the Kellogg products in a combination case. I carry most all the Kellogg products, All-Bran, and Corn Flakes, individuals. I buy a case of each, the biscuit in one case, All-Bran in another, and Corn Flakes in another. I must have learned about Whole Wheat Biscuit through the Kellogg salesman. He is in my place every Monday morning. The National Biscuit man does not call on me at all.

RE-DIRECT EXAMINATION.

THE WITNESS: I never had any customers complain to me or through my girls when we served Kellogg's Whole Wheat Biscuit in the way I have described.

ALBERT T. TOMSKO.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of the grocery market of Public Service Department Store, Cumberland, Maryland, a fairly good-sized department store, with this grocery department in it. There are larger stores in size in Cumberland. There is no other department store with a grocery department. The A. & P. Tea Company have an organization approximately the same size. I do not know their volume, aside from rumors. This is a large store. We are considered the largest individual grocery store in Cumberland.

The store is arranged as a self-serve market. Customers enter through a turnstile, pick up a basket. We have a shelf on each wall and tiers in the center. They go down the aisles, shop on both sides. Each unit item has a crayon mark. Cashiers add it up on the register, showing the total purchases, the customer pays, and the transaction is complete. They can buy a basket, or usually we have regular shopping bags and store bags, and the order goes there. If the order is large, they use an empty carton and take it out in their car. Usually there are no clerks to wait on them. It is a self-service proposition. They can go anywhere they wish. We try to train them to come in and go around to the right to relieve congestion. There

is no restriction, however; they can go anywhere they wish.

We handle Kellogg's Whole Wheat Biscuit, which is displayed the same as any other cereal. We also handle National shredded wheat biscuit. Shredded wheat has a better display in our store than Kellogg's biscuit. Kellogg's Whole Wheat Biscuit sells best by approximately three to one. At times the average has been higher. When the Kellogg Company had their house-to-house campaign on Whole Wheat Biscuit, I would say it was twenty to one, at least. That was a very outstanding week. I would attribute this large demand for Kellogg's Whole Wheat Biscuit to advertising, the house-to-house campaign. Until then, it was really just a shelf item. Some people did not know what it was. After the campaign, it was just the thing. They would come in and take it themselves. There was no one to serve it or wait on them. When the Kellogg's Company was doing this intensive campaigning, there was a decrease in the sales of National shredded wheat, a slight decrease, not much, because the sales of shredded wheat run rather uniform. I think we noticed a very slight decrease in the sales.

I would say that, after the Kellogg Company came into the field, there was a stimulation of the business in shredded wheat, applying that term to both products. We did not have a falling off of twenty-eight cases in the week on shredded wheat. As soon as the Kellogg people had this house-to-house demonstration, my sales jumped from five cases to twenty-eight cases a week of Kellogg's biscuit, the week after that demonstration. We sold, in the week before the campaign three cases of Niagara shredded wheat, and about the same of Kellogg's biscuit; that is to say, six cases of the product, lumping the two together as shredded wheat. In the following week, when the campaign was

on, we sold about thirty-two cases of both shredded wheat and Kellogg's biscuit, about twenty-eight or nine of which were Kellogg's.

Our store is a hundred per cent. self-service, except the produce, which has to be weighed. Clerks weigh it, mark it, and put it in the counting basket. It is taken out and paid for in the usual manner. That is produce, like turnips, lettuce, apples, and potatoes, sold by the pound. You cannot expect the customer to do his own weighing. Clerks there do nothing but weigh it, mark it on the outside, after it is weighed and wrapped, and it goes in the shopping basket.

We get nine cents for shredded wheat and ten cents for Kellogg's Whole Wheat Biscuit. Those have been the permanent shelf prices since we had it. We have always established the same price of ten cents on Kellogg's, never had any other price. We handle other National Biscuit products besides shredded wheat, not the entire line, but some of their box goods and a few loose cakes. We have every item Kellogg's make, but not every size. We are cramped for space, so we handle practically everything they manufacture. The Kellogg breakfast foods are displayed with the cereals in our store. Kaffee Hag is in the coffee department.

In introducing a new product, we occasionally run a line item of an ad. We advertise every evening. We have only twice carried advertisements of Kellogg's Whole Wheat Biscuit that I know of, in the six months we have been in business. Kellogg's Whole Wheat Biscuit, physically, is similar to that. It is a regular whole wheat shredded biscuit.

CROSS-EXAMINATION.

THE WITNESS: I call it so quickly a shredded biscuit, because I guess people are all used to calling

it shredded wheat and shredded biscuit. It is very similar. It is a natural thing, certainly, to call it shredded wheat. It has been known a long time to the public. I have known and always carried it in a package like Plaintiff's Exhibit 1, the old type package I have on my shelves today and have ever since we opened up, September 15th, a little better than six months. I had experience in the grocery line before that. I have been connected with the grocery business about four years.

We have Kellogg's Whole Wheat Biscuit in a package like this one, with the solid panels, which are stacked on our shelves where the customers can see them. I would judge Kellogg's biscuit are right in with Kellogg breakfast foods. We have their products all in with the breakfast foods. Kellogg's is at the end of the same counter here, where we stack it underneath. Shredded wheat is stacked at one end. When they turn the corner, they see shredded wheat from one end, from this side, and from that side; whereas Kellogg's is stacked in with the Kellogg products, so they have really only two ways to look at it.

Our store having been open six months, we have had both Kellogg's Whole Wheat and shredded wheat all that time, stacked as I have described it. Occasionally, new customers ask where the shredded wheat is or where Kellogg's biscuits are, or, occasionally, where something else may be. We do have that occasionally. They usually ask the cash girl. All she can say is: "Right up there." When we first started off, shredded wheat sales were a little ahead of Kellogg's for some time. Then the Kellogg Company did some campaigning. Every house got a sample. People would come in and say "I want a box of biscuit like the sample I received." My girls knew where the Kellogg package was. They stuck it in the news ads, also.

We posted our ads on a conspicuous bulletin there in the store. Our customers would ask the girls where they could find the biscuit of which they had received samples, and they were directed to the Kellogg display. At that time, in response to that campaign, the sales of Kellogg's biscuit had a great advance up to twenty-eight cases. I would say that was a temporary little wave of purchases for Kellogg's. In a length of time, it fell off to about three to one, and it has held its own something like three to one. That result was accomplished by this campaign of publicity and sampling. When they were selling twenty to one, the sales of shredded wheat went off slightly more, not much. There was a slight falling off in the sale. It would be fair to infer that that tended to indicate some users of shredded wheat were trying out Kellogg's biscuit. It is also fair to infer that some of them went back to shredded wheat, and some of them who had tried it did not care for it and did not repeat; otherwise, we would still have had that large demand for our Kellogg biscuit.

My store is not a member of the voluntary chain known as Plee-Zing Stores. We are wholly independent, not affiliated with any other store at all. We obtain our Kellogg supplies from the wholesaler, jobber. We get our National Biscuit Shredded Wheat from the National Biscuit Company agency. A salesman calls on us and keeps our stock up. We purchase a considerable quantity of National Biscuit Company goods in a month, have quite a sale of them.

DONALD C. DIETRICH.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am general manager of the Wheeling Wholesale Grocery Company, a retail owned wholesale grocery house. The group is classed as a voluntary chain. The stores are conducted under no particular name, just those of the individual owners. We have other accounts, aside from the voluntary chain, that we service. We have approximately three hundred accounts, only about one hundred of which are stockholders of our organization. We have a cash-and-carry department, also salesmen on the road. We cover a radius of about twenty-five miles in and around Wheeling. Our organization regularly carries Kellogg's Whole Wheat Biscuit. There is a demand on us from our retailer customers for that product, a very much increasing demand.

We have practically eliminated the Niagara Falls shredded wheat from our stock, because we can make no arrangement whereby we get any profit by selling it, because the larger retailers are able to obtain as long discounts as we are. They can buy it about as cheap as we can. We would either have to charge them more for it or service it for nothing. They obtain the maximum discount, which is about seventeen and a half, the lowest discount we can obtain. In that event, we would be performing the wholesale service at a loss.

We sell Kellogg's Whole Wheat Biscuit to our retailer customers right along. I have never had any of them return that product to me and say it was not what they wanted, to my knowledge. I never knew of an instance of that kind. Recently, the price of Kel-

logg's biscuit has been reduced to where it can be gotten into the ten-cent class, if the retailer and wholesaler are willing to work on a close margin of profit. We find that quite a number of retailers are asking for ten-cent shredded wheat, which means Kellogg's biscuit to me, because, to the best of my knowledge, the other product has never been marketed so it could be sold for ten cents. When we get such an order, we send out Kellogg's Whole Wheat Biscuit, and we never had any of it returned, to my knowledge. So far as I know, we never had any complaints about it, whatever. We sell it as and call it Kellogg's Whole Wheat Biscuit. We cannot stop a customer from saying Kellogg's shredded wheat, ten-cent shredded wheat, or something like that.

We have orders for it as Kellogg's shredded wheat. Whether more or less of the orders come in for that or for Kellogg's Whole Wheat Biscuit is a pretty hard question to answer. The fact is that Kellogg's product has become pretty well known as shredded wheat among the retail trade. I personally cannot see much difference between the two products. It just seems that the retail trade think of it as shredded wheat, although I think they are getting away from that more and more all the time, because we are trying to sell the trade Kellogg's Whole Wheat Biscuit. We cannot keep them from asking for ten-cent shredded wheat or Kellogg's shredded wheat. The demand for the Kellogg biscuit has been increasing very rapidly of late, because it has been put in the fairly respectable ten-cent class.

The price prevailing generally on the Niagara Shredded Wheat must be, I presume, fifteen cents or two for a quarter, or eleven cents at special sales. I do not know much about the retail prices of it, except what I see in walking around.

CROSS-EXAMINATION.

THE WITNESS: I think the retailer thinks of the Kellogg biscuit as shredded wheat, because of the picture on the package there. It looks like the old shredded wheat I have known for a good while, the original shredded wheat, like the package, Plaintiff's Exhibit 1. I have known about that for many years, since I have been in the grocery business, thirteen years. In those years, I purchased and carried this item of shredded wheat, regularly purchased from the Shredded Wheat Company. In those days, shredded wheat was a very well-known product. It is quite natural that, with the knowledge of that product, having called it shredded wheat, a product looking like it with a picture like that on the outside would be called shredded wheat.

We feel the condition is probably getting about to a certain extent, where many grocers know the Kellogg biscuit is obtainable at a certain price and is known as ten-cent shredded wheat. It is a fact that the grocers ask for ten-cent shredded wheat. At the present time, they only mean Kellogg's shredded wheat, because that is the only one they can sell at ten cents. Shredded wheat is not regarded in the trade as a ten-cent item. When a grocer asks me for ten-cent shredded wheat, I know right away he means the Kellogg biscuit. I absolutely cannot keep him from asking for it that way or calling it shredded wheat. It is quite the usual thing for him to refer to it as Kellogg's shredded wheat.

I do not think our present stock has any National shredded wheat in it at all. It has not been very long since we cut it out. The last shipment of National biscuit was possibly ten cases. I know we can get the regular jobber's discount on it; but, to the best of my knowledge, the regular jobber's discount is no better

than the maximum retail discount. The nameless group of stockholders in our organization are entitled to the seventeen and a half per cent. discount from the National. Individual retailers who can purchase a hundred or two hundred dollars worth of National Biscuit products every month do not also enjoy a maximum discount, unless they are members of a voluntary chain enjoying, as a whole, that discount. We have many retail dealers who can buy the National product just as cheap as we can. I am not sure whether those retail customers are members of some voluntary chain. At any rate, I know the National does sell shredded wheat direct, as it does its crackers, and distributes it direct to the retailer. I believe we put the Kellogg product in as soon as they brought it on the market. I was then carrying the line of Kellogg's cereals and just added this to the line. We feature it, advertise it, and push it in the hundred stores affiliated with us. We do not advertise shredded wheat. I imagine most of our stores buy at least some of the National Biscuit Company products. We have no dealings with any biscuit company on behalf of any of our stores. We do not go into the cake and cracker business in any shape or form. The only reason they participate is because they own the wholesale house. It is a retailer-owned house. I came to Pittsburgh to testify, at the request of the Kellogg Company. I believe Mr. Anders said they would pay my expenses up here, but that does not amount to much.

FRED J. WALDINGER.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

Direct Examination.

The Witness: I am branch manager of S. M. Flickinger, wholesale, and chain-store grocers. We

have our own affiliated chain of stores, and the Red & White Stores are a subsidiary of ours. We serve two chains, the Red & White and S. M. Flickinger, both co-operative chains. Flickinger Stores are co-operatively owned, and with the Red & White Stores, the manager owns all the stock. We have a contract with him, whereby we supply all merchandise to him.

I have been in the grocery business since 1900 and had my own organization at one time, under the name of F. J. Waldinger, which was merged, nine years ago, with the S. M. Flickinger Company. I am now in the wholesale end of the organization. I am a branch manager in charge of sales engineering. I do not manage stores. We have supervisors for that. My work covers both retail and wholesale.

Our organization carries Kellogg's Whole Wheat Biscuit. We did not put it in when it came out. It was a little while on the market before we put it in. As branch office at Buffalo, we are not permitted to buy anything new, unless we have sufficient demand. In this particular case, quite a number of them have demanded Kellogg's Whole Wheat Biscuit, from our branch stores. We put it in after that demand became insistent enough, and we have continued carrying it ever since. It sells right along.

We also handle National shredded wheat. Without checking up, I cannot say, but the sales of those two products are about fifty-fifty, pretty close to it.

There is much manufacturer's stimulation behind the Kellogg product in our market. We have had coupons giving a package with a package, then a chart wheel at one time, given with two packages; and the sampling I referred to, they buying a package and we giving them a package. There have been store and window displays.

Besides the two voluntary chains, we still service some old-line retailers. We have a Kellogg campaign

we are starting now, where we let each store send in fifty names. The Kellogg Company sends in a card telling them to go to the store and buy a package of biscuit and they will get one free. We just started that a short while ago. The names are not all in. I know about the selling conditions in retail stores. I do not know of any instance in which a package has been sent back by any dissatisfied customer who said she wanted the other. I get to the stores but not back of the counters. I could not tell you how they call for these products. Physically our orders are all warehouse orders, written out, usually marked Kellogg's Whole Wheat Biscuit, and come to our warehouse to be filled. I have had no confusion. No retailers have sent any back and said they wanted the other, to my knowledge.

As far as I know, all the stores of our organization carry both products. They are arranged, as nearly as possible, on the same type of plan.

CROSS-EXAMINATION.

THE WITNESS: The sales of the two products are about fifty-fifty, very little difference between them. That has been the case for a few years. I think we stocked Kellogg's just about two years ago in our branch. I do not think the Kellogg biscuit sale has been growing at the expense of shredded wheat. I think we probably sold more shredded wheat than we did Kellogg's biscuit, for a while. I would not say that Kellogg's biscuit then overtook it. I would be, I would say, pretty close to an even break. Kellogg's Whole Wheat started from scratch, with shredded wheat sales ahead, and the Kellogg product pulled up to a fifty-fifty break. It is a hard question for me to answer whether it was at the expense of shredded wheat. I would not say so.

I could only answer whether shredded wheat sales have fallen off for that year by checking my books.

Since shredded wheat has been handled through the National, we get them in smaller amounts. We used to buy a hundred cases in a pool car. When Mr. Walker here had an account, we used to make a pool car. We would be only buying fifteen cases at a time, as we needed it. We handle it through the warehouse. I am not prepared to say how much shredded wheat I purchase in a year. If you say a little over a thousand cases, at $4.05 a case for the year, that sounds reasonable. I believe Kellogg's would also run close to a thousand cases. I would say shredded wheat in past years has run more than a thousand cases. It has diminished since the Kellogg product came on the market.

As early as 1900 I did not know shredded wheat, I believe, I must have known it since it has been out. I could not tell you how many years. I would say offhand twenty years. I could not answer as to thirty years or more. I have not visited the factory at Niagara Falls. If it has been out thirty years, I have known it that long. Perhaps I sold it thirty years ago. It has always been known as shredded wheat, and it is a very well-known article. It is known pretty generally throughout the country among the public, due to extensive advertising given it when it was new. I know there has been a lot of money spent on shredded wheat.

In our organization, we never, to my knowledge, make the mistake of calling Whole Wheat Biscuit shredded wheat. If you would go into another store and call it that way, I would not know about that. So far as our store is concerned, there are two separate products. We sell very close to an equal quantity of each product at the present time. We make a little more on the Kellogg biscuit than we do on shredded wheat. That helps us push it. A merchant will push the product he makes the best profit on.

JOSEPH FRANCIS MAGA.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

Direct Examination.

The Witness: I am steward and purchasing agent of the Schenley Hotel. I have been in the hotel business eleven years, ten years with the Schenley. We run a grill room, dining-room, and room service. We carry cereals, including Kellogg's Whole Wheat Biscuit in the individual cartons like Defendant's Exhibit 80.

We carried Niagara shredded wheat in the small individual carton, but I discontinued that when I put the Kellogg biscuit in. That is, when I put the Kellogg product in, I discontinued handling the large carton of Niagara Falls and put in the small carton. I have both kinds. When they are served in the Schenley Hotel, they are served inside the carton. The carton goes to the consumer. I could not tell you how the consumers order them, because I do not take the order. The cereal is left on the tray. I would not know of any complaints or send-backs. Of cereals, corn flakes sells most in our hotel. Of these two biscuit, Kellogg's outsells the Niagara biscuit.

Cross-Examination.

The Witness: We get twenty-five cents a service for either shredded wheat or Kellogg's Whole Wheat Biscuit. I think Kellogg's costs us about ninety-five cents a case. I think there is a little difference in favor of Kellogg's. We carried shredded wheat a whole lot longer than the Kellogg product. We have had it for years. I happened to get the Kellogg biscuit started by being visited by Kellogg salesmen. It was the smaller package. After I took on Kellogg's biscuit, I took on the smaller package of shredded wheat, also.

I do not know whether our customers call for shredded wheat. The waiter takes the order.

On the menu card, Kellogg's are specified, as Kellogg's Corn Flakes or Whole Wheat Biscuits. We do not specify the Kellogg's. Post Bran, Whole Wheat Biscuit, Post Bran Flakes, and Kellogg's Whole Bran; each item is specified. We specify them by name, so they know what they are getting. We just put down Whole Wheat Biscuit—not Kellogg's. I guess the reason I leave that out is the size of the menu. They use up too much space. Kellogg's Whole Wheat Biscuit has been outselling shredded wheat for probably the last six months. That is just my rough impression of the amount of our sales. I have not consulted my books at all. I would not say I sell less shredded wheat than I did before Kellogg's Whole Wheat Biscuit came on the market, because I think I sell just as much shredded wheat. Right now, all that cereal business has fallen off. I purchase my Kellogg supplies in single-case lots of each article, not assorted.

MORRIS MELMAN.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I handle a grocery for my dad, Melman's, at 924 Brookline Boulevard, Pittsburgh. We are not connected with any other stores. The store is associated with a voluntary chain, Triangle Grocers. It is part full service and part self-service. We take quite a few telephone orders, extend a little credit, and make free deliveries all the time.

We handle Kellogg's Whole Wheat Biscuit, for which there is a consumer demand in our store. That is why I got it in the first place, to meet calls we had.

Several women asked me specifically for that one product. While I felt a little reluctant at first to be taking on a new item, I did it for their convenience. I have had demands for it ever since. There have been many new customers on that item since that time. They seem to like the shape of it and the fact that it is convenient and not so large.

I handle National shredded wheat, which outsells the Kellogg biscuit about two to one. The demand for Kellogg's biscuit is an increasing and growing demand, I believe. I think the demand for the National shredded wheat has fallen off somewhat.

When they want the National biscuit, they say, "Give me a package of shredded wheat." When they want the other, they say, "Give me a package of Kellogg's Whole Wheat Biscuit"—or: whole wheat biscuit. There is no confusion in our store between the two. I know what the customer wants, and I give it to her. She gets what she wants all the time in my store. I cannot say that I have had any customers return one saying they wanted the other. The cereals are up on my top shelves. I have had window displays and inside store displays of both products.

Kellogg's biscuit has by far the most active support from the manufacturer behind it of the two. The Kellogg salesmen have, from time to time, put up inside displays, especially displays like Defendant's Exhibit 83 on the top of a partition which separates my back from the store proper; also several window displays. I generally have a group of allied articles in my window, rather than concentrate on one. There are no National representatives by any means as active as the Kellogg men, in pushing shredded wheat. I have asked customers from time to time if they have tried the Kellogg biscuit. When I have an inside display, I open a package and show it, just as I would push any other article I had a special on. My method of introducing a new product to the attention of my cus-

tomers is to build a display and push it. Last week, I had a new article, a fruit cocktail, had a big inside display, pushing it, suggesting it, selling it. I try to bring a new article to the attention of as many people as I possibly can, depending on our stock. We never substitute. We give the customer what she asks for. If we do not have it, I tell her I am out and ask if she would care for something else, which is not regarded as substitution. What we regard as substitution is when she asks for something and we give her another product without saying anything, which I could easily do, because I get many telephone calls in the store. Whenever I am low on a particular item, I always make it a point to ask the party on the telephone to wait until I am sure I have it.

We advertise. I have advertised Kellogg's Whole Wheat Biscuit several times during the past year. I believe I have advertised shredded wheat about as many times. When I advertise, I tie up with some display connected with the ad. It does not pay to advertise if we do not back it up with display.

I handle quite a few of the National Biscuit line of crackers and some of their loose cakes. I have not for a long time carried the National line, but, the past year or so, I carry them. When I discontinued them, I did not get as big a discount as I believed I should. For that reason, naturally, I did not care to handle the line.

I never had any shredding machines in my place. I have seen them, though, little miniature machines, in a window in a town, probably in a restaurant. They seemed to shred them up and lay biscuit out. I believe they were always machines of the shredded wheat. They were little shredding machines, showing the kernels of wheat and the way they were ground or shredded. Personally, I prefer Kellogg's Whole Wheat Biscuit. I believe it is baked a little better. The regular shredded wheat tastes just a little raw to me. I prefer Kellogg's because it is baked on both sides.

CROSS-EXAMINATION.

THE WITNESS: I am enjoying, as a member of the Triangle stores, the National discount now. I have been carrying their crackers as well as shredded wheat. I get my shredded wheat from the National man. I have no set opinion as to why sales of shredded wheat are falling off. To my view, one woman may tell another about the small whole wheat biscuits she got. Kellogg may be getting some of it. The product is similar and can be sold for the same purpose. I have been in the grocery business about five or six years. I used to buy my shredded wheat from the shredded wheat company, through a jobber. I have known the article like Plaintiff's Exhibit 1 a long time. It has always been a good and fairly steady seller.

It is not particularly difficult to introduce a product like Kellogg's Whole Wheat Biscuit, in view of the fact that the public is already familiar with shredded wheat. It is not like a brand-new product the public had never seen. They are fairly familiar with it. Kellogg's biscuit are slightly different. My customers do not call for Kellogg's shredded wheat, ever, I believe. Three or four customers I can state offhand positively ask for Whole Wheat Biscuit. I do not remember exactly what some of the others say. When they call for Kellogg's shredded wheat, when something like that happens, I generally ask them what they mean, whether they want shredded wheat or Kellogg's Whole Wheat. In my experience, I have known them, when they wanted shredded wheat, to ask for it by that name. If they asked for Kellogg's shredded wheat, I would not think they might be confused regarding it. Offhand, I would think they might be asking for Kellogg's Whole Wheat Biscuit. There might be some confusion. For that reason, I always ask them what they want. I keep both products side by side in the store.

HARRY FARBER.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, Clover Farm store. Orders come in by telephone and people come in. We make deliveries, and we extend credit to a few. Our store is arranged so customers can serve themselves.

We carry Kellogg's Whole Wheat Biscuit and have carried it since it has come out, close to two years. There is very much of a consumer demand for that product in our store. One of the Kellogg salesmen came around and sold it to me. I had had a few calls for it before. They asked for Whole Wheat Biscuit.

I also handle Niagara Falls shredded wheat, like Plaintiff's Exhibit 1, and I have handled that for some years, since I opened up. Of the two, I sell the most of Kellogg's Whole Wheat, about ten to three. I get a case of Kellogg's every week, and I buy a half case of shredded wheat every other week or once in three weeks. I got a case yesterday, which will last me a good while. I buy shredded wheat now from the National. I used to buy it from Fox. We try to sell everything. When a woman comes in and asks for shredded wheat, I just give her shredded wheat. I do not try to give her Kellogg's or anything else. I have given window and store displays to Kellogg's biscuit but never gave any displays to the National shredded wheat.

Some kind of chart was given away with Kellogg's Whole Wheat Biscuit and they have some kind of animal pictures given away with them now, fastened on the packages with a rubber band. I have the two products stacked right up there. If they ask for shredded wheat, I just give them the National shredded wheat. They call for the Kellogg product as Whole Wheat Biscuit.

If a customer asked me for Kellogg's shredded wheat, I do not know what I would do, because they do not call it that. They call it Whole Wheat Biscuit. I have had no confusion between those products. Some of my people like shredded wheat and I give it to them. Some want Whole Wheat Biscuit, and I give them that. Customers never sent it back and say they ordered the other one.

Of the National line I buy only shredded wheat. I had a hundred per cent. National line two years ago. In Lent, I needed oyster crackers. A salesman came around every Tuesday. He never had them for me, always told me he was out. I live a half mile away from a grocer and I had to send a kid up to buy me half a dozen oyster crackers at the A. & P. They always had it. That is why I quit them. I asked Sunshine, they sent me oyster crackers, and I give them all my business. The National Biscuit man has come in the last couple of weeks. For two years he did not stop. I told him he should not, that I would not give him my business on account of the oyster crackers.

The Kellogg man gets around once in three or four months. I permit the Kellogg salesmen to put up store displays if they are small enough. I order Kellogg's biscuit through the Fox Grocery in Charleroi. I send in an order every week. The consumer demand for Kellogg's biscuit is growing up pretty well since I first started it. I did not sell much at first but now I sell quite a bit.

CROSS-EXAMINATION.

THE WITNESS: I still sell about a dozen shredded wheat a week or so. I think I sell less than I did before the Kellogg biscuit came. I cannot tell you exactly. I have handled shredded wheat all the time. I used to pick it up from the cash-and-carry wholesaler down there. I have been in business since three years next

July. I had not been in the grocery business before. I have handled shredded wheat since I was in business.

I have been a Clover Farm store since a year in April. Fox is the jobber I buy from. I first heard of Kellogg's biscuit through a little fellow, a Kellogg salesman who came around and sold me some. I never bought it from Fox until I joined the Clover Farms. I bought it down town.

The Fox people advertise Kellogg biscuit for me, and we push it. We push everything. If you belong to an organization, you want to put it over. I am an organization man now, and I co-operate with the Fox people and Clover Farm. I do not know if I make more money on Kellogg's or not. I sell shredded wheat for twelve cents and Whole Wheat for ten, used to be eleven. A lot of people like it because it is shorter cakes than shredded wheat. I guess a lot of people use it now who used to use shredded wheat. It must be so, I guess, if they are comparing it with shredded wheat biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I recently furnished a list of fifty names to the Kellogg Company, for them to send out coupons to have them buy one and we will give them one, on Whole Wheat Biscuit.

B. BLAINE FOX.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer, Fox Grocery Company, having affiliated with it a hundred and fifty-four Clover Farm Stores, located in Washington, Fayette, Westmoreland, and Greene Counties, a few in

Allegheny County. In addition, we have other accounts, a total of three hundred altogether. We have salesmen traveling the trade.

We have a very definite, substantial, increasing demand from retailers in our organization for Kellogg's Whole Wheat Biscuit. The business has been growing. Substantially all our accounts buy their products from us, in our group of stores. We also sell to outside accounts. All the Clover Farm Stores carry Kellogg's Whole Wheat Biscuit. Some of them carry National Shredded Wheat. I would estimate not more than twenty-five per cent. of them carry both products. A hundred per cent. of them carry the Kellogg product. Those stores feature and push the sale of the Kellogg biscuit, by advertising and running special sales, coupling the ads up with special features, such as window and store displays, and special exhibits furnished by the Kellogg Company. The stores also use the tie-up packages, with Jungle Land Books or Wheels of Knowledge. Lists are being prepared at the present time of names to send out postal-card coupons, entitling the recipient to buy one package Whole Wheat Biscuit and get one free. The Kellogg Company salesmen are very active in promoting the sale o. the Whole Wheat Biscuit in our stores. We have nothing like that activity from salesmen of the National Biscuit Company regarding shredded wheat. They are mostly cake and cracker men.

I have had plenty of discount discussions with the National Biscuit Company. At the time we organized a group of affiliated stores, as they were selling National Biscuit crackers and cookies, we were anxious to make what we called an associated hook-up. We felt our Clover Farm Stores should be entitled to discounts as much as the corporation chain. They refused to give it to us. After three attempts, we made connection with another cracker concern, very satisfactory. The

National refused to treat with our stores as if they were a chain-store organization. Their last statement was we would work with them as individual merchants, not as a group.

To my knowledge, our organization is not, at present, getting a larger wholesale discount from National than some of our retailers can get. I think the discounts are the same.

Our stores take any item they feel is going to be a success. They are anxious to handle it in the stores as soon as possible after it is put on the market. At the time it was introduced, Kellogg's Whole Wheat Biscuit gave the trade something new, by which they could put new light in their cereal business. The success the stores have had would justify the amount of work they put on it.

The retail purchases of the two products run uniform. They are about the same. I do not know whether retailers make a better profit on Kellogg's biscuit. As wholesale grocers, we make more on it than we could on shredded wheat. Shredded wheat is not a very active item in our wholesale house now.

CROSS-EXAMINATION.

THE WITNESS: I am the head of the entire country-wide Clover Farm organization. I am their president, not their active head. I have some responsibility. I think we have stores in something like twenty-five states. I do not know the number of retail outlets, but it is very large. The parent organization parcels out different territories or places in the nature of a charter or license, each group centered around some wholesale grocer who acts as sponsor for that group. We feel the organization is quite powerful and is a good organization. We have a pretty tight hold on our members by way of inducing them to follow our advice, more in the nature of each individual wholesaler. I would say,

however, that the scheme does compel a rather complete control over the individual units, as far as that is compatible with their individual ownership. We try to have our business operated in such a way they are glad to be loyal; but we point out to them it is to their interest to follow our instructions.

We were unable to deal with National and came to terms with Loose Wiles. We recommended our retail outlets to tie up to Loose Wiles. We recommended that the retail unit make their own decisions on a matter of that kind. They do not at all times decide what we recommend, but they do pretty generally. I cannot recall any places where the National was able to get into some retail units. What I meant to imply was this: When it comes down to a decision on a hook-up, that decision must be made by a retailer Board of Control, elected from the membership to represent the group as a whole. A decision made by a majority of that board will go before the entire membership. The board will sell the idea to the membership. If it is voted by a majority vote, that is the decision, and it is pretty likely to be adhered to. It is being adhered to. A retailer who dissents and hooks up in another way is not very popular with our organization. At present the National does not stand very well with Clover Farms in the Charleroi Division. I cannot speak for the organization nationally. We do purchase shredded wheat from the National, part of which is distributed through our own organization. I know by this time that the National does recognize organizations such as ours for discounts. That decision came too late for me.

I have been in the grocery business about twenty-six years. I knew shredded wheat for many, many years. It was a well-known and well-advertised product. I do not remember when it was introduced, that far back; but I do know the Shredded Wheat Com-

pany spent a lot of money making it a popular cereal. It was on the market long enough for them to spend it. I do not know much about what they would spend on the product in the early days. I know it was a very popular and well-known product, whatever means may have been adopted to make it so. A somewhat similar product that came out was Muffetts, which is still on the market. It did not resemble shredded wheat closely in the package, but in substance to some extent. The appearance of the round biscuit was not the same. Until Kellogg's biscuit came on the market there was nothing really like shredded wheat, except possibly Muffetts. I do not know enough by contact with the consumer to say whether, with Kellogg's biscuit, we are able to do without shredded wheat to a large extent. If they all felt just the way I do, I am sure they could get along without it. I am sure that Kellogg's biscuit could take its place very successfully. Only about 25 per cent. by my estimate of the membership in our unit carry shredded wheat. All of them have Kellogg's Whole Wheat, which is featured in the general advertising, something our Board of Control has decided shall be carried by the members. They have made no pronouncement regarding shredded wheat. The National Biscuit Company's salesman would not stand very much show with our retail dealers if he wanted to go in and stage a demonstration. He would not have a chance. The old sore has not healed.

RE-DIRECT EXAMINATION.

THE WITNESS: Shredded wheat never was the leading dry cereal. It was never the biggest selling dry cereal. It was a small seller in comparison to Corn Flakes and things like that. That was always the case. In the last fifteen or eighteen years, the sale of shredded wheat was very limited, I would say. It never was in the front rank of the big selling cereals.

RE-CROSS-EXAMINATION.

THE WITNESS: I would think shredded wheat would be very strong in the class of cereals featuring the use of whole wheat. It was one of the leaders in whole wheat. It is not in our territory a leader of the whole wheat cereals, but that does not mean that is so everywhere. I never did carry the National Biscuit cookies or crackers at all.

RE-DIRECT EXAMINATION.

THE WITNESS: As far as I know, there was no other shredded wheat besides National shredded wheat before Muffetts came on the market. In those days it sort of led itself. It was by itself. It has always outsold Muffetts. At one time Muffetts was selling our territory. Then the advertising was cut out and effort ceased. These businesses do not move along by themselves when advertising is stopped.

MRS. ADA WHITE.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with a husband and two children, four in the family. I use Kellogg's Whole Wheat Biscuit and have used it about three months. I first became acquainted with it through a sample at the door. I tried it, liked it, and have continued to use it since.

I have occasionally used the other product, Niagara Falls shredded wheat, like Plaintiff's Exhibit 1. I was not a great user of that, because it was always broken, and not toasted just right. The children did not seem to like it. We do like Kellogg's Whole

Wheat Biscuit, the size, small, and the flavor. The children like it very much. When I order it, I ask for Kellogg's Whole Wheat Biscuit. I never asked for it and got another product. I went to one store and did not get it. They do not handle it. I went to another store at East Liberty and got it. I continue to get it at this other store.

CROSS-EXAMINATION.

THE WITNESS: I used to buy shredded wheat occasionally and have known about it for a good while. It has been very well known and on the market for a long time. We were not very regular users of it. We always had a box in the house, and it lasted a long time. I have had it as long as I have been keeping house, about seventeen years. There was always some in the house, although it was not used very fast.

I got a sample of Kellogg's Whole Wheat Biscuit a few months ago and thought I liked it better than shredded wheat. Since then I have been converted to Kellogg's Whole Wheat Biscuit. I serve it in my home by putting boiling water on it. The children like it that way. Sometimes I put cream and sugar and a banana on it. I put it on the table in a dish. My husband and all of us eat it. We use more of the Whole Wheat than we used to use of shredded wheat.

MRS. JULIET V. MEYERS.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with three in the household. I use Kellogg's Whole Wheat Biscuit and have used it about two years, I think. They called

my attention to it first in the grocery store where I trade. I bought some of it, liked it very much and have used it ever since. I like the size of the biscuit and the way it is toasted.

I have used National shredded wheat, which is a larger biscuit. I do not see how they could be mixed up. I never did. I never mixed the packages in any way. I used the National biscuit a long time before I began using Kellogg's, because I did not use them all the time. In the winter I would use a cooked cereal. I was not as frequent a user of the National biscuit as I have since been of Kellogg's biscuit. I like the double toasting. I do not know any of the Kellogg people. They got my name through the grocer. Grocers sometimes tell me about new products when they put them in. They call our attention to different things. My grocer never substitutes one thing when I call for another. They never have asked me to take any substitute. If I order one product, they do not send me another without any explanation.

CROSS-EXAMINATION.

THE WITNESS: Melman was the grocer who first showed me Kellogg's Whole Wheat Biscuit. I trade there regularly. I do not think I was looking for shredded wheat at that time especially, because I usually get things like that once a week. When I order shredded wheat, I get it. I had not mentioned shredded wheat that particular day when he called my attention to Kellogg's biscuit. He asked me to try it, and I liked the size of the biscuit. He did not open the package and show me the biscuit. I saw them. I could pretty nearly tell. I asked him if they were smaller. I noticed the box was a different type. I used to use shredded wheat every week or so in Buffalo. I have been by the factory, but I never went in. I recognize

the package, Plaintiff's Exhibit 1. I knew about it for many years and had probably never been without it, because, as I say, I did not use it in the winter. When my daughter was little, I used cooked cereals; but, in the warmer weather, I did buy shredded wheat. It was a very well-known product. I never had seen anything else like it up to the time I bought Kellogg's biscuit, because I did not know there was any other. When I found I could get Kellogg's, that supplanted shredded wheat in my pantry.

RE-DIRECT EXAMINATION.

THE WITNESS: The other two members of my family like Kellogg's, also. When I order it, I ask for Kellogg's Whole Wheat.

MRS. W. CLOTWORTHY.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a son and daughter, just the three of us. I am a user of Kellogg's Whole Wheat Biscuit. I think I have used it almost since it came out, about two years. The grocery man had it on the counter. I saw it was a nice size, ordered a box, and have been using it ever since.

I have used Niagara shredded wheat a great many years. My husband has been dead four years last November. He was alive when I used shredded wheat. He liked it and used it, but he has not been alive since this was out. The children and I like it because of the size and the way it is baked. We have continued to use Kellogg's biscuit. We do not buy any shredded wheat. I just go up to the store and ask for a box of Kellogg's wheat biscuit. I have never had any other product handed me when I asked for that.

CROSS-EXAMINATION.

THE WITNESS: I have used shredded wheat, like Plaintiff's Exhibit 1, a good many years. The only fault I find with it is they do not bake it enough to suit me. I have been married twenty years. I have not used shredded wheat all that time. My husband used it when he was living. I serve it with fruit. We do not like it with hot water over it. I bring it on the table in a dish. I handle Kellogg's biscuit the same way.

Up to the time my grocer showed me Kellogg's biscuit, I had not used any other product of the kind except shredded wheat. I do not believe there was anything on the market before. I had always known it as shredded wheat. My grocer is Mr. Snyder. He showed me Kellogg's biscuit first. I was not then looking for shredded wheat. I just went up to the store and saw this package. I did not open it for a day or so after. I was not in the market for shredded wheat at that particular time. I saw this and thought I might like it and took it home. I have used them since then. Since that time Kellogg's biscuit has taken the place of shredded wheat in our household. We like the size of it. I came to testify here because Mr. Snyder, I think, recommended me as a buyer. I presume he gave my name to the salesman. He came to see if I would come down, the Kellogg salesman, because I said I was a good user of it.

MRS. MARGARET VAUGHN.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a husband and four children. We are all consumers of Kellogg's

Whole Wheat Biscuit and have been since they were first in Brookline. I know them as Kellogg's wheat biscuit, because I am so used to that name from seeing it for years and years, I have never thought of anything else. I have used the other biscuit, like Plaintiff's Exhibit 1, a couple of times, but I did not seem to care so much about it, because of the rawness of the biscuit. I like Kellogg's biscuit because it has a different flavor altogether. It is cooked or toasted so much better than the other biscuit. I like everything about it. I have continued to use it and more than I did the other. I do not believe I used two boxes of shredded wheat. But I use two boxes every few days of the other. My family like it.

I happened to come here today because Mr. Melman, our grocer, asked me if I would care to. I said yes, because I like the biscuits so well.

The day I first became acquainted with Kellogg's biscuit, I happened to be in Mr. Melman's store. I generally try new breakfast food he might get in. I was undecided one day what to get. He asked me if I had tried this particular kind. I said, "No, I did not know Kellogg's were making whole wheat biscuits." He said he just got them in. I have been buying them ever since, almost two years ago now.

CROSS-EXAMINATION.

THE WITNESS: I never used much shredded wheat. I have known about it, however, for several years. It is a well-known product. I never bought it except just once or twice. I was not looking for shredded wheat when I went to Melman's two years ago. I was looking for some cereal. I have most kinds. This was different. He asked me if I had tried it. I said no, that I would, and I did. He did not say anything about Kellogg making a shredded wheat biscuit. It is safe to say

that, from then on, I did not get shredded wheat biscuit at the store. They came around to get me to buy one box and they would give me one free, but I did not get it. I did not use those. That is the reason I do not use it today. I did not know shredded wheat until I started to use the Kellogg biscuit, which I liked very much and have continued to use.

MRS. ELIZABETH AMANN.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, and I help in my husband's business, a hardware store. Usually, there are just my husband and I in the family, except when my children come home with the grandchildren. They come occasionally and stay for a week or so.

We are consumers in our home of Kellogg's Whole Wheat Biscuit. I think just as soon as it came out, we had it. That has been several months, I guess about three months. I first became acquainted with it when I went to the little store at the corner, where Mr. Walsh used to be. I asked for shredded wheat biscuit, which I had gotten there before. He said he had something new, Kellogg's wheat biscuit. I said I would try it. He said there were fifteen biscuit in the box. I said I would try it. I went into Walsh's grocer and asked for Kellogg's biscuit. He said he never heard of it. I said, "They are just wonderful." He said he would have to get them in, and the next time he told me he had my wheat biscuit. I have never had any trouble getting Kellogg's Whole Wheat Biscuit. I like them very much, and better than shredded wheat biscuits, because my husband and I like something hot in winter weather. I make Postum and pour some of the hot water on the biscuit, and pour it off into my postum. It leaves it nice

but not too much. If it were a second too long on the National shredded wheat, it would leave it kind of mushy, and it would get you sick at the stomach, but not Kellogg's. It still leaves it solid so you want to chew it.

I prefer to use Kellogg's Whole Wheat Biscuit, and so do my grandchildren. I used to give them shredded wheat. They would tell me not to put too much hot water on. Since I have Kellogg's, they always ask for it. They like it much better. When they go back home, they ask their aunt to get them the kind grandma has.

A man came there and asked me what I thought about it. He got my name from Mr. Walsh, the grocer. I had never seen him before he came to the door.

CROSS-EXAMINATION.

THE WITNESS: I had known shredded wheat biscuit a great many years. I have even been into the factory sometimes at Niagara Falls. I had known it. It is a very well known product. We had used it up to the time we saw the Kellogg biscuit. I was shopping for it when I went into the store, but I used more Rolled Oats when I used it. We got tired of it. I was going to the grocer to get shredded wheat and asked him for it. He called my attention to Kellogg's Whole Wheat Biscuit, said they were a new kind. I said I would try it, and since then I used it instead of Shredded Wheat. I have not used anything else besides Rolled Oats.

MRS. LORETT SPRATT.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am married, have a child, and live with my husband's people. There are nine in the house-

hold. I use Kellogg's Whole Wheat Biscuit. I first became acquainted with it when mother brought it into the house before I was married. Afterwards, I introduced it to my husband's family. They had known about it but had never cared about it before I brought it in and they ate it. They tried National shredded wheat, but they have not been using it since I came. They have been using Kellogg's Whole Wheat. They like it because it is browner, and they like the small size of the biscuit.

CROSS-EXAMINATION.

THE WITNESS: My mother got it at home. I do not know when. I have been familiar with shredded wheat, like Plaintiff's Exhibit 1. I know that package and had them in the house as long as I can remember, up to the time mother got Kellogg's shredded wheat. After that, we started to use Kellogg's biscuit. I do not know how that all came about. When I was married and went to live with my husband's people, I carried Kellogg's biscuit along with me.

DAVID K. KASBARIAN.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer and market man, with a service store with a full line of groceries, meats, and vegetables, at 422 Broadway, Cambridge, Massachusetts. We wait on customers. Most of them, when I am busy, come in and look over the shelves, sometimes pick up a few things. Their custom of waiting on themselves is growing in the grocery trade. We have quite a few telephone orders and extend some credit.

I handle Kellogg's Whole Wheat Biscuit and have had it about three years. There is a consumer demand for it in my store. They ask for it as Whole Wheat Biscuit or Kellogg's Whole Wheat Biscuit. Sometimes they mention it as Kellogg's shredded wheat and sometimes Whole Wheat Biscuits, mostly the latter. If I have an order for Kellogg's shredded wheat, I tell them I do not have it, that I have Kellogg's Whole Wheat Biscuit. I tell her that is the only thing I carry. If she wants shredded wheat biscuit, I tell her where she can get it.

I did have Niagara Falls shredded wheat for years. I have been in the store thirteen years and had it always until Kellogg's biscuit came out, and I had so big a sale on Kellogg's biscuit, and had floor and window displays, to start with, and it started to boom. People tried it and repeated on it. I carried both kinds until a year or a year and a half ago. I discontinued shredded wheat, because it was left in my store and I tried to get rid of it. It spoiled. I reported that to the company and they did not make good for it. I figured that, if I was making a few cents on it and the company could not stand back of it, it was a loss to me. Why should I do it?

Since then, if a customer asks me for shredded wheat, I tell them I have Kellogg's Whole Wheat Biscuit. If they do not want it, I tell them they can get shredded wheat at the First National Bank Building. I let them walk out. I have probably two or three customers who ask for shredded wheat. I do not try to insist on their buying it, because I do not carry it. I have some months one case and some months two cases of Kellogg's Whole Wheat Biscuit. The first thing I did to help introduce the Kellogg biscuit was one of the salesmen put in a window display for me. They gave me green measuring cups. I put one with each package, and people tried it. I had it on the floor and on

the shelf. They took it home and they have since been asking for Whole Wheat Biscuit.

I have never had any confusion in my store between Kellogg's biscuit and Niagara Falls shredded wheat. I cannot remember any customer returning one product and saying they wanted the other. I handle the entire Kellogg line, for which there is always a consumer demand.

We have First United advertising. Most of those items come under circulars, on or off. Kellogg's Whole Wheat Biscuit has been advertised that way on and off in the season. It is a summer product, generally featured in the season. The consumer demand for Whole Wheat Biscuit holds up pretty well. It started slowly and has grown. I do not miss shredded wheat at all. When people ask for it and I say I do not carry it, some try Whole Wheat Biscuit and some walk out. Those that try it mostly repeat on it.

I do not practice substitution in my store. I do not believe in it. I would rather give customers what they ask for. If I do not have the product, I suggest what I have. If they like it, all right. I do not insist they buy it. I believe in satisfying the neighborhood trade. I would not be there for thirteen years if I did not. I have seen markets open up alongside me and close up in a year.

Sometimes we get Kellogg products from their salesman coming to the store. Other times, we get them from warehouses on some special. They always carry Kellogg's biscuit in stock, and we get them right over.

I handle some Uneeda Biscuit of National, and a few different things, on and off. The National Biscuit salesman comes in and gets the order. We get the seventeen and a half per cent. discount through the office, from both National and Sunshine.

I do not believe the chain stores in this territory advertise shredded wheat at a cut price. It is not exactly a cut-price item. They do not slash it so you cannot make a cent on it. I sell Kellogg's Whole Wheat Biscuit at eleven cents, the same price I used to sell shredded wheat for. I would make a profit on either of them at that rate, if I were handling both.

I think the Kellogg Company do sampling on Whole Wheat Biscuit. They always sample from house to house on the full line, almost every season. They leave generous order samples in the store for us to pass out to the trade. Those things help. We have had no Saturday sales in our store for a year or more. I used to print my own circulars and send them out. I had only one or two measuring cup deals. I bought so much I would put the stuff up, and it went so fast in stock, I had to repeat the order right away.

CROSS-EXAMINATION.

THE WITNESS: This is my first and only store. I have been thirteen years in the business. When customers ask for shredded wheat, I know what they mean, a package like Plaintiff's Exhibit 1. I know it now a long time. When I was first in business, that is the only product of that kind I knew, I am sure. I carried it in stock and sold it regularly, always. There was always a regular demand for it. Two years ago, when I put in the Kellogg biscuit, the Kellogg people made considerable efforts to introduce it, gave me floor displays, window displays, and had their own advertising outside. I think they sampled the biscuit in our neighborhood two or three times. When they sample house to house, they leave generous samples with us for our orders. I think they have done that with Whole Wheat Biscuit. The sample was a small package with either two or three biscuit. Then there began

to be a demand for Kellogg's biscuit, and there was also a slowing down of the demand for shredded wheat at that time. That fell off. We have a standing business, family trade coming in. Year in and year out I was in the same neighborhood. Lots of them stay. They are not buying shredded wheat from me because they know I do not carry it. They do not ask for it. If they do, I tell them I do not have it, that I have Whole Wheat Biscuit. They can use that instead of shredded wheat if they want to. Sometimes they do and sometimes not.

It was a green-glass measuring cup, six different measurements on it. It was a premium given the customer with each package of Whole Wheat Biscuit. It did not cost me anything. I am a member of First United, a voluntary chain. I can get shredded wheat from them or direct through the National salesman. But they only had it once on a sale since I joined First United. I get the National crackers through a salesman, and I can order shredded wheat from the same man. I do not do it because they would not make good for my shredded wheat I lost. Some went bad on me. I held it for more than a year and a half. The last, I think, was about the middle of last September. I average about one to one and a half of Kellogg's biscuit cases a month now. Before I had it, I sold a case or less a month of shredded wheat. We did not have this chain store system then. It has helped us along in the grocery line, buying co-operatively. When I buy shredded wheat, I always buy it through the jobber. It is at present fair to say that that trade in shredded wheat has now gone over to Kellogg's Whole Wheat Biscuit, with a few exceptions. I have an Armenian trade, which uses shredded wheat, something like the shredded wheat in the old country. It is made fresh over there. It is not as fine as a shredded wheat.

It is in shreds like that, in long pieces. They make it that way and use it as a pastry. They make it like a little ball, with little holes in it, put it in a big pan on the fire and heat it, slit into it; and it takes very fine dough, like milk. He turns it around once and covers it up. That is whole wheat. We break it up with butter, just like a pie. We make it in the big pan and put some layer of the stuff with walnuts on top, then another layer, and syrup. Sometimes we cannot get that. Then we use either Kellogg's Whole Wheat or shredded wheat. We do that in this country. I had some this morning. We make it at home. When you do not get the real stuff, you could use shredded wheat for it.

RE-DIRECT EXAMINATION.

THE WITNESS: The product in the old country does not keep more than three or four days at the most. On and off, you see some new faces in the store. They look around, because we always have on display with cereals, Whole Wheat Biscuit. A lot of them have been getting it. In each case there is a box with a display window, showing a full display there. Three or four of those show right out. Some who have never seen it before will ask if it is something new and try it.

RE-CROSS-EXAMINATION.

THE WITNESS: No, they never say "is that shredded wheat," because they notice what it is. Some of them, I believe, ask if it is shredded wheat, I have no doubt. It looks something like shredded wheat. They see the Kellogg name on it and say: It is something new. Let's try it.

RE-DIRECT EXAMINATION.

THE WITNESS: I think it is an effective and attractive display. We had a few of those glassine pack-

ages in each case, displayed it that way, and it made more sales for us. When Kellogg's biscuit first came out, I had customers ask me what Whole Wheat Biscuit was like. We told them it is something like shredded wheat, put up by Kellogg's, and it was fifteen little biscuit, instead of twelve.

RE-CROSS-EXAMINATION.

RXQ. 126. In other words, it is a biscuit that the Kellogg people put up that can be sold for shredded wheat?

A. Well, about the same, yes, sir.

RALPH C. FOWLER.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in insurance. I use Kellogg's Whole Wheat Biscuit, and I have been a user of it for a year or a year and a half. It was first served to me at home. I believe my wife got it at one of the local stores. I had used the other Shredded Wheat before. Of the two products, I prefer this latest product of Kellogg's to the old-fashioned shredded wheat biscuit. It is a little better size and flavor, and a little firmer biscuit. I cannot exactly explain the difference between the two. It is smaller, and I prefer it to the other for that reason. We have continued to use it in our household. I do not remember having any of the other shredded wheat since then. I recognize a difference in taste between the two products. I absolutely know one from the other. I think I could tell one from the other by taste alone, if I were blindfolded.

Whole Wheat Biscuit are moistened with butter, sugar, and milk and served on the table, in our house. We have the wife, two children and the young lady who takes care of the children, and myself. The children eat Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: For some years before I knew about Kellogg's biscuit, I had been using shredded wheat. I recognize Plaintiff's Exhibit 1 and the name. I have been familiar with that a long time. I think I have used it for a great many years. For a long time, I do not recall having anything else like that. I am a quite frequent user of shredded wheat, several times a week. I like it better than any other cereal. I have it several times a week for breakfast, and have had it for a good many years.

My wife purchased the Kellogg biscuit and placed it on the table. I saw the biscuit were much smaller than the others and inquired about it. She said it was a new biscuit. This was some time ago. When I first saw it on the table in the dish, I remember it looked quite different. I did not think the Shredded Wheat Company had changed the size of their biscuit. My wife told me it was a different product; but I noticed immediately the difference in the size of the biscuit. I would not say I have not used any shredded wheat since. I am sure I have, but not much. It is safe to say that, since that time, Kellogg's Whole Wheat Biscuit has taken the place of shredded wheat in my household.

ARTHUR FRANCIS RUSH.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am district sales manager of the Kellogg Sales Company and have filled that position a year in Boston. I have been connected with the Kellogg Company fifteen years, in capacities from crew manager to salesman, to district manager.

After being a sample salesman, I was a jobber salesman under the district manager in Boston, dealing with jobbers, chain, retail grocery outlets. I was more or less of a service man throughout the whole territory. There is no authority or title for an assistant, I was in that class of work. I came up through the organization and became district sales manager.

In 1919, when I first worked for the company, in Boston, we worked out all over New England. My present territory is Maine, New Hampshire, Rhode Island, Massachusetts, and all of New England except Connecticut.

We distribute Kellogg's Whole Wheat Biscuit in that territory and have a 40 to 42 per cent. distribution of it in the better grade stores. There is a consumer demand for it in this territory, as manifested through those stores. Some are chain, such as A. & P., voluntary chain, such as I. G. A., national, and chains like Nation-Wide Stores, a voluntary chain all over New England, and a voluntary chain in and about Boston, as well as New Hampshire, Maine, and Vermont.

The A. & P., probably more so with Kellogg than many others, not having advertised themselves as such, require consumer demand before they will put a new product in. They must have the pressure of con-

sumer demand through individual stores. When it is put in, it is on a special list. The individual manager of the individual chain store must ask his supervisor or superintendent of that special division whether he can stock that product in his store, telling him the demand he has for it.

We have distribution of our biscuit in this territory among restaurants and hotels, dining cars, inns, etc., represented by the individual cartons. The company pushes the sale of individuals at all times, for two purposes: It has an advertising value, and it will not deteriorate so fast in small packages. If a large package is kept in a kitchen, the steam from cooking would penetrate it and get into the product. The heat of the kitchen would then dry out the product or make it soggy and not nice to eat. It is our policy to educate the restaurants to handle the individuals. The value of the individual from a merchandising standpoint is good, because the carton is right in the bowl, with separate milk or cream container. The individual carton and the sample carton are both the same, except we have always used large-sized packages for promotional selling. The sample carton has across the top: Sample, not to be sold. The sample is given away, and the individual is sold.

To create a consumer demand for Kellogg's Whole Wheat Biscuit and to introduce them to the public as a new product, we have used sampling, house to house selling of one package, giving a second package free, window and ledge displays, mention over the radio, sampling of different friends, and so forth. We have had deals, giving the geography chart free with two packages, and Story Books of Games given away free for the children, to introduce it into the home. We have given Jungle Land Books free one with a package. We have had Saturday store demonstrations and

weekly demonstrations in super-markets, advertising in the newspapers, forty-inch promotional advertising, which we buy ourselves. The newspaper then goes out and solicits retail grocers with the ad, eight merchants to co-operate and pay out of their own pocket, using Kellogg's Whole Wheat Biscuit in conjunction with that sale.

In all the campaign, the product has been called by the name of Kellogg's Whole Wheat Biscuit. We have not, in this territory, in the last two or three years, sold any of it as Kellogg's Shredded Whole Wheat Biscuit. Our sales have been confined to Kellogg's Whole Wheat Biscuit. In the advertising and sampling and so on, the cartons have carried the name Kellogg's Whole Wheat Biscuit and emphasized that, on the large cartons, the dummy cartons, the individual cartons, the jumbo cartons with streamers, and the small window stickers, etc. We have used the big dummy jumbo display, with ribbons running out from it, dealing with the merits of Whole Wheat Biscuit, and, in conjunction with it, the dummy packages or regular goods in the window. The Kellogg Company has absolutely not sought to conceal the fact they were making a whole wheat biscuit. We are out to push it, advertise it, and let the world know we are manufacturing it, as well as the rest of the Kellogg line.

In one instance, we have encountered the small individual National package, like Defendant's Exhibit 81, in the restaurant trade. I understand the Waldorf received a shipment of it, sent it back, and made the boast they were the ones who made National change the biscuit back to the large-sized article. The buyer of the Waldorf told me that personally. I relied on that information and passed it on to my principals. Since then, I have not encountered the small individual size anywhere else in my territory. Where the Na-

tional has distribution in my territory, it is on the larger one, like Plaintiff's Exhibit 21. There may be other instances of the smaller, but I do not know of them.

I would say we have only thirty-five per cent. distribution of Kellogg's biscuit in individual packages in the better grade restaurants. We probably have fifty to fifty-five per cent. distribution in restaurants, at least throughout New England, from B grade down, but not A grade restaurants. Those figures are growing.

Our Saturday sales are selling of three packages of goods selected by the retailer or the man in the individual territory. Corn Flakes is a good seller in retail outlets. Pep or Rice Krispies might be a slow seller in a particular store. They would select a package of Rice Krispies, one of Bran Flakes, and possibly Corn Flakes, giving a package of Whole Wheat Biscuit free. We have a man in the store to conduct the sale and have the packages piled up on the floor, with the geography chart, probably. We have always used that method in house-to-house selling and sampling, as we call it. We sell the retail grocer five cases Kellogg's biscuit and purchase back three cases at the suggested resale price of eleven cents. We take those and have men go from house to house and pay the men five cents on each sale, selling one and giving one free. Sometimes we buy the free package also from the retail grocer, but generally fifty per cent. is supplied by the company and fifty per cent. is purchased from the grocer.

We bid on institution business in this territory. We get requests for bids from institutions and hospitals. We may have a call for a thousand pounds of wheat. In Army regulations, there is no interpretation, aside from four different wheat products, listed on the back of the Navy specification, calling for twelve

and a half ounces of wheat biscuit. It does not say Shredded Wheat or Kellogg's Whole Wheat. You must submit samples of the product before a bid is accepted. At times, it has called for shredded wheat, and we have put in Kellogg's Whole Wheat Biscuit, fifteen biscuit to the package, and twelve and a half ounces. I know about that institution bidding.

I have not known of any cases where a government department has sent back one product saying it was not what was bid on; because, before making any award, you always send with the bid a package of the product, so they have it there. They take it to laboratories and generally analyze the product to see if it is up to specifications. The bids specify the product by name and the number of ounces to the package. We have been very successful in bidding on that kind of work.

We have used quite a good deal of cellophane-front packages in this district, one package to the case, or two packages, and also twenty-four to the case; sometimes, twelve cellophane and twelve regular to the case. As district sales manager, I am charged more by the people at Battle Creek for the cellophane-front packages, twenty and a fraction. It is charged against selling cost and sales promotion per case for the year, against the Kellogg Sales Company, for instance, at 150 Causeway Street, Boston. The cellophane fronts carry a substantial charge, as a premium. That does not fall on the retailer but on the Kellogg Sales Company which pays that as promotion and selling expense.

These methods of introducing Kellogg's biscuit to the consumers' attention are always the same as methods used in introducing other Kellogg products. The company have been advertising that way for years. The men are instructed to go in and say: "Mr. Dealer,

all I want you to do is to put the product in and ask the customer to take a full package and eat all they wish. If they are not satisfied, tell them to return it. You return their money, and we will return yours."

I would say that, among our wholesalers, retailers, and consumers in the district, a knowledge of the Kellogg biscuit has been advanced and they know there is such a product. Those people interested in cereals would know. All those who eat the shredded wheat product would know that Kellogg is in the shredded wheat business, and that there are two biscuit of this kind.

The distribution of Kellogg's biscuit in our territory, in the wholesale line is ninety per cent. Ninety per cent. of the wholesale houses regularly carry the Kellogg product. I have built up a substantial and constantly increasing volume of business in the territory on Whole Wheat Biscuit. The retail price of the product varies. In the small outlying towns, they got twelve cents for either product, except voluntary chains, two for tweny-one or nineteen. When one of our deals goes over in a town, it brings it down to eighty, costing them ninety-one cents, which makes a difference. During that time, voluntary groups and independents feature ours at less. The chain stores, like A. & P., get eleven cents for Kellogg's Whole Wheat at all times, and sell National shredded wheat two for nineteen. They reorder each month on Kellogg's.

The Kellogg Company in this territory gets a very fine volume of dealer co-operation by reason of advertising in the newspapers, probably as great if not greater than in any other territory in the United States. We make no advertising allowance whatsoever. I have never heard of any confusion in the trade or any instance where a consumer bought one kind and sent it back saying it was the other she had ordered. Today

in New England, we boast that substitution is not practiced as much as it is in other parts of the country. Our people pride themselves on that. People are not so receptive to substitution as they used to be. For instance, other companies have introduced other lines, such as corn flakes, with a great deal of work, and have not gotten far with them. Post Toasties are a good seller in some parts of the country. They changed their package here to three-ounce Post's Corn Flakes and offered them in substitution. They not only withdrew that but withdrew Post Toasties here in Massachusetts. It is a practice less effective in New England, probably, than elsewhere. I hear it is practiced throughout the West, in substituting different brands of merchandise.

The work of Kellogg's in this territory has tended to stimulate the general demand for Whole Wheat Biscuit. We have had ten times as much more advertising and sales effort and work in the trade among consumers by Kellogg than from the National Biscuit Company for shredded wheat biscuit. Of every kind of biscuit, reports come in from eighteen towns throughout New England that we are doing from six to ten times as much. If we had as much work behind the National shredded wheat as we have had behind Kellogg's biscuit, that would help to sell that product, also. When they stopped their sampling and things like that, it helped us considerably. They stopped all their merchandising efforts, house-to-house selling. They did some house-to-house sampling last year and some advertising. Compared to what they did before, they did not do one one-fifth as much as under the old Shredded Wheat Company. They used to sample four or five times a year, keeping their trucks busy. They would take orders. They hired salesmen. As far as retail outlets went, they had nothing but promotional work. Those men are no longer with that promotional

end. They had sampling, window displays, tacking signs, making ledge displays, and so on. The jobbers had to solicit the retailers themselves, leaving the promotional men free for more work. That was cut down until last year, when they did a little more of it, some sampling in a few parts of New England and house-to-house selling, in a few selected towns, such as Burlington, Reading, and Portland, selling one package shredded wheat, giving a second package free, and through some civic organizations, but not one small part of the volume of effort of the old shredded wheat.

A year ago last January, National went direct to the trade. They would sell the retail grocer direct, four packages, or twelve or thirty-six. It formerly sold entirely through the wholesaler in thirty-six-package cases, at a profitable price. The wholesalers naturally felt peeved. They maintained overhead as far as wholesale distribution was concerned, and their profits on shredded wheat had been taken away from them. Those who sold at a low price did not make that percentage, anyway. In general, the wholesalers were up in arms against the National. A great many of them actually came to Kellogg and asked to have it featured, did everything possible to feature Kellogg's Whole Wheat Biscuit in the way of promotional and general advertising they were doing at that time. The Kellogg Company did not have to go out and dig that up. They came right to Kellogg in conjunction with advertising, window and ledge displays. When the National adopted that policy, they were deprived of the sales co-operation of the wholesalers. I think I would be safe in saying eighty-five per cent. of jobbing salesmen in New England would not mention the shredded wheat at all, for a short time, anyway. The wholesalers figured there was no profit, that the retailer could buy at the wholesale price. They had the grad-

uated scale of discounts, seventeen and a half if you bought a thousand dollars worth.

The National shredded wheat biscuit has always been more or less of a loss leader, especially in the last four or five years, since a great many of the nationally advertised products have been put in that class. Three or four years ago, when price-cutting was prevalent on all products, the retail grocer tended to feel that a manufacturer who would allow price-cutting of that nature was not giving them a fair show. Today, with voluntary chains and the way most goods are cut, especially nationally-advertised products, I think it hurts their standing with the independent, especially when the chain stores continuously offer it at near the cost price. The National product has been badly cut as long as I can remember. Chain stores have it now two for nineteen.

Kellogg's biscuit has been sold on absolutely a candid basis, as far as the consumer is concerned. We would tell them our biscuit was more convenient in size, toasted top and bottom, toasted through the center, better flavored than shredded wheat, if that name was brought into it at all. We do not believe in mentioning the other biscuit, because, if we mention it at all, we believe we are advertising it. We have enough to do to advertise ourselves. The size, number of biscuit and weight per package have been emphasized in our dealer helps, on our packages, and in our store display; a half-ounce extra per package, fifteen biscuit, convenient bowl size. On the Saturday demonstration sales where a Kellogg salesman has been in the store, in most instances, whether he has a cellophane-front package or not, he has one opened. If it is generally displayed in a food fair or market, you have the biscuits opened up and piled in a bowl, to let the customer see the exact size. He would turn the biscuit over, showing them toasted on both sides, would probably

break one open to show it is more toasted in the center. It is a darker biscuit than Shredded Wheat.

Regarding a previous question about demand, I think of one instance, a wholesale grocer in Boston who used to order ten straight cars of shredded wheat a year. He now buys twenty-five cases a month. He is one of the wholesale grocers we do not get a great deal of support from. He buys only two hundred to three hundred cases Kellogg's biscuit a year. Comparing his total volume on both products, adding the two shredded wheat products together, he is losing from his previous volume of business seven cars a year. That prevails in two different instances. The Kellogg Company absolutely guarantees the sale of its new product. They would take back from either retailer, consumer, or wholesaler any product which did not sell. That means a whole lot in introducing a new product to the trade. You guarantee the sale of a product, let a man know that, if the consumer does not ask for it, even without effort on his part to sell it, you will take it back, that plays quite a part in taking it on.

The Kellogg Company does not rely exclusively on national publications. My teacher was Mr. Kenney, now district manager of the National Biscuit Company for New England. He taught me that, in selling a man a product, you have to sell him the idea of using it himself. If he eats it himself, uses it in his home, recommended it to the consumer, you sell the merchant a case and display it prominently, floor, counter, or ledge. If the man advertises, try to have him incorporate it in his local advertising, handbills, window posters, etc. Then sample house to house to your consumers, all promotional work to get people to use it, and have it in national and local advertising. That is how we did our New England business here on Kellogg's biscuit. Corn Flakes outsells shredded wheat

by far. I was not in business when the Ross Biscuit was on the market.

CROSS-EXAMINATION.

THE WITNESS: I have conducted a very energetic campaign to introduce Whole Wheat Biscuit here in my territory. I have been right on my toes all the time, and I have to be today. The misfortunes of the National with some jobbers have given me a very good chance to get in with the jobbers. It gave me an opportunity to get in the market here; and I have had the co-operation of those jobbers, at the same time that there was some feeling of hostility toward the National Biscuit Company.

I know the Cross Abbott House, at Wood River Junction. They are still handling National shredded wheat in large quantities. His brother-in-law happens to be connected with the National, and, when the National took over shredded wheat, they went to them. They still sell it in large quantities. That was due to a misunderstanding with some Kellogg men. He told us then he felt toward the National as other wholesale grocers did. He placed an order with our salesman, Mr. Conklin, for three hundred and fifty cases. He canceled the order the following morning, after being contacted by the National Biscuit Company man up there. He buys a little Whole Wheat Biscuit from us all the time, but not in quantity. He is the only man in New England who buys shredded wheat in quantity. I would not say he is the only jobber in New England friendly to National, but the only one who buys it in any quantity.

The concern who used to buy ten cars a year of shredded wheat is the Standard Grocery Company, Boston. They only buy twenty-five cases a month now. I know the reason for that. It does not mean that

shredded wheat is not being sold. The National is servicing stores on shredded wheat. It does not simply mean that shredded wheat is moving through other channels. They claim from their own individual meetings. We claim from having a demand. The Pioneer Stores sell it through individual retail stores and know the product has fallen off in consumer demand. Some of that consumer demand Kellogg has acquired for its Whole Wheat Biscuit.

XQ. 152. There is no question in your mind but that the Kellogg's biscuit is competing directly with shredded wheat, is there?

A. Well, we are in the shredded wheat business.

XQ. 153. Exactly.

A. And we want to let the people know that we are.

XQ. 154. Exactly. You are making and selling a biscuit that is designed to occupy that field?

A. Yes.

XQ. 155. And you want to get your share of it?

A. No. We are not foisting our product in the mind of the consumer that it is a shredded wheat product. We are putting it on the market as a Whole Wheat Biscuit and shredded wheat product, just as it says on the side.

XQ. 156. Yes, although you use the words *shredded wheat*.

A. We do not want to push the other fellow's product. We do not want to help him.

XQ. 157. Yes, although you do carry on the end of the package: A shredded wheat product; and, on the other end: Shredded wheat in its most delicious form.

A. Yes, absolutely.

XQ. 158. I did not use the term in its disparaging sense, but you are putting every effort forth to occupy as much of that field as you can, are you not?

A. Feeling at the same time that, if there is a demand for a product made out of wheat, shredded and toasted, we are entitled to get our share of it.

XQ. 159. Yes, and, on that basis, you are competing vigorously with shredded wheat?

A. Yes.

THE WITNESS: We are taking advantage very naturally of the opportunity afforded by the change in the manner of distribution introduced by National, to get the jobbers to handle our product.

As I said, the Navy specifications call for a thousand pounds of wheat. They do not call for shredded wheat; but a thousand pounds of corn, or wheat, or rice, or bran. I know of no specifications from the Navy for shredded wheat. It has been in the past. On specifications of that kind we have written in Kellogg's Whole Wheat Biscuit, have put our prices, and gotten the award. Where the bid is asked for by the pound, our price is sometimes lower than the National, sometimes not. The National has taken business away from us. They have taken it away where there is an alternative for the bid, shredded wheat or Kellogg's Whole Wheat Biscuit. On the last bid, in some state institutions in Massachusetts, a bid has been awarded to both parties and the institution allowed to state which one they would take. We have doubled our business in that Whole Wheat Biscuit. I suppose that was put in to permit the National Biscuit Company to take that business.

We have a distribution on biscuit in 42 per cent. of the better stores in New England, but not the chain stores. We have a larger percentage of the voluntary chain than that. When we operate through a jobber, we are able to get better co-operation. The A. & P. carry our line in their Springfield warehouse, and at Boston, Portland, and Providence. I think some of

their individual retail stores buy them directly from Kellogg men. In the Portland and Albany districts, A. P. I. Cohen of Burlington supplies them.

Our 35 per cent. distribution in restaurants is Class A. We have a larger percentage of distribution among smaller restaurants, lunch counters, little Greek restaurants, dining cars. Many of them carry both items. Many others carry our item alone and still others shredded wheat alone. We do not, of course, advocate their calling our item shredded wheat. While it may be so, I could not actually testify that I know as a fact that, quite often, they carry any item on the menu card, shredded wheat, which is our line. I would be surprised if you know it to be a fact that there are some restaurants who carry our product and have listed it on the menu as shredded wheat.

According to my personal interpretation of substitution, I would consider that, if I were a retailer and you came into my store asking for Kellogg's Whole Wheat Biscuit and I handed you a package of Kellogg's shredded wheat, without a word, or foist the other upon you, saying it was the very exactly same thing put out by Kellogg's, that would be substitution, something in place of the other without any explanation. But if a girl asked a grocer for shredded wheat, and he said I do not have it, but here is a Kellogg product, a smaller biscuit, fifteen to the package, I would not say that was substitution, because he gives an explanation. If he foisted it on the party with intent to deceive them that it was shredded wheat itself, although it is a shredded wheat product, I would call that a substitution. If he had them both and the party asked for shredded wheat, and he made full explanation, saying he had shredded wheat, but this costs the same and has more biscuit, smaller biscuit, better to serve, introducing the customer to it in that way, that

would not be substitution from my point of view. That is merely salesmanship, merchandising on his part.

Kellogg's Corn Flakes have been used as a loss leader often. It has been kicked around quite a bit. I do not believe the substitution, as I have defined it, is practiced very much in my territory as it may be elsewhere. I do not think they go in very much for substitution in New England.

Referring again to Cross Abbott & Company, with all their friendliness toward that and their antagonistic spirit toward co-operating, last week they took in five hundred Rippled Wheat, of Loose Wiles, and put that out on the market, sold in grocery stores, from one to twenty-five cases apiece. My observation has indicated there is consumer acceptance of that product. It is flat biscuit, more or less like Triscuit, with it raised a little, four little ripples across the top.

I do not think there has been any great increase in the morality or ethics of the grocers, but the voluntary chain movement has made them build up their stores and make displays. It used to be the first thing you could put your hand on. If I went in and asked for either product, it would be: Where in the world did I put that one? They are waiting on them today with less help. Their lack of ethical conduct is somewhat less. I would not say offhand that I could think of any one deceptive package on the market today.

I am very careful in my work about distinguishing the name shredded wheat from Kellogg's Whole Wheat Biscuit, without mentioning the other. I cannot very well specify the merits of our product without comparing it with shredded wheat in some way, except by opening a package and letting them taste it. In bringing out that it is a shredded wheat product, more to the package, smaller biscuit, it is not necessary to compare it with shredded wheat. I just say it is

shredded whole wheat, double toasted, fifteen to the package, a half ounce more to the package, more than the other. I have to compare it to the other, absolutely. If he brings out the name Niagara with it, we admit we have a shredded wheat there and tell him right out that we have. I admit it is a shredded wheat product. We do not say it can be sold to the same market, but we just say it is a shredded wheat product.

Kodak means to me a camera, and Cadillac a certain kind of automobile, Lucky Strike, a kind of cigarette.

XQ. 225. You would not have any doubt about that package I now show you, would you?

A. No.

XQ. 226. What is it?

A. A package of Camels cigarettes.

XQ. 227. Will you read what is on the back of it?

A. Yes. "Hat cleaner for felt, straw, panama, cloth hats."

XQ. 228. Yes. Yet, when I held it up you had no doubt, did you, that it was a package of Camels cigarettes?

A. Absolutely not.

XQ. 229. And it closely resembles this package of Camels cigarettes that I have here, does it not?

A. Yes.

XQ. 230. It is a Chinese copy of it?

A. Yes, this is a copy of it, surely.

XQ. 231. That is what you would call an imitation package, is it not?

A. That is what I call an imitation.

XQ. 232. It could be plainly substituted for the package of cigarettes. It is a fraudulent package, is it not?

A. Yes.

(The package referred to was received in evidence and was marked "Plaintiff's Exhibit 208."

The genuine Camel's Cigarettes package was received in evidence and marked "Plaintiff's Exhibit 209.")

THE WITNESS: We do not have general demonstrations. If the boys book a Saturday sale and cannot take care of it, they hire a young lady to demonstrate once in a while. We may go into a food fair or something like that. Demonstrators are instructed to display prominently the cellophane-front packages, to explain the biscuit itself, to sell the package for whatever the retailer agrees at that time, two bought and one free, or straight for ten or eleven cents.

If the customer asks if it is shredded wheat, they are instructed to say "It is a shredded wheat product. We would like to have you look at it." We do not exactly give them those instructions. That has probably been said. We only use them for a day or so. It is a question that probably arises in most demonstrations. I had a Miss Evelyn Ealy down at the Brockton Public Market. She is not one of our regular demonstrators; just worked for us one week this year. I never heard of her before or since. I would not be surprised if she had told the public this was a shredded wheat product. It is a very natural thing to say, because of the close resemblance between the two products.

RE-DIRECT EXAMINATION.

THE WITNESS: We have in the territory the Manhattan Food Stores, who had sixteen self-service stores in greater Boston until October last when they went into bankruptcy, the same type as Piggly-Wiggly stores. The customer goes in, picks up a basket, walks around, takes the goods off the shelves into the basket. At the counter, the bundle is done up and paid for.

Both Kellogg's Whole Wheat Biscuit and National Biscuit Niagara shredded wheat were sold there. Kel-

logg's sold ten to one of the other. He was such a good customer it was a shame he went into bankruptcy.

RE-CROSS-EXAMINATION.

THE WITNESS: He is rather poor credit, still opening up again. He was out of the market for a while. I think he carried a full line of National Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: In the restaurant trade in my territory, National shredded wheat is used in large-sized individual cartons, like Plaintiff's Exhibit 21. I only know of one instance of their trying to introduce the small sized biscuit. I have never seen any since, and that was withdrawn from the manager who showed me the package and gave me all the information on it. I have never seen any of the National shredded wheat cases.

RE-CROSS-EXAMINATION.

THE WITNESS: I sell the restaurants and lunch counters a combination case, containing a few items, including Whole Wheat Biscuit, which has been successful in a small way in introducing the products. We sell the combination case to small restaurants that have no credit through the jobber, only to give full distribution of our five products where otherwise they would not be able to carry the full line if some of them had to invest seven or eight dollars. They will invest a dollar seventy-five for a hundred and two packages mixed.

RE-DIRECT EXAMINATION.

THE WITNESS: Referring to Plaintiff's Exhibits 208 and 209, assuming them both to be cigarettes under the name Camel, one being made by R. J. Reynolds Tobacco Company, the one not made by Reynolds would

be an absolutely deceptive and fraudulent substitute, an infringement altogether on the rights of the copyright owner.

The fraud here, if there is one, is in the making of the hat cleaner package so like a cigarette package that people would assume it was put up by R. J. Reynolds Tobacco Company. My experience in the trade goes back to the time when deceptive substitutes of that kind, like two brands of Baker's Chocolate, were on the market. The courts, by injunction, have pretty well cleaned up those deceptive substitutes. An entry was issued through the trade to hold them up. Thereafter, they were taken off the market. I do not believe Mr. Vilas, if he were to go from here to Honolulu, could attempt to go out into the trade to find whether those two packages are similar. This substitution would be absolutely open on its face. The customer might walk home and say, "W . I got some Camel Cigarettes." If he did not like them, he would say Camel Cigarettes were rotten, whereas he might never have smoked a Camel Cigarette.

If somebody went into a store, asked for Camels and were handed Chesterfields, that would not be a deceptive substitution, where the name Chesterfield was spread over the package; because, if they took them away without actually knowing, they would see and know they were not getting Camel but Chesterfield Cigarettes. It would not be a deception in that respect.

Demonstrators have not been instructed by the Kellogg Company to make any special reference to shredded wheat. When we have a demonstrator to sell Kellogg's Whole Wheat Biscuit, we feel, if she is going to talk about the other product, she is helping sell theirs, which we do not want. We tell her that, if a lady should say right out: "Is that a shredded wheat product?" she is to say, "Absolutely, it is a shredded wheat product, Madam."

We do not just want to make that one sale by that demonstrator. We try to impress on the consumer that she is buying Kellogg's Whole Wheat Biscuit, and to come back and demand it a second time.

RE-CROSS-EXAMINATION.

THE WITNESS: I would be very much surprised to learn that we have demonstrators that have given the impression this was a shredded wheat biscuit. I am not familiar with the testimony taken here on behalf of the plaintiff last December. I was not present then. I recall hearing that it was testified that a wholesale grocer had sold an entire case of Kellogg's biscuit as shredded wheat, in response to an order for shredded wheat. I know Mr. Verret of Burlington. This is an incident that happened to him, I believe. As I understood Mr. Verret's testimony at the time, he just said he carried both products. If a person came in and wanted shredded wheat, he would give them what he wanted. If they wanted Kellogg's, he would give them Kellogg's. Mr. Verret is not stupid or thick. He is a very good customer of ours.

RE-DIRECT EXAMINATION.

THE WITNESS: He is a good customer of the Kellogg Company and spoke afterwards to our man about the testimony he gave then.

Stipulation re testimony of Mrs. Norma Clark:

MR. CLARKE: Would you have any objection to stipulating as to just one witness?

MR. VILAS: Which one is that?

MR. CLARKE: That she would testify as follows: What would you say that she would testify to?

MR. RUSH: Mrs. Norma Clark, of 553 Commonwealth Avenue, Newton, Massachusetts, if called as a witness, would testify that the Kellogg Sales Company of Boston supply her weekly with Kellogg's Whole Wheat Biscuit and other Kellogg products.

MR. VILAS: In sample form?

MR. RUSH: No, in the full package, to be used in sample form; which she gives out with many other commodities of other manufacturers, to people moving into new homes in Newton, Watertown, Waltham, Weston, Wellesley, Woburn, and a certain section of Cambridge, Massachusetts, right down in the portion of Cambridge where there are professors of Harvard College and such as that, all down around the college, in a very restricted section. They do not take every Tom, Dick, and Harry there.

MR. CLARKE: You are giving her these sample packages——

MR. RUSH: We are giving her these sample packages, and she is distributing them. She is also being supported by very many retailers and such people as that, who are furthering the sale of Kellogg products throughout Newton.

MR. CLARKE: Is that stipulation satisfactory to you, Mr. Vilas?

MR. VILAS: Yes, we will assume that that is what she would say.

MRS. BETSEY JAMES.

Deposition taken at Boston, Massachusetts, March 28, 1933.

Direct Examination.

The Witness: I keep house with my mother, the two of us in the house. We consume Kellogg's Whole Wheat Biscuit, and have had it about two years. I like it. It was first introduced to me by a sample left at the door. I liked it. I got further supplies of it at the grocery, under the name of Kellogg's Whole Wheat Biscuit. I have had no difficulty getting it under the name. I never had any other product handed to me when I called for it. I would not take it, anyway. I used the old Niagara Falls product; and that is why I came to use Kellogg's. I liked it better, smaller and better browned. I liked it generally much better than the other. I have continued to use it since I got the sample. We use practically all the Kellogg products. I came to testify today, because a man whom I did not know before came to my door. I told him I would show him how good Kellogg boosters we are, and I showed him five other Kellogg products on the pantry shelf. I do have Kellogg's Whole Wheat Biscuit. I like it a whole lot. I would not take anything else.

Cross-Examination.

The Witness: We formerly used shredded wheat; but it was too large to handle and we got too much at once. I did not care much for it, because, with milk or anything on it, it did not hold up so crisp. I have used shredded wheat, Kellogg's, for about two years. We used a lot of shredded wheat when it was the only one we had, until we started getting Kellogg's. My mother used it. We only used them once in a while. We used about a box once a month, for about a year before Kellogg's biscuit came on the market. I have

known about shredded wheat for ages, but I have not eaten it. It is a very old product and I have known it for ages. I did not buy them frequently. After we got this sample, I bought Kellogg's, and I now buy that instead of shredded wheat. I do not buy any more shredded wheat. There are five of us and we all eat Kellogg's. We have corn flakes one morning, Pep another morning, and so on. I think you could call them a Kellogg family. Now we have Kellogg's biscuit, that is complete. We do not eat any other cereal. I do not know how the Kellogg salesman got my name. I buy my cereals at Thomas Arnold's grocery.

RE-DIRECT EXAMINATION.

THE WITNESS: That is an independent store, service type.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not buy anything from Torphy's store on Wittemoe Street. That is a long way out from where I live.

RE-DIRECT EXAMINATION.

THE WITNESS: If I want one product and my grocer hands me another, I will not take it. If I were to order a certain product and the grocer said he did not have it but had one he thought was a little better or a new one, if I liked really what I had ordered, I do not want a substitute. If the grocer asked me to try a new product, I might. I have tried things. If I did not like them, I would not bother to buy them again. I am particular that way.

MRS. NORMA A. KING.

Deposition taken at Boston, Massachusetts, March 28, 1933.

Direct Examination.

The Witness: I am a housewife, just my husband and myself in the household. I am a consumer of Kellogg's Whole Wheat Biscuit and have used it at least six months. I first saw it on the shelf at the grocer's. I thought I would like to try it, bought a package of it, and have liked it ever since. For one thing, it is small, crisp, and has a very good flavor.

I had before used the old Niagara shredded wheat. I have not since wanted to fall back on it. I have a decided preference for Kellogg's biscuit and have stuck to it since I first used it. I have ordered it from my grocer under the name Kellogg's Whole Wheat Biscuit. I get corn flakes, too. Since I have asked for Kellogg's Whole Wheat Biscuit, I do not get any other product.

I came to testify today because some Kellogg man came to my door. I did not know the man. He asked me which I would prefer and if I would appear here today.

Cross-Examination.

The Witness: I am a former user of shredded wheat. I have been familiar with the package, Plaintiff's Exhibit 1. I have known that for a long time; I would think about three years, since I have been married. I did not take much notice of it before. I do not think I have anything else given to me for it. I never had the Kellogg biscuit offered to me when I asked for shredded wheat. I never asked for Kellogg's shredded wheat. I ask for Kellogg's Whole Wheat Biscuit. Since I first saw it on the shelf at my grocer's, I have bought it in preference to shredded wheat. I do

not use shredded wheat any more. My grocer is C. A. Medlin, on Summer Street, not a chain store, merely a neighborhood grocer. When I saw Kellogg's biscuit on the shelf, it was in a package like Plaintiff's Exhibit 161, with a picture of a dish with two biscuit. I do not think I ever saw a package like the other side of Plaintiff's Exhibit 161, with a window in it. I just bought it in a package with the panel on both sides, with a picture of a dish with biscuit.

CRESSON A. MEDLIN.

Deposition taken at Boston, Massachusetts, March 28, 1933.

Direct Examination.

The Witness: I run a little variety store at 101 Summer Street. I handle all groceries, take telephone orders and have a route. I make deliveries, and I extend credit where it is justified. We have to do plenty of that lately.

I carry Kellogg's Whole Wheat Biscuit regularly in stock. I have had it as long as it has been out. I do the same as many others, when a new product comes out like that. We generally put it on anybody to try it, to see if it will go, especially when we have found that all the rest of the goods of the company putting it out are good. There is, without a doubt, a consumer demand for that product in our store. They say they want Kellogg's. They say it is a smaller biscuit, crisper, and they like it better. I asked customers to try it. I do not do much talking about anything. I just show them what I have, and I tell them I have tried it myself and think it is better, ask them to try it, and tell them if they do not like it, they can bring it back. In each order they ask for Kellogg's shredded wheat. That is what they ask for, naturally. On each order,

when they ask for Kellogg's shredded wheat, I give them Kellogg's Whole Wheat Biscuit.

I handled the other product, Niagara Falls shredded wheat right along, until I found people had gotten used to using this and it was just useless to put it on the shelf. I no longer got consumer demand for the other product. Once people tried Kellogg's, they never asked for the other any more. I had to drop the other altogether, for that one reason, when the demand for it ceased.

I never, that I remember, had any mixup or confusion between the two products, when I was carrying both. I never had any customer send back one and say she wanted the other one, as far as I recall. The customers differentiated between the two. They would just ask for Kellogg's, and that was all there was to it. There would not be much chance of getting mixed up, that way. I handle the other Kellogg products. That is, no doubt, an advantage in selling it. That is the way I figured it. My family is big, and I used quite a lot of it. I always try it myself, so, when I am talking about it, I know what I am speaking of. My family use it, and I still use it. I used to use the shredded wheat of Niagara Falls, always. If I preferred it, I would be using that now. I like Kellogg's. I have nine in my family. The rest of my family and some of their families they brought home like the Kellogg biscuit. We have eleven now. Some are married. It is quite an accession to the Kellogg family of users.

I have all the co-operation that is necessary on the part of the Kellogg Company in creating consumer demand for Whole Wheat Biscuit. I have store and window displays. They are on display now, which tends to attract the attention of consumers. What I do is to change the different displays around, in the window displays, which is good salesmanship. You cannot

have the same thing there all the time. The purpose of a store display is to push the product. You have to let people see that you carry a line of goods they want. If they want it, they come in again, naturally. Some people passing by might think you did not carry that particular brand. If you put it in the window, they know they can get it there. That is our way of introducing new products to our customers. Any new product we put in, if the people do not give a window display, we naturally put it in ourselves, mix it with other goods we want people to know we deal in. We have distributed samples of Kellogg's biscuit, put them in with orders, and give people one to try when they call. I have done that with Kellogg's Whole Wheat Biscuit. We have been furnished from time to time with store displays and cards advertising Kellogg's biscuit. I have used a whole background of Whole Wheat Biscuit in the window, a display with a big jumbo carton of Whole Wheat Biscuit in it.

I charge eleven cents for Kellogg's biscuit. When we carried Niagara biscuit, it was twelve and went down to eleven.

We sell about two and a half cases Kellogg's biscuit a month. When I had shredded wheat, I did well to sell a case a month, so this is a much larger sale of Kellogg's than I ever had of the other. I do not handle shredded wheat; I handle another line. Ever since I have been in business, I find you have to change once in a while. People tire of coming to a store and seeing the same thing. I had National Biscuit there for five or six years. I changed it the last three years. I handle the entire line of Atlantic biscuit now. I did handle Uneeda Biscuit. Without a doubt, I certainly had trouble with price-cutting on that. That is one of the big arguments I had about it, and, I suppose every one else in the same boat did, too. The dealer feels

that the little stores made those people what they are. They go right around behind our backs as soon as they get a couple of million dollars and cut our throats. Uneeda Biscuit used to cost us four and three-quarter cents a package. The chain stores and five-and-ten offer them three for a dime. They tell us they are using them for a loss leader. They must think we are pretty thick. How would you feel when a man came and asked only three for a dime when you know you are paying more.

I think it hurt the sales of Niagara shredded wheat to have it taken up by the National Biscuit Company. Sales were not so big, when the National took over, as under the old Shredded Wheat Company, in my opinion. Naturally customers would ask me what kind of product Whole Wheat Biscuit was. I think I would tell them it is a better product altogether, because I have tried it myself and think it is better. All they have to do is eat two. If they do not like them, they may bring them back. I never had a package returned. Every one was more than satisfied and asked for them again in preference to the others.

CROSS-EXAMINATION.

THE WITNESS: I mean better than the old shredded wheat they had at the National Biscuit Company, of course. That is what they tell me. I have known the old shredded wheat for a long time, without a doubt. That is one of the old packages, Plaintiff's Exhibit 1. I have been in the grocery business about eleven years and have always known this shredded wheat during that time. I used it at that time. It has been a household article, and I have always known it as just shredded wheat. When people asked me for shredded wheat, I knew what they wanted. When they came in and asked for shredded wheat, that was the only

thing we had that was shredded wheat, and we handed that down. That is the only name it was known by and the only article, I guess, at that time that answered to that name. It was a good seller during the eleven years. I am a mechanic in my own line. I just came and tried this, because Mike Lee sold out. He had shredded wheat then, and I ordered it from the jobber.

It must have been somewhere along about the time that the National took over shredded wheat that the Kellogg Company came in with its biscuit, as far as I can remember. At any rate, Kellogg's biscuit is a newer biscuit, and it came on the market recently. The story is that people who used to buy shredded wheat now buy Kellogg's Whole Wheat Biscuit, a lot of them. Mrs. King was one of my customers, and she has bought Kellogg's at my store. I showed it to her. Maybe fifty or a hundred will tell you the same, that they were converted from shredded wheat to Kellogg's, about the same thing that she told you, that they like it better because it is smaller and more crisp, more to the box, and a better product, as they claim. I think the profit on the two is about the same. I do not think we buy Kellogg's a little better than we do shredded wheat. We carry a thousand different items, and it is hard to remember everything. I am not a member of any chain or purchasing group. I do not allow any one to tell me what I am going to do. I have groceries and a little Arnold Chamberlain's meat, and a little of everything; but groceries is the main part of my store. It is a food store. When I said variety, I meant I sell almost everything, like oranges, apples, and a little truck stuff they need in the evenings when everyone else is closed.

My customers have learned, when they come in, to ask for Kellogg's shredded wheat. I handle no National products now. I am not well disposed to-

ward the National Biscuit Company; but, if a customer asks for a product, we have to sell it. I am there to sell everything I can sell. My customers do not ask for it. I have shredded wheat on my shelf there and they could make their choice. I have had window and floor displays and demonstrations of Kellogg's Biscuit. I did that for shredded wheat before I got Kellogg's biscuit in. I do not push anything. I figure I have to have what the people call for, or they will go somewhere else. I give them Kellogg's to try. If they do not like it, they can bring it back. If a customer who has been using the old shredded wheat comes in, I do not ask him to try it. We figure they know that product. If people want it, they will ask for the old shredded wheat. That does not require the push and advertising that Kellogg's biscuit does. That is why we do not figure they demand the Niagara product. But Kellogg's biscuit will take the place of shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I do have customers ask me for Kellogg's Whole Wheat Biscuit. As to which name, that or Kellogg's shredded wheat, is used most, of course, some people get mixed up in that way, you know. Some will ask for the biscuit and others will ask for the wheat. It is just a matter of average on that. I know some ask for Kellogg's Whole Wheat Biscuit and some for shredded wheat. I certainly do not see why Kellogg's biscuit is not a shredded whole wheat biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: It is quite natural, when you have two biscuit so much alike, that people will get a little mixed up on them. I should not say it is anything to

be surprised at. Some people get mixed up with a very little thing. Just the same, when people get Kellogg's, they all see the difference in a very short time. Naturally, they notice the size. They see the difference when they eat them and will come right back and tell you it is a better biscuit. I find people are sometimes careless or casual about buying and are apt to pas over things. That is quite natural.

RE-DIRECT EXAMINATION.

THE WITNESS: I cannot recall any customer sending either product back and stating she wanted the other. I have had kids bring back the others and ask for Kellogg's once or twice.

RE-CROSS-EXAMINATION.

THE WITNESS: That is when they come in and ask for shredded wheat and get the old package.

HARRY MAZMAN.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am general manager of First United Stores, Inc., a voluntary chain. About 35 per cent. of our stores carry their independent names, and the rest First United. They have the emblem in front of their store windows. I have a retail store that I own at 910 Mass Avenue, Cambridge.

All the members of that voluntary chain carry Kellogg's Whole Wheat Biscuit. We carry them because there is a consumer demand for that product in our stores. Our stores have given co-operation to the Kellogg Company in creating consumer demand for

all their products. When we took Kellogg's biscuit, all their items were known to the consumer through advertising. We took the biscuit and advertised it. The first sale went over, showed an increase of at least 75 per cent. Of course, that was put over with the cellophane cut in front showing the public what the biscuit was. In my list to the members I instructed them to display this one package in every case in the middle of their stores, showing the consumers what Kellogg's Whole Wheat Biscuit is.. The name alone does not tell the consumer what the product is. They would want to know what kind of biscuit it was. Whole Wheat Biscuit could be any one of a dozen different products.

We put out fifty thousand hand-bills advertising Kellogg's Whole Wheat there, three or four times last winter. Our stores have given window displays and store displays to Kellogg's biscuit. I do not know whether they furnished any names for sending out coupon cards to.

We do not carry Niagara shredded wheat, because, when Mr. Allen was their representative or manager at Boston, at that time, they wanted to sign up with us for the entire line of National Biscuit products, and he came back and forth to me, just like a person going out on a shopping tour, from one store to another. He was doing the same thing, shopping around, to see if he could shop along with me. I laid out my plan. I told him that I thought, if the chain stores could have a certain amount of discount, we were just as much entitled to it. He told me, if I was doing a thousand dollars' worth a month, we would get the same discounts as the chains. If a man was doing one cent less than a thousand dollars sales a month, he would not be recognized on the new discount of 17½ per cent.

He kept coming and shopping around, not giving me an answer. I told him it was the last week and it was one of the two, his or Sunshine. Whoever would make the right adjustment, I would go along with. He was to let me know. Then the Sunshine man came around with the same discount the chains were getting, and I recognized Loose-Wiles biscuit. I did not want any better discount than the chains were getting. Some chains were getting a discount and explaining it was increased sales, bringing business, and so on. I could not see it at all. I said, if we could not get it, we would take a different kind of biscuit. It made no difference. We were not sold on shredded wheat. Theirs could be just the same. We preach to our stores that any product recognized by the central office we think is something we ought to push. We picked out Kellogg's Whole Wheat Biscuit and took it in over a year ago. We tried it first and a second time and found an increase of 75 per cent. We said that was what we wanted, and we are sticking with it. That increase came from sales. I first generally box them in a pretty good column with six or seven leading items and a cut of Kellogg's Whole Wheat. Naturally, Kellogg's is put along the top. I have a cut on the side showing what the biscuit looks like. We say it is special for that week, two packages of thirty biscuit for seventeen cents. Sales of that type are effective in creating demand for the product. I have always found the demand for Whole Wheat Biscuit as a whole is being increased. I have built up a good business on it.

The members of my organization give the customers what they ask for. If they ask for Kellogg's Whole Wheat Biscuit, they get it. If a customer asks for shredded wheat, we tell him we do not have it, that our office recognizes Kellogg's Whole Wheat Biscuit and we should do the same thing. If he asks for shredded wheat, we say we do not carry it. That is all we say, as far as I know.

Kellogg's Whole Wheat Biscuit is whole wheat biscuit, shredded, or the same as shredded because, if you would ask me what shredded is, I do not know. It is shredded biscuit, Kellogg's Shredded Whole Wheat Biscuit. The only way to show the public is that cellophane package, the cut they had in it, showing what the biscuit looked like, what it is. We have packages with the cellophane front. It comes that way and came that way last year. I would not confuse the package of Kellogg's biscuit with the Niagara Shredded Wheat package, like Plaintiff's Exhibit 1. There is a whole lot of difference. All the Kellogg packages, including the Whole Wheat Biscuit packages are the same kind of package, with the same coloring. I have used the Kellogg biscuit myself. I also used the shredded wheat for some time. If you ask me which I prefer, Kellogg's suits me, so I am using Kellogg's. I do not handle any of the National Biscuit line. Their salesmen have not been calling on me. They ceased trying to make sales, because I do not recognize them at all. The First United does not recognize National.

The Kellogg Company co-operates every time in creating consumer demand for its biscuit. They furnish me window and store displays, and they do advertising, furnish store cards and advertising displays, everything in advertising. We have always had plenty of it and always got it into our stores. Those dealers use the selling helps of the Kellogg Company. We had a lot of them come in last year, and we sent them all out to our stores. They want them and use them. The Kellogg name on the Whole Wheat Biscuit is absolutely of benefit and help in selling the product, because all Kellogg products are well known, so they sell. We worked every one of our products the way I have described, everything we advertised, we went

to our stores, just put a display in their windows and in their stores, if they have the room, along to hook up with the advertising. We found through the store sales we had increased demand, and it is right in front of the consumer. When a customer comes in, she can pick it right up and place it on the counter.

We have handled the old Shredded Wheat Biscuit at times, in my own store. Out of three years, I can only remember handling shredded wheat twice at our ware house when there was a deal on. When I was operating the retail store, four or five years ago, I have sold shredded wheat, at times. In my opinion, at the present time, Kellogg's Whole Wheat Biscuit sells faster than shredded wheat, and the present call or demand for Kellogg's biscuit is much greater now. Five years ago we had no voluntary chain, but, from checking with our stores, it is much greater than it was three years ago.

I was in the grocery business six years ago, before the voluntary chain was in. I purchased Shredded Wheat from the wholesale grocer then. There was never any advertising for it, such as posters, unless I made a sale myself. There was not a lot of sale on it. If I made a special, I bought maybe a case a month. In the retail business, on a special, I figure the average store, if he sold one case a week, he would naturally dispose of what he had the following week. Next week, he has to purchase another case and fill that space. He figures he is selling two to one.

When I have that same kind of sale on Kellogg's biscuit, I naturally sell more than in the old days, because then shredded wheat cost more than it does now.

CROSS-EXAMINATION.

THE WITNESS: There are four hundred and seventeen stores in our voluntary chain. I am the manager

and purchaser of that outfit. I operate a wholesale warehouse for those stores. I purchase all the Kellogg biscuit that goes out to these various stores. We cover metropolitan Boston, but not outside. I do not say none of those stores has any shredded wheat at present. Our members are not forbidden to purchase shredded wheat or National products; except that, as their central office does not carry it, they do not carry it themselves, unless they have a fussy customer who wants a package of National shredded wheat biscuit. Then they will go to a store, pay cash for it, and deliver it. We do find some fussy customers who want shredded wheat.

Shredded wheat has been on the market many years, and I have known it for many years. I have been in the grocery business twenty-two years, and I have known shredded wheat all that time. Up to recently when we had this run-in with the National, I had carried shredded wheat and always had had it; but I have found, in taking on a line, the advertising put out by Kellogg makes a difference. Shredded wheat did not do the advertising that Kellogg's do. That is, they did not co-operate with the grocery stores at all. I am speaking now of the old Shredded Wheat Company. They did very little national advertising. I know they carried advertising in magazines like the *Saturday Evening Post*. How many retail grocers would you say read the magazines? The consumer reads the magazines. Sometimes, it would be some little pamphlet in the mail going with the package to the retail stores. That is what Kellogg has done with us. We have used Kellogg's Whole Wheat Biscuit to supplant shredded wheat in our stores.

I have had some dealer helps for Whole Wheat Biscuit that I have not yet had by the Shredded Wheat. Last year, they had the Wheel of Knowledge, which helped me sell the Kellogg product. I am not and

never have been using any premiums for shredded wheat, no blotters or little booklets. I have been twenty years on the one corner and I have never had them.

RE-DIRECT EXAMINATION.

THE WITNESS: That helped me sell at that time, when we had the sale. I think I made three purchases that week. Grocers in our voluntary chain sell the Kellogg biscuit two for seventeen cents when I run a sale. On a special we lower the figure to meet competition, price competition to meet loss-leaders somebody else is advertising. Where it is advanced to ten or eleven cents, if she did not purchase it that day, that is her hard luck. Eight and a half cents is selling pretty close to cost. The price on Kellogg's last year was a dollar-eighty and now a dollar-sixty something, which is why I could run it two for seventeen cents.

RE-CROSS-EXAMINATION.

THE WITNESS: We sell at cost to our members but not to outsiders. He has to be a member and stockholder of the organization to purchase anything. When I buy Kellogg's biscuit at a dollar-sixty-seven, that is a special price only for that week. I get that from the Kellogg Company. If they have a special, they will have ten cases and one case free. I figure out the cost and that is how I give a special to our stores that week. It is a chance for us to make a leader of Kellogg's. I do not mean to say that, when a customer comes in the store and asks for shredded wheat, we just say we do not have it. We try to sell her Kellogg's shredded wheat. We try to tell her about it. We do not just tell her to go somewhere else, unless she insists on having shredded wheat. We have a weekly educational meeting for our stores once a week. I may get a good salesman from Arthur Rush for our meet-

ings, to talk about various points and commodities. We do not instruct our salesmen to send a customer out empty-handed. We tell them to give her something just as good if they can. We would say that Kellogg's Whole Wheat Biscuit is better than shredded wheat. If we have not got Shredded Wheat, it takes the place of shredded wheat.

Re-Direct Examination.

The Witness: Our men have different ways of saying it. One will say: "We do not carry regular shredded wheat but this Kellogg's Whole Wheat Biscuit, which we find a better kind. All Kellogg's products are best, in leading items. That is a staple and so we are carrying Kellogg's biscuit. We have a better demand for it."

Re-Cross-Examination.

The Witness: I recognize the package, Plaintiff's Exhibit 161. The reason that is so good a seller is they can see the biscuit inside and readily understand it is like shredded wheat. On the National, a thousand-dollar-a-month scale makes the seventeen and a half per cent. discount. They were insisting on that, and that they would sell us the biscuit; but they did not sell us the idea of the discount sale. No doubt, if four hundred odd stores, we would sell the thousand dollars worth or more a month and make that discount all right; but we just did not come to terms with the National and did with Loose Wiles. That automatically takes out the Uneeda Biscuit and all the National line, including shredded wheat. Our members are at liberty, if they have a demand for shredded wheat biscuit or Uneeda Biscuit, to take the National line on. We do not prohibit that; but we want them to co-operate with the various companies that are co-

operating with us. I came here today, because Mr. Rush, whom I know, called on me. I do not know Mr. John L. Kellogg.

RE-DIRECT EXAMINATION.

THE WITNESS: I recognize the cards, Defendant's Exhibits 89 and 90, one being the deal price on the deal basis, scaled off on the prices, showing the percentage of a pool carloads, and so forth.

If we have a deal and sell two for seventeen, after that, the price goes to normal, which is about what the chain stores sell them for; but we have our stores competing with them, and we naturally like to have all our stores as uniform as possible. There is a general or consumer demand on it as a ten-cent product, and we stimulate that by lowering it from time to time. There has been an increased demand for Kellogg's Whole Wheat Biscuit in our stores.

DAVID D. KAY.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer. My store is conducted under my own name, one of the Home Circle Stores, a group of dealers banded together for their own advantage, co-operative advertising, and buying and selling co-operatively. They all buy at the same price and sell at the same price, the same week. Advertising material, circulars and so on, is prepared for us, with the space blank, so each grocer can put his own name in. If the majority feel something is worth while putting out that will pay them, they put it on the advertising circulars that day and get it started

I handle Kellogg's Whole Wheat Biscuit and have handled it about two years, when I first knew about it, when it came out with the new package. The other members of our group have also handled it. It has been the subject of co-operative advertising. We have had store and window displays on it. There is a good consumer demand at the present time for Kellogg's Whole Wheat Biscuit. I also handle the National shredded wheat, like Plaintiff's Exhibit 1. Kellogg's sells more, two to one or three to one of shredded wheat. The public does not confuse either one of those two products. I have never had an instance where one product was sent back with the statement they wanted the other.

I should say our consumers recognize there are two brands of whole wheat on the market, because some will call for Shredded Wheat and some for Kellogg's Whole Wheat. The people that have used shredded wheat have shifted from shredded wheat to Kellogg's Whole Wheat Biscuit, an advertised product of the Kellogg Company, which advertises it and puts its name on it.

I think I have done sampling of Kellogg's biscuit in my store. I have co-operated with the Kellogg Company in introducing that biscuit to the attention of consumers. Kellogg has given us samples and has sampled them at houses. We have advertised them on circulars. We give them store, window, and counter displays, and so on. It has created a demand for it. People seem now to recognize a difference between the two. There is no confusion in them. They seem to call more for Kellogg's than for Shredded Wheat. To my mind, there is quite a difference between the two. Shredded wheat is a large cake and kind of flat. Kellogg's biscuit is small and there seems to be more of a flavor to it. People have recognized that difference. I have used Kellogg's at home, had different people in

the house, and I use it in the morning for breakfast. People use it differently. I pour a little coffee over it, then milk and sugar. I have served it to my guests that way. They wanted to know what it was. They did not happen to be in a locality where they could get it, and three or four people spoke about how good it was.

We do not practice substitution in our stores, and you cannot do it nowadays, with the small community or neighborhood stores. A customer knows what she wants and, these days, she is going after it. If a customer asks for something I do not have in stock, if it were something I had never heard of, I would so state and would inquire to see if I could find out about it. If I thought it was something worth while stocking, I would get it.

If somebody asked me for National shredded wheat and I had none in stock, I would tell her so but that I had Kellogg's Whole Wheat Biscuit and ask her to try it. If she did not like it, I would refund her the money. Customers, with me, ask for shredded wheat and Kellogg's Whole Wheat Biscuit. I presume they have been educated to use those names in that way. They have always advertised them as Kellogg's Whole Wheat Biscuit. They ask for them that way. If a customer asked me for Kellogg's shredded wheat, I would naturally hand her a package of Kellogg's biscuit. I would tell her it was not shredded wheat but Whole Wheat Biscuit, put out by Kellogg's. I get the same price for both products, twelve cents, unless we run a special, when they are sold at ten cents.

I handle some of the National Biscuit line, but not all. Some of our group of stores handle some of the National Biscuit line of crackers and some do not, depending on their locality. There are several individually owned stores, which have to go according to whatever their neighborhood calls for. Some do and

some do not. Some of them have not handled any at all.

Lots of the Whole Wheat Biscuit have been coming in cellophane-front packages, like Plaintiff's Exhibit 161. First we got a couple of them in a case, and then I have had cases with all cellophane-front packages. My own store has it on top of the shelf. I have shredded wheat in one place and Kellogg's right alongside, where I keep most of the time. If I run a sale, I generally put it in the windows, tag it, and put some tagged on the counter. I like the cellophane-front package. I think it is more attractive than the other. It gives a person a chance to see what they are getting, if they are not acquainted with it. It kind of dresses it up, to me. It lets the product speak for itself. I do not recall seeing any cellophane fronts in Niagara shredded wheat packages.

We get telephone orders in our store and make deliveries. We never had a mix-up between the two products on the telephone in our store. It is pretty hard to mix them today, because there is so much difference between the two products, it is hard work to get them confused. I know of no instances of confusion, because you get a large biscuit of shredded wheat. On Kellogg's, you have a different kind of end, package, product inside, different shape and size, and everything else. I cannot see any chance of confusion. A person might err in ordering. You cannot put anything over in that respect on the public today.

We have plenty of competition, not so much chain store, the nearest one being quite a little way from me. Competition is pretty keen today. I have not personally ever had any difficulties with the National Biscuit Company about discounts.

CROSS-EXAMINATION.

THE WITNESS: I do not find any other Kellogg varieties sold with a window in the package or bring

to mind any other cereals I have handled sold that way in that kind of package. I have handled and eaten shredded wheat for a great many years. The grocery business is about all I have ever done. I have been in it on my own hook about seven years, and in the business all my life. I have known shredded wheat all my life and used it in my house. It looks practically the same as I always knew it, as it was twenty-five years ago, very well known to the public, and always, to my knowledge, largely advertised, and always asked for as shredded wheat. It is only within the past two years or so that the Kellogg biscuit came along, and our customers preferred it and switched from shredded wheat. I do not think that is owing to the energetic sales efforts of the Kellogg Company. They have gone out and tried to bring it to the public. They have not hidden it away. They have gone out and pushed it. People have learned about it, liked it, and it has supplanted Shredded Wheat in a great many households in my territory, through superior quality. Many people liked the biscuit and more the flavor. They have had to put force behind their sales to get it going. The thing that has kept them coming is the fact it is a superior product, a good product and people like it. Then they forget the old shredded wheat and ask for Kellogg's. Naturally, they ask for Kellogg's shredded wheat, and I have no doubt what they mean when they do, because, when a person has been accustomed to using shredded wheat for any time at all, it becomes second nature to think of it as shredded wheat. It does not make any difference what firm made it. That kind of bischit is shredded wheat, the same as a can of condensed milk. It makes no difference whether it is Standard's or Borden's, or whose.

We have had shredded wheat at home for the last twenty-five years, and we have switched to Kellogg's. We do not take shredded wheat in the home any more.

In connection with the sampling campaign, Kellogg's gave those samples away. They had a small container marked Free Sample, and they gave them out to the houses. I think the group has participated in a Kellogg forty-inch ad with a number of grocers coming in on it. I have not had any personally. My group is the Home Circle Stores, a voluntary organization, for the advantage of community buying. The betterment of everybody concerned is in the air. You cannot do business alone. You have to get together. I do not do business with any other voluntary chain in the grocery business. I have meats, but I am in no other chain. Some of the other members of the Home Circle Stores carry National shredded wheat and other National Biscuit Company products. I handle some National Biscuit Company crackers in addition. I think we get the maximum discount from the National now, 17½ per cent. I get that right in my store, from the National Biscuit Company agency right in town. I must get it through the Home Circle. I am also a member of the Retail Grocers' Association. I do not know whether they get a discount from the National. At one time, I was getting extra discount. We could get it through two or three different ways, a wholesaler in town. We were doing business with Shaw's in Fall River. If I were buying from them, I could get a discount. I also did business with the Rival Foods in Boston, through whom I could get it.

There was some controversy between the National and some retailers about discounts, three or four years ago. At that time they asked them what they could do. They did not recognize them right away. They were tied up with National, but broke out. I could very well do without Uneeda Biscuit, but there was a demand for them. You could get your own throat

cut, so at times you have to do it, things you do not want to do.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not try to substitute the other biscuit for Uneeda. I give the customers what they want. I get 10 per cent. on the National Biscuit. I would not say where it comes from. I know our group tried some years ago to get that discount from the National. They said, if they would give it to the individuals, it would cramp them. It comes right off the face of the bill. I do not buy a thousand dollars' worth of goods monthly. The early dispute between the independent grocer and the National I was not linked up with, as I was not in business for myself. I cannot state definitely about it. From the drift of conversations I have heard, I should say it was pretty stiff. They had a little difference some three or four years ago, but nothing very severe. It was just a word or two, a little talk.

Many different things are transacted today so you do not know if you are getting them all or not. Sometimes you feel you are getting everything coming to you. Other times you see things cut badly and you wonder whether he is really losing money or has something up his sleeve that you have not. When they are selling something cheap, I think sometimes there is something wrong. That was always the dispute: that the independents did not think they were getting the same kind of discount as the chains.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not know that I ever saw shredded wheat sell at a price I could not buy it for. In days gone by, one fellow in town always sold shredded wheat for ten cents. I do not know whether that is exactly what it cost, but I always figured they

undertook to cut them out. Shredded wheat now costs me somewhere about nine and a third cents a package. I bought a case of shredded wheat very recently. I should say there are probably a dozen packages of Kellogg's Whole Wheat Biscuit on my shelves today. I could not tell how long I have had them. I probably bought my last Kellogg's biscuit about three weeks ago.

RE-DIRECT EXAMINATION.

THE WITNESS: I have seen advertising of the shredded wheat at A. & P. two for nineteen cents within a month, nine and a half cents a package, about cost.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not know that I ever saw the Kellogg biscuit advertised two for seventeen. Nothing would surprise me today. It would not surprise me to know that a witness today said they were sold two for seventeen cents.

MRS. BERTHA P. FOWLER.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with four in the house, one a son, nineteen, his sister, and a child. We use Kellogg's Whole Wheat Biscuit entirely as a cereal. We had formerly been acquainted with the National shredded wheat. We had for many years had the regular shredded wheat, as I call it. I prefer Kellogg's biscuit every time. My particular reason is I like the size, just right for serving, and the crispness. It has a little different flavor, a sort of nutty flavor. Another great help in my house, if I get up

late, I can serve Kellogg's biscuit directly from the package. I cannot do that with the regular shredded wheat. I have to put it in the oven and heat it to get away from the glutinous or kind of soggy, chewy taste. If I have shredded wheat, the family say not to serve it cold because they cannot eat it. It says on Plaintiff's Exhibit 1: "Heat the biscuit in oven to insure crispness." I have to do that to get away from the glutinous taste. You cannot do it in three minutes. It takes maybe ten. I do not have to heat the Kellogg biscuit at all, although I have heated it. I serve them with milk and sugar, sometimes with fruit in season.

I first became acquainted with Kellogg's Whole Wheat Biscuit when I got it at my grocery store. I told my dealer, Mr. Craft, of Arlington, if anything came along new to send it up and I would use it if I liked it. That is how we came to have it. I used a package, and it was always asked for after that. I ask for Kellogg's Whole Wheat Biscuit. If my grocer sent me anything new and I did not care for it, he would refund my money.

I came to testify today because somebody came to my door and asked me to come here. I never saw him before, and I do not know any of the parties to this dispute, did not know there was such a thing.

CROSS-EXAMINATION.

THE WITNESS: I do not know how he got my name. I suppose it was from the grocer. I had been using the regular shredded wheat, like Plaintiff's Exhibit 1, twenty years or more. I had always used them and had been very familiar with the product for a long time. It was a well-known product. I had always asked for it as shredded wheat. It always came in a package like Plaintiff's Exhibit 1.

My grocer recently induced me to try Kellogg's biscuit. He sent it to me a couple of years ago. I

tried it, liked it, and have been using it ever since, instead of Shredded Wheat, for the reasons I gave you. I have noticed in print on the side of the Kellogg package the number of biscuits and the weight; that is about all. I do not believe I ever noticed the suggestion on the back to split and toast them and serve with butter. I never tried to use shredded wheat any other way than just as a cereal. I take it out of the package, heat it in the oven, and put it on the table. When I do that, it is a crisp biscuit after ten or fifteen minutes' heating. I and my family used and liked it before we knew about Kellogg's biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I had heard of Kellogg before I bought the Whole Wheat Biscuit. I do not recall using any of their other products. I am not in any way related to Ralph C. Fowler, 19 Suffolk Street, Medford, a witness here today. There is no connection between us. I do not know him. One Fowler is all I know. I know him well, and I know he likes his Kellogg's Whole Wheat Biscuit.

PERCY W. WITHERELL.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am treasurer of the Warren F. Witherell Company, cash-and-carry self-service grocers. We get some telephone orders. We handle Kellogg's Whole Wheat Biscuit, for which there is a consumer demand in our store. We have carried it since 1928. It was at first known as Kellogg's Shredded Whole Wheat Biscuit. It has been known as Kellogg's

Whole Wheat Biscuit maybe two or three years. Other names under which they ask for it are Kellogg's shredded wheat, Kellogg's wheat biscuit, indiscriminately. We deliver the Kellogg biscuit under any of those names. We have never had the Kellogg product returned by anybody ordering it under those names who said it was not what she wanted.

I was out of Kellogg's biscuit around the last of February for three or four days. One or two of my men came to me rather excited because I did not get it in right away. They said some people ask for Kellogg's and would not accept the other. They do not substitute in our store. We simply tell them we do not have Kellogg's and ask if they want the other. My customers would not take it. They said they wanted shredded wheat, Kellogg's. Of the two, Kellogg's sells more in our store, approximately two or three to one.

I have opened the packages of Kellogg's biscuit and seen the product physically. It is wheat that has been shredded and baked in the form of a biscuit. The old Niagara product is a similar type biscuit, the Niagara being a larger biscuit than Kellogg's. They are sold in packages of a different shape and color. We handle the Kellogg line. There is a recognizable family resemblance between the different Kellogg packages, such as corn flakes, etc. The Whole Wheat Biscuit package is in that family line of packages, in colors and general appearance. The name Kellogg's on that package is, in my opinion, very advantageous in the sale of the product, because of Kellogg's general reputation, especially corn flakes. People who had tried the others would take over a certain good-will with it.

I have never heard of a customer having a standing order with her grocer to send her new products. That is rather unusual. I offer customers new products that come out. It is more or less understood that, if she does not like the product, we will make a rebate

to her on anything not very satisfactory. We would make good.

We have a lunch counter and have Kellogg's biscuit in the little individual packages. We do not handle Niagara shredded wheat in the individual packages. Our customers seem to like Kellogg's at the counter in individual packages. I have been a consumer of Whole Wheat Biscuit, Kellogg's and have tried it. I had also been familiar with the other Niagara biscuit. As to taste, personally, I prefer Kellogg's. We also handle the National crackers, Wheatsworth Biscuit, cereal, and Holland Rusk. We get seventeen and a half per cent. off the bill. I do not pretend to say that is the maximum discount given. We doubt it, from past experience with them. We do not buy a thousand dollars worth of products a month, but we get the seventeen and a half per cent. discount. We have not always gotten that in the past. I have had a great many discussions with them about discount. We thought it was unfair the chains should get a better discount than we, which was our opinion they did. In recent years, the National has given some discounts they refused to give us in former years. Not giving those discounts caused a great deal of dissatisfaction. I would say the acquisition of Shredded Wheat by the National hurt the sale of the biscuit very much.

We have kept a constant display on the counter for several months of quite a number of the cellophane-front packages of Kellogg's biscuit. It did a great deal of good in attracting the attention of customers. It was a good selling feature. We kept that particular counter display constantly for several months, last Spring, through last Summer, and quite a number of window displays. Those and floor displays are customary methods of introducing a new product to the attention of customers.

I went to Worcester when the first Niagara shredded wheat machines were in operation, before it was on the market. I saw it at that time. I was a small boy. I know of other shredded products, like shredded coconut and shredded codfish, which are well-known products on the market. Shredded codfish is codfish that has been shredded up into fine shreds. Shredded coconut is simply the white meat of the coconut, shredded and probably treated with sugar. Since the introduction of corn flakes, they have outsold Niagara shredded wheat a great many times. Originally, there was nothing of that kind except shredded wheat. I think Maple Flakes was the first dry cereal after that. I think it took many years for shredded wheat to be properly introduced to the public for their consumption. It took them a long time to get going. I do not recall when Kellogg's flakes were just known as toasted corn flakes, but I think we ordinarily spoke of it as corn flakes, and then people commenced designating it as Kellogg's Corn Flakes. There were other brands at that time.

I do not think the entry of the Kellogg Company into the whole biscuit line has decreased the general volume of demand for that sort of product in any way. The increased sale of dry cereals in contrast to those which have to be cooked, has been very marked. There are so many different brands on the market, it is hard to say whether this type of biscuit has definitely increased or not. I am inclined to think it has. Much has been said about the advantages of whole wheat as a proper food, in national talks on health. I think that has helped the entire business.

Since the first introduction of the product, the Kellogg Company has, I think, succeeded in impressing that new whole wheat biscuit on our type of customer, teaching them to ask for it.

CROSS-EXAMINATION.

THE WITNESS: No individual cereal has a very large or predominant sale with us. Since we commenced to buy Kellogg's biscuit, I think we bought three hundred and six cases. In that time, we bought a hundred and twenty-four of Niagara, thirty-six to a case, while Kellogg's is twenty-four. Before the coming of Kellogg's biscuit, we bought more shredded wheat because there was not any other kind, nothing else to buy. We bought the same quantity of it then, however. I cannot, without figures, explain how shredded wheat is still selling in the same quantities after the coming of Kellogg's. I imagine there was probably more of the Niagara then, than is now sold. The coming of Kellogg's biscuit would naturally take some customers who had been using Shredded Wheat, Niagara. It was always known as just shredded wheat, I think, until Kellogg came into the field. It was known as shredded wheat, for years and years. There was also Ross' Biscuit, I recall, on the market a short time. The box was different, a red box of a different shape, but the biscuit was about the same.

I remember shredded wheat being made in Worcester many years ago. I have been active in the grocery business since 1899. Shredded wheat has been carried in that store all the time I have been active. The business has been going about eighty years, and it is one of the oldest grocery businesses in Massachusetts, right near the North Station. It is an old-line service and cash grocery store. We tried to swing over as much as possible to cash-and-carry. For many years, it was a service store; and, for many years, when a customer called on the telephone and asked for Shredded Wheat, she got this well-known package I recognize. With the single exception of the Ross Biscuit, there was, I suppose, nothing else that would fill that order in all those years.

We think we can buy our Whole Wheat Biscuit as cheaply as the chain stores can buy them. We do not know anything. We get seventeen and a half per cent. off the bill. I deal with the Boston Wholesale Grocery to some extent. That discount is irrespective of the amount I buy, less than a thousand dollars a month.

We have not lately had counter displays of shredded wheat. There was never any profit, so there was no use in doing it. We make some profit on the Kellogg line. We sell both products at the same price, eleven cents. We sell Kellogg's biscuit in packages at the lunch counter. We do not serve the Niagara shredded wheat there. I know them both as shredded wheat. If a customer asks for shredded wheat, I do not know which she wants, now, I suppose. I really have to ask her which one she wants. We do not serve National Biscuit shredded wheat at our lunch counter. We might, if somebody asked for it. We have, at times; but we do not have the individual package of that biscuit.

We have had displays of Kellogg's Whole Wheat Biscuit but never a demonstration in our store. We never gave away a package of Kellogg's with a deal of Kellogg products.

We used to use the National Biscuit shredded wheat at home and had it for a great many years. When I tried the Kellogg biscuit, it pretty largely supplanted the old shredded wheat. We have practically nothing at home but Kellogg's now.

RE-DIRECT EXAMINATION.

THE WITNESS: If I remember it correctly, the Ross whole wheat biscuit was in a red carton. I have seen a carton like Defendant's Exhibit 91 before. It looks like the Ross Biscuit carton, and it is so labeled. It looks like my recollection of it. I do not believe I handled it. It was shown to us and we expected to handle it. For some reason we did not get it.

MRS. BEATRICE KELLY.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with my husband and daughter in the household. We are consumers of Kellogg's Whole Wheat Biscuit, having used it about a year. I was in the store one day looking for a new cereal. I tried it, because I always try all Kellogg products. I saw it there and it attracted my attention. From the picture on the box, I knew it was a biscuit. I bought some of it. I had never used the National shredded wheat biscuit. I liked the Kellogg biscuit very much, the flavor, crispness, etc. I have never tried any other biscuit. I am satisfied with this.

CROSS-EXAMINATION.

THE WITNESS: I had seen shredded wheat before but had never tried it. I may have seen their ads and displays in stores, but I never paid any attention, because I always buy Kellogg products. I like them very much. When I saw Kellogg had something new, I tried it.

EUGENE S. BOARDMAN.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of the supply department of Field & Coles, insurance. I am a consumer of Kellogg's Whole Wheat Biscuit and have been for all of two years. It first came to my attention when I went into Witherell's, on Portland Street, and asked for a package of shredded wheat.

He said, "Kellogg's or Niagara Falls?" I told him I did not know there was more than one kind. He said, "We have Kellogg's." I said, "All right, I should like to try it." I used it, and I have used it since. I like it very much better than the other. I came here to testify, because someone asked me about this case. The last time I went to Witherell's, they did not have Kellogg's but said they would have it Monday. My wife used Scotch Oats and asked me to get some Kellogg's shredded wheat. I got it yesterday. I came out of Witherell's last night in a hurry to catch my train. A young man, Mr. Hurd, stepped over and asked me if I just bought a box of Kellogg's. I told him yes and I had been using it. He asked why, and I said it was because I like it very much better than the other. He said they were threatened with a suit, so I gave him my name, address, where I live and where I am employed, and started for the train. I got to thinking afterwards I had not treated that salesman politely. I used to sell. I called their office this morning and said, if I could do anything, I wanted to help. I wanted to buy the Kellogg Biscuit. It was not that I knew Kellogg's or this salesman.

CROSS-EXAMINATION.

THE WITNESS: I do not know Mr. Rush. I have not the least idea who he is. It just happened accidentally, as I told you. I had been using shredded wheat for years and years, I guess ever since I can recollect anything. That is about the only product that did not change its price during the war. I recognize the package, Plaintiff's Exhibit 1. I have been to Niagara Falls and seen the factory. I never was through the factory. At any rate, I have been using that for many years, probably twenty or thirty. It is pretty safe to say it is a household word, just like the old Arabian Balsam. My mother would not be without it and would

not permit us to be without shredded wheat. She had gotten that for thirty or forty years. It was thirteen cents, if I remember right, during the war.

Some time ago, when I asked for shredded wheat at Witherell's, they called my attention to Kellogg's shredded wheat, and I liked it better; so I switched over from Niagara shredded wheat to Kellogg's shredded wheat. I go there now and ask for Kellogg's shredded wheat, referring to this Whole Wheat Biscuit. We traded with Atkinson, in Reading. The last time I asked, he did not have Kellogg's. I used to get shredded wheat, and now I have become a Kellogg fan instead of a shredded wheat fan. Do not forget the bananas that go with it.

MRS. CATHERINE C. HANEY.

Deposition taken at Boston, Massachusetts, March 28, 1933.

Direct Examination.

The Witness: I am a user of Kellogg's products, including Whole Wheat Biscuit. I have used it since Mr. Burroughs brought it, about a year ago last month. I use as many Kellogg products as I can. I have used the National shredded wheat. It is a longer biscuit. In making my choice, I am always interested in advertising products, because my line is advertising. In choosing that, I made up my mind I prefer Whole Wheat, because it is smaller, and, for my particular interest, I do not leave any on the plate. I have continued using it since as much as I wanted to. I vary my cereal every morning, sometimes eating Educator Crackers. I used the Kellogg biscuit sometimes.

Cross-Examination.

The Witness: I have known shredded wheat a long time, because they were advertisers of it. I am in the

advertising business, and one of the gentlemen in our office covered New York City. I was his secretary, handled a lot of the copy, and know the product. I know shredded wheat has been extensively advertised and was a very well-known product for many years. They spent a lot of money advertising it. It was just a question of size and of fitness of the biscuit for me. I had used shredded wheat. It was served to me once or twice, but, for my own use, I prefer Kellogg's Whole Wheat Biscuit. In the old days, not having the Kellogg biscuit, if anybody wanted that kind of biscuit, he had to take shredded wheat. It was the only one but not the one I would have chosen. When Kellogg's biscuit came, I took it because I liked it better for my purposes. I use Kellogg's biscuit now, as it is my favorite. I no longer use shredded wheat, I think. If it were served to me when I was visiting outside, I would not refuse it. I prefer Kellogg's because of the size.

I came here today because I know Mr. Burrows in their organization. I work once a week or so for him. I hope they will be one of my accounts. I was with Mr. Burrows with the *National Sportsman* advertising staff. He worked very hard with me, and I was very appreciative of the creative work he tried to do. I came to see him, made inquiry for him, and they asked me if I would tell what I know about the biscuit, while I am here. I am very glad to.

RE-DIRECT EXAMINATION.

THE WITNESS: I never had business relations with the shredded wheat company at all. I do not have with Kellogg nationally. I did national work before. The *National Sportsman* is a national publication and they solicit national accounts. Now I am in the direct-mail line locally, I have only local accounts. As far as I am aware, my testimony has not been colored by friendship for either company. I have just given you the facts, as a consumer of the two products.

MRS. ELEANOR AGNES WILKES.

Deposition taken at Boston, Massachusetts, March 28, 1933.

Direct Examination.

The Witness: I keep house, with my mother and sister. We are now consumers of Kellogg's Whole Wheat Biscuit, having used it about eight to ten months. I had been using shredded wheat, but it got stale so long that I was disgusted with it. I went in the Deapness Market one day and saw this other new biscuit, ate it, liked it, and have used it ever since. I also use their Pep. I like their other products, but I do not care for corn flakes.

Kellogg's Whole Wheat Biscuit is small, just convenient for me. I like it in the morning. It was fresh when I happened to buy it. The National Shredded Wheat was very stale. I have bought it many times in the summer when you would think it would be fresh, and it was not.

Cross-Examination.

The Witness: My mother used shredded wheat off and on four or five years. We do not eat it regularly. It was a well-known product for many years. We had it off and on at home, and it got stale many times. Then we came across Kellogg's biscuit, which seemed better and tender. I happened to know I could use Kellogg's biscuit instead of shredded wheat, because I saw it on the table in the Deapness Market and tried it, just as you see it now. It was in a package, two biscuit in the package, with a picture of two biscuit in a dish, I mean, something like that on Plaintiff's Exhibit 161. That attracted my attention, and I saw it was something I could use instead of shredded wheat. I have not bought any more shredded wheat since. I bought Kellogg's.

RE-DIRECT EXAMINATION.

By MR. CLARKE:

RDQ. 23. Mrs. Wilkes, by *shredded wheat* what did you understand Mr. Vilas to mean? He asked you whether you have used shredded wheat. What kind of product is that?

A. Well, it is a biscuit. It is a larger biscuit than what we are using now, and it seemed to me to be, if I might use that word, tougher. I do not know whether that is the proper word, but I like this other biscuit much better.

ALFRED B. CRAFT.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a market man, running my own store under the name Craft's Market, since March first, formerly Brown's Market. I have been connected with the grocery business twenty-two years and with this store three years. We carry Kellogg's Whole Wheat Biscuit and have ever since we opened, about three years ago. There is a consumer demand in our store for that product.

We also sell the other shredded wheat made by the National Biscuit Company. The sales of the two products are about equal, fifty-fifty. We have featured Kellogg's Biscuit. Twice a week we run specials, and we featured it quite often then, with window and store displays. The one that made the most sales was a display with the open front, showing the biscuit. The other day, a lady from Hartford, Connecticut, said it was hard to find, that she had tried in several places. Then she saw it in my window and

came right in. She was in several stores in Arlington trying to find it. She wanted a regular package, but she saw the open-front packages in my window.

We find no confusion in our store between the Kellogg biscuit and the Niagara shredded wheat. I never had a customer return either and say it was the other she ordered or wanted.

Customers usually order them by the name of Kellogg's Whole Wheat Biscuit. If a customer should ask for Kellogg's shredded wheat, if I were taking the order myself, I would not leave it that way. I would want to find out whether she wanted shredded wheat or Kellogg's Whole Wheat Biscuit. I would ask her. One of our rules is that we ask. I suppose another clerk might not. I always ask what she wants, when I take an order. I do not recall anybody ever asking for it as Kellogg's Shredded Wheat. Aside from specials, we sell both products for the same, eleven cents a package, unless there is a special sale on.

We handle the National Biscuit line of crackers and cakes. We are a B. W. G. Store, Boston Wholesale Grocery. We get 17½ per cent. discount on National goods through the New England Stores, irrespective of whether we buy a thousand dollars worth a month. It is taken off every bill, whether it is one dollar or ten or twenty, at the time we purchase. We did not always get that discount from the National—perhaps in the last year and a half. We had at that time four stores and bought enough for the four to get twelve and a half or fifteen. The chain stores were then getting seventeen and a half. There was some dissatisfaction among the independent retailers because of that. We always felt a combination of grocers should have the same discount as chain stores. We were unable to get it from any of the biscuit companies until recently. We get it now from either

Loose-Wiles or National. We are a service store, making deliveries, extending credit to a certain amount where it is justified, and two-thirds of our business comes in by telephone.

We handle Kellogg's Kaffee Hag, Pep, Rice Krispies, Corn Flakes, as well as Whole Wheat Biscuit. The name of Kellogg on that line is of great value as a selling medium on new products. I introduced Kellogg's Kaffee Hag lately and found Sanka Coffee better known in that territory. When I told them Kellogg made it, it seemed to sell much easier. The name seemed to carry a certain guarantee. At home I have used the Whole Wheat Biscuit in the summer time. There are three people in our immediate family. The whole family enjoys Whole Wheat Biscuit. We formerly used shredded wheat. I myself prefer Kellogg's Whole Wheat Biscuit. I have not had a package of shredded wheat in the house since I first tried Kellogg's Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I used shredded wheat at home and have known it for many years. It is one of our old cereals. We have used it for years. It was one of the old standbys for grocers. I do not think we ever sold it for ten cents. Now that you speak of it, I remember Shredded Wheat Company had it for ten cents, and, when National took it over, they put it up to eleven. I can make a little profit on it at eleven cents. Kellogg's Corn Flakes at seven cents is one of our best cereals. We make a profit on it. Regularly we sell them for nine and sold them last week two for fifteen, at a profit. There are quite a good many sales of Kellogg's Corn Flakes. It is quite a popular leader. I do not know that Kellogg's biscuit

has supplanted shredded wheat among our customers in a great lot of cases. I think it has a good deal in some cases, but much of it has been built up itself. We sell almost as much shredded wheat as we do of it. We have some customers who have switched to Kellogg's. I am one myself. There have been some; but it is among a lot of new brands. In the twenty and more years I have been in business until Kellogg's biscuit came on the market, there was only one product of that particular type. I remember having Ross' Biscuit several years ago, somewhat similar; but it did not go across. I had one case of Kellogg's Wheat Flakes at one time. I got rid of it, but it was a slow seller. It seemed to be one of those things that did not take. Wheat Flakes were not so popular. Wheaties was the first popular one.

When I say there is no confusion between the two in our store, the packages are altogether different. When our customers come in and ask for Kellogg's shredded wheat, I ask them what they mean, to find out which they want and avoid any confusion. That is what I have in mind, because, when people ask for Kellogg's shredded wheat, there might be some confusion in their minds. They might want Kellogg's Whole Wheat or shredded wheat. I am not sure, so, in order to avoid any question, I ask them. The same is true on telephone orders, the same as if they ordered round steak. They might order rump or porterhouse.

I would not say they never have asked for Kellogg's shredded wheat. That might have happened to us, and it might have happened over the telephone. I never heard a woman refer to it that way. We do get orders for shredded wheat over the telephone, and we know what they want. That is what they have been ordering for a great many years under that name.

RE-DIRECT EXAMINATION.

THE WITNESS: Defendant's Exhibit 91 is the Ross package I referred to, which I have seen. It was on the market a while. We had one lot of it, but it did not seem to sell. It was quite a few years ago.

JOHN E. TORPHY.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the grocery business and have been for thirty-five years. I carry Kellogg's Whole Wheat Biscuit, for which there is a consumer demand in my store. I have heard comment from people who buy them that the small biscuit is just enough for a child with no waste. Sometimes they say two are just nice for their families. Other times, they say they like Kellogg's goods because they keep them fresh and all their other products are nice, so they know this must be. I always have four or five packages National shredded wheat on hand. Before, I used to have trouble because they were so long on my shelf without changing, and they became wormy. Kellogg came along, took care of their goods, their windows, and everything, and created a demand. They come into my store and pick Kellogg's in preference to National shredded wheat. They have confidence in my opinion of the goods. I sell a full case of Kellogg's biscuit to four packages of shredded wheat. That is how my trade want it.

My trade ask for the Kellogg product by saying, "Give me a package of Kellogg's wheat biscuit." They come in and pick it right up. In my opinion, the

only people I sell Shredded Wheat in my store are relatives of Kenny, salesman for the National. They seem to pick his goods, come in and take his packages. I suppose he might have asked them to do that. The general trade will take Kellogg's Corn Flakes, Rice Krispies and Kellogg's shredded wheat and will go off satisfied, without any ballyhooing. So in my store, I think the demand for the National product has dwindled to relatives to the National man. I would not want him to feel I noticed it. It might hurt my business to make that statement. Some of his relatives come in my store, and, when they want a package of shredded wheat biscuit, take his. I do not tell them what to take or say a word. The general trade want Kellogg's.

I have not experienced any confusion between the two. I have never had anybody buying Kellogg's send it back and say they wanted the other kind. I have seen people send back the National brand and say it was Kellogg's they wanted. It happened yesterday afternoon. A little boy from up the street, Ahrens, came in and said to my girl: "A package of shredded wheat biscuits." She delivered it, and he came back and said, "My mother does not want this. She wants the other one." It makes no difference to me. I am only here to tell you the truth, as I find it in my trade. I am not co-operating with the Kellogg Company any more than I have been with the National Biscuit Company. I have not advertised. I give both products equal displays. The National Biscuit man works very hard to put them in your store. He put in two packages and said to let him put in enough so I could keep a couple on hand to help him out. He said he was supposed to have distribution around all the stores.

I have not been buying shredded wheat for a long time. He put in four boxes on consignment. His

manager expects him to make a showing, and I permitted him to put in four without really buying them. I would not handle them at all. It was on account of Tom himself. He is a pretty good kind of fellow. His relatives are around there. He probably put in a few packages for them; but my trade is entirely Kellogg. I am a consumer of the Kellogg product. I had sometimes been a consumer of the Niagara product before. I certainly prefer the one I am using now.

Some time ago, before National took it over, it would be in the store as long as I liked to leave it there, until I sold it. In hot weather, they would get grubby. I used to put them out, and it caused a lot of dissatisfaction in my trade. As long as the Kellogg people have put out theirs, it seems I have never had a complaint. When I opened them at home, we always felt they are fresh, because we use a lot of Kellogg products. I guess everybody does today. They have nice goods. People will think that, as everything else is nice, Shredded Wheat must be all right, too. They both sell at the same price. I get twelve cents for mine.

CROSS-EXAMINATION

THE WITNESS: I have no chain-store competition near me. There are chain stores in Fall River which sell shredded wheat for eleven cents. They do have Shredded Wheat. I do not know if they have Kellogg's. I am in a kind of exclusive section, up on the highland. It is a zoned district. I am alone. I operate a service store, have telephone orders, and so on. We carry some of the National products, crackers, and so forth. I have always had them. During thirty-five years, I have carried shredded wheat biscuit. It was a well-known product during the time I have been in business. I have always had it on hand.

During all the time it was on hand, I knew it as shredded wheat. I knew what they meant when they called for that, and that is what they asked for. There was a time when Shredded Wheat Company transferred its assets to the National Biscuit Company. Then I did not carry shredded wheat, any of it. I had the Kellogg product. To the extent my customers were interested in that kind of product, it supplanted shredded wheat biscuit. They called for shredded biscuits, and I had them there. They sometimes asked for shredded wheat. That is what they call them. As a rule, they call them shredded wheat biscuit. They put Kellogg's on and call them Kellogg's shredded wheat biscuit. We have people ask for shredded wheat and ask the customer what kind she wants. She will say she wants this package or that package. Whichever she points to, I will take it. I have four packages shredded wheat. I always had a case of Kellogg's, right on the shelf with the others. Some of them have the cellophane front. They are now featuring the geography chart as a premium with two packages. That is a very good selling point and makes it move. Lawyers in town have called me up and asked me to send over a couple of packages to their home, to get that chart. It is quite a thing.

I am friendly with the Kellogg people. There is a nice lot of fellows there that come in and take care of my windows and seem to be nice. The National Biscuit Company gives me no service at all. He just wants to get it in there to have it to sell. There is nobody to help you do anything else. I carry maybe eight or ten of the National Biscuit crackers. I usually use the Alantic at Providence, because the Home Circle stores are linked up with them. I am a member of that. I get a discount through those stores on my National goods, not through the Economy Grocery Com-

pany. I just buy a few there. I belong to them and am supposed to buy more from them, but I have always been a high-class store. I feature their goods but do not stick to everything.

I cannot tell you how long it has been since I had the National shredded wheat in my house. I never bring it home. I used to a long while ago, but now I use all the Kellogg products in my home.

MRS. MARY G. MILLER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

Direct Examination.

The Witness: I am a housewife, and my husband is not working and is home with me. I also have a son and daughter, four in the house altogether. We are all consumers of Kellogg's Whole Wheat Biscuit. I have used that product almost two years, since it first came on the market. During that time, it has been known as Kellogg's Whole Wheat Biscuit, under which name I order it.

It first came to my attention through a sample at the door It was a hundred per cent. to me. I ordered it right from them and have continued to use it. If my grocer sends the other, I return it. He can verify my statement. If he sends Niagara shredded wheat to me, I return it to him.

I like Kellogg's biscuit, because it is better roasted, much better flavored biscuit, very firm and crisp. There are fifteen Kellogg's biscuit to the package and they are smaller biscuit. I noticed that when the sample came to my door. Since I had the sample delivered, I have continued to use Kellogg's. We have it every morning. We use it for breakfast, a biscuit and a cup

of Kellogg's Bran, except Sundays, when we use Kellogg's Corn Flakes. Kellogg's name on the package means quality, which is what counts with me, what I am looking for.

CROSS-EXAMINATION.

THE WITNESS: I know about this old shredded wheat. I have seen packages like Plaintiff's Exhibit 1 and used it. I have known about it for a great while. It is one of the old staple foods. My husband used cooked cereals before Kellogg's, but I should say three or four years before I knew Kellogg's biscuit I knew shredded wheat. I have used it off and on for some time. I would say I have known it longer than a few years. I have not been housekeeping as long as twenty years. Somebody left the Kellogg biscuit at my door and I sampled it, liked it, and have continued to order it at my grocer's. Since that time, I have not ordered any shredded wheat. It has taken the place of shredded wheat on my shelf partly, but I used a cooked cereal before. Where I formerly used shredded wheat, I now use Kellogg's biscuit. I would not use the other, now. I would never ask for Kellogg's shredded wheat. I am very careful to specify Kellogg's Whole Wheat Biscuit. I came here today because a gentleman asked me, somebody I do not know connected with the Kellogg Company. I suppose he got my name from the grocer. I buy my biscuit at Mr. McCorkle's, in Collingswood, about three miles from Philadelphia, in New Jersey, across the river. I was willing to come down here to tell about it, because I was coming to town. Mr. McCorkle knows I never bought anything but Kellogg's, because I am satisfied with it. I do not expect the Kellogg Company to pay my expenses. There was not much expense to it. I was coming to town anyway.

RE-DIRECT EXAMINATION.

THE WITNESS: I have not asked anything for expenses. I have asked for Kellogg's Whole Wheat Biscuit; they sometimes sent the other one, the old shredded wheat. I returned it, because my family would not eat it. I returned it to the grocer.

MRS. WILLIAM T. WESCOTT.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have an apartment, just my husband and myself. We are both consumers of Kellogg's Whole Wheat Biscuit and have used it about a year and a half. Mr. Hall, the Quaker Store dealer, said it was a new product which he would like us to try. We did and have used it ever since. He is our grocer, at the Quaker Store. We always used the other biscuit before. We prefer Kellogg's. They have a sweeter taste, browner, and I think they are more tasty. Shredded wheat is a larger biscuit. I order the Kellogg biscuit just as Kellogg's Whole Wheat. A strange grocer, if you speak of them, will try to send you the others. I usually send them back and say we do not want them. When they do not have Kellogg's we will wait until they come. Sometimes we send it back by the boy. If you try to take them back yourself, they will try to stick them on you. I came here today as a witness because their representative came to us, some man I had not met before came to my door.

CROSS-EXAMINATION.

THE WITNESS: He probably got my name from a grocer, said he was a Kellogg representative, and asked me if I liked Whole Wheat Biscuit and if I would come down and tell about it.

The first time I saw Kellogg's Whole Wheat Biscuit, I was in the grocery store, buying shredded wheat, that day, and he asked if I ever saw the other. He said it was the same thing and induced me to buy it. I liked it better. Since then, I have not used any other.

I have known the old shredded wheat several years. Plaintiff's Exhibit 1 has been very familiar to me for many years. I do not know whether the box has been changed or not. I have always known it by that name, and I have always asked for shredded wheat. On this day the grocer showed me the Kellogg product, I had asked for shredded wheat. He said he had Whole Wheat, a new product of Kellogg's. He did not say anything about shredded wheat. He just said to try them and see if we did not like them better. He showed me the box, which was like this panel in Plaintiff's Exhibit 161. It did not have a window in it then. It was just a box, with a picture of the biscuit in a dish on each panel. Ever since that time, I have used Kellogg's biscuit instead of shredded wheat. Since then, whenever they sent me shredded wheat, I have sent it back. If you go back yourself, they always try to argue you into it, but I always wait until the other comes in. I ask for it as Kellogg's Whole Wheat, not as Kellogg's shredded wheat.

EWALD GROBEL.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have a restaurant and cafeteria, the Fourth Street Cafeteria, at 129 South Fourth Street. There are twelve of us in all at present. We handle Kellogg's Whole Wheat Biscuit. There is a cafeteria railing, and we have it all on the counter,

each one in a bowl, in a container, the little individual carton. When the customers pass by, they pick up whatever they see. It is in a container like Defendant's Exhibit 80, put in the bowl, but not opened. The customer opens it himself. If he desires, we open it for him.

Some years ago, we had another product in the biscuit line like this. We do not handle the other one. I saw it once in another store. I liked it a whole lot better, because that was two in one. The other product came in a larger package, like Plaintiff's Exhibit 1. We do not sell the other kind, because, after it was opened and standing around a while, it was not right. When I saw Kellogg's, I liked them better and put them in, myself. I bought them through some jobber on order. We have not gotten any for at least a month.

I never had a customer complain about not being able to get any other biscuit than Kellogg's. We have corn flakes and several other Kellogg cereals. We do not get an assorted case. Sometimes, the Kellogg salesman stops to see if everything is all right, whether we are serving them right. They get the products for us through the wholesale grocer. We handle the National Premium Saltines, and Wheatsworth, and Uneeda, in small packages. I get them direct from the National bunch at Glenwood Avenue. Once in a while, the National salesman steps in to see how everything is. They do not come in as often as the Kellogg men.

I have tried the Kellogg Biscuit, as I try everything that comes in my place, whether I like it or not. I do not care for any of that stuff, even with fruit. I would not say that Kellogg's biscuit is any worse than any other. Whole Wheat Biscuit with cream in our cafeteria is ten cents.

I absolutely prefer to handle those biscuit in the individual size rather than the big size, either that bis-

cuit or the other. I think the customers like it better. My largest cereal seller is Corn Flakes. That is also serviced in our restaurant in the individual containers. All the breakfast food is handled the same way.

I have been in this particular business about ten years this December. Before that, I was in the saloon and restaurant business. When prohibition came, I got out.

CROSS-EXAMINATION.

THE WITNESS: We sometimes give an order to the Kellogg Company and they deliver it through the jobber, Mr. Salus. I have been ten years this December in this cafeteria. We have twelve people there altogether. We do not serve many at breakfast now. Lunch time is the biggest time of the day. For many years, we carried shredded wheat like Plaintiff's Exhibit 1. I had to take it out of the package and put it in the dish for the customer. We always had Shredded Wheat on hand before I saw Kellogg's biscuit. It is safe to say that I have been familiar with shredded wheat for many years, probably before I went in the cafeteria business; but I would not have heard much of it before that. I knew of it, had heard of it before, and had visited the factory up there. That is all I know about it. I do not eat it. I was not aware of the fact I could get shredded wheat in the individual package, like Plaintiff's Exhibit 21. I never heard about that. The National salesman did not tell me I could. They may have been around when I was not in. I see that package now, somewhat similar in size and shape to the Kellogg package Mr. Clarke showed me. I know now I can get the National shredded wheat in the individual package.

I first saw Kellogg's biscuit like Defendant's Exhibit 80 in one of the stores, a long time ago. When I first saw it, it struck me that here was something

like shredded wheat, which I could get in the individual package, so I started to buy it and ceased to buy shredded wheat. The gentleman came in, saw my customers, and sold me Kellogg's shredded wheat. I have used it to the exclusion of shredded wheat since then. I have no menu. I just set a carton of it right out on the counter, as they go by.

MRS. WILLIAM C. STOKES.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

Direct Examination.

The Witness: I am a housewife. There are two of us, but my dog eats this, too. He loves them, eats two every morning. Sometimes I only eat one myself. I refer to Kellogg's Whole Wheat Biscuit. I have used them in my household about a year and a half. It first came to my attention when I went over to the Quaker Store at the corner. Mr. Hall said I might try it, so I took home a package. All I used to get was like Plaintiff's Exhibit 1. Whole Wheat is what I am using now. I order them as Kellogg's Whole Wheat. One time he was out of it and said he had the other. I said I did not care for the other. I like the size of these, think they are a better flavor, not as coarse. I have been using them since. My husband and my dog also like this biscuit.

My dog has tried the other biscuit. I got them before these came out, a year and a half ago, since Mr. Hall first told me about it. I am here today because Mr. Hall gave my name to a man who came to see me. I never saw him before he came to my door.

Cross-Examination.

The Witness: I used shredded wheat a good many years before Kellogg's biscuit came out. I have known

shredded wheat pretty nearly all my life. When I was a little girl, my mother and I took a trip to Niagara Falls. I think my brother went through the factory, but I did not. I remember seeing the Home of Shredded Wheat up there. The name shredded wheat has been familiar to me for several years. When I started housekeeping, I was familiar with shredded wheat. I had them until Kellogg's biscuit came out, but I never got them afterwards. I never bought it again. When I learned about Kellogg's biscuit, I was in Mr. Hall's store shopping for Shredded Wheat. He said, "Here is this. Would you like to try it?" I took it home, tried it, and liked it a lot better. From then on I stopped getting shredded wheat, never bought it any more. Kellogg's has taken the place of shredded wheat in my household, including the dog. I cannot say whether the dog likes Kellogg's better. He used to eat shredded wheat, but he eats everything, except he will not eat canned spinach.

MRS. WALTER GRIMM.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

Direct Examination.

The Witness: I am a housewife, with my husband. We are both users of Whole Wheat Biscuit, a Kellogg product, like the package, Plaintiff's Exhibit 161. I have used those about a year and a half. It first came to my attention through a niece of mine. I had shredded wheat biscuit, like Plaintiff's Exhibit 1. She told me of Kellogg's biscuit and said she liked it better. I said we would try it. After we did, I liked it better, myself. I have continued to use it. It is more toasted, I think, and there is a better flavor to it.

Since I began eating Kellogg's biscuit, I tried shredded wheat biscuit again. I went to my grocer for Kellogg's and they did not have any on hand. It was off the shelf, so I took one of the shredded wheat. When I asked for Whole Wheat, my grocer said he had shredded wheat, would I take it, and we said yes. They had Kellogg's in stock, but it was not yet unpacked. I tried shredded wheat. My reason for having Whole Wheat, Kellogg's shredded wheat, is that I have a dog and I feed him a wheat biscuit every day. He would not eat shredded wheat. I went to the store later, got the Whole Wheat, after it was on the shelf again. He ate that. I had to eat the other myself, but I do not care for it like I do Kellogg's. I will not buy any more shredded wheat, as long as I can get Kellogg's.

I came here as a witness today because some man who was referred to me by Mr. Bausher, my grocer, came to my door and asked me to come here today. I did not know who he was.

CROSS-EXAMINATION.

THE WITNESS: Before I knew about Kellogg's biscuit, my niece and I used shredded wheat. When I tire of it, we use it off and on, and then we shift. I have known shredded wheat, like Plaintiff's Exhibit 1, and have known it for a long time. It has been known to me for many years. I have known it a long time. We have been eating it quite a while. I did not have my dog before I knew about Kellogg's. He will only be two years old in June. He will not eat shredded wheat at all. The dog is the fault of that. He would get shredded wheat or get something else. We really buy Kellogg's biscuit more for the dog than for the family. I really like the dog more than myself.

It was several weeks ago that Mr. Hopkins, of the Kellogg Company called at my home, back in January, I think. That was the first time I knew Mr. Hopkins.

He asked me whether I would come if there would be any occasion. They later arranged I should come down from Reading today. They did not mention paying my expenses, but I figure on that. Reading is sixty miles away from Philadelphia. I came by machine, my own car.

I told Mr. Clarke that a friend of mine with dog kennels started the dog for me on loose shredded or crumbled wheat, which they buy by the pound. My dog will not eat that. He is very particular. He has to have Whole Wheat Biscuit. My niece first told me about it before I got the dog. Through her I switched from shredded wheat to Kellogg's biscuit.

I have a cottage along the shore. In summer it is damp along the water. Kellogg's biscuit stay crisper there than shredded wheat does. In putting milk on Whole Wheat, I find they keep more crisp than shredded wheat. When school stops, my niece comes to me and stays until school starts again. I had a box of the old shredded wheat down at the cottage. She said, "Aunt, I do not like this. I like Kellogg's." I said I did not know they had put out any Kellogg's shredded wheat, and she said they did. We are eleven miles away out in the country, and my husband went to one of the Keystone Stores in the city and got Kellogg's, and we have used it since. My niece told me it was something like a shredded wheat biscuit. She called it Kellogg's Whole Wheat Biscuit. Mr. Bausher is a Keystone grocer, the man I am dealing with.

MRS. MARY E. KEENE.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with just my husband and I in the house. He is an osteopath. We

are users of Kellogg's Whole Wheat Biscuit, having had it more than a year. I do not recall how we first became acquainted with the biscuit.

I have used shredded wheat like Plaintiff's Exhibit 1. When I first saw Kellogg's biscuit, I did not by any means think it was the same biscuit I had been using. I remember the difference in size. Kellogg's biscuit fits my dishes better. We have had several people at home remark on the niceness of the biscuit and how they liked it, comparing it with shredded wheat biscuit. They asked me when and where I got it. About three months ago we were entertaining. Someone remarked about the biscuit being very nice and asked me the name of it, when I had been serving Kellogg's biscuit in my house. She mentioned the size of it and liked the taste better. I told her what it was and showed her the box.

My grocer, Mr. Shannagan, sends down Kellogg's biscuit by his boy. I have never ordered Kellogg's Whole Wheat Biscuit and received any other product. He has never sent me the old biscuit.

CROSS-EXAMINATION.

THE WITNESS: I have been keeping house about twenty-three years. During that time I have known shredded wheat was on the market, but I have not used it extensively, because I did not like the shape and it seems not as well done as it ought to be. I have known about it for a long time. I have been through your factory at Niagara Falls and have seen it made on a tour through there, about four or five years ago. It was not a strange item to me at that time. I had known it very well prior to that. I did buy it and use it on a few occasions but not very often, because of the size and taste.

I do not remember how I made the change from shredded wheat to Kellogg's biscuit, how I came to use

it; but, since a year or so ago, I have been using Kellogg's Whole Wheat Biscuit instead of shredded wheat. I do not buy shredded wheat now, although I saw it made, like many people who took the trip.

EDWIN A. WURSTER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am co-partner in a wholesale grocery firm, Joseph A. Wurster, a registered co-partnership in Pennsylvania. We serve mainly restaurants, institutions, and hotels. We handle in our wholesale house Kellogg's Whole Wheat Biscuit, both in packages like Plaintiff's Exhibit 161 and in the individual packages, like Defendant's Exhibit 80. The small package goes to the restaurant. The large package goes mostly to the retail outlets we have, in our own retail stores we control. A few restaurants buy it, also. Roughly, we service several hundred restaurants with the individual size package. About twenty or twenty-five would buy the large package, because they are very small places, buying only a half dozen packages at a time. In the total business, they would represent an almost negligible part of the volume.

The use of cereals in individual packages in the restaurant business is a growing practice. It has been on the increase in the last ten years. It has practically grown from scratch in that time.

There is a demand from our retailer customers for Kellogg's Whole Wheat Biscuit. We do not use any other shredded product beside Kellogg's biscuit. I used to handle the old shredded wheat. We never had much call for it. When Kellogg's biscuit came out there was quite an increased demand for Kellogg's.

People like it because of the smaller size biscuit. We had so little sale, finally, for the other, that we discontinued it altogether. We handled some of the shredded wheat in individual size cartons, but I do not believe there were ten cases a year of the individuals at that time. We handled it in large cartons like Plaintiff's Exhibit 1.

The demand for Kellogg's biscuit has been created mainly by the service Kellogg gives the restaurants. They have done a lot of missionary work, also given them a combination package, made up of small lots of each of their individual products, which helps the small man, because we never break individual cases. In the old days a man had to take a hundred one kind to the case, which was too much. In certain neighborhoods they do not have enough call for them. Kellogg's men continually call on restaurants. Finding a man of that type, they sell him combination cases that suit his requirements. They protect the wholesaler by giving us profit on the sale. The grocer gets the profit and we get a sale and our profit. We wholesalers surely appreciate that consideration. The restaurant man appreciates it, too. They give him menus and things of that sort. They have developed a very kindly feeling in many restaurants for Kellogg's. That shows itself by an increased demand for the product.

We do not have any kind of demand for Niagara shredded wheat, from the trade. In a year I will probably have a few calls, not exceeding ten. We tell them we do not have shredded wheat, and why. We explain the merits of Kellogg's biscuit. If they see our argument, they buy. The demand for shredded wheat is very sporadic and small.

I know what is going on in the restaurants, more or less. I do not believe the National Biscuit men do

any work comparable with the work of Kellogg men. In the very poor restaurants, hash houses, real cheap, they use the large carton and take it right out of the package. They think the large package is an advantage. They do not have enough business for the small one. The better class restaurant will serve it in the package with the top torn off and cream or milk on the side. The practice of serving it in the package is growing. People more or less demand it for sanitary reasons. No hand touches the biscuit.

We have never handled the National Shredded Wheat in the individual carton like Defendant's Exhibit 81, but I understand they are taking the small type of biscuit lately. It was not their original sized biscuit, like Plaintiff's Exhibit 21. They have only packed the other one lately, which, in my opinion, was in order to meet the size of biscuit Kellogg seems to have put over on the trade. The trade knows Kellogg is making a smaller biscuit than the National, and they favor it. Personally, I believe National tried to put that over to confuse the consumer. They got that out to meet the demand for the smaller biscuit. I do not call on the trade personally, but I have reports from the men that the trade is taking the smaller biscuit. I do not know how much pressure is put on the trade by the National salesman to get them to take it.

I have never seen in restaurants any of the old Niagara shredded wheat displayed in big glass globes filled with biscuits. I think it is kind of a vanished institution.

My organization has a retail store of its own, still conducted under the same name. We handled Kellogg's Whole Wheat Biscuit in our retail store, in the large packages, like Plaintiff's Exhibit 161. We find a consumer demand for it in our store, for the reason people like the two small biscuits, because they fit better in the plate and do not run over the edge. For the

same reason we stated for the restaurant, we discontinued Niagara Falls biscuit in the store. We are now a hundred per cent. Kellogg. In the beginning, there were a few customers of the retail store who insisted on having Niagara shredded wheat. When we explained the merits of Kellogg's biscuit and induced them to try it, we won them over, and they are satisfied.

We do not substitute in that store. If a customer asks for shredded wheat and the retailer hands them the Kellogg package like Plaintiff's Exhibit 161, unwrapped, it might be an attempt at substitution on the part of the retailer, but it would be a very foolish attempt, because a person would have to be blind. If I go in a store and ask for shredded wheat, meaning the Niagara package, if they handed me the Kellogg package, I could see it was not the same in shape, appearance or color. It might be an attempt. I do not know what our retailers do. I know we do not have it. We tell them we have Kellogg's Whole Wheat Biscuit. If they like it, they take it. We have been there over forty years and do not have any trouble putting it over and inducing them to try it. When they do, they are satisfied with it. Substitution, in the sense of trying to put across a fraudulent deception on the public is a rather vanishing institution in the grocery trade.

CROSS-EXAMINATION.

THE WITNESS: When our few shredded wheat customers ask for it, we say we do not have it and show them Kellogg's biscuit. We have been very successful in inducing them to take it and to become Kellogg users. In a not necessarily derogatory sense of the word, that is still not a substitution, because, as I understand the meaning the law would put on the word, substitution would be handing out a package in place of another asked for, without explanation, the customer thinking she was getting what she asked for.

It is a fact that, in our trade, we have been successful in inducing many customers formerly shredded wheat users to become users of Kellogg's biscuit. That is true of many other things in the line. When a customer has become a user of Kellogg's Whole Wheat, that is a substitute for shredded wheat in that customer's pantry, in that sense of the word, not meaning we are guilty of fraud in telling the customer about this type of product we are handling.

Naturally, there is no confusion in my mind between the old shredded wheat package, like Plaintiff's Exhibit 1, and the Kellogg package. That is perfectly plain. I have known Shredded Wheat a long time. I have been in the grocery business all my life. I am forty-three. I have been familiar with shredded wheat. It has always been that large, pillow-shaped biscuit and has always remained the same. There has not been very much change in the package, to my recollection. Shredded wheat has always been a well-known product.

XQ. 80. Up to the time that Kellogg came out with this biscuit, there was nothing else like it, was there?

A. No, not for many years, although there have been other biscuits; for instance, Muffetts, and some other thing came out, a shredded biscuit.

XQ. 81. You have never sold Muffetts in place of shredded wheat, have you?

A. No, but there was an attempt to put that across in the trade that were accustomed to eating shredded wheat.

XQ. 82. Yes, there was; but it did not succeed, did it?

A. No, for various reasons.

XQ. 83. For various reasons. When I say "take the place of shredded wheat," I am trying to avoid the use of the word *substitute*. Of course, you have a special idea in your mind about that. Why did you say so promptly that you think that the Biscuit Company

put out this small biscuit to confuse the trade? If the Biscuit Company had a right to make shredded wheat, and they found a demand for smaller biscuit, did they have a right to make it?

A. Well, the demand was created particularly by Kellogg. In other word they went out to get that trade. One way to get it was by imitating the style of the biscuit, the shape of the biscuit, and the style and the size of Kellogg's.

XQ. 84. It never occurred to you, did it, that the Kellogg Company went out to get the shredded wheat biscuit trade, and that the only way that they could get it was to imitate the style and shape of our biscuit? Did that ever occur to you?

A. Well, they were altogether different. The size was different. As a matter of fact, the appearance of the two biscuit—any one familiar with both of them could pick them out.

XQ. 85. Oh, if you had them side by side, you could pick them out?

A. Yes.

XQ. 86. But you have just told me that you have known shredded wheat all your life. I say, then, that I am just wondering if it did not occur to you that, when Kellogg's came out with the shredded wheat biscuit that looked like them, with its pillow-shape and shreds, as you call them, that they were trying to get the old shredded wheat business in that same fashion.

A. Yes. Yes, certainly they have. That is true.

THE WITNESS: They have, also, gotten something new. They have converted people to the use of shredded wheat, also. They have gotten new customers. How many of the old customers they got I do not know, because I do not know whether they were doing much business before Kellogg's biscuit came out.

I am not attempting to discourage those individual packages. I was unfortunate in using the word *con-*

fusion. I should probably have said *imitation* in size. I agree with Mr. Vilas that these packages are different, Defendant's Exhibit 80 and Defendant's Exhibit 81. So, in my view, now, the National Biscuit Company is imitating the Kellogg Company and not the Kellogg Company imitating the National Biscuit Company. They do not imitate the Biscuit Company at all. The size of the package, coloring, and everything are different. They called it Shredded Wheat, but they have changed that now. I have handled it when they called it shredded wheat. I have no feeling against the National Biscuit Company. I never bought shredded wheat biscuit from them. We discontinued taking it at the time they took it over and began distributing it direct. We do not have the old shredded wheat in our stores now. Naturally, we do not let customers get away if we can help it and naturally, most of them buy Kellogg's Whole Wheat instead of shredded wheat, which is a matter of personality of the salesman, salesmanship, not substitution.

As I told Mr. Clarke, the Kellogg Company has done a lot of missionary work on this biscuit. In the combination cases for the restaurant trade, they include some Kellogg's biscuit, with their other products. We carry all their products now. The National has not done that sort of work. The National man on shredded wheat called on us a month or two ago, the first time we were ever solicited. The National Biscuit men who go to the stores sell it and also go to the restaurant people and sell them. Naturally, we would not buy a case of biscuit from them and expect to go out and sell it to the restaurants for the same price that they sell to the restaurants direct. Five or six weeks ago, they wanted us to handle it. They did not have any luck with us. I said I would have to think it over very seriously. We thought it over but did not fully make up our minds.

We also service institutions, not State, but schools and colleges. We do not enter at all into any of the competitive bidding on public institutions. It is safe to say that substantially all our customers, particularly retail, have been won over to Kellogg's biscuit by us.

RE-DIRECT EXAMINATION.

THE WITNESS: Shredded whole wheat biscuit, naturally, would have to be a biscuit, we will say, in the shape of a pillow, made of wheat which is in the form of shreds; in other words, which has been shredded.

RE-CROSS-EXAMINATION.

THE WITNESS: It would have to be in the form of not exactly a pillow, but a biscuit shape. It might be round, but it would have to be something high, could not be flat. You could not take the shreds and have them loose in the form of something like corn flakes. It would have to be put together in a cohesive form of some kind, not necessarily pillow-shaped.

RE-DIRECT EXAMINATION.

THE WITNESS: Shredded whole wheat biscuit might be anything that was made of whole wheat and shredded and held together in some particular form that held it together. It might not be that particular style. To me it would be always shredded whole wheat biscuit, no matter who made it. I cannot think of anything else to call it that would describe it as well as that. That is a description of the product, and that is the thing to call it. It has always been called whole wheat biscuit. The fact that it has been descriptive would not alter, I think. It is always shredded whole wheat biscuit. I think that is all it was. If you should ask me what Uneeda Biscuit was, I would probably say it was a soda cracker. That is so. The trade name

would be Uneeda Biscuit, and the descriptive name would be soda-cracker. If someone were to ask me what the trade name and what the descriptive name of shredded wheat was, I would say it would be just shredded whole wheat biscuit. The only descriptive name I know for it is shredded wheat or shredded whole wheat biscuit. It cannot be anything else.

If anybody asked me what a *Kodak* was, I would say it was the trade name of the Eastman Kodak Company meaning a *camera*, the latter word being the descriptive name that anybody could call it by. I do not, however, know any other descriptive name that can be used to tell about shredded wheat, except shredded wheat, or shredded whole wheat biscuit, any other name you could call it.

RE-CROSS-EXAMINATION.

THE WITNESS: Kellogg calls it Kellogg's Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: To my mind *shredded* goes largely into the description. You ask for a description, and it is shredded, although they do not mention it on the package as shredded whole wheat biscuit. You could have any biscuit made of whole wheat not shredded, and put up in another way. Biscuit might be like crackers or like bakers make in the form of a roll, or almost anything.

If I would imagine I had never seen the Kellogg package, Plaintiff's Exhibit 161 before, hiding the plate so that all I would see would be the words *Whole Wheat Biscuit*, if somebody asked me what Kellogg's Whole Wheat Biscuit is, I would not have an idea of the shape or whether it was shredded or just made of pure flour or in the form of a roll or what. I would think it was

made out of Whole Wheat. As a biscuit, it might be a little cracker like Uneeda Biscuit or anything of that sort. To that extent, without a picture on it, that would be a blind package, meaning I would have to open it to see what it would look like.

RE-CROSS-EXAMINATION.

THE WITNESS: If you covered up the name and showed me the picture on there, I would know what it was.

RE-DIRECT EXAMINATION.

THE WITNESS: I would say it was Kellogg's; a shredded wheat biscuit, whether whole wheat, now, I could not say.

RE-CROSS-EXAMINATION.

THE WITNESS: It might not be wheat; it might be rye. I never heard of shredded rye or shredded barley. I have heard of a corn shredder. I am not that technical that I should know what it does to corn. Perhaps the word *shredded* would tell me that it tears it into strips. What it is I do not know. Shredded Wheat is in the shape of strips. Whether they tear it down that way or what I do not know the process. I do not know that the wheat berry is pressed out into a long thread. Shredded, to me, means not what is done to it but the appearance. In this way it is shredded. It might have been made that way or might have been torn the other way. It is shredded wheat, from the appearance.

I have not seen Rippled Wheat yet. I think I will have to say I did not see a biscuit shaped like shredded wheat biscuit until I saw shredded wheat. I never saw anything called a biscuit that looked like that. As far as I can remember, until shredded wheat was known, there was no article of food like it or known by that

name; so it was really a very natural thing to call any biscuit that looks like that a shredded wheat biscuit. I could not think of anything else to call it. That is the first thing that comes to my mind. That is quite natural.

RE-DIRECT EXAMINATION.

THE WITNESS: I knew this Niagara shredded wheat product when it was put out by the Shredded Wheat Company at Niagara Falls. I do not know what the old Shredded Wheat Company did do to push the sale of it; but I know from our experience that we have no calls, no demand. There was never a missionary order turned over to us. I took it for granted they never did. It was a cereal product in our wholesale house. I did not notice any particular increase in the falling off of the demand for the product when the National Biscuit Company took over shredded wheat, but it had declined to a very, very great extent from formerly.

RE-CROSS-EXAMINATION.

THE WITNESS: I am speaking from my own experience. I do not know what happened to the other fellows in another town. They may have done missionary work; but it is logical to expect that, if so, we would be bound to get orders.

RE-DIRECT EXAMINATION.

THE WITNESS: We did not get them, so I assumed that they had not. That condition was true for many years; certainly before the Kellogg Company came into the market with its Whole Wheat Biscuit, and for some time before that. I regard the Kellogg Company as having stirred up a demand not in existence before it came into the fi[illegible].

WILLIAM W. BICKHAM.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a buyer for Alfred Lowry & Brother, wholesale grocers, having thirty to thirty-five salesmen. It is an old-line wholesale service grocery, servicing a territory within a radius of, say, thirty to forty miles surrounding Philadelphia, touching the Jersey coast and downtown, including all of Philadelphia. We have approximately five thousand accounts.

We handle Kellogg's Whole Wheat Biscuit, also Niagara shredded wheat. We have not experienced any confusion in our trade between those two products or any mixing up of orders on them. We have never had any instances of either product being returned with the statement they wanted the other. We have a substantial volume of business on both products. The demand from our retailers for Kellogg's biscuit has been created by their regular workers, through advertising, house-to-house sampling, and regular work, the same kind they have done on the rest of their cereal line. Our salesmen accept orders on both products. I would hardly say we solicit orders on shredded wheat, since the margin of profit is not very attractive. I would say definitely that the Kellogg Company gets the larger degree of co-operation in the sale of its products. We feel there is more co-operation from Kellogg. The National are selling from their own trucks over the territory, servicing the retail grocers. Naturally, we are not interested. It is one of our competitors in the sale of that product. Our principal competitor is the company itself. We do not encounter any competition of that kind, whatever, from the Kellogg Company in the sale of its Whole Wheat Biscuit.

In offering goods for sale through our salesmen, they quote from a price list, carrying the cost to us, as well as the suggested selling price. From memory, I would say the cost of shredded wheat to us is about three dollars and thirty-five cents per case of thirty-six packages. The same plan holds true of the Kellogg product. If due, to the competition of the National Biscuit Company, the best profit we can realize on shredded wheat would be ten or fifteen cents a case, possibly less, their financial interest would be in selling that product to give them a better margin of profit. For those reasons, we not only co-operate more with the Kellogg Company but we regard the Kellogg Company very definitely as co-operating more with us, than the National Biscuit Company does.

Defendant's Exhibit 92 is our Lowry's Blue Book Price List of the Chester Branch, and Defendant's Exhibit 93 is the list of the Camden Branch. On pages three and four, in the price list of grocery products, it is listed under cereals, under breakfast foods, as follows: Cream Wheat, Crackles, Grape-Nuts, Grape-Nuts Flakes, Pettijohn, Puffed Rice, Puffed Wheat, Kellogg Rice Krispies, Kellogg Wheat Flakes, Shredded Wheat, Kellogg Wheat Biscuit, Ralston Wheat Food, Rice Pops, Wheat Pops, Wheatena, Wheaties.

In the price list, Defendant's Exhibit 93, we list shredded wheat, thirty-six to the case, three dollars and thirty cents, and Kellogg's, twenty-four packages to the case, Kellogg's Whole Wheat Biscuit, two dollars and ten cents. That represents the competition we have to meet specifically by exchanges, such as Frankford and Quaker City. Their usual practice is to offer goods on a basis showing a margin of profit about five per cent., in most lines. The price we pay for shredded wheat, weeding out competition, shows

us no net profit whatever. We are taking into consideration the case discount and probably show a cent or two less than its cost to us. My trade conclusion would be that these competitive stores are buying it at a better profit, and that the National is giving a better price to our competitors than it gives to us. In addition, they are selling to the trade we expect to sell to at the same price at which we expect to sell to that trade.

Our men do nothing actively, except soliciting of orders, to help the sale of Kellogg Whole Wheat Biscuit. About all we can do is ask the grocer how his stock is and if he needs any this week, keeping it before him in that way. There is nothing further we can do. I handle the rest of the Kellogg line. There is a good demand for those products in our store. It is the recognized policy of the Kellogg Company to stand behind the sale of its products and take back any that do not sell.

Shredded whole wheat biscuit would convey to my mind that it was a biscuit made from shredded whole wheat, wheat that had been shredded. I would say the Kellogg Company makes that kind of biscuit. Asked to describe Kellogg's biscuit as a physical product, I know of no other language that would describe it accurately. If you asked me what a Uneeda biscuit was, I could describe that, perfectly truthfully, as a soda cracker. One name is the trade-mark name and the other is the original descriptive name. We handle soda crackers that are not Uneeda crackers.

Assuming the Kellogg Company was using Whole Wheat as a short name for its product and somebody asked me what it was, I would know of no other way to describe it than in the language we have been using, that it is a biscuit made from shredded whole wheat, and it is shredded.

The discount difficulty I have spoken of in connection with Niagara shredded wheat has only existed

since the National Biscuit Company took over the ownership and distribution. I purchased shredded wheat biscuit for years from the Shredded Wheat Company and there never was any competitive difficulty of that kind, regarding the demand price differential. That has existed definitely since the National took it over, which it is my impression was about two years ago. Up to then, shredded wheat was just an ordinary wholesale article, the same as any other good wholesale article. I never expected to encounter the National Biscuit Company's competition in respect to my customers, in the sale of shredded wheat. That has all occurred since the National took over the shredded wheat business.

In the period I have handled it, fifteen years or so, corn flakes have always outsold shredded wheat considerably in volume, 50 or 60 per cent.

CROSS-EXAMINATION.

THE WITNESS: I cannot recall definitely what I paid the Shredded Wheat Company for shredded wheat. During that period, there were at least one or more price changes, covering the war period. It advanced with other goods. My impression is it was three dollars and sixty cents a case. I am now buying it at four dollars and ten cents, less seventeen and a half, less one per cent. for cash ten days, producing about three dollars and thirty cents.

The National Biscuit Company, in our territory, services its shredded wheat along with its crackers direct to the retailers at present, which makes some competition for us, and we naturally lose interest in that line. The Kellogg Biscuit Company came along about that time and developed an additional volume of business, on which we can secure a profit, due to that development work. I believe it to be correct that

some of our trade that used shredded wheat biscuit now uses Kellogg's Whole Wheat Biscuit.

We carry shredded wheat in our catalog in the same classification we carry Kellogg's Wheat Biscuit. on page four of Defendant's Exhibit 92, under breakfast foods, we carry Shredded Wheat at 3.35, and, immediately beneath it, Kellogg Wheat Biscuit, 2.10. By the item Shredded Wheat in our catalog we refer to a product long manufactured by the National Biscuit Company and the Shredded Wheat Company at Niagara Falls. That item has been carried by our house for many years, just under that name, shredded wheat. It never was called anything else, that I know of.

I have been associated with the business proper about twenty-five years; but, as buyer, about fifteen. During that period of time, my house has stocked shredded wheat. We always buy it and sell it as just shredded wheat. I think, some period of time ago, Ross put out another biscuit. That was in the early days. I do not remember whether we stocked it. It was a good many years ago. With that possible exception, shredded wheat was the only biscuit of that kind on the market for many years, until Kellogg came out with a similar biscuit made from shredded wheat, although the shape and taste are a little different. It differs in some details, but it is essentially like the old shredded wheat biscuit in its composition.

XQ. 90. Is it not quite natural, when you are asked to describe this Kellogg's biscuit, that you call it shredded wheat, for the reason that you have known this older biscuit so many years by that name?

A. Well, if—in the sense of describing the biscuit, we would say that it was made from shredded wheat; that is true. But, if a customer asked for shredded wheat, you might ask him whether he wanted Kellogg's Whole Wheat Biscuit or shredded wheat.

XQ. 91. Yes. So that, although you carry the National Biscuit Company's product just as shredded wheat in your catalog——

A. That is correct.

XQ. 92. —you would be inclined to question a customer when he asked for shredded wheat, inclined to think that he might not know just what he wanted?

A. No, I do not think so. I do not believe—of course, I do not have direct contact with the retail grocer, but I think that, when an order came in for shredded wheat, that particular package was what we would send.

XQ. 93. You would not have any doubt about it, would you?

A. No.

XQ. 94. You really would not question an order that was written up for shredded wheat, would you?

A. No.

XQ. 95. You would not call back a customer and say, "Do you know what you want? Did you mean to order shredded wheat or Kellogg's Whole Wheat Biscuit?" There would not be any doubt about that, would there?

A. No.

XQ. 96. Therefore, as a matter of fact, the unadorned *shredded wheat* means the National Biscuit product, does it not?

A. In that sense, yes.

XQ. 97. It has meant that for fifteen years, to your knowledge?

A. Yes.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not think I have ever seen any packages like Defendant's Exhibit 91. It has been so long since Ross had that out, I could not identify it technically as his package. I would say the picture on

that carton represented a biscuit made from shredded wheat. I would say it looks as long a biscuit as the regular Niagara Falls Biscuit, as it is pictured there.

MRS. EDGAR F. CHEW.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

Direct Examination.

The Witness: I am a housewife, with five in my immediate household. We are users of Kellogg's Whole Wheat Biscuit and have been for about a year. I first bought it through my grocer, Mr. Hall, on Linden and Haddon Avenues, Collingswood, New Jersey. He said it was a cent cheaper than the other and he thought it was better. That is the reason I purchased it. I have used that ever since. I liked it from that time on, because it was crisper and browned on both sides. The other did not taste quite so good to me after I had used Kellogg's. It found favor with the rest of the household. They all liked it.

I had bought before shredded wheat like Plaintiff's Exhibit 1. We had used that for years. I at no time thought I was getting the old biscuit when I bought Kellogg's. They were in entirely different packages. One, I knew, was made by Kellogg, and the Niagara shredded wheat, I knew, was an altogether different product. I never mixed the two products up in my own mind, never thought they were the same product. I came here today because a Mr. Rhodes came to my door and asked me. I never knew him before. I suppose he got my name from Mr. Hall.

Cross-Examination.

The Witness: I was shopping for shredded wheat when Mr. Hall showed me this Whole Wheat Biscuit. I

had been using shredded wheat always for years. It is a very old product, which I had been using for years. Until I saw Kellogg's Whole Wheat Biscuit, I did not know anything I could use instead. I always used shredded wheat until Mr. Hall called my attention to Kellogg's biscuit. I was there one day for shredded wheat, and he showed me this other product. He said it was cheaper than shredded wheat. He said it was shredded wheat, and: "Why don't you try it? I have tried it and liked it." I did try it and liked it, too. Since then I have used Kellogg's biscuit and have never used any more shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: When Mr. Hall stated to me it was shredded wheat biscuit, after I opened it up I did not think he had misrepresented it. I have known that package for years. He said he tried it, too and it was a cent cheaper and I might as well save my cent if I could. So I tried it and liked it. It was browner and on both sides, whereas this is only browned on one side. I liked the size better.

RE-CROSS-EXAMINATION.

THE WITNESS: I was paying eleven for shredded wheat. I pay ten for Kellogg's biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I ask for it as Kellogg's Whole Wheat. I asked for it once when he was out of it and he just had the other, so I took that, because he told me he was out of Kellogg's.

MRS. LILLIAN M. CLARKE.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

Direct Examination.

The Witness: I am a housewife, with my husband and child in the household. We are consumers of Kellogg's Whole Wheat Biscuit, and we have used that biscuit about nine months. My grocer asked me one day if I had tried it. I said no, but I was willing to. He also stated it was cheaper than shredded wheat. I tried it. He said the Kellogg people were making it.

I had previously had shredded wheat, made at Niagara Falls. I did not think this was the same biscuit or made by the same people. I understood it was made by the Kellogg people. I never mixed up the packages in any way. I have used other Kellogg products besides Whole Wheat. I continued to use the Kellogg biscuit. I liked the size of it better, more biscuit to the package, and also cheaper than shredded wheat. My family like it. I came here today because someone came to my door and made inquiries. He asked me if I had ever used Kellogg's Whole Wheat Biscuit. I did not know who he was before.

Cross-Examination.

The Witness: I had been using shredded wheat regularly in my household for some years before this, quite a long time. I had known about it all my life. It is a very well-known product and was always known as shredded wheat. When I went to the grocery store on this occasion, I wanted shredded wheat, and they asked me if I had ever tried any of the other product. I said I had never tried Kellogg's. He asked me if I had tried Kellogg's Whole Wheat Biscuit which was similar to shredded wheat, when I asked for shredded

wheat, so I was willing to try it. On taking it home and serving it, my family liked it better than shredded wheat. I have used it ever since and have not bought any shredded wheat since that time. We have it in the morning, as a cereal, with milk, taking it out of the box and putting it in a dish. It is served on the table in a dish.

RE-DIRECT EXAMINATION.

THE WITNESS: This was not the first time my grocer asked me to try a new product. Every time I call, if there is something new on the market, he always asks if I have tried it. I am always willing to try something new. If I did not like Kellogg's biscuit, I would not have continued buying it. I find it a more convenient size and crisper than the shredded wheat.

MRS. F. M. SHOLLENBERGER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with four in the household, my husband and two children. We are consumers of Kellogg's Whole Wheat Biscuit, using at least two boxes a week. I have used that product close to a year. I first became acquainted with it through my boy. He was at his chum's place and saw it. We were at the store a few days later, and he said, "Oh, Mother, there is that Whole Wheat my boy friend was talking about." We bought a box and liked it right away. I like the taste a little better than shredded wheat. We had used shredded wheat before we knew about Whole Wheat. My boy is very particular about cereals, would not eat anything but shredded wheat or oatmeal or something like that. I used to get shredded wheat for

the summer. He likes the Kellogg's Whole Wheat better. He does not want the shredded wheat now. His appetite keeps up. In fact, my boy seems healthier since he has been eating it. He had a run-down condition. I told the doctor what he had been eating, and he said, "That is good." He seems to be doing fine. The rest of the children eat it once or twice a week. My husband and the girl will eat it once or twice, but they like variety. My husband does not like shredded wheat. They only like Whole Wheat.

I came to testify today because a man came to my door and asked me if I was a user of Kellogg's Whole Wheat. I had not known him before. That was my first connection with the case, in any way. He had secured my name through my grocer, Robert Smith, just above Media on Fifty-ninth Street. I am 1400 and he is 1500.

I have had a grocer ask me to try a new brand; but, when he did not have it, I would go elsewhere. If I want a certain thing, I will not accept anything else. If he tells me there is a new product in the market he would like me to try, we try them, and we use them if we like them. Other cereals have come out new, and we tried them but have not taken to them. I have no resentment against the grocer for asking me to try a new product, especially if a new thing comes out. If we do not like it, we do not buy it.

We recognized the difference between the two products when we first bought Kellogg's Whole Wheat. We did not think the packages were alike. They did not taste alike. I did not think I was buying the old shredded wheat when I got this product. When I opened it up and saw it, I thought it looked like shredded wheat biscuits, but when we tasted it, we saw the difference. I noticed a difference in the outside of the packages, different name, different shape, and smaller biscuits.

CROSS-EXAMINATION.

THE WITNESS: We had been using biscuit like Plaintiff's Exhibit 1 for a long time. I was through the Shredded Wheat Biscuit factory on my wedding trip. It was a very well-known product and well known to me. Since my boy discovered this Whole Wheat Biscuit and got me to try it, we have used that instead of the shredded wheat. We prefer it. They do not care for the other. If a grocer does not happen to have Whole Wheat and I am in a hurry and take it home, the shredded wheat does not go so quick. It lies around the house.

When I opened up the first package of Kellogg's Whole Wheat Biscuit, I thought for an instant it looked like shredded wheat, and I concluded that Kellogg was making a shredded wheat biscuit. I used this instead of shredded wheat and liked it. I got shredded wheat off and on, but I saw there was no use buying it when we had the other which we liked. It is safe to say that Kellogg's biscuit has supplanted shredded wheat on our table. I serve it by pouring hot milk over it in the winter and put it in the oven the same as I do with shredded wheat, to keep them hot, then put them on the table. In the summer I just serve them the way they are.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know whether I ever asked for Kellogg's biscuit and got shredded wheat. There have been other things the grocer wanted me to take, but I do not remember about the biscuits. Each time I got shredded wheat or Kellogg's biscuit, I knew what I was getting. I have tried shredded wheat since I got Kellogg's and found they did not like it. I had it in the house, but it did not go as quickly as Kellogg's.

WILLIAM W. SHAW.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: There are three in my family. I am in the habit of buying groceries and meats for them, because I am home and have had some experience in buying. I have been around more. It is inconvenient for my wife to get around, and I have a car. We use Kellogg's Whole Wheat Biscuit and have had it about two years. It first came to my attention on a shelf in the grocery. My habit in buying is a little different than the average customer. They ask for something. I look up at a shelf and say: "Give me two of those, one of those and one of these." That particular time I happened to see the Whole Wheat. It attracted my attention to the fact that there are two whole wheat biscuits on the market, shredded wheat, for instance. I tried it. Mrs. Shaw said she liked it, that one was enough. Sometimes two of those was not as much as two of the other and they liked the smaller size biscuit and the taste. My analysis of the taste was it was not cooked quite so hard and did require chewing. The reaction was we wanted Kellogg's biscuit again. We have bought it almost continuously when we wanted that type of cereal. I have bought Shredded Wheat as well as Kellogg's. I asked Mr. Hall for Kellogg's biscuit a few weeks ago and he was out of them. I just pointed down the line and said I would take that for a change. That has not converted the family back to Shredded Wheat. We still use three or four packages of Kellogg's a week and are continuing to use it. We have eaten Shredded Wheat when the grocer was out of Kellogg's.

I came to testify today because I understand somebody talked to the dealer and he gave them my

name. I did not know anybody connected with Kellogg or that anybody was going to call until this morning. He asked me if I would come and testify.

CROSS-EXAMINATION.

THE WITNESS: Hall is with me today. He runs the grocery. He is here in Philadelphia with me. Four of us came up on this trip from Collingswood. I have heard there were more, but I do not know who. I do not know the people there. I have used shredded wheat ever since it came on the market, when they demonstrated it by a little Quaker maid who had this wheat and put that together in a store. That was more than thirty years ago, I think. Since that time the product has been more or less continuously on the market. I have used it for quite a long time, but I do not think as much as we have of Kellogg's. My family is more grown now, ranging from six to fifteen, the five of them. I have bought shredded wheat for a number of years, ever since it was first put out and the public was taught to know it. We have had it nearly thirty years. Not a week went by that we did not have it in the house, until Kellogg's Whole Wheat Biscuit came on the market. When we got that, we liked it a little better. So far as products are concerned, we are no respecters of persons, if we get what we like. Kellogg's Whole Wheat simply supplanted shredded wheat in our affections, if you want to put it that way.

When I saw them demonstrate shredded wheat with little machines in the store, that is the first time I saw that new product. It was a new product, a new form of food to me thirty years ago. I was working downtown and could see it. If it was on the market before, I would not know, because I was new to business. It was new to me, and it was something I had

to learn to like. We tried it that day of the demonstration. They gave out samples; but whether I ordered any that day, or two or three or five years after, I could not say. Shortly after that or from that time, I knew about this product and would have Shredded Wheat in the house, especially after the children came along. I also knew that as shredded wheat. You do not get a chance to do anything else. It is spread all over the package.

I first saw Kellogg's biscuit nearly two years ago. It seems to me it was in a higher package than Plaintiff's Exhibit 161. I do not know whether they called that shredded whole wheat then. I knew shredded wheat is made of Whole Wheat. I would say it was about that type of package, even larger. I have seen a package like the Kellogg's Shredded Whole Wheat Biscuit, but I do not remember its being so wide, but higher. I am buying it now in packages like Plaintiff's Exhibit 161. The one I got yesterday had a window in it. When I saw it on the shelf, I did not know what kind of biscuit it was, whether Kellogg's or somebody's else. Whose it was meant nothing to me. It was something new, and I would try it. I continued to get it after that. The family liked it and we bought it. It is usually served in the bowl with milk and sugar, sometimes with a little bran on it. When we have served shredded wheat we often use a little hot water to soften it up, first.

FREDERICK HALL.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

Direct Examination.

The Witness: I am a retail grocer, at 1030 Haddon Avenue, Collingswood, a Quaker Store. We deliver to our customers and take a great many telephone

orders, as the regular Quaker Stores are doing. We extend limited credit where it is justified. We have only lost six dollars and fifty-two cents since we have been in business.

We carry Kellogg's Whole Wheat Biscuit, such as Plaintiff's Exhibit 161, and have some on our shelf right now. I have some of the Niagara shredded wheat on my shelf now, too. At the present time I am selling more Kellogg's biscuit. The consumer demand for it is growing in our store. I like it from a business viewpoint. That is the reason it has been going in my store. I push it. I make the most satisfactory profit on the Kellogg biscuit. The trade conditions making that possible are that we buy one for a dollar thirty-six a dozen. We sell it for the same price and make 6 per cent. gross, which does not pay for the trouble. The Kellogg biscuit we buy at a dollar forty for twenty-four packages, and it pays me about 13 per cent. gross.

For a while I would not handle shredded wheat, because I felt we were not being given a square deal at the price they were selling it for in our district, chain stores at ten cents. We had requests and I had to put it on the shelf. I did that, but I sold it at eleven cents, because I am not going to pay for advertising anybody's product. That was a cent above the prevailing market. One of the Kellogg salesmen came around and told me about Whole Wheat Biscuit. We compared prices and I told him to put in a case and we would see how it went. We stuck it in the window. There was so much demand created for it that, if I am out of it now, people will not take shredded wheat. We have exceptions. A woman the other day when I was all out of shredded wheat for the moment, asked for it. I said, "How about Kellogg's Whole Wheat Biscuit?" She particularly likes the old-fashioned kind and would not take Kellogg's. She has to pay a cent more for it. We have very few customers like

that, old-fashioned people. They do not like to try anything new. We very seldom substitute in our store, except with the customer's consent. We make it a rule not to. If I knew a customer and her likes and dislikes well enough, we might do it if I were out of what she called for, but with anyone new coming in, we do not substitute, because we think it is not good business.

If anyone asks for shredded wheat, we give them shredded wheat. At the same time I will call their attention to Whole Wheat Biscuit. That is perfectly legitimate, from our viewpoint, because it is all right for me to say that. I say, "Here is a biscuit similar to shredded wheat. Why not try it? You may like it, and it will save you a little money." That is the way I have been introducing it. Customers do not seem to resent that a bit. Most of them, if you can suggest a saving of a cent, will take it; so we built up quite a business in Kellogg's biscuit and I am selling about three to one Kellogg's over shredded wheat.

I do not believe we have any confusion in our store between the two products. I do not recall any customer sending back one and saying she ordered the other. Our customers know the two products and ask for them. If I am out of one, they may take the other. A woman the other day, when I was out of Kellogg's, said she would wait until I got it in. They seem to favor it. When they try it, they stick to it, a majority of my customers.

Shredded wheat means to me shredded wheat put up in the form of a biscuit. It is whole wheat, shredded, in the shape of a biscuit. I have seen the Niagara biscuit made but not the Kellogg. We have regular bi-weekly calls from the National Biscuit salesman, every other week. When I first brought Kellogg's biscuit in there, the salesman tried to get me not to handle it, spoke to me and told me there was a lawsuit

on it at the time, and possibly I might get into trouble from handling it. I told him we would take a chance on that. It was on the open market for sale and I saw no particular reason why I should not handle it. He never bothered me about it from that time on. We handle National Biscuit goods in limited quantities. They co-operate with us in trying to make a profit on the sale of some of their goods, but not on shredded wheat. I figure money spent on Niagara shredded wheat is spent advertising it. Our competitors sell it at ten cents, and it would lie on the shelf if I did not. I decided I would not sell it at that. The Kellogg man came and helped me out. I can sell Kellogg's biscuit for ten cents and I keep shredded wheat for those who want it, at eleven cents, a premium of one cent in my store over the chain store price. Certain people will pay that naturally, anywhere. As a grocer I do not like the prospect of having to sell a product for one cent more, because it prejudices people against your place, makes them feel you are not meeting competition.

I get telephone orders for shredded wheat, which I handle the same as if they were in the store. After customers have tried the Kellogg biscuit, they invariably seem to like it and stick to it, although maybe not in every case, but pretty generally.

I would not say the Kellogg Company has co-operated in producing or stimulating consumer demand for their biscuit, except the few cases I brought in, where they gave charts for the children and made it very interesting. In that way they really pushed it for a while. After the product took on, they did not have to use those premiums. They left us alone. I would rather that 99 per cent. of them would. I would rather have a product that sells on its own merits. Premiums are rather a bother to the grocer, in one

sense. We give out jig-saw puzzles on a hundred and one things today. You have the stock, and, if you do not have the puzzles, you have to get another lot. It is not a good thing for the grocer.

I find this type of breakfast food, Kellogg's biscuit and shredded wheat, is probably one of the best sellers we have, except Corn Flakes is best, then All-Bran, and then this product, Kellogg's biscuit, and then the other shredded wheat. The name Kellogg's on that package is not a detriment to the sale of it, because they have so many good products, Rice Krispies and Corn Flakes, etc., so the name on there induces them to buy. There is good will for the other products carried over on to Whole Wheat.

I should think the effect of taking over shredded wheat by the National Biscuit Company, so far as creating an additional demand in the market for shredded wheat is concerned, would be the same as Kellogg's here, because, in general, the National Biscuit Company's name is good. It would create good will in the trade for the National to take it over, providing they were a little more liberal in their discounts to grocers. They refused to equalize the discount for the grocer, which antagonized him, because we are all in business to make a living. If National had been more liberal with us, probably Kellogg's biscuit would not have gotten far. When you antagonize a group of grocers, they are naturally going to resent it, because a grocer is human and your action is hitting his pocketbook. That resentment has not been expressed in any way I would regard as illegitimate. If they did not like the manufacturer, I do not know that they would refuse to handle his goods. A man who would do that would be very foolish. A man looking after his business is another matter, because you cannot put likes and dislikes into a business. It is a question of business sense. I

might like the National or their opponents very much, but, if I could not make as much money as I could by putting on a competitor's product of a similar nature, I would naturally favor the competitor's product, recommend it, as by saying, when they asked for shredded wheat, "Why not try this?" That is regarded as perfectly legitimate, I would say.

CROSS-EXAMINATION.

THE WITNESS: I have converted possibly twenty to twenty-five customers of shredded wheat to Kellogg's in that manner. Those who have been switched over are sticking to Kellogg's, so they have been converted from users of shredded wheat to users of Kellogg's. I buy my shredded wheat at three dollars and thirty cents and sell it at ten cents, or three-sixty for the case, giving us thirty cents profit on thirty-six sales. No, it is about nine and three-quarters per cent. gross profit. On the Kellogg Company biscuit, at ten cents, I get two-forty and make thirty cents a case, which my slide rule says is twelve and six-tenths per cent. My statement of six per cent. gross is a slight understatement, just roughly out of my mind, without calculation. It is not quite as bad as I thought, but bad enough. A man cannot run a place under ten per cent. on the gross, and that is a trifle low. I am not affiliated with the Frankford Grocers. I am with the Quaker Wholesale Grocery Company as a director. That is a voluntary chain; or co-operative chain I think is the better term. A voluntary chain is another story but the co-operative chain is composed of owners. The voluntary chain is a wholesale grocery business wagging the other dog. I own my own company and thereby combine my buying power. We have about nine hundred and eighteen stores. It is quite a substantial organization, the sec-

ond largest in the country. We have a very large buying power. We can make the manufacturers give us the same prices as the chain stores get. We can put our soap on the pavement at least two per cent. cheaper than they, because we have not so many superintendents running around loose.

We do co-operative advertising of shredded wheat. All our goods, everything in turn, get advertised. I have not seen Kellogg's Whole Wheat Biscuit sold for nine cents a package in my place. It may be sold competitively for that, but I do not know of it. I have been in business since last October. I was not in the grocery or food business before that. I was an engineer last year. Before, I was assistant chief process engineer of Victor Talking Machine Company, and research engineer for the Welsbach Company, and president of Bergren Engineering Corporation of Trenton. I have not been long in the grocery business. I have been familiar with shredded wheat a great many years. It has been an old standby, since many years ago when they first made shredded wheat at an exhibition at Manasquan. I saw them make it. I was at Niagara Falls once, but not to the factory. I have used shredded wheat. I have both products in the store. Shredded wheat is an old household article that people know as shredded wheat. I have never used the term or heard it used, Niagara shredded wheat, until Mr. Clarke used it today. In my store, it was not necessary to designate it. They simply ask for shredded wheat. When they ask for the other, we give them Whole Wheat Biscuit.

XQ. 122. They sometimes ask for shredded Whole Wheat Biscuit, do they not?

A. Yes, sir; because you cannot stick a product right in your mind immediately. It takes time for your——

XQ. 123. No. And the Kellogg's shredded wheat serves the same purpose as the Niagara shredded wheat, as my friend calls it?

A. Yes.

XQ. 124. It is a similar product, is it not?

A. Very similar.

XQ. 125. You are able without much difficulty, are you not, to induce a woman to try the Kellogg's instead of the other?

A. Very. It is a very easy matter.

THE WITNESS: I do not call that substitution, because we sell it under another name. We might tell them it is similar. Wheat Flakes is very similar to Wheaties. I do not know the difference when I eat them.

When I came to set up my business, I had to stock shredded wheat, because there was a demand for it. I did not know anything about Kellogg's biscuit then. Since we have had that, it has got to the point where we do not have to stock so much shredded wheat. We do not have to renew it so often. We keep it for the benefit of those customers who stick to it, as a matter of accommodation.

The reason I am so enthusiastically back of the Kellogg biscuit is I make a better profit on it, and that is good business for me. If the National Biscuit Company was as good, I would not be a bit surprised if we might be able to switch some of the customers back, because that is natural.

RE-DIRECT EXAMINATION.

THE WITNESS: I am director in our wholesale organization. Quite a number of the other members of it use Whole Wheat Biscuit. We sell quite a lot from our warehouse. You will find it listed in our catalog every week. Quite a number of members handle that prod-

uct. Some are known as the R. G. E. Stores, Retail Grocers Exchange. I could not say whether they sell more of Kellogg's biscuit than shredded wheat.

WILLIAM E. SKELLENGER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of the Retail Grocers Exchange, an organization of retail grocers owning their own wholesale house. We service about two hundred, mostly in and around Wilmington, Delaware. I am manager and buyer. My title is secretary and manager. I have to do to some extent with the arrangement of the stores and the way the common business is conducted. I buy and sell for them. If they want advertising, I run that. I am the head of it.

We handle Kellogg's Whole Wheat Biscuit, also some Niagara or the original shredded wheat. I rather think my greater volume is on Kellogg's, because shredded wheat is handled by the National Biscuit Company direct. They took over from the wholesaler the distribution of that product, away from the wholesaler. I was familiar, as a wholesaler, with that product, before the National Biscuit Company took it over. Our organization built up some business in Niagara shredded wheat, which was taken over by the National when they acquired the Shredded Wheat Biscuit. They still sold us; but we, as wholesalers, are now in competition with the manufacturer himself in selling to the retail trade.

I do not know whether we get some discount not possible for our retailers to get. I do not know what discounts the National Biscuit Company gives chain stores. Our general impression is that retailers can

buy on just as good terms direct from the manufacturers as they can from wholesalers.

We have no confusion in our wholesale or retail organization between the two products. I know of no instance where products are sent back with the statement it was the other that was wanted. Our retail organization is a co-operative buying organization, also we have a co-operative selling organization. All the grocers in the buying group are not in the selling. The selling group have a uniform sales method with the same products to sell on the weekly advertising plan. All the members are in the buying group, have to be, in order to be a member of the selling organization and advertising group. It is not compulsory. Nearly half the membership is in the advertising and selling departments.

Our organization has co-operated with the Kellogg Company in pushing the sale of Kellogg's Whole Wheat Biscuit. We have advertised it occasionally. The members have given it store and window displays. They have accepted advertising material and assistance, and little display cards and things of that kind from the Kellogg Company and have used them in their stores. Window, store, and counter displays are effective methods of drawing the consumer's attention to new products.

I think Kellogg's biscuit is a little cheaper in general retail selling price than the shredded wheat. They make a better profit on the Kellogg biscuit. That tends to create favor toward the product among the retail distributors.

I do not think substitution, a person asking for a product definitely by name and the retailer giving her another product which she thinks is the one she asked for, is practiced in our retail stores. I do not think it would be possible, in that sense, to substitute Kellogg's Whole Wheat for the Niagara shredded wheat

without the customer knowing what she was getting, thoroughly. If a man happened to be out of shredded wheat, he might say, I am out of it, but I have Kellogg's, or vice versa; but it would not be ignorantly or deceptively substituted.

I have asked the National to give me a wholesale price on shredded wheat which would make me a profit as a wholesaler distributing it. I asked the manager at the Wilmington branch to talk it over. That is all it came to. He said their plan was to distribute direct. They used to have a plan of quantity purchase, the more you buy the bigger the discount. I am under the impression that our retailers get seventeen and a half per cent. discount on purchases from National, irrespective of the quantity they buy, as I now understand. I am told all grocers get it, whether they belong to any co-operative organization or not. The name of our wholesale organization is Retail Grocers Exchange. Our advertising members have a uniform sign. The others have their own individual fronts. Those with the uniform fronts have a sign, R. G. E. Store.

I personally would not mix up the two packages, like Plaintiff's Exhibit 168 and Plaintiff's Exhibit 1, or confuse them, one with the other.

As far as I know, the efforts of the manufacturers to stimulate the sale of Niagara shredded wheat have been as great in the retail trade since National took it over as they were when the old Shredded Wheat Company was pushing the product. I do not know whether it is handled in the same way it was handled by the old Shredded Wheat Company. I presume the sale of the product was transferred from the special shredded wheat or cereal men in the old business to the cracker salesmen of the National; but I do not really know the situation in the trade. We handle the rest of the Kellogg line of cereals. They are well-known products in the grocery trade.

I do not remember ever carrying a whole wheat biscuit made by the Ross Biscuit Company of Batavia, New York, some years ago. We did handle Muffetts, which is a similar product. Our co-operative selling organization has advertised Kellogg's biscuit from time to time. They have given window and store displays to that product.

CROSS-EXAMINATION.

THE WITNESS: Our organization is a purely co-operative wholesale organization, run for the benefit of our members. We are not in the position of the old-line jobber who cannot make the profit on shredded wheat that he used to when he handled it direct from the manufacturer. The profit we make is for the benefit of our members. We are not considered a profit-making organization but a mutual organization. The idea is to sell products to our grocers as cheap as we can and give them the benefit of our combined buying power. If the National services them direct at the same cost we could buy them for, it does us some harm. We are not obliged to make a profit as a wholesaler; but our grocers belong to our organization to save money. If every concern did business like the National, our organization would be no good. There would be no occasion for it. If our members obtain shredded wheat at the same price the jobbers could, I would not say they are accomplishing everything the organization was designed to accomplish. If we had no Retail Grocers Exchange and each member had to buy Shredded Wheat and Kellogg biscuit from the jobber and pay a profit to the jobber; we now, having combined in a buying exchange, as the head of it, represent the jobber for them. We buy from the manufacturer at the same price the jobber does and pass that along to our members.

The common enemy of the independent grocer is the chain store. They buy stuff at the wholesale job-

ber's cost. Therefore, they could in years gone by, sell at a price the retailer had to pay and make the jobber's profit. The big object of our organization is to buy goods as cheap as the chain stores and pass it to the retailer at a profit enough above cost to maintain our organization, operate our central offices. At the present time, however, as far as I know, our stores are purchasing shredded wheat independently and having it delivered right to their doors from the National, at the jobber's price. I am told that any grocer, whether he belongs to our organization or not, gets that price. Some grocers not belonging to our or any other organization that they are getting seventeen and a half discount on all National Biscuit Company products. I was told by them that they did not belong to any organization, and they were joining ours. My impression is there would be little object in joining ours if they belonged to another. We service approximately two hundred stores. About half of them participate in the advertising department. Eighty-five are there.

We do stock shredded wheat and dispose of it on order to some of our grocer members. Some grocers do not buy from the National and therefore procure it from us. Those who do buy it from the National get the greatest discount. The majority of our members do buy from the National. I have been in the grocery business about thirty years, twenty-eight in the wholesale end. During all that time, I have carried shredded wheat. I have been familiar with the package, like Plaintiff's Exhibit 1, and the name and product for all those years. During that time, it was the only product of its kind. I cannot remember when it was first brought out. It was a new kind of product. I know that, during all those years, the Shredded Wheat Company spent a good deal of money and effort in advertising its product to make it popular, and it has become a very well-known product, always known as shredded

wheat. Not until comparatively recently, within a year or two, have I had Kellogg's biscuit which could be sold competitively with shredded wheat, two or three years, probably. Kellogg's biscuit is now an item that competes with shredded wheat. Most of our stores carry both items. My impression is that the retail price is a little higher on shredded wheat. I do not know just how the grocers hold it up. We very seldom include shredded wheat in our advertising. I do not think we ever have the chance to cut it so close that we can advertise and sell it. There is still a good demand for shredded wheat. I would say shredded wheat sells more than Kellogg's Whole Wheat, probably sixty to forty per cent. I get Kellogg's Corn Flakes. That is the largest selling cereal of its kind on our market, sold pretty close by chain stores, too. We have to sell Corn Flakes very close. I think it is advertised as low as two for fifteen. The chain stores run it at approximately the same price. That gives us our regular profit. We try to average at least five per cent. gross; but that does not apply to every item we sell.

A cash-and-carry store should average fifteen to eighteen per cent. gross profit to operate efficiently. A credit service store should average twenty to twenty-five. Ten per cent. gross is a pretty low operating margin for a service store, as a regular diet. On specials we sometimes operate for less than that. It could not be done on all items. If he did it all the time, he could not stay out of bankruptcy for long.

RE-DIRECT EXAMINATION.

THE WITNESS: I told Mr. Vilas some retail grocers told me they were getting as good a profit as they could through an organization. I do not know positively that they are. That is the representation they made to me. We are led to believe we are getting as good a price on

shredded wheat as anybody is getting. The representations made to me did not convince me that we are getting as good a price as anybody else, entirely. We have complaints from members that the chain stores are selling at prices they cannot meet. They seemed to have the impression that the chains are getting prices that enable them to sell at those retail prices at a profit or without loss.

RE-CROSS-EXAMINATION.

THE WITNESS: I have been told the chains sell loss leaders at times. My people sometimes mark down popular items close to cost basis, many times. That is not uncommon in the grocery business, either among chains or among independent retailers. I have been told by representations of the National that we are getting the maximum discount. I am inclined to doubt that, because of these reports from our members. That is what I meant to convey in answer to Mr. Clarke's question. I do not know that we are not getting as good a price as anybody else. It would be a greater comfort if I did.

HOWARD S. GLANDING.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a merchant, handling groceries and meats, under the name of Herman Glanding Company, a retail store, a large one in our line. In the whole business I have between thirty-five and forty assistants.

We handle Kellogg's Whole Wheat Biscuit, also the Niagara shredded wheat. We were one of the first ones in Wilmington, Delaware, to put in Kellogg's bis-

cuit. We carried it while it was known as Kellogg's Shredded Whole Wheat Biscuit. I know it was first known as that. I have carried it since it has continued to be known as Kellogg's Whole Wheat Biscuit.

I have no confusion in my mind between those two products. Customers do not send either one back and say it was the other one they ordered and wanted. One product is known as just plain shredded wheat. The other one is mostly asked for as Kellogg's Wheat Biscuit. I would say we have had calls for it as Kellogg's shredded wheat. If a customer asked for it that way, she would get Kellogg's biscuit. There is a consumer demand for Kellogg's Whole Wheat Biscuit in our store, I would say a substantial demand today. The volume of sales of Kellogg's biscuit is nearly 50 per cent. of shredded wheat. We have given window, store, and counter displays to Kellogg's Whole Wheat Biscuit and have advertised it in all circular work. We have had special sales on it. During those sales, we have asked customers if they would like to try it. We show them the package, say it is Kellogg's Whole Wheat Biscuit. When those sales are on, you have a little chart or premium of some sort for the two-package combination, or the Wheel of Knowledge. We have also had Saturday sales, where a combination of three other Kellogg products is sold, with one package of Kellogg's biscuit free. Those sales are mostly conducted by Kellogg men. The two products are practically the same in price in our store. We make a better profit on Kellogg's. Our store is a service store, taking telephone orders, making deliveries, and extending credit where justified.

If the customer on the telephone asks for shredded wheat, she gets Niagara shredded wheat. If they ask for Kellogg's shredded wheat or for Kellogg's Wheat Biscuit, they get Kellogg's.

I would not say that our customers resent requests to try new products, to any considerable extent. Some people would not try a new product. Others want to try everything new on the market. They will try anything new when it comes on the market. Substituting is not practiced in my store in any way. For instance, if you come in and ask for shredded wheat biscuit, we would not by any means ask you to take Kellogg's, unless we were out of one and would ask you if you wanted to try the other. The customer gets what she asks for. If I were out of shredded wheat and asked her if she would like to try Kellogg's. I would not say that that was deceptive substitution. We do not substitute anything, unless, in certain cases, to retain the sale with something that is the equal of it. The clerks, however, are instructed to give the customers what they ask for, regardless of the item or the price.

If a woman said she wanted shredded wheat and I said I had none but I had some Kellogg's Whole Wheat Biscuit and asked her if she wanted to try it, I would figure that was legitimate. When you do it that way, it is not exactly substitution. It gives the woman a chance to try it, if she would like to. We are not forcing it on her, merely submitting it to her if she wants it. We do not regard that as illegitimate.

CROSS-EXAMINATION.

THE WITNESS: I have been in business since 1904, all that time in the retail grocery and meat business in Wilmington, meats about six years before we put groceries in. We carried shredded wheat a long way back and knew it then. It has always been in probably the same style package as Plaintiff's Exhibit 1, and has always been the same biscuit. It was a very well-known product among the public. For a long

time, to my knowledge, until Kellogg came out with this biscuit, it was the only thing of its kind. People always ask for it as shredded wheat. When they ask for it today, I know they mean this product made at Niagara Falls. Only recently they have become conscious of this Kellogg article and sometimes ask for Kellogg's Shredded Wheat, although that is not the name of the product. They even ask for Heinz Rice Krispies, but we give them Heinz Rice Flakes, because Rice Krispies is a well-known name to apply to such an article. A woman becomes confused. She knows what she wants. I think, when she calls it Kellogg's shredded wheat, she wants the Kellogg's Wheat Biscuit. You will not find many who will memorize the whole name; but they know what they want. It is quite natural to call this Kellogg's shredded wheat, because she has known this other article so long.

I do not know what would be the reason for Kellogg's Whole Wheat Biscuit edging up on shredded wheat within three or four years to nearly 50 per cent., any more than this Kellogg name, as much as anything else. Kellogg products have always been outstanding. They came out with Whole Wheat Biscuit, and it was displayed, and special sales have been offered to try it with their other products. The National Biscuit Company has not given me any special sales that I recollect or any such co-operation as the Kellogg Company has, or any such advertising helps. I would not say that the picture of the dish on the package or the cellophane window feature is attractive and makes people buy it. I think, if anything, it is the Kellogg name, rather than anything else on the package is concerned. I would not say I have especially favored this Kellogg's biscuit in my store or pushed it any more than shredded wheat. I would not favor one against another when there is a profit on it. We want all the

profit we can make. We make a little more on Kellogg's than on Shredded Wheat.

I know right away, when a customer asks for shredded wheat, what she wants, and she gets it. If a customer came in and bought shredded wheat, it is not our practice to ask if she has tried Kellogg's, unless we have a special demonstration or sale on it. If we have a sale on, with a combination and one biscuit package free, if a customer asked for a package of shredded wheat, we would not ask her to try Kellogg's biscuit. If she asks for her order, including a package of shredded wheat, we do not substitute anything, not even our own brands, until she is through. Then we start to offer the special combination of Kellogg's or whatever it might be. I do not know if there have been instances where a customer has been switched to Kellogg's instead of shredded wheat. We carry other items of the National Biscuit line, and our store is serviced by the National Biscuit Company salesman. We carry shredded wheat along with the other items and get them direct. We are a member of the Retail Grocers Exchange, but we do not buy our shredded wheat from them. We get it direct.

RE-DIRECT EXAMINATION.

THE WITNESS: We have had no shredded wheat from the Retail Grocers Exchange. I cannot tell you what they want for it within the last two years. Before that, we got shredded wheat through the Exchange. Since National took it over, it has always come by the cake salesman. I get Kellogg's biscuit through the Exchange.

THOMAS J. MORRISON.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

Direct Examination.

The Witness: I am a dining car operator and owner, at Frankford Avenue and Conklin. We have five help, with my partner and myself, altogether. I have been in that business about six years. We have Kellogg's Whole Wheat Biscuit in the small cartons like Defendant's Exhibit 80. We open it up in the presence of the customer and put cream or milk on it. I cut it open on the counter in front of my customer and dump the biscuit into the plate or bowl. Customers call for bran, or whole wheat biscuits, or corn flakes, or something like that, never mentioning the name.

I do not think we handle any whole wheat biscuit except this Kellogg's biscuit. I do not remember having handled the Niagara Falls biscuit like Plaintiff's Exhibit 21. I was out of the car for two years. They might have, two years ago. I have never had any experience in connection with it. None of our customers ever expresses dissatisfaction with Kellogg's biscuit, says it is not what he wanted, or turns it back. They seem to like it. We have regular customers on it. We run specials, with fruit salad, toast, coffee, fifteen cents. I think that cuts down the sale of all cereals and that sort of thing, any brand. I do not remember having customers call for shredded wheat. I was out for two years. I never heard of it. We have all our goods displayed on top. One company has puffed rice. I have seen them there, but I do not know whose name, if any, is on them. They pay for it right there.

Cross-Examination.

The Witness: I do not know which of the cereals in my car sells most lately, since we put on specials.

We have regular customers, though. We have bought them in case lots, small cartons, whether different varieties or not I could not say. My partner does most of the buying. We buy a case like that every three or four months. It is not a fast mover. We have not had anybody come in and ask for a dish of shredded wheat. Cereals in our car do not mean much. They come in and ask for bran or corn flakes.

If somebody said, "Give me a bowl of shredded wheat," I would be stumped to fill that order. They look up on top to see the things we have, usually. We have a little rack over where the ice box is. It has it in display. They will say bran, and things of that kind. The only time I ever heard the name of a product mentioned would be when we have a fellow come in and ask for Kellogg's Bran.

RE-DIRECT EXAMINATION.

THE WITNESS: Ours is a forty-foot dining car, larger for a dining car. When a fellow does seem to buy corn flakes, he buys them all the time. You have your regular customers and practically know what they are going to ask for every morning. That was before we had our specials. That is funny. I often remark I think we ought to put them on our specials. It would be better. I think handling cereals in the little individual cartons is great. You cannot make any mistake. In the lunch bar business, we try to do everything right. It is just a case of getting it and cutting it open. By another method, you might give them an ounce too much or a speck too little. The package is the best way. It is sanitary, and I think the customer likes it.

RE-CROSS-EXAMINATION.

THE WITNESS: We have menu cards. I do not think we list our cereals at all, unless we have corn

flakes. We have menus furnished by Kellogg. We have a menu book and paper. On the bottom of the paper is a picture of Kellogg's.

CLARENCE A. MORRISON.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the business of meats and groceries, and have had my own store since I have been in that business, about twenty-five years. It is conducted under the name of C. A. Morrison, at 2936 Westfield Avenue. We handle Kellogg's Whole Wheat Biscuit, for which there is a consumer demand in our store. People mostly ask me now for Whole Wheat Biscuit. When they do, I give them Kellogg's Whole Wheat Biscuit. I do not now handle shredded wheat, like Plaintiff's Exhibit 1, the Niagara Falls product. I stopped handling it three or four years ago, because the chain stores sold it for about what I paid for it. I could not sell it at a profit to meet their competition. I do not handle other National products any more, because I could not make a profit on them and keep up with the A. & P. stores. I have to make a profit to stay in my business. I had both products right along until three or four years ago. I never had any confusion between the two, never any instances in which customers sent back the product and said it was the other one they wanted. Kellogg's is called for as Whole Wheat. I have not had a call for Shredded Wheat for a year or more. If a customer came in and said she wanted a package of shredded wheat, I would say I do not have it. I would not just let her walk out; I would tell her I had Whole Wheat. I tell her there

are fifteen biscuit in the package, very nice, and ask them to try it. They usually do try them. I have not had any of them bring them back and say they did not like it. I have a big volume of business on Kellogg's Whole Wheat Biscuit the way conditions are today.

I have put in orders for Whole Wheat to the wholesaler and gotten something else, about three or four years ago. I had several cases of Whole Wheat Biscuit, and I told the wholesaler I wanted Whole Wheat, and they sent me shredded wheat. I sent it back to the wholesaler and told them what I wanted. Then I got what I wanted. That was not a very grievous transaction as far as I was concerned. I got a product I had not asked for, sent it back, and got what I asked for. That is in our line, every day, that way. That transaction did not put us out of busienss or drive us wild. Sometimes I ask for Pale Dry Ginger Ale and they send me light and I do not want it. I send it back and get what I want.

We do not practice substitution in my store. I used to have a butcher working for me a couple of years ago, who never had a calves' liver for years in his store. He always sold pigs' liver for calves'. I would not do that. The customers who asked for calves' liver and got pigs' liver went out thinking they had got what they asked for. That is one method of substitution. Assuming, when a woman asked for shredded wheat, she meant Plaintiff's Exhibit 1, I do not think you could give her a package like Plaintiff's Exhibit 168 and have her walk out of the store thinking she got the Niagara Falls package. I do not think I would be expert enough to create that impression in her mind. I do not think any grocer could do it. I have to tell customers today that I have new products and ask them to take them in place of other products I am out of, to gain customers. That is not regarded

in the trade as illegitimate. I have been through that with Mother's Oats and things of that kind. It is a case of making a profit on it. I think it is a very good product. I make a profit on Kellogg's Whole Wheat Biscuit. I did not figure I made a profit on shredded wheat by selling them the same as the rest of them did, on account of the chain store competition. When I figured I could not make a profit on shredded wheat, I dropped the sale of it. I co-operate with the Kellogg Company in bringing Whole Wheat Biscuit to the attention of consumers, giving them window and store displays from time to time, using the store cards, hangers, and strips they furnish me. I just had one of their combination special sales on their new flakes, this week. The salesman came around two or three weeks ago. I never have a sale of three Kellogg products with a fourth one free. The sale is just putting that on the floor with a sign on that. That sale included among other things the Whole Wheat. We charge twelve cents for Kellogg's right along in our store.

We do not handle any other National Biscuit product, because I have Ivins' Cakes, and they sell. You do not get any discount from a company like the National. If you bought twenty-five dollars worth, they would send you a check for the discount at the end of the month, when I was there. I got tired of that when a fellow with four or five stores sold Saltines down the street for sixteen cents, just what they cost me. I took them out after that and have not dealt with the National Biscuit Company since.

I have tried the Kellogg's Whole Wheat Biscuit and found it very good. I like them a little better than shredded wheat. I have eaten both. I prefer Kellogg's. The same customers repeat on Kellogg's biscuit. They seem to come back for more. I do not be-

long to any co-operative buying or selling organization. I am just an independent grocer, selling by telephone, making deliveries, and extending credit if it is justified. We wait on our customers. They do not serve themselves.

CROSS-EXAMINATION.

THE WITNESS: I have been in business about twenty-five years and used to carry shredded wheat. I have been familiar with it a long time. My customers used to be familiar with it and asked for it as shredded wheat. It was a well-known name in the trade. I have eaten shredded wheat. I switched to Kellogg's biscuit about four years ago. I was then and had been for many years carrying shredded wheat. I had some customers who asked for it, but I had to let it go. After a while, I got the Kellogg biscuit, and I was able to retain my customers by switching them to Kellogg's biscuit. I had samples, showed them what they are, told them how good they are, and they bought it. I have not had a shredded wheat customer for a year. I do not have as many old customers as I had. I have been where I am now for about eight years. My customers are regular customers, many of them old customers, none just transients who pass by. Many of them stay with me year in and year out. Many of them used shredded wheat and are now using Kellogg's Whole Wheat Biscuit through my efforts. Many of them would come in and ask for shredded wheat, and I would tell them we do not have it any more, that we have Kellogg's. I would indicate them how to ask for Kellogg's instead of shredded wheat. They ask for Whole Wheat now. I could not say how many customers have been switched over in the four years from shredded wheat to Whole Wheat Biscuit. Nothing new today is moving very fast, not even Kellogg's Whole Wheat Biscuit. It is rather slow. I still

have some of my old trade. I know I have three or four steady on it all the time. During the day, I do not know. That does not represent a very large volume of sales. I do not sell a great many cases of Kellogg's in a month. Camden is very poor. I sell as much as a whole case of Whole Wheat Biscuit in a month. In the old days, I think I sold about a case of shredded wheat per month. It is pretty safe to say that my trade that was once shredded wheat is now devoted to Kellogg's Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not mean to tell Mr. Vilas that the same customers who now buy Whole Wheat Biscuit are the customers who used to buy shredded wheat Biscuit; much different. Those armies are recruited from new customers. Some drop out and some come into the new army of recruits for any product. Some of them are old ones, not many. I think of one right here who was a customer of the old shredded wheat some years ago, who now uses the Kellogg product and has ever since he got out of shredded wheat, three or four years ago. He tells me he likes the Whole Wheat Biscuit better than the old one, so I do not think I have done him any injury by introducing him to the new Kellogg product.

RE-CROSS-EXAMINATION.

THE WITNESS: I understand the reason I could not obtain a larger discount from National is that I do not buy as much as some other people, so I felt I could not carry the line. I do not like the stuff to sit on the shelf. I like to move it. I do not like to see anything go bad. Years ago, I carried a full line of National Biscuit cakes. It got so I could not sell enough of them at the price I used to get for them, to pay me for having them.

CHARLES W. MILLER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am general manager of the Keystone Wholesale Grocery Company, a co-operative wholesale organization for buying and selling. We have three hundred of our members, and two hundred are in the selling organization, which is called Keystone Stores. Those members who participate in the selling do not have uniform store fronts, but we have a uniform sign hung in front, green, with gold letters. They are all in Pennsylvania, principally in Berks County, with a few over the county line, such as in Pottstown. They are service stores. Some of them make deliveries and extend credit, and some do not.

Our organization carries Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 168. We have carried the product ever since Kellogg put it out, five or six years ago, I think.

We also carry shredded wheat, like Plaintiff's Exhibit 1. We sell the most of Kellogg's biscuit, about three cases to one last year, in favor of the Kellogg product. A big majority of our members handle the Kellogg biscuit as retailers. We can undoubtedly get a hundred per cent. or between ninety and a hundred on any thing. There is a consumer demand for that product in those retail stores, which has been created in various ways. They first put out measuring bowls, then a kind of game in books, then an educational geographical chart from the Kellogg Company, to give out with the biscuit. They did a lot of newspaper advertising. They send their salesmen around at times to make lots of displays. When they had their first campaign, they had three men working on window and

store displays. Our organization connected it up and ran ads similar to that at various times.

The paper you show me, Defendant's Exhibit 94, is the ad from *Reading Eagle*, February 4, 1932. That same sort of ad has been conducted through the newspapers from time to time. It was also broadcast on the radio, that Wednesday to the following Tuesday.

Store circulars have been distributed direct to customers from different stores. I think Mr. Moyer, one of our members, has some of the circulars he put out. Kellogg's Whole Wheat Biscuit have been advertised through those means. We only advertise the four specials. We may have others. We always say: This week's big four, and then they build theirs around those, which are the main specials we advertise. Defendant's Exhibit 94 starts off with about half the space devoted to Kellogg's biscuit, and the lower half with four specials, of which one is Kellogg's biscuit, that week. We change every week. When an ad is run like that in the *Reading Eagle*, our stores hook up with it. They make counter and window displays with the posters we give them, exactly like those. They are put in windows. The items they feature in those displays will be the four items we display in the advertisement.

We will not stand for substitution. If a woman comes in and asks for a certain thing and a storekeeper gives her something else and she goes out thinking she has what she asked for, I would consider that substitution. It is deceptive substitution. None of the stores in our advertising group does it. I have had cases in which customers have asked in our stores for just shredded wheat. I do not run the stores. Each one runs his own store. If anyone called up and asked for shredded wheat, unless they specified otherwise, we would give them the National Biscuit Company's shredded wheat. We have store conferences. I sit in

at their meetings. We have had this question of substitution up at those conferences. We have an advertising committee meets every Tuesday. Samples of these two biscuits are on my desk. On man said a woman asked him for a box of shredded wheat. He handed down a package of the Niagara; and she said, "No, I do not want that. I want Kellogg's." I will say that, nine times out of ten, they ask for Kellogg's Whole Wheat Biscuit. Sometimes they ask for shredded wheat and I find, when I have gotten the Niagara shredded wheat, they want the other. They say they wanted the smaller biscuit. By that the clerk understands they mean the Kellogg product.

If a customer asked for Kellogg's Whole Wheat Biscuit, I do not think the grocer could hand her the shredded wheat package and get her out of the store thinking she got what she asked for; nor vice-versa. The packages are too dissimilar in looks. Each package would publish it was not what the customer had asked for. Our wholesale organization now carries both kinds of biscuit. Two years ago last December, the Shredded Wheat people, through the National Biscuit Company, notified us by letter, Defendant's Exhibit 95, dated December 1, 1930, that, effective January 1, 1931, they would turn their goods over to their local agency. I wanted to give them an order during December for a carload. They said they would not sell us, that we had no salesmen on the road and were not in a position to do them any good. Shortly after January first, they stated they had changed their method and would let us have it, and they gave us seventeen and a half per cent. I received this letter by mail, headed National Biscuit Company and dated December 1, 1930. They offered the seventeen and a half per cent. discount some time in the first months of the following year. I would not accept it right away, until they would give our members seventeen and a half

per cent. on everything they purchased, which requirement they finally acceded to. For a while they would not sell us. After that, we would not stock it for several months.

Before we got that letter, we bought Niagara Shredded Wheat in carloads. That business had been created through sampling. As wholesalers, I do not think we did anything in particular to create demand for shredded wheat, only we were in a distributing channel for three hundred stores. That was a buying association at that time. We could save them money, coming through us. As a wholesale association, acting through that buying agency, we did have carload orders for Niagara shredded wheat. We had no advance notice that it was going to be cut off, except the letter of December 1, 1930, which was a surprise to us. There are five hundred and fifty cases to a car, and I think we were using a car every sixty or ninety days. That letter was the way I knew exactly where I was. We were so surprised they had a meeting in the Manufacturers' Club in Philadelphia, of the various clubs, and, when I told them about it, Mr. Haase got after them and told them he wanted to buy a car. It was good we needed a car then, because, otherwise, we would never have known they did not want to sell it to us. I rendered an order for a car of shredded wheat, and Mr. Haase and the local manager were up in my office. I said I wanted to buy a car, and they said they could not sell it to us. I regarded that as an offer tendered and rejected, had no doubt about it. That is why their local manager brought Mr. Haase there, to have his authority to turn down our order, and it was turned down. We have never bought a car since. The Kellogg Company has never turned down any of our orders for any of their cereal products. Mr. Haase said they refused to accept that order because we had no salesmen on the road.

I do not believe any of the National people said anything to us about handling the Kellogg biscuit at any time. I have heard of this litigation from time to time. I do not remember how the information came to me. The National salesmen come to see me, soliciting orders on Niagara shredded wheat, and Kellogg's men do the same.

The National cut us out from shredded wheat when they took it over, but not as soon as they took hold of it. They had it for some time. Mr. Haase explained their method of handling through their agency was to increase their sale through the agency on account of the slackness in their business. He said that was a matter of self-preservation; that they wanted to have the agency show a larger percentage on the account, so as to enable more people to make higher discounts.

At the time National took over the Shredded Wheat business or shortly after, they let out the old shredded wheat sales force and began selling that biscuit through the cracker salesmen of their own organization. They closed their Philadelphia office. For a long while, we had to buy carloads through their local manager. They did not carry shredded wheat in stock at that time. They took the shredded wheat out of the hands of their salesman here and closed their Philadelphia office. They only sold the jobber. I think their local manager took care of that, which was quite a change in the old selling methods of shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: Mr. Haase explained to me at that time that the National salesman would serve shredded wheat to the retailers along with the crackers and that, in taking the business away from the jobbers, they intended to go direct to the retail stores and supply them with shredded wheat, just as they were doing with the

crackers, and that the retail stores would profit to the extent that the volume of shredded wheat would apply to their sales for discount purposes. So, in the latter part of 1930 or early part of 1931, being unable to get shredded wheat in carload lots, we bought Kellogg's Whole Wheat Biscuit; but we had purchased it before that. We bought it in pool cars prior to that time, but not a whole carload of Whole Wheat Biscuit. We never have. There is no necessity to. Then the National came back and said they would again recognize our organization and would like to have our business. It was too late then for that carload. Since about April or May of last year, we have been purchasing some shredded wheat, and we have been going ever since. We buy twenty-five cases at a time, about twice a month, or a total of about five hundred and twenty-five cases last year, for our membership.

A certain proportion of our members purchase direct from the National Biscuit Company salesman. We try to discourage it. We do not like them to do that. We have to reduce our overhead. We get some shredded wheat now, however, getting it through to our retailers.

I have been in the grocery business all my life. I have been with this company as general manager ten years. The company has been operating about fourteen years, purchasing as a co-operative organization. I do not know how many of our members carry shredded wheat. I should judge about the same proportion as carry Kellogg's. About ninety per cent. of them handle Kellogg's, and I think many of them also carry shredded wheat. I know and have known shredded wheat. I could not make any mistake between those two packages. I questioned our office girls before I came here, so I am sure when I say no substitution has occurred in our warehouse. I do not know about any of our individual stores. There might be some con-

fusion there. I called on our stores to find out if substitution was practiced in any of them. We are always interested in having stores of good clean reputation. I do not believe some of them have occasionally sent a Kellogg package when shredded wheat was ordered.

I know H. B. Schaeffer, Bernville, Pennsylvania, and Sander of Lenhartsville, and Fehr of Shillington, and L. E. Rote, of Reading, and Max Bachl, and C. H. Hoffman, members of our stores. I do not know that Kellogg's Whole Wheat Biscuit has been delivered as shredded wheat by each one of those within a comparatively recent time. We would not let them in our organization if we knew they did it. We do not approve of it. I could not say it was not done.

I recognize one of our ads in the *Reading Eagle* dated May 5, 1932, Plaintiff's Exhibit 210. That is one of our ads and appeared in that paper. That is what I said about the Wheel of Knowledge. That ad was paid for by us. I see on the same sheet the Shredded Wheat advertisement adjoining our box. Most of the national advertisers like to get near us. They know that is where the home-town stores advertise.

Plaintiff's Exhibit 211, page from the *Reading Eagle*, February 4, 1932, is the same as the other one. The reading matter for the top part, about Whole Wheat Biscuit, I judge was some material the Kellogg people send out in their advertising. When we advertise pineapple, for instance, I generally hunt up some of the advertising the pineapple people do, out of magazines or somewhere. I would not want to state that that is just as the Kellogg people furnish it. We make it up ourselves.

I recognize Plaintiff's Exhibit 212, page of the *Reading Eagle*, Thursday, May 12, 1932, as our ad on one page of it. I will not say I recognize the ad of the Kellogg Company on the page you showed me. I do

not remember seeing that one, that I know of. We will even take up their advertising and run our ads on it.

We do not advertise shredded wheat in our advertisements. We never advertise anything we have direct competition in, where they sell our stores. We do not advertise that line. We never aid anything that competes with us. We think there is too much to sell that does not compete. Except in one or two instances, I do not know at what retail price the two products are selling in our stores. We do not attempt to dictate prices, except to regulate the four special items for the week and have them all carry those at that price for that one week. Otherwise, they are at liberty to fix their own retail prices.

We deal with Standard Brands only on what they do not sell direct to the stores. Royal Baking Powder, I guess, is the only thing we purchase from them. They have wanted us to advertise it, but we have not done so yet. Standard Brands puts out a gelatine dessert, on which they did the same thing National did on Shredded Wheat, servicing the stores direct and cutting us out. They would like to get back now, but they have not come to it yet.

RE-DIRECT EXAMINATION.

THE WITNESS: The last two paragraphs of Defendant's Exhibit 95 meant to me that, as Mr. Haase explained, they would only have jobbers who had salesmen and would sell it on those list prices. They asked us in that letter not to deviate from those prices. They said they would take off our hands anything we had. We had it all sold, so that was not necessary.

We generally copy the material for advertising Kellogg's Whole Wheat Biscuit from some ads we see. They did a lot of advertising in the *Reading Eagle*. When we were writing up an ad, I looked up all those

things and copied them. I did not mean to imply that the Kellogg Company are furnishing us copy. They did not know what we were going to say in our advertisement until it appeared.

GEORGE W. MOYER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer. My store is Moyer's Daily Market, at 1523 Cotton Street, Reading, Pennsylvania, a combination meat, green goods and grocery store. We wait on the customers in the grocery department. There is no self-service. About 90 per cent. is cash and 10 per cent. charge. We receive telephone orders and make deliveries.

We handle Kellogg's Whole Wheat Biscuit and have had it, I believe, nearly ever since it has been on the market, about four years. There is a consumer demand for the product in my territory.

I now again handle shredded wheat from Niagara Falls. There was a time when I did not carry it. We sell about eight packages of Kellogg's biscuit to one of Niagara shredded wheat. They purchase it as Kellogg's Whole Wheat Biscuit. The other product is sold as shredded wheat. If a customer asks for shredded wheat, we give her shredded wheat. She does not always mean that Niagara product when she says it. In a very large number of instances, people ask for shredded wheat, and, when we get it, they say they do not want it but want the other package, the smaller biscuit. That happens in numerous cases. I have never had them return a product purchased and say it was not what they wanted, since they marketed it. As far as I know, I have never had a customer get

one of those packages, though she wanted the other, thinking she got what she wanted. I forbid substitution in my store. It is positively forbidden to our clerks. If the customer is there and we do not have an article, you can tell her you do not have it or that you have some other item which will take its place. On telephone orders, we can call them or tell them we are out, or something of that kind.

In view of our experience of a customer saying in many cases the Niagara biscuit is not what she wants but the Kellogg package, when we get a telephone order for shredded wheat biscuit, we ask them which one they want, shredded wheat or Kellogg's Whole Wheat Biscuit, because, for a year or longer, I have not handled shredded wheat biscuit at all. They refused to sell them to the Keystone Wholesale Grocery, to which we belong, and we cut them out. We had to pay more for them than we did through our own organization. Then we discontinued handling them. During that time we explained to our customers why we were not handling them. Our customers knew why it was at that time. If they would not take Kellogg's biscuit, they would walk out without the other one they desired. When a customer asked for Niagara shredded wheat, we told them we did not handle that, but we had the Whole Wheat Biscuit, which gave them fifteen biscuit to the package and a half ounce more. They could return it if they did not like it, and we would refund the money. In nearly every case, they tried it. We very seldom lost a sale on it. There is nothing illegitimate in our use of that method, nothing improper in telling our customers those facts.

Our Keystone organization advertises in the newspaper about the food elements, the different formulae on the packages, and we use that. In nearly every case the consumer tried it. In a very large number

of cases they repeat. They seem to like the product. Defendant's Exhibits 96 and 97 are circulars we put out every week.

Besides those circulars carrying advertisements of Kellogg's Whole Wheat Biscuit, we have a window display, sometimes a solid window. I have two large windows, a hundred and ten inches wide and three feet deep. We often make a solid display in one window and some of our specials in the other. We give store displays, also. The Kellogg people put out different games and inducements to buy their package, also sampled on it a few days before in the neighborhood. At present there is a substantial consumer demand for the Kellogg product in my territory. The general average price for Kellogg's Whole Wheat Biscuit is, I think, ten cents. The general average price for the Niagara Falls biscuit is eleven cents, I believe. That is what I get for them. If we run a special on Kellogg's, it is nine. I cannot compete with the chain on shredded wheat, and they often sell it at nine. So I put no sales effort behind it at all. I have had full window displays of the Kellogg product.

We have had Saturday sales in our store on Kellogg's Whole Wheat Biscuit. The different times we put a special effort on, we put premiums out and a cash prize for the man selling the most among the clerks, and used different sales efforts. That was when I did not handle shredded wheat. The Kellogg Company furnished a salesman who was in the store at the time of those sales, the same as a demonstration.

CROSS-EXAMINATION.

THE WITNESS: I was without shredded wheat a year or more. I put it back when they started to sell again to the Keystone Wholesale Grocery Company. I am practically a 95 per cent. customer of the Key-

stone Company and a stockholder. We had some demand for shredded wheat, which continued when we put it back. When we were without it, I explained to the customers who wanted shredded wheat why we did not sell it, and asked them to try Kellogg's Wheat Biscuit. Some of them did and some not. I would allow those who did not to go out, the same as today we do not handle Royal Gelatine. That loses some sales. Some people try some other brand. We did the same with our telephone customers. If they ordered shredded wheat, we would explain we did not handle it, and why, and induce them to take Kellogg's biscuit and try it. I would say about 70 per cent. of my customers were switched from Shredded Wheat to Kellogg's biscuit by those methods. That may be taken to account for Kellogg's biscuit outselling shredded wheat eight to one in our store.

Many people, even now, come in and ask for the small shredded wheat, when they mean Kellogg's. I know what they mean when they say small shredded wheat. Sometimes they just mention shredded wheat, and, when we get it off the shelf, they say, "No; we want the other package with the small biscuit in it." They sometimes call it the small shredded wheat and sometimes Kellogg's shredded wheat. There can be no mistake between the two. They are right alongside each other on the top shelf. The customer can positively see it as we take it down.

RE-DIRECT EXAMINATION.

THE WITNESS: People, as far as I know them, eat shredded wheat until they get tired of it, and then switch to another cereal, and then get tired of that and practically come back.

RDQ. 77. When you told Mr. Vilas that seventy out of a hundred of your customers that used to buy

Niagara shredded wheat biscuit now buy the Kellogg's shredded wheat, did you mean that, out of a 100 per cent. demand, there had been a 70 per cent. shift, or did you mean to say that the same 70 per cent. of customers who used to buy the others were now buying Kellogg's? What did you mean?

A. I think that what I meant by that was that 70 per cent. of the people that formerly used shredded wheat are now using Kellogg's Whole Wheat Biscuit.

RDQ. 78. That is to say that, out of a hundred customers who bought the old product, seventy of those are now buying the Kellogg product?

A. Yes, that is approximate.

RDQ. 79. And they are apparently satisfied with it?

A. Positively, or they would not come back and repeat.

MRS. WILLIAM D. (ELSIE) BOYER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with three in the household, my husband, myself and my son. I also have full charge of a laundry. I did have a girl with me but not any more.

We are all consumers of Kellogg's Whole Wheat Biscuit and have used it about two years, a pretty long time. I had been using shredded wheat, but not regular, just every now and then. I have been using Whole Wheat Biscuit or whole wheat products, anything with whole wheat in. I noticed Kellogg's Whole Wheat Biscuits and thought I would try them I bought them, liked them, and have continued to use them ever since. I like the taste of them better than

the old shredded wheat I had been using. I like the size. They fit nicer in the cereal dish. These are not so fine. There is just something I like better, taste and all. I have continued to order them ever since. I never ordered another package of the original shredded wheat.

Since I got the two products, I have never mixed them up in any way. Once I went in a store. I do not remember if I asked for Whole Wheat Biscuit or shredded wheat. They sent me a box. I said I did not want that, but I wanted the Kellogg's. They were confused that one time with it. They did not have them at the same place. Six feet or so away they had them separated from the other. When they handed me shredded wheat, I knew right away it was not what I wanted. Since that time I have been asking for Kellogg's. I do not think now I could get the packages mixed up any more. They could not give me either one and make me think I was getting the other. I made a purchase of shredded wheat when they did not have the Whole Wheat and I did not want to wait.

I came to testify today because Mr. Hopkins came to where I work. They told him at my grocer's, Bausher's, that I am a regular user of Whole Wheat Biscuit and sent him to me. He asked my people to let me off to be down here today. That was the first time I met him.

CROSS-EXAMINATION.

THE WITNESS: I did not know who Mr. Hopkins was before that. My grocer is W. S. Bausher & Sons, in Reading. I was in the store the first time I saw the Kellogg biscuit. I think I asked about it, if that was the same. Or I think I noticed the picture of the cereal in the dish on the package. That was what I thought was whole wheat biscuit. I did not know shredded wheat was made of whole wheat. I never read what

was on the package. I did not read the package very carefully. I did not know it was whole wheat. I recognize the package as the one I was buying. I never noticed the words *whole wheat* on the bottom of the package before. I did not notice on the back: "Made of the whole wheat—nothing added, nothing taken away." I do not use it now. I did not use it so much. I had been using Kellogg's Bran and all things of that sort. I would use it once in a while. I had known it for many years. It is an old product. I knew it as shredded wheat. When I saw Kellogg's Whole Wheat Biscuit, I knew it was something like shredded wheat. I noticed the biscuit on the package. Since then I have not bought any shredded wheat. It is about two years since I used it. Ever since I have been housekeeping, about twelve years, I had been using shredded wheat, but not as regularly as the Kellogg's Whole Wheat.

MRS. EVA KISSINGER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. There are eight of us in the family, and we are consumers of Kellogg's Whole Wheat Biscuit. I use all their products, a lot of their Corn Flakes and Bran. We like the Kellogg products and use a lot of them.

A son of mine had a lot of trouble with his bowels. My boy always suggested he try whole wheat. He had been using shredded wheat before that. We had the Whole Wheat Biscuit, and I thought that tasted better than the other, because it was toasted on both sides. I told him I thought he should try it. He did and liked it. We have been using it ever since. If they want a quick

dish of it, I heat milk, put it over, and have it ready when they sit down. They say what keeps me so fat is that, when I get hungry, I take half of it with the knife, put cheese on it and put it on top of the gas, letting it stay there a minute or two. It is very tasty and I eat lots of it. I use Corn Flakes all the time. Not all like the Whole Wheat Biscuit. I use the bran, too. I make muffins out of it and use a whole lot of it.

I happened to come to testify today, because the gentleman outside, Mr. Hopkins, came to me and asked me. I did not know what he wanted to know it for before he came to the door. I had never met him before. He got my name from my grocer, Mr. Bausher.

CROSS-EXAMINATION.

THE WITNESS: I have used shredded wheat for a great many years. I think I have kept house about twenty-seven years, and I have used shredded wheat all that time in my household, with other cereals. I am familiar with it and have been during all that time. There are many ways of using it. My people do not care for pie crust, so I roll the whole wheat up fine with butter and put it around the pie pan. That is Kellogg's Whole Wheat, because it is not so tough. When you mix it with butter and pad it around the pan and put a filling in it, just put it around nearly medium with the gas and brown them. It was my son who first mentioned it. I have been buying it from Mr. Bausher. After I first tried it, I did not buy any more shredded wheat, at any time. The Kellogg product take the places of shredded wheat in my home. We like it a whole lot better.

RE-DIRECT EXAMINATION.

THE WITNESS: Mr. Bausher's son comes to my door each week and gets my order. I usually buy enough in that line to last me a week and I give him my order and tell him what I want, which he sends me.

RE-CROSS-EXAMINATION.

THE WITNESS: He knows what I like. If I get anything I do not like, I send it back to him. I do not tell him I want shredded wheat any more. I always tell him I want Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I have never had any mix-ups between the two packages.

ROBERT J. SMITH.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. I have been connected with the retail grocery business about twenty-eight years and have never done anything else. I handle Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 168. I also handle Niagara shredded wheat. The volume of sales on shredded wheat is greater. I think it is the best seller of the two, about sixty or sixty-five per cent. to forty or thirty-five per cent. of the Kellogg biscuit. The demand for Whole Wheat Biscuit is an increasing, growing demand. There is a consumer demand in our store. Customers come in and ask for Kellogg's Whole Wheat Biscuit.

I had an experience with one of my customers, a lady named Shollenberger, a short time ago. She stated she did not want anything but Whole Wheat Biscuit, that her boy liked them. She refused to take the Niagara shredded wheat. I told her I was sorry I was out of it but I had shredded wheat biscuit. She insisted upon Kellogg's. When they were in, she came back and got the Whole Wheat Biscuit later, so I did not lose a customer on that account.

I do not practice substitution in my store. It is not a good practice. My definition of it is something just as good, or something very much like it, and saying that we have an article just as good or just the same. We do not do that. It is not a good policy. I do not call that deceptive substitution. It is not good for the merchant. When a customer asks directly for an article, you have that article in stock and want to sell the one they ask for. If a party comes in and says she wants some wheat for breakfast, it is all right to suggest something then.

In our store, if a customer wants shredded wheat, we just give her the Niagara Falls product; and, if she wants Whole Wheat, we give it to her. In this one instance I was out of Whole Wheat Biscuit and asked Mrs. Shollenberger if she would like to try the other. She would not use it. I did not regard that as one item substituted for the other. I just simply mentioned it. It was a biscuit. That is all I know.

When we have a new product in the store, we sometimes introduce it to the attention of our customers with window displays. I claim the counter is better. I think you get closer to the people and talk to them on it. I cannot say I have ever done anything in my store to push the sale of Kellogg's Whole Wheat Biscuit or treated it any differently than I have the Niagara biscuit. They are both on the shelf, and I hand them out in response to the demand for each. I do no advertising, absolutely not. Mine is a service store, extending credit where it is justified, making deliveries, and taking telephone orders. I have not had any mixing up between the two products or any confusion of them in my store. I think we had one package sent back. I never substitute it. It is bad policy. I would rather tell a person I am out and will have it in a short time.

In this one instance where the package was sent back, it was straightened out, and that was the end of it. I do not remember ever having any other transaction, because I never made a practice of substituting It is not good. It seems to me that I sent this woman shredded wheat. I would not like to say. I am pretty sure she sent it back and said she wanted Kellogg's.

I have heard of customers refer to Kellogg's as the little shredded wheat or as the small shredded wheat biscuit. I never really heard anybody ask for small shredded wheat biscuit. They ask me for shredded biscuits and shredded wheat. I have never had the other question put to me. I do not think I have ever had customers ask me for Kellogg's shredded wheat. I do not recall that.

CROSS-EXAMINATION.

THE WITNESS: We have handled shredded wheat for many years. I may have been out of it for a short time a couple of years ago. It has been a well-known product, well advertised, and well known to the public. My customers always ask for it as shredded wheat and have for years. I have no doubt what they mean when they ask for that product. I have noticed a difference in the biscuit. They are different biscuit entirely. At the time of the Mrs. Shollenberger incident, as to quality, I had not noticed any particular difference between the two kinds. It had not really occurred to me at that time. I have had Kellogg's since they first came out, a few years ago. Up to then, all the shredded wheat biscuits I sold were shredded wheat, although it seems to me that there was another on the market years ago. With some possible slight exceptions, nothing else filled the order for shredded wheat, which was what we particularly handled. Shredded wheat sells about sixty to forty of Kellogg's at the present time.

I guess some of the people who now buy Kellogg's Whole Wheat Biscuit are people who used to buy

shredded wheat. Possibly, some are new trade. I have been about twelve years at the one place. I have a large number of steady customers. Some of them shifted to Whole Wheat. I have had some change to Kellogg's Corn Flakes, I suppose through advertising or goods displayed on the counter. They wanted to try them because it was something new.

I give a person what she asks for, because it has always been my custom never to lie. I have done very little of pushing forward with advertising or display. When a new product comes in the store, I always give it a chance, laying it on the counter or sometimes in the window. I did that for Kellogg's Whole Wheat Biscuit. It was on the counter and in the window. At present, they are both on my self, on display. Our customers ask me for what they want and I have no trouble about that. We give them what they ask for.

RE-DIRECT EXAMINATION.

THE WITNESS: It is an entirely different package, in appearance and all. I do not think I could sell a customer one of them with the idea she really had shredded wheat when she had a package of Whole Wheat Biscuit. I would not even try it. It would be misleading. I would not want to do it.

ISADORE COHEN.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer under the name of Lebanon Delicatessen. I have been in the grocery business about sixteen or seventeen years. I handle Kellogg's Whole Wheat Biscuit like Plaintiff's Exhibit

168. I handle Niagara Shredded Wheat, like Plaintiff's Exhibit 1, and I have some of the new package, with the purple grass, which I got last week. That reached me already.

I find a consumer demand for both these products. That is why I got Kellogg's, because I had people asking for it. They sell in a proportion of about three packages of Kellogg's biscuit to seven packages of shredded wheat. I have no confusion in my store between the two products, never have a customer send back one and say she ordered the other.

If a customer calls for shredded wheat, we give her shredded wheat. If she calls for Kellogg's Whole Wheat Biscuit, we give her Kellogg's Whole Wheat Biscuit. If a customer said she wanted Kellogg's shredded wheat, I would say that Kellogg's is not shredded wheat but is Whole Wheat Biscuit. I would straighten it out in that way. I have customers who ask for Kellogg's Whole Wheat, which is why I started to handle it. I handle a lot of it now. A salesman took a case, came back, and took it again. Then there was a demand, and I got it back again and have been selling it right along, too.

Occasionally have customers say they want Kellogg's shredded wheat. A few say: "What do you mean by Kellogg's Whole Wheat Biscuit?" They are smaller biscuit, and I think there are fifteen in the box. There cannot be any confusion between the two products. We take orders by telephone and handle them in the same way I have just described.

I do nothing to create a demand for either of these products. I treat them both the same way. When I got them first, I displayed them and had a box in front of the Kellogg biscuit. They did not go so well then. After that, I treated them both alike, on the shelf, the same as the other one. I keep all my cereals in one place, and I have the same price for both of them, ten

cents, the tag right in between the two packages, so it relates to both of them. I do not advertise. Ours is a delicatessen store. We have groceries and fresh meats. In the summer time, we order pretty nearly a case a week of shredded wheat, and one every two weeks in the winter. We have a pretty good sale for the delicatessen store. We make deliveries and extend credit where it is justified. I have four people to help me in the store. I do not know how the demand for Kellogg's biscuit has been created. I know customers started to call for it, and I started to handle it.

CROSS-EXAMINATION.

THE WITNESS: There is only one shredded wheat. That has been so for years. That is shredded wheat, Plaintiff's Exhibit 1; and this is the new shredded wheat. That has been so as long as I am in the grocery business, selling it. I do not know how many years. It has always been known and asked for a shredded wheat, and as nearly as I can remember, it has always been in the same package. The coloring of the package has just been changed, but it is the same size, and the biscuit has always been of the same general size and appearance. People have asked for it and known it as long as I have been in business. Some people claim they buy it because it is a smaller biscuit and more in the box. I myself am using Kellogg's shredded wheat, because one of the old shredded wheat is too much for breakfast, and two of Kellogg's is just enough. I like it for the same reason some of my customers do. It is a little more toasted, I think. That is my opinion. I never asked a customer why they should like it better or what their reason is to favor it.

I really could not say if many of them are people who have used shredded wheat and have switched to Kellogg's. I guess we have one or two that were buying shredded wheat and have been going in for Kellogg's. I do not know how that came about.

JOHN HOPKINS.

Deposition taken at New York, N. Y., April 4, 1933.

Direct Examination.

The Witness: I am district sales manager of the Kellogg Sales Company and have been connected with the Kellogg Company since December 1, 1910. Before that I was in the cereal business with the Shredded Wheat Company, my duties being sales and advertising of shredded wheat. I was with them from about 1904 to 1910.

The Kellogg Company was not putting out a Whole What Biscuit when I started with it. They put out a shredded wheat type of biscuit about 1928 or 1929. They had a dough biscuit before that. I cannot remember if it was flavored or not, but it was made from dough and squeezed out, flattened biscuit. I think it was called Kellogg Biscuit.

My present territory is from the northern boundary of Hunterdon County, New Jersey, across over to the northern boundary of Ocean County, New Jersey, and from there on down to Cape May. Then I go south through what we call the eastern shore, taking in Delaware, eastern Maryland, and two counties in Virginia, down to Cape Charles, and west as far as Hancock, Maryland. In Pennsylvania, I go as far on one railroad line as Lewisburg and Williamsburg, and in Tioga County to the New York State line. I go east from there with the exception of the county in the extreme northeastern corner of Pennsylvania, which comes under the New York office. I take in the District of Columbia, too. I have about twenty-seven or twenty-eight salesmen in my district, engaged exclusively for the Kellogg Company, selling Kellogg Company products, Kellogg's Corn Flakes, Kellogg's Pep, Kellogg's Whole Wheat Biscuit, Kellogg's Rice Krispies, Kel-

logg's Krumbles, Kellogg's All-Bran, Kellogg's Wheat Flakes, Whole Wheat Flakes, and Kaffee Hag Coffee. Our Wheat Flakes come in competition with a product known as Wheaties. They are competitive to us. They are also in flake form and are a product of General Mills.

The work we have done in our territory to introduce to consumer attention and create consumer demand for Kellogg's Whole Wheat Biscuit has taken various forms. We have sampled. We have gone into food shows. We have done what we call Saturday promotion sales. We have used different merchandising pieces handled through the grocers, the first one being a green glass measuring-cup, graduated. We also used a book of games, and then the Kellogg Wheel of Knowledge, or geography chart. Last year we had the Jungle Land Books. I have a couple of those pieces here. Defendant's Exhibit 98 is the Story Book of Games which has been given out with Kellogg's Whole Wheat Biscuit.

Defendant's Exhibit 99, is the geography chart or Wheel of Knowledge. That is a feature that has been in demand among consumers, in order to create a demand for Kelloggs Whole Wheat Biscuit.

We have used newspaper advertising. We have had co-operation from dealers in our district in the way of advertising, window displays, store displays, and so forth. That certainly has been effective in increasing consumer demand. We have secured a fifty per cent. or better distribution of the biscuit in the better types of stores in our territory. That is a steadily growing proportion.

We have sought to impress upon the product in our work in this territory the name Kellogg's Whole Wheat Biscuit. I have never heard it called Kellogg's Shredded Wheat. I have never seen any dealer advertisements of it under that name.

I would not say that the Niagara shredded wheat has a hundred per cent. distribution in our district. Neither product is distributed in all these types of stores.

The selling points or features we have emphasized in pushing the sale and creating a consumer demand for the biscuit are: The size of the biscuit, fitting into a cereal bowl without having to be broken; that it is more porous, that it is toasted on both sides, fifteen biscuit to the package, twelve and a half ounces to the package. None of the Niagara biscuit that I have ever seen has been toasted on both sides.

Since the National Biscuit Company has had shredded wheat, in the last few years, they have not practiced the same methods of creating consumer demand for that product that the Kellogg Company has for this in our territory. I have heard they left a few samples with a grocer occasionally. They did some newspaper advertising last year. Otherwise, our men have not encountered their competition in any strong way in the biscuit field, in the advertising.

They have no force comparable to our force of salesmen working on Saturday sales, demonstrations, and house-to-house work, etc. We have much stronger competition to encounter on the sale of Corn Flakes than in connection with the sale of Whole Wheat Biscuit and shredded wheat.

I would say that there has been a change in the attitude of the grocer toward his customer and of the customer toward the grocer in recent years. The old-line grocer was doing more or less of a credit business. Every grocer used to know his own customers. Today, the housewife does more shopping. She is a sort of free-lance, knows where she wants to go. Nothing would make her stay with a grocer she was trading with unless it would be confidence in him.

Kellogg's Whole Wheat Biscuit has gone into both the old-fashioned and new-fashioned type of stores. There are a few Piggly-Wiggly self-service stores around Philadelphia, about sixteen of them. It is a new type of store just beginning to come into the East. There are also a few of them in Washington.

I have not encountered or had any reports of any confusion in the trade between the Niagara product and the Whole Wheat Biscuit. The two products compete with each other.

Kellogg's Whole Wheat Biscuit has been introduced into the restaurant and hotel trade in our territory in individual packages, packed straight cases of sixty packages. Then we have had the combination cases of all cereals, in which there are twelve packages of the individual Whole Wheat Biscuit, a few more corn flakes and less of some of the others. That has been a familiar feature in the restaurant trade. The individual packages have been increasing in popularity. From the standpoint of the trade, the advantages are sanitation and an equal quantity served to each customer. To the manufacturer the advantage of pushing the individuals is the advertising that they give on the shelf, and getting his package before the public.

There is no physical difference between the individual packages and the sample packages, as to the contents of the package or the size. They are both the same, except one is printed "sample" and the other is printed "individual." The policy of the Kellogg Company has been to push the sale of the individual cartons of Whole Wheat Biscuit.

Kellogg's Whole Wheat Biscuit has been introduced into chain store organizations. They usually want to see a consumer demand before they stock it. There is a consumer demand for Kellogg's Whole Wheat Biscuit in my territory.

Shredded Wheat and Kellogg's Whole Wheat Biscuit have sold generally on a par as to price. If there is any difference, Kellogg's tends to be higher. We have seen them getting eleven cents for Kellogg's and ten cents usually for Niagara Shredded Wheat, unless there was a special sale.

I do bidding on behalf of the Kellogg Company for the institution trade, such as government departments, hospitals, and things of that sort. The practice is that they send out proposals. The state and the government send out proposals, and we bid on them. They have public openings. I have brought with me two typical bids, being Navy Department standard government forms bids, supply contract. This is one from the Navy Department at Washington.

(The file copy of standard government form of bid as modified for use by the Navy Department, for the supply department, U. S. Naval Air Station, Lakehurst, New Jersey, was received in evidence and was marked "Defendant's Exhibit No. 100-A.")

(The standard Government form of bid copy as modified for use by the Navy Department for bid to Supply Officer U. S. Navy Yard, Washington, D. C., referred to was received in evidence and was marked "Defendant's Exhibit 100-B.")

(The standard Government form of bid, as modified for use by the Navy Department, dated January 12, 1933, to the Supply Department, U. S. Naval Air Station, Lakehurst, New Jersey, referred to was received in evidence and was marked "Defendant's Exhibit No. 101.")

I have also handed you a small folder marked Federal Stock Catalogue, Section IV, N-C-191, July

21, 1931. Those are the Federal specifications on cereals and breakfast foods.

Under Section IV, Part 5, E-2 (h) the following: "Shredded wheat—shall be prepared from sound clean wheat without material removal of the bran. Shall be processed with or without added flavoring, drawn into fine shreds, formed and baked in oblong biscuits of uniform size and shape, weighing approximately one ounce each. Shall be porous, tender, crisp, and of excellent flavor, free from rancid, musty, or other undesirable taste or odor. Shall contain no dirt, grit, or other extraneous matter." They usually state in the bids that it must come under the standard Government specifications, N-C-191.

In Defendant's Exhibit 101, item number 66, reads: "150# Cereal, Wheat, to be Kellogg's Whole Wheat Biscuit 24 pkg. to case, each pkg. contains 15 biscuits, net weight of contents of each pkg. is 12½ ounces." That item was inserted in the bid by the Kellogg Company. I put that in there.

In Defendant's Exhibit 101, the mimeographed paragraph under materials and workmanship, etc., reads: (A) Cereal, Wheat. Shall be made in a proper manner from good quality wheat, shall be shredded and in biscuit form, and must be clean, cooked and evenly toasted on one or both sides. Shall be similar to and equally as acceptable as the product manufactured and distributed by the "Shredded Wheat" and "Kellogg Whole Wheat Biscuit" respectively. That was in the bid when it came to me, put in there by the Government.

Defendant's Exhibit 100-A contains, under Schedule 1009, in the mimeographed request for bids, the following:

"65. Wheat, Cereal, E-2 (H) Kellogg's Whole Wheat Biscuit, 150 lbs." That was in the bid when

it came to us, with the exception of the typewritten part: "Kellogg's Whole Wheat Biscuit" and so forth. We inserted that. E-2 (H) refers to the specifications which you read.

(The Federal Standard Stock Catalogue N-C-191, Section IV, Part 5, referred to, was received in evidence and was marked "Defendant's Exhibit No. 102.")

The Government, in asking for bids on products like Whole Wheat Biscuit, encourage competition. They put out proposals to get competitive bids. The State bids generally want real competition, too. They encourage it.

The Kellogg Company gives no allowances to retailers who advertise its products.

We use cellophane-front packages in the sale of Kellogg's Whole Wheat Biscuit in this territory. That has been a popular feature. The product is marketed to the retail trade in this territory through the jobbers. The National Biscuit Company Shredded Wheat is marketed to the retailer direct, to a majority of them. They once distributed through the jobber. They sent out a letter in December, 1930, advising the jobber they were going to sell from their wagons, just the same as they do their crackers and cookies. That policy has been followed by the National Biscuit Company since then. Our distribution on Kellogg's Whole Wheat Biscuit in this territory, as far as the wholesale trade is concerned, is 85 to 90 per cent.

The same methods I have described for the purpose of introducing the product to the attention of consumers and creating consumer demand for it in this territory have been used on other Kellogg's products. We use the same methods on our whole line.

There are red stickers on Defendant's Exhibit 100 and Defendant's Exhibit 101, reading: "Notice:

All the items that we are bidding on are in accordance with Government Specifications on cereals, No. N-C-191. Kellogg's Sales Company." It is now our practice to put those stickers on the bids when they are returned.

CROSS-EXAMINATION.

THE WITNESS: I went with the Kellogg Company a very short time after Mr. James F. O'Brien, left the Shredded Wheat Company, which was about 1910. Mr. Clarke in some of his questions referred to Niagara Shredded Wheat. It was always known as shredded wheat made at Niagara Falls. It was known as shredded wheat. There was nothing else then known as shredded wheat. It was not until 1928 that the Kellogg Company began to make their Whole Wheat Biscuit, which they then called Shredded Whole Wheat Biscuit. They put out a biscuit before that, that was of a little different type, the biscuit I referred to on direct examination as made of dough. That was about 1915 or somewhere in there. It was a biscuit shredded different, but it was more compressed. It was originally in dough form, if I remember correctly. It was passed through a grinder and was shredded. It may have been flavored. That biscuit did not achieve any great measure of popularity. I do not recollect the Kellogg Company starting to make Whole Wheat Biscuit similar to shredded wheat in 1921. The only biscuit I can remember is the one in a more compressed form than this. In 1921 I was either working out of the Boston office, or I was in Richmond, Virginia. I was with the Kellogg Company and have been with them continuously since 1910. I cannot recall ever hearing about or seeing a biscuit resembling Shredded Wheat in or about 1921 or 1922. I have visited the main plant in Battle Creek. I was not stationed there. I have always been in the field.

It was about 1928, that the Kellogg Company put out the nine-ounce package of the more porous biscuit, substantially like the one we now call Whole Wheat Biscuit. It has not been substantially changed since that date. It was in a package like Plaintiff's Exhibit 166, which was used a year or a year and a half, beginning about 1928. The next package was like Plaintiff's Exhibit 165, which followed Plaintiff's Exhibit 166. It was used approximately a year, or a total of about two years or more for the two packages, in which the biscuit was called Kellogg's Shredded Whole Wheat Biscuit. Plaintiff's Exhibit 165 was extensively marketed in this territory, started in here and was more extensively used than the last one. It was advertised. I do not remember seeing any cuts of that package. I would not say there were such cuts or were not.

The methods of promotion I described to Mr. Clarke applied mostly to this other twelve-and-a-half ounce package. There was more extensive work done on it. We did house-to-house sampling and held Saturday sales, and the other features I have described were used in promoting that biscuit.

The change in which the word "shredded" disappeared from the front of the package and it became Kellogg's Whole Wheat Biscuit took place about three years ago, somewhere around 1930. Plaintiff's Exhibit 159 represents the package in use around that time. I recognize it as a Kellogg package in use in 1930 or 1931. It has been around two years since I have been using that package. Kellogg's Whole Wheat Biscuits are marketed at present in packages like Plaintiff's Exhibit 159.

I recognize the package, Plaintiff's Exhibit 161. That is the cellophane-front package. I think we started it in the fall of 1931. We had some in 1931.

The window package in 1931 carried the same printed matter that Plaintiff's Exhibit 161 does. I am not sure. Looking at the end of the package, I could not tell you about that. These little changes come on the package. It either has: "Biscuit thoroughly toasted," or "Fifteen biscuits." That could be put on. On the ends of Plaintiff's Exhibit 168, there is a little difference in the phraseology of the printed matter there. As far as the biscuits are concerned, the picture of the dish with the biscuit may be a little different in the lithography. There is a difference in the drawing, a difference in the dish used, and a difference in the perspective. This biscuit is a little browner than the other one. That could be a little difference in the lithography. The biscuit shown on Plaintiff's Exhibit 161 are browner. Plaintiff's Exhibit 168 looks like the later of these two packages to me. Mr. Clarke says that he thinks the brown one is much later. It may be. I cannot just offhand carry in my mind a picture of it.

I would say that the cellophane front was put on in the fall of 1931. This open-easy top has been out a little more than a year. I think we started that package in 1932. Plaintiff's Exhibit 161 came out sometime in 1932. I just do not remember the date. We started the easy-open packages about that time.

I could not tell you whether the new printed matter on the ends and the new picture of the dish came out at the same time the easy-open package was first used. At any rate, packages like Plaintiff's Exhibit 161 are now in use in this territory. No packages bearing the designation Kellogg's Shredded Whole Wheat are now sold in my territory, that I know of. There may be isolated cases. If you say that Plaintiff's Exhibit 215 was picked up in an American store recently in Philadelphia, I would not be disposed to dispute you.

It resembles Plaintiff's Exhibit 166. There might be isolated cases where one of those was still out. It might be that, as you say, this package was picked up in a store on North Tenth Street in Philadelphia recently, referring to Plaintiff's Exhibit No. 216.

The piece of cardboard you show me looks like a liner to me. It is a liner that might have been in Plaintiff's Exhibit 166.

Referring to the 1915 biscuit, the flat biscuit, I think it started out in Portland, Maine. I was in New England at that time, and I think we pushed it right lively in New England, using general advertising and sales efforts. It was known then as Kellogg's Toasted Wheat Biscuit. I have not seen it called shredded wheat. I do not know. It was not called shredded wheat at that time. I had to do with the sales of it. I was in New England at that time. I would say it was an item that competed with shredded wheat. It was on the market several years before it was withdrawn. I would think that item was eventually withdrawn from the market, because of its lack of popularity, which I would assume was because of its being in that compressed form. That one did not have consumer acceptance at that time. It was a war-time withdrawal, when they could not get wheat. It was made of wheat, and that probably was the reason, that they could not get wheat during the war. I was just a salesman at that time and did not know the ins and outs. We sold quite a little of it until they withdrew it. The Kellogg Company does not usually withdraw a popular item, but there were extenuating circumstances connected with that. It was during the war, and they probably could not get the wheat. The time came when they could get wheat, but they did not renew the item then. When I say we have fifty per cent. or better distribution in the better class of stores, I do not mean that that includes all possible outlets in my territory. The distribution

is there in some quantity, but I do not mean that there is an equal amount sold in all those outlets.

I have no way of knowing whether shredded wheat is still outselling Kellogg's biscuit in this territory. I have no way of knowing, because the National sells its shredded wheat from its own truck, and I would have no way of knowing.

At the time that the National Biscuit Company withdrew shredded wheat, in part, at least, from the jobbing trade, we already had the distribution on Kellogg's Whole Wheat Biscuit. All our business has increased. I cannot say that we have done any more with this line, the Whole Wheat Biscuit, than we have with our other products. It may possibly be that the absence of shredded wheat from the jobbing houses has offered Kellogg's a splendid opportunity for the introduction of their Whole Wheat Biscuit I could not say whether it is true, because I do not know. I am in charge of that district. I think that is very true. Our sales have been increasing, because we have put effort along with the merchandising. There are some jobbing houses which carry our product and do not carry any shredded wheat.

We are quite particular to introduce the product as Kellogg's Whole Wheat Biscuit. That has been the case since about 1930. I am so emphatic in stating that we are popularizing that name for it, because that is the name of it. There is no confusion between the two, in my opinion. I do not say that there is no confusion whatsoever or no possibility of confusion in the public mind. There is a different package there, of a different shape and different color entirely. We are selling our own merchandise by what we call it. Both products are wheat, shredded, in biscuit form. As far as the shreds are concerned, they look somewhat alike, but the biscuits do not look alike. Ours is an entirely dif-

ferent shape from the others. It is a pillow-shaped biscuit, but it is more or less of an oval shape. The bottom part is almost as round as the top part. You can look at the two, and you will see a vast difference in the shape of the biscuit. For a person standing up, looking down at it, he will, of course, only see the top, which is oval. It has square corners. You would call it a pillow-shaped biscuit. It is not the same shape, in that it is flat on the bottom. Our's is oval. Ours is rounded on the top and bottom, and shredded wheat is round on the top and flat on the bottom. Thus, a cross-section of Kellogg biscuit, both top and bottom, would show an oval shape. That is what I mean when I say it is an oval-shaped biscuit. That does not appear readily when you look at the biscuit in a dish. You see both the same shaped biscuit, then. Looking down on them from the top, they are both pillow-shaped biscuit.

I did not mean to say in answer to Mr. Clarke's question that I never heard the Kellogg biscuit called shredded wheat biscuit. I surely have. I presume people sometimes ask for it as Kellogg's Shredded Wheat Biscuit. I have not seen it advertised as Kellogg's Shredded Wheat Biscuit. The dealers may have, when that package was out. I recognize the easel or study you show me as one of our ads. I do not think we put any of them out recently. I may have a few of those around, but they are obsolete. I would not be disposed to dispute you if you said it was recently picked up in this territory. I do not know how long it might have been in use. I could not tell you how many were put out in this territory. Some of them may have been put out last year or the year before. I really could not recall just how many were sent to me or how many I still have. They are supplied to me through Battle Creek. Plaintiff's Exhibit No. 218 is the easel you have just referred to.

I do not think I have made any attempt to recall cards like the easel, Plaintiff's Exhibit No. 218. I did not know there were any of them out.

Plaintiff's Exhibit 219 is evidently one of the company's ads in the *Reading Eagle,* Thursday, March 31, 1932, published by the Kellogg Company about that time. That was quite extensively used in the towns in Pennsylvania that had it in. It is called shredded wheat, and it also says Kellogg's Whole Wheat Biscuits.

I also recognize Plaintiff's Exhibit 220 as one of the ads from the *Reading Eagle* for May 5, 1932; and I recognize Plaintiff's Exhibit 221 as a sheet from the *Reading Eagle* of March 17, 1932, containing one of the company's ads. Those and the other similar advertisements you have shown me were published extensively in my territory at or about the time of those dates.

The Merchants' Wholesale Grocery Company in Philadelphia is one of our customers. They are a regular jobbing house, sponsoring a co-operative group. I think they put out a price list and I recognize Plaintiff's Exhibit 222 as the price list of that store. It looks like the one they put out, this one being dated June 13, 1932.

I see in column seven the expression: Kellogg's Shredded Wheat, case, $2.00, and, in the same column, a few items below that: National Shredded Wheat, case, $3.55; but we did not put it there. It is there but without our knowledge or request. I saw a similar list the other day and asked the jobber to change it.

John Scott and Company, wholesale grocers, are a customer of ours. I recognize the paper you show me, Plaintiff's Exhibit 223, Cash-and-Carry Bulletin, February 10, 1933. I see on the first page, in the second column, an item: Kellogg's Shredded Wheat.

William Montgomery and Company are wholesale grocers, at Philadelphia, one of the largest in the city, an old-line wholesaler, who have been in business quite a while. I recognize Plaintiff's Exhibit 224 as one of their price lists, dated March 4, 1933. That is something new with them. It carries a price list of cereals. In column four, I see, immediately adjoining each other, the items: shredded wheat, $1.14, and below, on the next line, shredded wheat, Kellogg's, $2.16. I think it was Mr. Dorsett, buyer for William Montgomery and Company, whom I recently asked to discontinue printing Kellogg's shredded wheat in their price list, the one you have just shown me, Plaintiff's Exhibit 224.

We have already seen one copy of the *Modern Merchant and Grocery World.* I think it is associated in some way with the Retail Grocers Association of Pennsylvania. It is a grocery publication, carrying price lists. They do not deal in wholesale groceries. It is just a magazine, quoting prices for various things, under the heading of Community Bulletin. I think that must be the Frankford Grocery Company. I recognize Plaintiff's Exhibit 225, being a copy of the *Modern Merchant and Grocery World,* dated Philadelphia, February 9, 1933. This is the Frankford Grocery Company's price list, the Community Bulletin. I recognize those prices as some of theirs. I see in column three the item: shredded wheat $2.10; and, a few items below, I see: shredded wheat, $2.30.

Other wholesalers may possibly have advertised or put on their price lists our product as Kellogg's shredded wheat. I have not noticed retail grocers doing it lately. I have seen it when the old biscuit was put up as it was there, as Kellogg's Shredded Whole Wheat Biscuit. I will not say it has not been done lately, because I do not see all the advertisements.

Defendant's Exhibit 100-A and 100-B, two sheets each, are from two departments of the same organization, one at Lakehurst, New Jersey, and the other the Navy Yard at Washington, D. C. 100-A, being Standard Government Form 31, did not have pasted to it when I received it the rider which is now pasted to the second sheet. That half-page rider pasted to page two of that form was prepared by my office. I sell the Government direct, not through a jobber. Where the second page of the schedule we received specified: Wheat Cereal, E-2 (H) Kellogg's Whole Wheat Biscuits, we rewrote items 65 to 68, both inclusive, item 65 reading: 150# Cereal, Wheat; "To be Kellogg's Whole Wheat Biscuit, 24 packages to case," and so forth. That was all put in by us, including the bid.

On Defendant's Exhibit 100-B, the same form, received from the Supply Officer of the United States Navy Yard, Washington, D. C., I likewise rewrote and pasted the sheet that is now on the back of the first page, which is pasted over that portion of the original request for bids reading: Shredded Wheat, Type E-2 (H) Wh. wheat 100 lbs. I rewrote that to read: 100# Shredded Wheat, to be Kellogg's Whole Wheat Biscuit, and so forth, as it appears on this half sheet. I submitted that bid. We very likely received the award. I could not say just on that particular one, dated March 17, 1933. Sometimes we do not get it. I could not say whether we got that one or not. This is on March 11th, and we may have gotten it. I do not know if the formal contract has come in or not. We frequently get awards on the bids so prepared. The Government sends a formal contract for that.

Defendant's Exhibit 101, which appears to be on the same standard form 31, as modified for use by the Navy Department, is from the Supply Department of the United States Naval Air Station at Lakehurst, New Jersey. We inserted the wording after Wheat

Cereal: Kellogg's Whole Wheat Biscuits, in there. On the second sheet, as received by us, items 66 to 69 inclusive, simply read Wheat Cereal, 150 lbs., and we filled it in Kellogg's Whole Wheat Biscuits, and the price. Then I also pasted on a rider, referring to the same item 66, Cereal, Wheat, to be Kellogg's Whole Wheat Biscuit, and so forth. That was put on by me. I could not say whether we got that contract. I did not look it up. It is dated January 18, 1933. Perhaps I did. I do not know how the National Biscuit Company bids on that. We bid a net price there and it is the lowest net price that gets the business. We try to get it. We put a low bid.

I see some of the prices usually bid by the National Biscuit Company on shredded wheat contracts. I do not attend all the openings. Looking at the Supply Contract on the same form, addressed to the Supply Officer, Building 83, U. S. Navy Yard, Philadelphia, I cannot say I ever have received them from the Philadelphia Navy Yard like that. Most of them have it up there in mimeographed form. I have never seen it like this. I never submitted a bid for supplies to the United States Navy Yard at Philadelphia. I could not tell you if our product finds its way into there, because I do not bid on it. Jobbers may bid on it, but I do not.

I see on the reverse side of this form: Specification, Shredded Wheat, see the detailed requirements of the above specification, E-2 (H). That is the paragraph we introduced this morning. When I get a specification like that, my practice is to bid on it, Kellogg's Whole Wheat Biscuit, putting a rider on, if necessary. Some of them do not ask for a rider. I do not know what I would do in this case, because I have never bid on it. I would type in there Kellogg's Whole Wheat Biscuits.

I do not recognize the batch of mimeographed papers entitled: Price Bulletin of Provisional Contracts for month of March, 1933, United States Navy Yard, Philadelphia, because I do not get them. I do not bid on them.

Price Brothers, 118 North Delaware Avenue, Philadelphia, is one of our customers and carry our biscuit. I see their name down there as one of the bidders, I presume, on contract 12879-C, awarded to Price Brothers. On page four of the body of that, under cereals, I see Shredded Wheat, at eleven and eight-tenths cents a pound. I do not know whether that is Kellogg's biscuit at that price. This is the first time I have seen it. I have no knowledge of that. I do not know that Price Brothers have bid on the United States Navy Yard contract to supply them biscuit. They buy the goods. Where, when, how, or at what price they bid on them, I do not know. (The standard form of bid was marked "Plaintiff's Exhibit 226 for Identification," and the Price Bulletin of Provisional Contracts was marked "Plaintiff's Exhibit 227 for Identification.")

I have not bid on the Navy Yard at all, in Philadelphia; but I do bid on other state institutions, not all. I do not take on the Philadelphia Navy Yard business because I have no facilities for servicing them. It is about six miles down there, and I cannot make deliveries as they would want them, for ships coming in at different times.

We deliver to Lakehurst by freight. I have no facilities for making delivery to the Navy Yard. I cannot ship it to them by freight direct, because there is no freight station down there. It is in Philadelphia. We have advertising trucks or cars, but no large trucks. I have no facilities for anything they want in a hurry, and I never bid on it. They have never sent me a bid. I have never asked them for one.

The display package with the cellophane window is valuable, all right, but I do not say it is one of our best selling points. It is one of the selling points. I said very positively the Kellogg Company gives no advertising allowances. If they ever did, I never knew about it. In the length of time I have been with them, I think I would in some way. My dealings are with the jobbers and chain store heads right in my own section. I will say positively that there are no arrangements with the headquarters at Battle Creek. I know there is no allowance given.

RE-DIRECT EXAMINATION.

THE WITNESS: I have never encountered in my territory any Niagara shredded wheat in individuals smaller than their regular individual carton. Mr. Vilas asked me whether the Kellogg Biscuit was shaped the same, looking at it from the top, as the Niagara biscuit. That is not true as to length. I was just talking about the oval. None of the advertising like the easel, which is obsolete, is now distributed, to my knowledge. Kellogg's Whole Wheat Biscuit is the name under which we seek to sell it. That is it when customers call for it.

MILTON A. GALLUP.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer for the Farinaceous Department of Griggs, Cooper Company, a wholesale grocery house, manufacturers and selling direct to all independent grocers. We have absolutely no chains, voluntary or otherwise; just selling direct to the independents. We travel about eighty-four strictly gro-

cery salesmen. We cover all the way from northern Michigan and part of Wisconsin, to all of Minnesota, all of North and South Dakota, a little of Montana, and the northern fringe of Iowa. We carry about six thousand accounts on the books, including crackers, candy and groceries. I think we have forty-five hundred to five thousand customers.

We handle both Kellogg's Whole Wheat Biscuit and Niagara shredded wheat. Taking last year's figures, we sold about twice as much of Kellogg's as of the original shredded wheat. I do not know that we have any confusion in our house between those two products. We have never had either product returned with the statement the other one was what was ordered and wanted. We get our orders by telephone, the customer coming in, or through a salesman. We call Kellogg's the Kellogg's Whole Wheat Biscuit, and we call the other one the original shredded wheat biscuit, or shredded wheat biscuit.

Our house does nothing in the matter of pushing either of these two products. They sell themselves, what the dealer asks for. I never heard of our salesmen doing anything to try to switch a user of one product to the other.

With the exception of size, I think those two products are the same. The weight of the package is different. They are practically the same and are considered so by a great many people. Kellogg's is a little bit smaller in the biscuit form than the other. If anybody asked me what kind of biscuit they are, I would say shredded wheat biscuits. I would consider the Kellogg product a shredded wheat biscuit. The original Niagara product is also a shredded wheat biscuit. I do not know any current or other name I could call those products by than shredded wheat.

I do not recall that the Kellogg product has been ordered through us in the last two years as Kellogg's

shredded wheat. We list it. If it is called for on the telephone or a salesman writes an order for Kellogg's shredded wheat biscuit, we change the order to Kellogg's Whole Wheat Biscuit before we fill it out. I would understand that expression meant Kellogg's Whole Wheat Biscuit, because the order is supposed ao designate the case. Kellogg's is twenty-fours and shredded wheat, thirty-sixes. If a man asked for a case of twenty-four biscuit, we would take for granted that it was Kellogg's. Usually the word Kellogg's is in, because he is supposed to fill in everything pertaining to the product essential in getting the order correctly filled.

I cannot recall seeing the word *original* on shredded wheat cases. I term it that because, for years, it was the only shredded wheat biscuit we handled. I know it as the original shredded wheat, Niagara shredded wheat, their product.

There is just a trifle of difference in the prices of the two products. I think Kellogg's is a little bit cheaper in this form. Of course, one is two dozen, the other three dozen.

MR. VILAS: Pound by pound, Kellogg's is a little cheaper, is it not?

THE WITNESS: I could not say that it was. Our list on one is four dollars and five cents, and our list on the other is two dollars and twenty cents. I do not know what your weight is. I do not think you carry it on your package now, do you?

MR. VILAS: We are required to by law.

THE WITNESS: I think it just calls for twelve biscuits.

MR. VILAS: Twelve ounces.

THE WITNESS: Twelve ounces! Well, that is something new. I looked all over it a year ago and could not find it at all.

THE WITNESS: I recall it was several years ago when National took over Shredded Wheat. I think they continued to deal through the jobbing houses the original Shredded Wheat Company had had. We got it just the same. I think they began to distribute it direct in our territory and sold them right along with the crackers. I so understood, but we never had much conflict with that. I do not think it produced any effect on our sales of their product. After the National began selling direct, our sales of original shredded wheat continued about the same. In some places it made a difference, because I understood the Shredded Wheat Company had a form of discount. The National, if I recall, sold at the same discount when sold with crackers.

CROSS-EXAMINATION.

XQ. 38. Mr. Gallup, did you ever hear it called Niagara Shredded Wheat until Mr. Clarke used that expression?

A. I do not think I ever heard that expression used on it. It might have been called that, though, sometime.

XQ. 39. Up to the time that Kellogg's Whole Wheat Biscuit became a factor in the market, you never heard it called anything but shredded wheat, did you?

A. Yes, shredded wheat; that is all.

THE WITNESS: That was the only shredded wheat biscuit we had in years. I never heard it called anything but shredded wheat. That was the only shredded wheat I had ever seen. I stocked it a great many years ago. When we were selling it, they stocked it. I have

been with my house thirty-four years. I would not know how long it has been out.

XQ. 46. In other words, shredded wheat has been a household word all through your lifetme and your connection with the business, has it not?

A. Yes. I think they stocked it since they originally put the package on the market.

XQ. 47. Why do you suppose, Mr. Gallup, that you so readily call Whole Wheat Biscuit shredded wheat?

A. Well, I suppose they are both the same thing, both shredded wheat biscuit.

XQ. 48. Yes, I understand that; but is it not reasonable and fair to assume that the reason you call that product shredded wheat biscuit is that you have known the other so long by that name?

A. Well, they are practically the same products.

XQ. 49. Yes, they are the same products, are they not?

A. Well, I would say they were, yes.

XQ. 50. Except for the size?

A. Yes.

XQ. 51. And it is a very natural thing, having known all your life this shredded wheat biscuit as shredded wheat, to call the Kellogg's Whole Wheat Biscuit shredded wheat; is that not so?

A. Yes, although we do call it Kellogg's Whole Wheat Biscuit on the package.

THE WITNESS: We do now, but we have not always. We carried it as Kellogg's shredded wheat for a while and then changed it to Kellogg's Whole Wheat Biscuit. I remember the Kellogg Company originally called it Shredded Whole Wheat Biscuit. The same term, shredded, is on the package. I recognize Plaintiff's Exhibit 161, with the window, as one of the packages of Kellogg's. I see on the end, "A shredded wheat product," and "shredded wheat in its most de-

licious form." I would say they are right, because it is shredded wheat. There is no other expression occurs to me when I see a carton like that with the picture of the biscuit on that package, but shredded wheat, although they call it Whole Wheat Biscuit.

We stock Muffetts. I would not say it was a shredded wheat biscuit. It is a whole wheat biscuit made in a different form. I am pretty sure it was shredded wheat. I have not seen it for so long to see whether the wheat is in shreds like this other biscuit. I know it is coiled around. It is not shaped like shredded wheat and has never been sold as shredded wheat. We have always sold it under the trade name, Muffetts. I have not seen Loose Wiles new product, Rippled Wheat, yet.

XQ. 71. It has never occurred to you, probably, Mr. Gallup, that the expression *shredded wheat* has acquired a proprietary or trade-mark meaning, as designating the product that the Shredded Wheat Company had made for so many years, has it?

A. Yes, I think it has. That is what I say. We still call it shredded wheat biscuit, and, when they call for shredded wheat biscuit, we sell it for that.

THE WITNESS: We sell it as the trade name designating the National's shredded wheat biscuit, because that is the only way it is listed. The other we call Whole Wheat Biscuit, although I very quickly say it is shredded wheat when I am asked.

XQ. 75. Is that not because of the fact that the Shredded Wheat Company have for many years past dinned that word into the public, until they know that product as shredded wheat more than anything else?

A. Yes, I say that they have brought that before the public as shredded wheat.

THE WITNESS: It is the first product of its kind that was ever manufactured, I think. They did a lot of work to teach people to know it as shredded wheat and even to teach people to like it.

My house, Griggs-Cooper Company, also manufacture crackers, candy, and jam. We are a little in competition with the National Biscuit Company. The jobbing business is run separately from the manufacturing end. We have a hundred and twenty-five salesmen, of which about forty are cracker and candy salesmen exclusively, and eighty sell for the jobbing business, although at times they sell crackers and candy.

We stock both items and try to fill orders without substituting one for the other. We try to avoid confusion. If a man wrote in for Shredded Wheat and gave no designation of the size, we would not know what he would want. Our salesmen are supposed to write in one case twenty-fours of Kellogg's Whole Wheat Biscuit or one case thirty-sixes, if they call for a case of shredded wheat. There might be a little confusion in our own mind, because we have both cases. We would undoubtedly hold that order up until we found out exactly what he wanted.

Within the last three years, I imagine people would consider there have been two shredded wheats, because they are both shredded wheat. To prevent the customer getting confused and receiving a wrong bill of goods, we would rather write and wait another two days to find out exactly what he wanted, because we do not substitute. That was not so until Whole Wheat Biscuit was produced, because Shredded Wheat would be the only one he could have. If we had received then an order for shredded wheat, that is the only one we could have gotten.

We have customers call up over the telephone from the city and ask you to send a case or five cases of shredded wheat. We have to say, "Which one do you want? Kellogg's Whole Wheat Biscuit or shredded wheat?" We would ask him which one of the two he wanted, to avoid that, because we want to avoid return

freight if we can. We try to avoid confusion. If a customer writes the order himself, he is supposed to designate so there is no guessing on our part of what we should fill in on the order. If a customer, in the absence of a salesman, telephones or sends in an order for just shredded wheat, the only other check we have on it, to know practically for sure is to look at his previous orders. If we find he has previously ordered shredded wheat, we give him the thirty-sixes package. If we find he previously had Kellogg's biscuit, we take it for granted that is what he wants. We try to avoid confusion. There is no confusion in our minds, but we might sometimes give the man the wrong product, different than he thinks he is going to get. There might be some confusion in his mind by ordering carelessly under the old trade name; but we go back to the salesman or the customer. If he asks for shredded wheat, we do not fill it until we know absolutely what he wants. So it is true that some confusion might arise. We know the difference and try to keep it straight with our customers.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not think or recall that the question of large or small shredded wheat has ever come up. I know the picture of Niagara Falls has been on that package. It was on the original shredded wheat years ago. When you referred to that package as Niagara shredded wheat a while ago, I had no doubt what you were talking about. I knew the one you meant, made at Niagara Falls.

RE-CROSS-EXAMINATION.

THE WITNESS: I remember and recognize the old package you show me, Plaintiff's Exhibit 10, with the picture of a dish on one end. I have sold a lot of those.

We have sold it ever since it came out. I remember the dish on the end of the package. I think it was used for several years. I did not notice much difference on the label at all until recently. I think it has been the same package. I see that, and I see Plaintiff's Exhibit 1, which, in addition to the picture of the factory, has a picture of the biscuit on the outside. I have been familiar enough with the product itself so I can say the appearance of the biscuit, its shape and size, have always been the same. I would say there has been no change, to my knowledge.

RE-DIRECT EXAMINATION.

THE WITNESS: My house services restaurant trade somewhat. We have some accounts we sell to restaurants. We handle both products in individual packages for restaurant and hotel trade. We sell them mostly that way to institutions. The marketing of cereals in these individual packages has become rather common in the trade. A great many institutions use them now in place of the larger packages. That custom has existed several years. It has been of comparatively recent growth within the last few years, just grown gradually. I cannot say it is very large with us, but it is a big business, the restaurant and institution business in individual packages.

We handle the complete line of Kellogg cereals. I do not recall when Kellogg's corn flakes were known simply as Toasted Corn Flakes, before the name Kellogg's was put on.

RE-CROSS-EXAMINATION.

THE WITNESS: We enter into competitive bidding for institution business. They will send out a list of items they expect to buy and ask for bids on them. Sometimes those lists contain an item for shredded

wheat. It is usually called for by name. If they ask for shredded wheat, they either have the size, a case of thirty-sixes or fifties. If so, we try to find out from them what they really wish on the bid. If we get an invitation to bid on shredded wheat, we do not know what is called for, whether to bid Kellogg's or the National. Unless they call for Kellogg's shredded wheat, it would be two bids. We would have to find out whether they wanted Kellogg's biscuit or the original shredded wheat. If they called for shredded wheat, I would want to find out which one they meant. We have found sometimes they call for shredded wheat biscuit twelve-and-a-half-ounce package. The only one to fill that order would be Kellogg's biscuit. If other orders came in calling for a case of thirty-sixes, we would have no doubt which to bid. If it comes in with other designation, we just try to find out, as we do with other customers.

RE-DIRECT EXAMINATION.

THE WITNESS: We would assume it might be Kellogg's, because we do not want any changes, any trouble in filling the order correctly. I do not think we have had any instance in which we have bid and had the institution reject what was delivered, as not being asked to bid on.

OSCAR H. LANDIN.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have no occupation now. Until two weeks ago, I was connected with the National Tea Company, a chain store organization with a total of seventeen hundred stores. I was branch manager in Minnesota territory, with about two hundred and ten

stores under my management, located in Northern Minnesota, North and South Dakota, and Wisconsin. The other stores are in the East, Illinois, and Michigan. Those are service and self-service stores, cash and carry. In some of them, people can take goods off the shelf, pay for them, and go out.

The stores in this branch handle a product known as Kellogg's Whole Wheat Biscuit and also carry the Niagara or original shredded wheat. There is a consumer demand in those stores for the Kellogg product. The two products sell nearly fifty-fifty, up to within the last year. The demand for Kellogg's is increasing more rapidly. We have only handled it in the last two or three years. I do not remember when we put it in, but it has been growing, and more rapidly than any change in the demand for the original shredded wheat. I would not say it has been growing any faster, but maybe it has. Starting from nothing, it has gone up to fifty per cent. We have handled shredded wheat for years, as long as I can remember. The last year, the two products sold about equal. We have a shelf price of two for twenty-three on shredded wheat and twelve on Kellogg's, except on a sale. In single package, the price is the same. On two, Kellogg's would be half a cent higher.

Our organization has done nothing to create that consumer demand for the Kellogg product. We may have advertised it a few times, but not very much. We do not consider we have done anything substantial. We have given the Niagara product about the same treatment as Kellogg's. They are both on the shelf, usually on the ledge. Neither is displayed, except that. Customers ask for them by name: shredded wheat, and Kellogg's Whole Wheat Biscuit or shredded wheat. I have never heard of either one being returned with the statement it was the other one they wanted.

Our stores do not practice substitution in any way. If a customer asks for a product they do not have, they might substitute one if they did not have the other. If a woman asked for Royal Baking Powder and they did not have it, they might try to sell her Rumford's or Calumet. That is what I meant when I said they might have substitution. The clerks or managers would not show any preference for one or the other. I would call it substitution if a clerk said he did not have Royal but had Rumford's or Calumet. They are supposed to sell them something else similar. I would not regard that as deceptive or fraudulent substitution. They are instructed to sell something. If the customer wants baking powder and they are out of one, they are supposed to try to sell some other brand. I think that would be a natural thing for anybody to do. It is not substitution to try to substitute one product for the other.

If a customer had no experience with it and asked me what Kellogg's biscuit is, I do not believe there would be any difference. They are both a shredded wheat product. I have eaten both of them, and I do not know that there is any difference in them. I do not regard the practice I have just described in regard to baking powder as illegitimate or improper, because I would want to make a sale.

Some but not all of our stores carry the National Biscuit cracker line. We have two different biscuit companies. I do not think we have had any demonstrations of Kellogg's biscuit. We had to make up an ad on it occasionally. We have had no Saturday sales I know of, with a salesman and a combination of two or three packages sold with one free. I do not think we have had that, though it might have been without my knowledge.

The Kellogg name is so well known, on account of experience with other Kellogg products, that it helps introduce the biscuit to the trade as a new product.

The sale of shredded wheat biscuit, original or Kellogg's, does not compare in volume with cereals like Corn Flakes. It is a comparatively small seller. No comparison with Corn Flakes at all.

CROSS-EXAMINATION.

THE WITNESS: Until a week or so ago, I was manager in charge of the National Tea Company's general group of stores in this unit. We have a headquarters and warehouse here, where we stock several items for distribution to our retail members. I was in charge of that. I had been with them twenty years, nearly my whole business life, in various positions, from store manager up. I had been a manager in the retail store itself and worked up until I was manager of the branch.

All my life I have been familiar with shredded wheat. It is an old product. I have had it a long, long time, have had it at home, and it was always called shredded wheat. The Shredded Wheat Company spent a lot of money introducing it as a new product, and I know they advertised it extensively, but I did not pay any attention to the advertising of it in the early days. I know it had been made almost a household word by propaganda advertising and educational advertising, teaching people to know it as whole wheat and to call this product shredded wheat. So, when the Kellogg Company came out with a product very much like it, while it did not have that name on it, as far as I know, the product is the same. I could not see any difference. There is a difference in size, but the two types of product are the same. The filaments or shreds are the same. I could see no difference.

Having been familiar for at least twenty-six years with shredded wheat, it is very natural, I suppose, to some people, to call Kellogg's biscuit shredded wheat. I would not myself take it that way, but I do not know

what the public would think about it. It is shredded wheat. It is similar in taste and a biscuit that will fill the same order. To that extent, and taking out the doubtful meaning of the word *substitution* that counsel put into it, it would mean a substitution of one for the other, with the knowledge of the customer, just as if I did not have Royal Baking Powder and would try to sell her another. It would be natural to do it, quite natural that one should be sold for the other, and vice versa. If they came in and asked for Kellogg's Whole Wheat Biscuit, if I did not have it, I might offer them shredded wheat. If a customer came in and asked for Kellogg's shredded wheat, I would know what she meant. I know they call for them by name. Some purchasers are careless about names. There are all kinds of ways. Some might be largely confused between the two. When I said there was no confusion between the two in my store, I meant I and my clerks and managers all know the difference. I would not make the mistake of picking up one for the other.

By the sales of Kellogg's biscuit jumping in a couple of years to a parallel with those of shredded wheat, I suppose Kellogg must have built a demand for it. They have done some newspaper advertising. I do not know about samples. I do not do buying, so I do not know about special deals or introductory allowances. I know the sales were near fifty-fifty last year. I have made no investigation for the purpose of being accurate, but I know Kellogg has grown and it is somewhere near that. It has grown from nothing in a couple of years.

XQ. 105. Do you not think that that growth may be accounted for, in part, at least, by the fact that it is like shredded wheat biscuit?

A. Well, I do not know. It is like it, and I suppose it would—I cannot answer that. I do not know the reason of it.

XQ. 106. It is not natural? Here you have had a product that you have known for twenty-six years, and that has been known for longer than that, which has been advertised so that every household, practically, knows what shredded wheat is.

A. Yes.

XQ. 107. Now, if you have another product, almost indistinguishable from the well-known shredded wheat, would it not be easier to sell that than to sell something that is brand new?

A. Oh, I imagine it would.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not think I have ever heard a customer say why he liked the Kellogg biscuit. I have used it myself. I did not use shredded wheat for many years. I have eaten both of them since I have been out, because I am quite a wheat fiend.

There is a little difference in size of the biscuit. Theirs is a little smaller biscuit. The packages are not alike. I would not confuse or mix up one package with the other. Defendant's Exhibit 4 is the general type of package I handled with Kellogg's Whole Wheat. I have not seen any packages with a cellophane front.

RE-CROSS-EXAMINATION.

THE WITNESS: Our retail units just use newspaper advertising and handbills. We have advertised Kellogg's Whole Wheat Biscuit several times. As far as advertising goes, I think we have advertised shredded wheat a good deal more. I do not think we advertised either one very much. I do not think we have given more advertising to Whole Wheat Biscuit in the last two years; because we have cut shredded wheat several time to ten cents a package. Kellogg's is twelve cents. I do not know whether we have advertised Kellogg's for ten cents or not.

CLIFFORD F. GUYER.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer for the Slocum Bergren Company, wholesale grocers, an old line house with traveling salesmen, a little different now. We are mostly on a co-operative group plan now. We have two salesmen. Most of our orders come by mail and telephone. The co-operative group is the Red & White Stores, uniform front stores of those colors. They are just around this section here, but you will find Red & White Stores all around the United States and Canada. This particular unit is in a small part of Minnesota, some parts of South Dakota, and a small part of Wisconsin.

In servicing those Red & White Stores, we carry Kellogg's Whole Wheat Biscuit, and we also carry the original shredded wheat. We have no mix-up or confusion at all between those products. We have listings of those items to our members, who order them out in the regular way. We have no reason to be confused. We list shredded wheat as thirty-sixes and twelves, and Kellogg's Whole Wheat Biscuit as twenty-fours. The orders come in by name and number of packages to the case. If we got an order for shredded wheat twenty-four to the case, we would possibly investigate it. I do not recall having trouble of that sort. We have trained our members and they refer to their listing. They are correct in ordering. They ordered twenty-fours, and, if they did, they would get Kellogg's. I know of no instance where one has been sent back with the statement that the other was ordered and wanted. We have not been troubled that way, because we have different-packed cases.

We have handled the original or Niagara shredded wheat biscuit for many years. I know what you mean when you say Niagara shredded wheat. You refer to Niagara shredded wheat, the original shredded wheat, which is the way some of our members seem to look at it. I would know the name Niagara in connection with it. The old original shredded wheat we used to buy direct, the same as any other product. We now buy it direct from the National Biscuit Company, and the retailers can buy it direct. I think the retailer's scale of discount is a quantity discount, which figured down as low as the discount to our wholesale house.

Personally, having been in the trade myself years ago, I found that, in this particular market, the National Biscuit were not in so good favor with the general retail trade, due to the feeling that the larger buyers had an advantage over the small buyers in the discount.

I would not think it would be possible to substitute a Kellogg package of Whole Wheat Biscuit for the Niagara shredded wheat biscuit and make the customer think she really had the shredded wheat. From the consumers' standpoint, it seems to me if the consumer demands Shredded Wheat, that is all they want.

CROSS-EXAMINATION.

THE WITNESS: If the grocer really set out to deceive a customer, he perhaps could go so far as to say: This is shredded wheat, and Kellogg's have taken them over. They have a biscuit that really looks like shredded wheat biscuit, so it would back him up; but I do not think the retailer, with the many items he has to sell, as busy as he is, is trying to push one product and deceive his customers. Most retailers, I think, have learned better and are giving them what they want.

There are several hundred stores in the Red & White unit we service. It has now come to be the major part of the business of my house. We do have, however, those not in the unit group and have city salesmen for that purpose. It is true that the Red & White is at present the major part of my house's business. We purchase Kellogg's Whole Wheat Biscuit and stock their cereals, which we hold in our warehouse for the purpose of distributing them to our stores as needed. We do not have store managers; it is an individually-owned chain group. The individual store owners purchase them by mail and telephone, with reference to our list. They are all supplied with our list, and, with it beside them, they can order items as they want them, which is what I meant when I said there is no confusion between those two biscuit. Our store owners know them and know what they should call for. The people in our house know the difference. I, myself, am not directly in contact with the retail outlets. I am not in a position to say exactly whether there is any confusion in the minds of the public between those two biscuit. I do not contact the retail stores direct. I am just inside. I have been with Slocum Bergren twenty-five years. It is safe to say that I have known shredded wheat longer than that. Up to a year or two ago, I guess there was nothing else that was called shredded wheat. In fact, I never heard it called Niagara shredded wheat or the original shredded wheat, or anything like that, until just recently. It was just shredded wheat; and it was a household word, known to pretty nearly every housewife in the country, I presume. It was generally known. I would say my house sells considerably more shredded wheat than it does Kellogg's Whole Wheat Biscuit. We are a regular buyer of it from the Na-

tional. I would say the proportion is at least two or three to one, in favor of the National shredded wheat.

We stocked practically the complete Kellogg line, and, when the Whole Wheat Biscuit came out, we naturally took that in with the rest, because it is a popular line and the consumer takes it up readily. We are selling it, and I account for the demand because it is an item that I think would fit in with the Kellogg line. It is a cereal, breakfast-food item. I imagine it is very similar to shredded wheat. I have been familiar with both products and have seen Kellogg's biscuit and eaten it. There is some difference between the two. Personally, I have no preference for either. Either one satisfies me. If I wanted to be fussy about it, I could see a difference, and I could pick one from the other.

If a retailer were out of shredded wheat when asked for it, it would not be very difficult for him to induce a customer to try the other, depending on the retailer. It is possible.

RE-DIRECT EXAMINATION.

THE WITNESS: We have no rule forbidding Kellogg salesmen to go into individual stores for Saturday sales or demonstrations. It is the retailers' own rule, not ours. This is a co-operative group, and all these rules have been gotten up by the retailers. They have a committee which lays out the plans. One of them is they do not have specialty men or give specialty orders. Everything is done through jobbing houses. The specialty men have not been able to get into our stores and have not been able to arrange to hold Saturday demonstrations or have store or window displays. Nothing has been done. Whatever consumer demand has been created has been without any special store work of the Kellogg Company.

RE-CROSS-EXAMINATION.

THE WITNESS: We attempt no exercise of directory power over the salesmen of those stores. If they have a call for shredded wheat, we have it. If they want Kellogg's biscuit, we have that, too. It is up to them for their stores. The committee does not attempt to influence them at all. Theirs is purely buying co-operation. Their committee meets and chooses their specials. We meet with them and we naturally work with the layout; but they have their own choice of specials. They handle very few of the National Biscuit crackers. Most of them, through their committee, have connection with Loose-Wiles. Our house does not attempt to dictate that, at all. The cracker salesman does service stores. In contacting the stores, I do not know whether the National men get into some of them. Our house has had no occasion to be particularly friendly or unfriendly with the National in past years. The Red & White Company made this affiliation with Loose-Wiles on cookies and crackers. Naturally, they have worked that connection. We do not attempt to handle anything in the cookie and cracker line. We stock nothing in that line.

RE-DIRECT EXAMINATION.

THE WITNESS: I told you our members, as an independent group, do not favor the National on account of its trade discounts. That was in the minds of the dealers when the Red & White began to function. Now, when we started the Red & White, they made their affiliation with Loose-Wiles. Naturally, all the buyers get their cookies and crackers through that connection.

CARL O. JOHNSON.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer for the Twin-City Wholesale Grocery, strictly and purely a co-operative organization. The retailers actually own it. It is a collectively owned organization. Out of our St. Paul office, there are about seven hundred and twenty-five unit members. We have another branch office at Fargo, North Dakota, and three other branches. Our headquarters are in St. Paul. In many instances, our stores operate as Fairway Stores; in others, under their own individual names. We would rather have them do that. It is not a uniform-front proposition throughout. Our house buys for these various units who are owners of our organization.

We handle Kellogg's Whole Wheat Biscuit. We also have the other product, which is called, in our house, shredded wheat. We have no other name for it. We sell them both as shredded wheat. We list them both under the name of shredded wheat in our cost book, the only difference being that the Kellogg brand is listed as Kellogg's shredded wheat. We have no confusion between those two products in our house, have never had either one sent back with the statement it was not what was wanted or had been ordered, that I recall.

This morning I saw our city desk man. We travel only four men in the outside territory. All our telephone business is taken care of by thirty desk men, for the city business locally and long distance calls. I inquired this morning just how those orders come in. They told me they either specify Kellogg's shredded wheat or Niagara shredded wheat, or honeymoon

shredded wheat, associating, I suppose, Niagara Falls with honeymoon trips.

I dug up the figures of sales on both products for the last six months. We had four hundred and fifty cases of the original shredded wheat, as we call it, and three hundred and thirty cases of Kellogg's shredded wheat, a difference of a hundred and twenty cases. Our house does not service the restaurant trade at all.

CROSS-EXAMINATION.

THE WITNESS: Our house is a purely retailer-owned wholesale house. We service only our own members. Aside from that, we conduct our business just as any other wholesaler. We purchase in carload lots or quantities of that sort and store it in our warehouse and distribute it as requested, as our members have need for it. The profit they derive from belonging to our organization is in the form of both better price and dividends. Our only reason for being there is to get that line of goods in and out of the house just as close as we can handle it. It is a non-profit organization, and the members profit from belonging to it by getting goods as near to the cost as they can be handled. We have no control over the operation of these various retail stores at all, other than to suggest merchandising plans, and helps for advertising. We do attempt to get them the benefit of whatever knowledge we have that they do not have. We try to give them anything we can to make them better merchants, the benefit of our experience and knowledge.

I have been in the grocery business about seventeen years. During all that time I have known shredded wheat and stocked it. Most of that time, until very recently, it has been known as shredded wheat and by no other name. It is the only one I have known it by. In answer to Mr. Clarke's questions I referred to it as

Niagara and the original and honeymoon shredded wheat. I had no occasion to use those designating terms until the Kellogg product came on. Prior to that time, it was just shredded wheat. There was nothing else then with which it could be confused.

Kellogg's shredded wheat or Kellogg's Whole Wheat Biscuit has been on the market two or three years now. Since its advent, I have found it necessary to distinguish it, in order to avoid confusion between the two, by calling one Niagara or original shredded wheat and the other Kellogg's. I never get a call myself, so I do not know if our members still call and ask for shredded wheat. I presume that is the way it is handled: If a retailer calls up and asks for shredded wheat, the boys or the desk salesman would inquire what brand was wanted. That is my guess. I talked to some of the city boys today about it, and they said just that very thing, that they ask for a specification of which package they want. If the wrong one goes out, we have to pay drayage to get it back. In order to avoid confusion they ask which one is wanted. We have crackers in our building, a Manchester Biscuit agency. That cracker is favored by our members. We encourage it. We are not particularly friendly to the National line of crackers. We do handle shredded wheat because there has been a demand for it, and we believe in giving people exactly what they call for. If we do exercise any influence, suggestive or otherwise, in regard to crackers, it is absolutely in favor of the Manchester.

RE-DIRECT EXAMINATION.

THE WITNESS: I have never noticed that they have the name *original* on the cases of Niagara shredded wheat. I pay very little attention to either one of them.

CLARENCE A. RUCKMAN.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

Direct Examination.

The Witness: I am district sales manager for the Kellogg Sales Company, with which I have been connected about eighteen years. I have been in this district one year. Before that, I was in the headquarters at Des Moines, Iowa. My present territory is the State of Minnesota, North and South Dakota, a small portion of Montana, and part of Wisconsin. I have fifteen regular men assisting me at present. Their duties generally are to promote the sale of Kellogg cereals in their sub-districts, in their territory. Our district is divided among eleven men. We have four special men designated from week to week to work in different parts of the district.

We push the entire Kellogg line in this district, including Kellogg's Corn Flakes, Kellogg's Pep, Kellogg's Whole Wheat Biscuit, Kellogg's Krumbles, Kellogg's Rice Krispies, Kellogg's Bran Flakes, Kellogg's All-Bran, Kellogg's Whole Wheat Flakes, and Kellogg's Kaffee Hag Coffee.

On Kellogg's Whole Wheat Biscuit, we have been able to secure approximately eighty per cent. distribution among the better grades of grocery stores in my territory. We have probably seventy-five or eighty per cent. distribution of the individual size in the better class restaurants, not including little hamburger stands.

There is a demand for Kellogg's Whole Wheat Biscuit in my district, as manifested through grocery stores and in the restaurant trade. That consumer demand has been created through the efforts of our organization in creating such demand through our various channels of promotional work, accomplished

through sales efforts, sampling, store sales, and, in some instances, direct mailing to consumers. We get lists of consumers' names and mail coupons direct to customers of grocery stores, redeemable in Whole Wheat Biscuit, one package free with the purchase of one. We have had Saturday store sales and demonstrations, etc., in the various stores as our men can reach them in turn. Our men spend a day in the local grocery store, selling a complete line of Kellogg's in that store, unless we have a special sale in that territory. For instance, we might have a special deal on in Whole Wheat Biscuit. If there is a run on it, we could sell it. The man makes a prearranged sale. In the City, buying is over by early evening. In country towns, much of the trade is from three to nine P. M. The men are instructed to stay in the stores at the times when the customers come in. The man must be one of the clerks of the grocery. He is there when the grocer is busy. The farmers work late in the day in summer and buy into the night.

In addition to these methods of the Kellogg Company, we have also done newspaper advertising, and we have also had the co-operation of the trade in doing their own advertising of Kellogg's biscuit and giving store displays. They have advertised in the newspapers and in circulars and things of that sort. The Kellogg Company makes no allowance for that. It is all contributed by the dealer. Window displays are usually put in by our men. Where the dealer runs a special deal, he advertises it and makes a floor display. Our windows are put in by dummies and our own men. We have used premium cups, the Wheel of Knowledge and Jungle Land Books. Those methods we have used to create consumer demand for Whole Wheat Biscuit are the same plan of operation used in pushing other Kellogg products, with the possible ex-

ception of post cards, which we have used on Pep and some of our other products, depending upon the season and our program. Those are all generally known methods of introducing new products to consumers in the trade.

In the sale of other cereals, like Corn Flakes, we encounter the competition of other brands, tremendously. We have in this territory about twelve different brands of corn flakes competing with ours, including Post Toasties of General Foods. Fairway is another. There are Jack Spratt, Red & White, Time O'Day, Millers', Jersey, and Premier Corn Flakes. Northern Jobber Company handle a brand of corn flake. There may be others. The competition on those products is tough. The competition we have had on shredded wheat in the past two years has not been anything to compare with the corn flake competition.

As far as their promotional efforts are concerned, I know the methods of selling Shredded Wheat since the National took it over are nothing to compare with the old straight system used by the Shredded Wheat Company before. They were pretty hard competitors, extremely active from the beginning of their spring season until the end of their summer season. They had advertising cars, with two men on each car, conducted group store sales, with free package for the sale of two. In a town like Albert Lee of 10,000 population, they would conduct a week's sale, three packages of shredded wheat in a shopping bag, for the price of two. Those two salesmen would go on throughout the year. They did that for at least five years in our territory. That is a very effective method, getting your merchandise right into the housewife's pantry. Nothing has been done like that by National, to my knowledge, since they took it over. I would say that,

as far as real competition in the cereal or shredded wheat field is concerned, the National Biscuit Company, since they took it over. have not been offering that competition.

In our sales effort on Whole Wheat Biscuit, and, in fact, on our entire line, unless a competitive brand is mentioned by the dealer, we never mention it. If it is mentioned, we call attention to the different-sized biscuit, fifteen to a package, being toasted thoroughly on both sides, and a finer shred biscuit.

We feel that the Kellogg name is a great advantage in the marketing of either an old or new product, because the Kellogg Company has been existing about twenty-seven years and have always established a product of high quality. We have also used every effort to promote sales of our products for our distributors and create consumer demand for them. The Kellogg Company guarantees the sale of their products and we take them back if the products do not sell well. While we do not guarantee to any distributor the sale of a product, we always pick up any that is old or unsalable for any reason.

So far as we have been able to do it, the name Kellogg's Whole Wheat Biscuit has been impressed on our trade to sell this product to the consumer, in this territory. Neither directly nor by reports have we experienced any confusion or mix-up between those two products, by any grocers sending them back and saying the other product was wanted.

Our company favors the marketing of Whole Wheat Biscuit exclusively in the individual package to the restaurant trade, if possible. We try to push it as much as possible. I know of nothing we could do at this time to increase the sale of Whole Wheat Biscuit in individual cartons to the restaurant trade that we have not done. Small restaurants, like hamburger

stands, would buy from the retail grocer in the large package, instead of individuals from the jobber. There is little demand for any cereals in that type of restaurant.

I think the demand for Whole Wheat Biscuit and for all types of cereals has been on the decrease since the depression, due to several things. I would say the important reason of people who eat meals in restaurants is the low prices of other food commodities and the increased operation of so-called specials or club breakfasts, for a certain price, like orange juice, eggs, toast, coffee, but no cereals, or rarely are cereals listed in most cafes on a special. In first-class places, like Radisson Hotel Cafe, you might find them listed. Aside from that type of restaurant I have mentioned, the individuals are generally used, where there is a demand for that product at all.

In connection with Whole Wheat Biscuit, we have had the regular window set-ups and have built up displays on the regular display stand, carrying the name Kellogg's. We have used hundreds of the little display stands in restaurants. I have not encountered anywhere in my district the small-sized individual biscuit of the National in the restaurant trade. I have not called on the restaurants, and I have had no report of that small National biscuit being in the restaurants.

We have only two groups of chain stores in this district. I am satisfied we have had a 100 per cent. distribution of Whole Wheat Biscuit in the Red Owl Stores and National Tea Stores. In my experience they do not stock a product until there is a demand, although occasional groups might. I do not know what they did here, because they were stocked when I came here a year ago.

I think the retail prices of the two kinds of shredded wheat are about the same in most stores.

Some stores sell theirs a little less than ours; others, a few, might sell ours a little less than the others. The National Tea Stores in Minneapolis are selling the original shredded wheat biscuit slightly under Kellogg's, twelve on ours and two-for-twenty-three shredded wheat.

I understand substitution means giving somebody something other than the package they asked for. If a customer came in the store and asked for Royal Baking Powder and the grocer wanted to sell her something else, the general procedure would be to explain, possibly the new product in stock, and ask them to try it. Another method might be to explain the qualities or qualifications the new product had that the seller felt the old product did not, and ask her to try it. Then the result might be called explanatory substitution. I have not heard of deceptive or fraudulent substitution, such as a grocer making a woman who was getting an imitation Baker's Chocolate believe she was getting the original Baker's Chocolate. I think that form of substitution has pretty generally died out. I have not heard of anything like that, of any type. Some years ago, wholesale grocers even substituted on small wholesale orders with a rival corn flakes instead of Corn Flakes. That has not been done recently. It has died out for two reasons, I think: one of which is that the grocer pushing out substitute goods gets them right back from the customers. I think the main channels of distribution are operated today on a more equitable and fair and square basis than they have ever been in history. I think the retailer is more honest and upright today than at any other time, say, some fifteen years ago. In the case of my friend with Kellogg's Corn Flakes, I might think it was just a mistake between that and some other kind, and yet the grocer returned it.

CROSS-EXAMINATION.

THE WITNESS: I do not think this part of the country is stronger for private labels than other sections. This section is strong on private labels. I mentioned quite a long list of corn flakes, mostly private label corn flakes. It is so with other cereals. No doubt we are in competition with shredded wheat with our Whole Wheat Biscuit. I did not mean to infer that National is not as aggressive as the old Shredded Wheat Company. Shredded Wheat is still being sold and advertised; but the letting up of any competition below the activity of a competitor would naturally give that competitor a slight advantage. If he competes, it will give him a slight advantage. If he puts forth more promotional effort in that field, he will pull more business than the other fellow. I would not say whether or not he would get the other fellow's business away. I could not say whether or not we have acquired some customers who were shredded wheat users and now use Kellogg's biscuit. I do not know that we have. We do not know of people who have used our biscuit and are now shredded wheat users or whether we have created a new demand for Kellogg's, or whether Shredded Wheat has lost any business. I would not state absolutely that every person now using Kellogg's Whole Wheat biscuit has never used the old product. Possibly some of those people have used shredded wheat and have switched to our product.

When I said we have an 80 per cent. distribution in grocery stores and 75 per cent. in cafes, I think shredded wheat possibly has a similar distribution, maybe better, in the terms in which I expressed them. When I say we have 80 per cent. distribution, I mean our product will be found in approximately eighty out of a hundred of the better stores. It does not mean

at all a comparison of the volume of sales. The product may be there and not selling, but still be counted in my estimate of 80 per cent. distribution. I mean I do not know that Kellogg makes any advertising allowance. I believe they do not. I know there is none made in the territory under my supervision.

None comes through me. The chances are I would not know what may be done at headquarters on large chains or with large distributors, if there were an advertising allowance or something in lieu thereof, except from the fact that, when our company does anything, they have not done it for any one section alone, but extended it to the entire country.

Five years ago we put our Whole Wheat Biscuit on as Kellogg's Shredded Whole Wheat Biscuit. To begin with, we put the same intensive sales efforts behind it then that we now use in connection with Whole Wheat Biscuit. Then, for a time, we did not. The package was smaller then, but we found it was the wrong size, discontinued it and put on the present size.

Plaintiff's Exhibit 166 is the nine-ounce package we started out with, which did not go so well. It was discontinued for Plaintiff's Exhibit 165, the twelve-and-a-half-ounce package called Kellogg's Shredded Whole Wheat Biscuit. We put our usual efforts behind the package. I cannot state what distribution we had of them. I was in Des Moines at that time. We had them there. We used the same promotion methods I outlined in my direct examination.

We do not undertake to deal with public and state institutions and the like on a direct bidding basis. I issue no bids for institutions. We sell state institutions through wholesale grocery channels. We have our own men calling on all state institutions, hospitals, and so forth. We do not have anything to do with invitations to bid. We do not get them or have anything

to do with bids. The jobbers themselves bid. We have no direct dealing with institutions anywhere in my territory, but we contact them with our salesmen, the same as we do retail outlets.

The usual procedure in calling on an institution, is to contact the dietitian or chef and get him to use our cereals more extensively and list them on his next requisition, which goes to the jobber, not to us. There is competitive bidding by jobbers for state institutions.

If we had an item in an invitation to bid from Red Wing State Training School, shredded wheat, twelve and a half ounces, ten pounds, I really would not know whether it referred to our product or not. Our package does contain twelve and a half ounces. I believe the shredded wheat package contains or did contain twelve ounces. The inclusion of twelve and a half ounces in the specification from a public institution on shredded wheat would probably be the result of our salesman's call.

Another item from the State Sanitarium, shredded wheat, twenty-four to the case, twelve and a half ounces to the package, I would imagine would probably be specified that way as a result of our salesmanship. For institutions, we have a regular form order book containing a list of all our products, with the weight listings after each listing on that form. Our man usually leaves a copy with the man in the institution, for his order or requisition, whether chef, steward, or who.

I have seen forms like form 57, schedule 8, cereals and breakfast foods. I could not identify it as a form used by the State of Minnesota, except that they are state institutions. Practically every state has them. The State of Iowa has a form for institution buying. I see Anoka State Asylum, Hastings State Asylum, and Willmar State Asylum, and Fergus Falls State ospital. I judge them to be in Minnesota by the names

of the towns. I would judge the six sheets, Plaintiff's Exhibit 228, to be authentic copies of their requisitions. I assume they are. Those do not come to me. I have seen forms in Iowa like these.

RE-DIRECT EXAMINATION.

THE WITNESS: On page 1 of Plaintiff's Exhibit 228, "Shredded wheat biscuit, 2307, shredded wheat biscuit, three cases," I would judge that to be Niagara shredded wheat biscuit. In this reference, the word *Shredded* is capitalized, and the words *wheat biscuit* are small lettered.

On page 4, under Red Wing State Training School, I would say the product there, ten pounds twelve-and-a-half-ounce shredded wheat would be Kellogg's Whole Wheat Biscuit. The same thing is under Sauk Center Home School for Girls, shredded wheat, twelve and a half ounces. We do not and cannot have that put in. Our men request them to order the product as Kellogg's Whole Wheat Biscuit. There is a distinction in the weight and packing of the two. I could not answer whether, when shredded wheat or shredded wheat biscuit is referred to in these specifications, it means any particular manufacture of that product to the people who put it in the bids.

I do not believe there are any self-service stores in my territory, especially in the Twin-City. I do not know any, if there are. There is no self-service store, like Piggly Wiggly, where they go in and pick goods off the shelf and put them in the baskets, in this territory, that I know of. There might be some in the outlying territories.

JOHN OLSON.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer with a service store. We have from six to eight employees all the time. We are the Olson Bowman Company, a partnership. I am the Olson of the firm. We get telephone orders, make deliveries, and carry charge accounts where they are justified.

We handle Kellogg's Whole Wheat Biscuit, for which there is a consumer demand. We also handle the original shredded wheat. We sell at least twice as many Kellogg's as shredded wheat. The Kellogg people have trimmed the windows and done display work. I distinguish the other as the old-fashioned shredded wheat, as I have always called it. I have not seen anyone from them to co-operate with me in the last two or three years. No one has been over to help me trim windows, to help at all, or to sell me the product. If I want a case of old-fashioned shredded wheat, I have to go and order it. No salesman comes to sell me at all. We have the two of them on the shelves alongside each other. If a customer comes in, she can get either one she wants. If she wants old-fashioned shredded wheat and asks for it, she can get it. If she wants Kellogg's, she gets what she wants. I know people prefer Kellogg's because it is a smaller biscuit and they get more for their money in that package. I have heard that mentioned. The two sell about the same price. We get a quarter for two. I think the profit on both is about the same, the percentage. We have better co-operation from the Kellogg Company. They trim our windows and sell us their products, fix a window display and give us dummies we can use over Sundays. We see

nothing like that from the National. We do not even see a salesman.

We do not practice substitution in our store. A lady gets just what she wants. We never have any confusion between the two products, do not have a customer send back one and say she wanted the other; because we usually ask them, unless we know what a customer is using. If a lady asked for shredded wheat, we would usually ask her which kind she wants, the old-fashioned shredded wheat, or Kellogg's. They get whatever they want.

We handle no other National products except shredded wheat, and, from time to time, fruit cakes or something in season, when a man may come around. Except for that, we have only this one we handle. We have had cookies in the past. We have handled the rest of the Kellogg line of products. I do not think the name Kellogg on the Whole-Wheat Biscuit package is an advantage in selling the product. I think they just want that particular biscuit, regardless of what name is on it. It sells in my store because it is a smaller biscuit. I do not think we ever have it called for as the small shredded wheat. I would not say that. They ask for Kellogg's and that smaller biscuit over the 'phone, I have been told.

I would surely be willing to give the National Biscuit Company window displays, if they just attended to it. Years ago, they sampled in our neighborhood. I have not even seen that lately. Shredded wheat people do not come around and distribute samples. That would stimulate business, but I have not seen it in two or three years.

I am not connected with any buying organization or voluntary chain. We have orders for the Buy Rites, with about twenty stores, but that makes no difference as to selling it, because they advertise both brands. Kellogg's may come down there and tell us to advertise

more. They may have some deal on. I have never seen any others put an ad in our dodger. The Kellogg Company had ads in there.

CROSS-EXAMINATION.

THE WITNESS: I suppose the Kellogg Company pays for the ads it puts in. I do not know any of the National Biscuit people who come to my store. I do not know Mr. Monroe sitting beside you. I do not believe I have ever seen him in our store. I do buying, and Mr. Bowman does some buying, also. The National Biscuit salesman might contact him; but I have never seen him. I know the National Biscuit Company do not call on Mr. Bowman to sell shredded wheat. They come in and sell cookies. I have seen a salesman come in and try to load us up with cookies; but we are lined up with the Sanitary right now. There may have been a National man in to sell us cookies, but there has been no man in to sell us shredded wheat. We do not know that the cracker and cookie man will sell us shredded wheat. If he comes in for an order and does not say anything about shredded wheat, does not want to sell it, that is his business. We do, however, carry shredded wheat. I put it alongside Kellogg's. A lady can come in and take either package off the shelf. We buy it through the jobber.

I buy four or five cases of Kellogg's biscuit a month. If we get rid of two cases of shredded wheat a month, we are lucky. I think my sales in shredded wheat have dropped down since the National cookie people took them over, because we used to sell quite a bit of shredded wheat before that. We have been selling shredded wheat about twenty years. I have been in business twenty years or more.

Before Kellogg's Whole Wheat Biscuit came on the market, shredded wheat was the only article of that

kind we had. I think we have been carrying Kellogg's biscuit about five years, as close as I can recall. In that time, it has come up and supplanted shredded wheat to the extent that we are now selling it two to one.

If, prior to the time Kellogg's biscuit came out, one of my customers asked for shredded wheat, that was the only one kind. I had known it for twenty years; and the public knows it as shredded wheat. When a customer calls on the 'phone and asks for a package of shredded wheat, we will ask her what she wants, because we do not want to substitute. We do not want any confusion. We want to give her what she wants. When she asks for the shredded wheat, we do not reach for Niagara shredded wheat or for Kellogg's, either; but we may ask her which one she wants. Our store is open. They can go up and take what they want. She cannot do that when she is on the other end of the telephone, and then we ask her. If she says shredded wheat, we distinguish them as old-fashioned shredded wheat, and Kellogg's; and then she can decide which she wants. Then, there is no comeback. We have it right the first time.

JOSEPH E. KROEMER.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. I am the proprietor of Kroemer's Grocery. I have been in business about thirteen years. We have a service store, making deliveries and giving charge accounts where they are justified. We have three in the store, including myself.

We handle Kellogg's Whole Wheat Biscuit, for which there is a consumer demand in our store. I have

carried it some five years, as I recall. I handle, also, Niagara shredded wheat and have carried it ever since we have been in business. The two sell about equally in quantity. We get the same price for each: thirteen, two for a quarter.

We get co-operation from the Kellogg Company in the sale of that product. Men come around and give us window dressings. From the National Biscuit Company we have not seen a man come for an order or any salesman come in, or window or other displays. Nobody has come around. We get the Niagara product through a jobber, St. Paul Wholesale Grocery. We also order Kellogg's biscuit through the jobber. We do co-operative advertising with the Fairway group. I do not recall our doing any advertising of either shredded wheat or Whole Wheat Biscuit.

We do not have confusion in our store between those two products, never had a customer send one back and say the other one was wanted. We do not practice substitution in our store. The customers usually call them shredded wheat and Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: When they call them shredded wheat, I know right away what they mean. We have no hesitancy. We do not stop and ask them whether they want Kellogg's or the other. I had personal cause, when we were out one time, to remember to be sure and get it. A young lady really demanded it of us. For a time we were out of Kellogg's and she insisted upon it. I asked her why; and she said she preferred the Whole Wheat Biscuit to the other.

We do, however, have calls for shredded wheat. They sell about equally in our store. We have had a National cookie man around. We can get our shredded wheat from him, but we do not buy it that way.

We buy it through the jobber, and we also carry National Biscuit cookies, zweibach, and pretzels. We buy those from the National man. I know I can buy shredded wheat and have it figured in my discounts. The National salesman has mentioned shredded wheat. He may have it printed on his cookie order blank, with Uneeda Biscuit. I have not noticed that.

Substitution would mean if a woman called for shredded wheat and I would send her the other, being out of shredded wheat. I would not send her Kellogg's Whole Wheat Biscuit without asking her if she would take it and telling her we were out of the other. That is what I mean. If a woman came in and asked for shredded wheat, I would suggest the Kellogg product to her. I would not want her to get away without my making a sale. I would not regard that as substitution. I do not know whether I would regard that as coming under that head or not.

I have had shredded wheat as long as I have been in business and always known it as shredded wheat. People have known it by that name, and it has always been asked for by that name for many years. As long as I have known it, it has been sold in a package like Plaintiff's Exhibit 1, and it has always been the same sized biscuit, always looked the same.

CHARLES R. STEARNS,

1555 Van Buren Street, St. Paul, Minnesota.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I operate my own cafeteria under the name of Quality Tea Rooms Cafeteria. Our customers wait on themselves entirely. The goods are put on the counter and go on down with the trays down the tracks. The customers pick up what they want.

We carry Kellogg's Whole Wheat Biscuit in the individual carton. We display it by putting a carton in a bowl and setting the bowl on the counter. The customer picks up the bowl with the carton in it and opens it himself.

We do not, as a rule, handle Niagara or the old, original shredded wheat. We have had some, but not usually at a time when we had Kellogg's. Before one kind was gone, a few packages of the other might be in. I have not found it made any difference which we carried. The customers take either one. That way of serving and displaying cereals in our type of restaurant is a common, as far as I know, putting the carton in a bowl, and having the customer pick it up and open the carton himself.

I have not seen for a long time any restaurants serve either Kelloggs or the old shredded wheat biscuit out of the big cartons. As a restaurant man I am very glad to serve the cereals in individual cartons. They are easier to take care of. I think the package is more sanitary for our customers. I remember the Niagara shredded wheat is a larger biscuit. That was also in individual cartons.

I am starting my sixth year in the restaurant business. During that time, I have seen shredded wheat displayed in closed glass globes, but not at our place. It seems to me the last place I saw them was at the Pearl Cafe in Red Wing, more than two years ago. I do not think that is a current way of displaying the biscuit. It was prominent at one time, but I believe it has gone out.

It makes no particular difference to me whether I serve the large biscuit of the Niagara Falls people or the smaller Kellogg's biscuit. We charge the same price. It seems to make no difference to our customers, to have them mention it. It is self-service in our place. They pick up what they want. There is a Kellogg

salesman who calls on us. I have bought assorted cases, but, usually, I buy a case of each item. I handle shredded wheat now a case at a time. There is no National Biscuit salesman who calls on me to sell me shredded wheat. There is a General Foods man. I got my last supply of shredded wheat by ordering it through the Foley Grocery Company in St. Paul. Grape Nuts is our largest-selling breakfast cereal in package goods. They sell about the same as Corn Flakes. First Grape Nuts, then Corn Flakes, then Bran. Most of the restaurants now serve cereals in individual cartons.

CROSS-EXAMINATION.

THE WITNESS: We occasionally order shredded wheat just for a change, just a little different package. Our customers noted the difference one time that I can remember. A lady asked for the Niagara biscuit. She asked for shredded wheat, and we did not have it. We told her we had Kellogg's Whole Wheat, and she took it. She used that instead of the shredded wheat. I do not stock the two at the same time, because the volume is so small. If I had two at the same time, I figure my stock would get too old, with two cases. It is not an important item with us on either side. We have call for it. A case of shredded wheat will last us maybe once a month. Sometimes I order one and sometimes the other. If we have Kellogg's Whole Wheat Biscuit in stock at the time and somebody asks for shredded wheat, we give them Kellogg's, telling them that is what we have. I might tell them we have a shredded wheat biscuit I tell them I have Kellogg's Whole Wheat Biscuit or shredded wheat biscuit. I ask them if they want to try that. I do not tell them it is the same thing. We have no waitresses on the counter. Boys take care of everything. If a person did not find

what he wanted, there would always be somebody he could ask about it. We seat one hundred and four people in our restaurant. Our cereals are nearly altogether sold at breakfast time. Our breakfast trade is not very large.

RE-DIRECT EXAMINATION.

THE WITNESS: Our customers wait on themselves. I find Post's Bran is more popular than the others. We carry it, and they say they like it better. As far as Kellogg's Whole Wheat Biscuit or shredded wheat are concerned, they just pick the product up and take it along. We do not alternate the two products in any regular period. If a salesman calls oftener upon you, he gets a whole lot more business than the other. I think I will shift brands back and forth again. In other words, in a month or so, I will be using Kellogg's, and again in a month or so, I will be using shredded wheat. I imagine I will change again some time during the summer. I like variety, usually, something that looks different. It is more of an eye appeal than anything else. People notice the difference. It is my idea to have a different package on the counter every little while. By eye appeal, I mean that, after they are used to seeing the Kellogg package for a while, I want them to see the Niagara Falls package there a while. They seem to notice things of that sort. I think they do not like to see the same old package too long. Post's Bran Flakes is the name of the product I spoke of. I imagine it may have on it "with other parts of the wheat." I do not know.

MRS. EDITH M. WILLIAMS.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of Williams Cafe, conducted by me and my husband. We handle breakfast cereals altogether in the individual cartons. The cereals are in a glass case behind the counter. When a customer orders one, we give them right in the package, and we open it for them. We put a package beside the bowl.

We handle Kellogg's Whole Wheat Biscuit in the individual package. We have carried it ever since we opened, a year in May. We carried the other, shredded wheat, at first. I do not know why we discontinued it. It did not seem to pay to keep two. The demand seemed more for the smaller biscuit. We never had any complaints about it, of people saying it was not what they wanted. The general, regular customers usually ask for Whole Wheat Biscuit. New customers will point it out, as a rule.

The Kellogg salesman calls on us and solicits orders. We have always bought a case of Whole Wheat Biscuit at a time, in the individual cartons. We prefer to handle cereals of that kind in individual cartons. We have not handled them in the big cartons. I do not know any restaurants who serve them out of big cartons, recently. I have understood the common practice is to serve all cereals in individual cartons. I know of no restaurants that do not serve them that way. I get out very little to other restaurants.

I do not recall that I have had any calls from National salesmen, trying to sell me the old shredded wheat we used to handle. I do recall Kellogg salesmen coming around regularly.

CROSS-EXAMINATION.

THE WITNESS: We have sixteen stalls and six booths, and a counter. We sometimes have a large breakfast trade. Luncheon and dinner are more important. They tell us we use the average amount of cereals. We use a quite a few. I probably buy a case of Kellogg's biscuit about once in two months, in individuals; I guess a little more than a hundred packages. I have only ordered shredded wheat once or perhaps twice since we started, about a year ago. Since then, I have not ordered any more shredded wheat, but have used Kellogg's Whole Wheat Biscuit. When people ask for Shredded Wheat now, Kellogg's biscuit is all we have to serve. We are handling it. I could not say for sure if customers ask for shredded wheat. I do wait on them. If they did ask for shredded wheat, naturally, having Kellogg's, I would serve them that.

RE-DIRECT EXAMINATION.

THE WITNESS: No customers recently, that I recall, asked me for shredded wheat. They just point out what they want.

JOSEPH TROST.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have a retail grocery, service store, under my own name, with two assistants. We have charge accounts where they are justified and make our own deliveries. People can pick up goods in the store and wait on themselves, if they want to.

We handle Kellogg's Whole Wheat Biscuit and have had it since soon after they put it on the local

market. There is a consumer demand for it. Some people call it Whole Wheat Biscuit, and others say Kellogg's shredded wheat biscuit. If they say Kellogg's shredded wheat, we give them Kellogg's Whole Wheat Biscuit.

I also handle the other biscuit, Niagara Falls shredded wheat and have carried it for several years, probably ever since I have been in business. Of the two, we sell more Kellogg's. I think the consumer demand for Whole Wheat Biscuit has been created mostly by Kellogg's. When we first got them in, we displayed them in the store and mentioned them to customers. Since, we have treated it as an ordinary article, the same as anything else; and the demand for it has continued and is increasing.

The salesman from the Kellogg Company comes around to see us sometimes. He is not around very often. We order Kellogg's through the jobber, calling him up, or the jobber salesman calls. I never had either product returned with the statement a customer had ordered the other. I have had no confusion between the two products or gotten them mixed up. I do not recall any customer telling me why they liked one or the other. We sell both at the same price. I think Shredded Wheat is all I handle of the National line.

I belong to the Buy-Rites of St. Paul. I do most of or a good deal of my buying through the Lux Company, a jobber who has quite a few things but not a full line like large jobbers. I do not know what discount I get on shredded wheat and I do not know just what the chain stores get out of it.

CROSS-EXAMINATION.

THE WITNESS: It will soon be thirty-three years I have been in the grocery business, always in St. Paul. I have been familiar with the shredded wheat package the biggest part of that time, ever since I started in for

myself. Probably, I sold it longer than that. It has always been sold in a package something like Plaintiff's Exhibit 1. All the time I have known it, the biscuit has been the same size and had the same appearance, as far as I know. It has always been a well-known product. It has always been known to my consumers as shredded wheat and nothing else and always asked for as shredded wheat. I think they used to be shredded wheat biscuit some years ago; but shredded wheat has been the popular name for it right along, I think. For a long time, I think there was nothing else like it, until the Kellogg biscuit came on the market comparatively recently.

I think I stocked Kellogg's biscuit as soon as it got on this market, maybe four or five years ago. When they first put it out, they sold it as Kellogg's Shredded Whole Wheat Biscuit in a carton like Plaintiff's Exhibit 165, which I recognize. I think they called it that in those days. At that time our sales of it began, and they have been increasing right along. I could not say whether that increase has been at the expense of Shredded Wheat. We sell both of them right along and have them side by side. We do not sell as much of anything as we used to; but we sell quite a lot of shredded wheat, right along. Both are selling now.

When my customers ask for shredded wheat, the old product, like Plaintiff's Exhibit 1, is what I give them. I carry no other of the National line, none of their crackers. The salesman calls on me and does his best. It is no fault of his. He has not succeeded in selling me any crackers. I did carry the National line quite a few years ago. I buy my shredded wheat from the jobber.

RE-DIRECT EXAMINATION.

THE WITNESS: I stopped handling the National line because there was a little misunderstanding about

discounts. I did not think they were giving me as good discounts as they were giving the others. I have not given it much of a thought now. I am buying from another company and am satisfied. It is a local concern.

I cannot remember any instance where a customer has asked for shredded wheat, and I gave them the Niagara shredded wheat, and they said that they wanted the other. I never had a customer ask for little or small shredded wheat. I have had quite a number of them asking for Kellogg's shredded wheat. When they do, I give them Kellogg's. That is what they want.

MRS. MINNIE WIERS.

Deposition taken as Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a husband and three children, making five in the household. I am a user of Kellogg's Whole Wheat Biscuit and have used it since they were on the market. They were recommended to me by my grocery man, who said he was carrying it. I gave it a trial. Since then, I thought I liked it better. From then on I continued using them. I have compared them with shredded wheat biscuit and find it is a smaller biscuit. They are really a smaller package, toasted a little better and on both sides, which the others are not.

The children like and are well pleased with the biscuit. One thing they like is it is not at all salted. Some cereals are. I just call them Kellogg's and have no difficulty in getting them. Schoch's carried them ever since they were out. If I have asked for Kellogg's and gotten the other shredded wheat, it was just by mistake in putting up orders, even if I have mentioned

it to them. I would not bother to send the other back, but I would have them make a note to send Kellogg's next time, because we like it so much better than the other. It was just a mistake, because others than those taking the orders put them up. It does not happen often, not more than once or twice since I began using Kellogg's.

I came here today through Billy Sorenson, a clerk at Mr. Schoch's grocery store, at Seventh and Broadway, who knew I used them. Some party called to see me. The Schoch grocery is an old, established grocery.

CROSS-EXAMINATION.

THE WITNESS: I have been there nineteen years now. I have been keeping house practically ever since, all my married life, except the first six months. Before I knew about Kellogg's Whole Wheat Biscuit, I used shredded wheat, which I have known all my life, too. If there is something better in place of it, you will naturally try it. If you like it better, you get it. Up to that time, I had been getting shredded wheat and liked it. Then Billy Sorenson said he recommended Kellogg's, and I tried Kellogg's. Since then, I have used Kellogg's. He recommended it to me in the store where I had gone to give my order for shredded wheat. When I ordered shredded wheat, he suggested I try Kellogg's Whole Wheat Biscuit. I took it home and have used it ever since instead of shredded wheat. When I call up I ask for Kellogg's shredded wheat, or biscuits, shredded biscuits, or anything, because they know me so well. They know any time they ever sent me another kind, they would get it back.

RE-DIRECT EXAMINATION.

THE WITNESS: I have used Kellogg's Corn Flakes. I like those, too. They are very nice.

MRS. MARTHA A. STICKNEY.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a husband and three children, five in the family altogether, and we are consumers of Kellogg's Whole Wheat Biscuit. We have used it either three or four years. I first saw it in a grocery store, on the little counter. He told me they had some new shredded wheat in the market. It was introduced to me as a new shredded wheat. I had tried the old shredded wheat before, and I noticed a difference between the two. There is a different shaped package. I did not think it was the old product I was getting. I knew I was not, because the biscuit was entirely different, and I thought it even tasted different. I liked it better than the old product. It was crisper and I thought it was fresher. I have continued to use it. The children like it very well. I have trouble getting it. If I order shredded wheat by telephone, I get Niagara Falls shredded wheat. I have to say I want Kellogg's shredded wheat or I get the other. That has happened at least five or six times. Each time I said I wanted shredded wheat, I wanted Kellogg's. Each time, they sent me Niagara shredded wheat, and I returned it. I got them before and asked the reason for it. He was out once or twice. Since then, he has remembered it. I always ask now for Kellogg's shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: My husband is a machinist for the Great Northern. I have been keeping house about twelve years. Before I knew about Kellogg's biscuit, we used the shredded wheat in a package like Plaintiff's Exhibit 1, which I recognize. I have known

that a long time. We used that when I was a little girl. We always had it at my home, and it was a very well-known product, always known as shredded wheat. I am not at all surprised when I see this shredded wheat the grocer sends me in that package. I would really think one might be mistaken for the other. It is just different products. They are both shredded wheat to me; one being National shredded wheat and one Kellogg's.

Up to the time the grocer called my attention to Kellogg's, I had been using this shredded wheat. Since then, I have been using Kellogg's, always, unless he called me up and happened to be out, but I have already sent this back. Since then, I have always used Kellogg's biscuit. My grocer is Kroemer. When he first called my attention to Kellogg's biscuit, I was in the store but not to buy shredded wheat at that time. As a rule, when he has something new, he usually calls my attention to it. They usually have a display of the shredded wheat. He carries all Kellogg products. He asked me to try it, I think. After that, I tried it, because I heard in the meantime there was a new shredded wheat biscuit out. Since then, I have been using them.

I serve the biscuit at home in a sort of oatmeal dish. My husband prefers it with hot milk first, then with milk and sugar, with bananas or other fruit. The children prefer it with milk or cream. I take it out of the package and put it on the table in dishes.

I came here today through Mr. Steinwerk, who works for the Kellogg Company. I have known him for several years, before he was married and afterwards. He mentioned the controversy to me and asked me if I would tell if I liked Kellogg's shredded wheat. I said I would and thought no more of it. He called me and asked me to come today.

RE-DIRECT EXAMINATION.

THE WITNESS: I have used Kellogg's Corn Flakes regularly.

PAUL G. SCHOCH.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have a regular wholesale and retail grocery store, the Andrew Schoch Grocery Company, a wholesale house, with a retail establishment connected with it. The wholesale end of the business serves restaurants and hotels mostly in St. Paul and some suburbs, such as White Bear and Bald Eagle. We have two or three salesmen who travel around the city but most of them are telephone men. I could not say offhand how many wholesale accounts we have. Seventy per cent. of our business is charge.

We carry Kellogg's Whole Wheat Biscuit in the wholesale trade. We have carried that product, I think, several years, as long as I can remember. There is a consumer demand for it in our retail establishment.

We handle, also, the original Niagara shredded wheat. I made a little survey of the sales. Last year, we sold a third more of Kellogg's than we did of the National. That does not include the individuals, of which we just handle Kellogg's. I do not know whether the National have an individual. The Kellogg salesmen call on us in both the retail and wholesale end. We do not get as much service from the National as we do from the Kellogg Company. In fact, they have only one man that I know of, who sells cookies and shredded wheat. I cannot say that we have any confusion in our retail store between Niagara shredded

wheat and Kellogg's biscuit. No instance was ever brought to my attention where either was sent back with the statement the customer had ordered the other. Both brands are pretty well-known on the market now. When they ask for Kellogg's shredded wheat, we know they do not want the other, the regular, and they would get Kellogg's Whole Wheat Biscuit. If they said they wanted the regular Shredded Wheat, they would get the Niagara.

Kellogg's biscuit was just introduced here a year ago. The consumer demand is more when they see that. Kellogg's are more aggressive, are right in back of all their products, with demonstrations, deals, and things of that sort, store displays and window displays. We had one like that almost every week. They put on deals and created a demand for it. They did sampling. Our store advertises the products, and I think we have advertised Kellogg's Whole Wheat Biscuit. We have advertised almost all the cereals, especially if they have a deal, advertising Bran Flakes in conjunction with cereals and the shredded wheat biscuit. If they are ten-cent packages, it might be three for twenty-seven. That combination includes one package of Kellogg's biscuit. They have used Jungle Land Books and the Wheel of Knowledge.

The package we use is like Defendant's Exhibit 4. I do not think we have ever had any cellophane-front packages of Kellogg's biscuit. We charge a little higher price for the regular Shredded Wheat than for Kellogg's. We pay more money for it. We are just a regular wholesale house, having no connection with any co-operative group or voluntary chain. I do not think Shredded Wheat is as good a seller as it was years ago. There is very little push behind it. The National has not kept it up the way the old Shredded Wheat Company did.

We do not practice substitution in our store. If a person asks for a certain article and gets something else, he is bound to send it back and it is poor policy, anyway. If a party asks for a certain article and we have something far superior, our clerks talk it and sell it if they can. They stress different points, more quality or quantity, and ask them if they will try the new product. I do not regard that as substitution or improper. We really do not impose on them. In a way we regard it as a service to the customer.

In case of the substitution I described, the customer would know she had not gotten the product she asked for and would send it back. Under modern conditions I know of no instance of fraudulent or deceptive substitution, where a store tried to substitute a package deceptively like another package so the customer would think she got what she asked for. However, we do have certain articles advertised at certain prices. When the customer asks for it, they will say they are out, but here is another article. That is practiced, especially in chain stores. Indirectly, I think there would be an element of fraud there, because you are really calling people there with the idea you have it and then you say you are sold out but have something similar. The grocer himself is the only one who would know, because it is even below cost.

CROSS-EXAMINATION.

THE WITNESS: That is a sort of bait to get a customer in. I do not adopt that practice in connection with Kellogg's Whole Wheat Biscuit. We do not practice substitution. When a customer asks for shredded wheat, we occasionally suggest they try Kellogg's. If we had a superior product, we would endeavor to induce a customer to try it. Some people are more critical; and you can just about judge whether to suggest it

or not. If they say no, their mind is made up and they want shredded wheat. I would not say whether we have pushed Kellogg's biscuit that way, because, when Kellogg comes out with a new product, they put on something popularly advertised and make a deal on it, which brings people in. If they try it, they will more or less create a demand for it.

Some of that demand for Whole Wheat Biscuit has absolutely been created among customers who formerly used shredded wheat so there are former shredded wheat customers who are now Kellogg customers. There is no doubt about that. Some people come in and ask for the original shredded wheat. Some say regular shredded wheat, having in mind there is another. You might call it the genuine shredded wheat. Kellogg's biscuit looks like it, but it is somewhat smaller.

A good deal of business is done on bids. At Fort Snelling, they bid on shredded wheat so many cases, specifying twelve and a half ounces. National Biscuit's product is twelve ounces. Twelve and a half ounces naturally means Kellogg's. We absolutely have to fill that with Kellogg's, because the regular shredded wheat will not answer that specification. I think Fort Snelling specifies it that way because it is practically the same product. It is a shredded wheat, only a little more in one package than the other. It is probably because the Kellogg salesman has been busy out there, selling his product to them.

I do not mean that shredded wheat is not advertised at all, but they have not had the free deals, displays, and so forth. I have seen shredded wheat advertised in the newspapers recently, and in magazines. It is the same sort of intensive work the Kellogg Company are now doing that shredded wheat company did originally. I have known it for years, and it was the

only product of its kind. We did not have to call it regular shredded wheat then. People asked for shredded wheat, and we knew what was wanted right away. I have been in the grocery business pretty nearly all my life; and I have known shredded wheat all my life. Up to a few years ago, there was nothing else like it. It was in a class by itself, because nothing else came out like that. It was known as shredded wheat and nothing else.

Then Kellogg's Whole Wheat Biscuit came along, and we have people who sometimes ask for shredded wheat. We do not have it listed in our catalog. In the restaurant business, individual size, we handle only Kellogg's. I do not know whether the National make individuals. We buy the old shredded wheat from the National Biscuit Company and cookies, also. We have regular calls from the salesmen. I can buy shredded wheat as a jobber just now. I think we are a little ahead, because the cookie works on a sliding scale. The more you sell, the more discount. That affects the shredded wheat, too. We buy shredded wheat in five or ten-case lots. Every so often, with a quick turnover, ten cases. It is still a pretty good seller. There is a certain demand for it.

When I say there is no confusion between the two, I mean we have no trouble telling them apart. A customer usually goes over and looks at the cereal first, trying to point out which they want. When they telephone and ask for shredded wheat, we have no doubt what they mean. Our clerks have different customers. We know just what they want, even over the telephone. When people call and ask for shredded wheat, sometimes, a clerk will know they want Kellogg's biscuit and will send it without further questioning.

MRS. ETTA M. SCHULTZ.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

Direct Examination.

The Witness: I am a housewife. We have five in my household, all adults. I am a user of Kellogg's Whole Wheat Biscuit, and I have used it since sometime last fall, when I started using it and have continued. I used the other shredded wheat before then. I prefer Kellogg's. I like the better toasting on both sides, the stronger flavor after it is covered with milk; and I like the size of the biscuit better, and the way it is packed with paper between. I use about six packages a week. It was first called to my attention by a clerk at Schoch's Grocery. I used to use the other, and he said, "Why not try Kellogg's?" I said, "Oh, well, one is just as good as the other"; and he said I had better try Kellogg's, that he thought it a little better, and why not try it and find out. I said, "If you tell me to try it, I will have to, of course." I did. That is how I came to use it.

When I first got Kellogg's, I noticed the difference, as soon as it was put on the table. My daughter spoke about it first, about its being a better-toasted flavor when you put milk on it. The other is not and is a lighter brown, even on the one side where it is toasted. You have to be very careful putting hot milk or cream on shredded wheat, toasted only on one side, because it gets soggy and doughy. I regard it as a service for the clerk to introduce a product to me that I liked. I have continued to use it. When I ask for any Kellogg product, I always ask for Kellogg's. I use Pep, too.

Cross-Examination.

The Witness: I have traded at Schoch's for fifteen years, and it was his clerk who shifted me from

shredded wheat to Kellogg's biscuit. I would not say I have bought shredded wheat there for fifteen years. We have not used breakfast foods in my home for a long time. My husband had stomach ulcers and had to diet light, and then we started using a lot of breakfast food. One does tire of a few all the time. We have three or four different kinds. I do know shredded wheat. It has been known to me for many years. I do not think I ever heard of anything else on the market like it, until I learned about Kellogg's biscuit like it. Those are the only two shredded wheat biscuit I have ever used. I never heard of any other.

When Schoch's clerk told me about Kellogg's biscuit, I had gone there to get shredded wheat. When I asked him for it, he asked me to try Kellogg's. He is a nice clerk and is always asking me to try things. He got me to try this, and, since then, I have not used any National shredded wheat.

My husband is working. He is storekeeper at the Northern States, handling gasoline and things for the outside men, like a storeroom.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not resent the clerk asking me to try a new product. He often asks me to. I josh and kid him about it. I do not think I have not tried any product he has asked me to. I do not resent it, because I would not now go back to the other kind.

MRS. LILLIAN S. LE BLANC.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with my husband and four children, six in the family, altogether, users

of Kellogg's Whole Wheat Biscuit. We have used that product since it was on the market. I ordered shredded wheat one day. The grocer was out of it or something and sent me the Kellogg brand. He sent it to me with my order. I knew it was a different product from the shredded wheat I had been getting right along. I liked the looks of it, kept it, and tried it. I never would go back to Shredded Wheat and have not.

One thing we liked about Kellogg's biscuit, especially the children, was the smaller size. Many times the little ones could not eat a large shredded wheat biscuit. Liked them because they were browner and on top and bottom. They seemed to be a little finer shreds to chew. I would not use anything else.

Once in a while grocers have sent me things like that, when they are out of what I called for. I usually send it back, because I am very particular about a brand I want. In this case I liked the package very much. I had not known about it before that time. This is the first I had heard of Kellogg's biscuit.

CROSS-EXAMINATION.

THE WITNESS: My grocer is E. G. Bergman, Central, Minneapolis. Before he sent me Kellogg's, I had been using shredded wheat off and on ever since I started housekeeping. I have been familiar with it all my life. At home, before I was married, I was familiar with it. It has always been known as shredded wheat to me. I believe it was always called that. It was always known as shredded wheat.

I do not remember whether I ordered on the telephone on this occasion, but I had given him the order for shredded wheat, and he sent me up a package of Kellogg's Whole Wheat Biscuit. Since I tried those, I have bought no more shredded wheat, and I have continued to get Kellogg's, which I like so much better.

I always specify Kellogg's shredded wheat. My husband, who is traffic manager for a linseed oil manufacturing concern, likes it, too. We serve Kellogg's biscuit different ways; with hot milk on winter mornings; with milk or cream and fruit in warm weather. We take it out of the package and bring it on the table in a dish. I came here today because Mr. Simonson came to my house. He evidently found from my grocer we always prefer Kellogg's.

RE-DIRECT EXAMINATION.

THE WITNESS: I had not met Mr. Simonson before.

RE-CROSS-EXAMINATION.

THE WITNESS: The gentleman who came to see me was a representative of the Kellogg Company and said he understood I liked the product. I said I would be glad to testify, because I am interested in having it kept on the market.

MRS. JOSEPHINE TOUSIGNENT.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a husband and one child, three in my household. I use Kellogg's Whole Wheat Biscuit and have for about eight months. I went to the store and wanted a change of breakfast foods. I looked on the shelf, saw Kellogg's Whole Wheat, thought I would try a package, and have used it ever since. I like it because of being browned on both sides, finer shreds, more weight and fifteen biscuit to the package, and it is cheaper. My child likes it fine. I use all Kellogg's cereals, but my child likes Whole Wheat Biscuit best. She eats it more readily than the others.

I have used the other or original Shredded Wheat. I like Kellogg's better. I order Kellogg's Whole Wheat Biscuit and have no trouble getting it.

CROSS-EXAMINATION.

THE WITNESS: I got a package of each biscuit and thought out the points of difference I just told you. We ate them and found the difference. The taste was different. I have bought the two packages at different times; but, since Kellogg's biscuit was out, I prefer that brand. By examining the biscuit, I found out those points. As I said, it is cheaper also. I had the two packages to compare at that time. My husband went over them with me and worked out those points of difference. It was never suggested to me by the grocer or the Kellogg Company or anyone, or by any literature of the Kellogg Company.

I just got shredded wheat a couple of times and then we changed to other cereals. I saw this other biscuit, went to it, and have been using it ever since. We never went back to shredded wheat, although I had known it a long time before I was introduced to this other biscuit. We used it a few times. Before I was married I was not home very much. I could not say I had it very many times; but I have had it sometimes and have known about it for a good while.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not know anybody connected with the Kellogg Company when I was asked to appear here. Somebody sent by my grocer asked me. I happened to be at the store when the Kellogg man was there. My grocer, Mayes Brothers, knew I was a user of Kellogg's Whole Wheat Biscuit.

CLARENCE A. RUCKMAN (Recalled).

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

Re-Direct Examination.

THE WITNESS: The Kellogg Company does not consider an advertising program complete without a complete cycle of advertising tie-ups, like promotional programs in connection with store sale and consumer promotional efforts. We do not think it is effective without the other things tied up with it. We do not think newspaper advertising alone will sell a product, to create a demand for anything.

Re-Cross-Examination.

THE WITNESS: I remember a newspaper advertising campaign of Kellogg about a year ago on All-Bran. I did not see Plaintiff's Exhibit 229, in the *Minneapolis Journal* of April 30, 1932. I did not know there was a series of articles like that around here. That is really the first time I ever saw an article of that nature. I had been in Minneapolis about four weeks at that time.

MR. CLARKE: I do not question the proof of the clipping. I will not question the authenticity. Ads like that were run, and I assume that is one of them.

A. LEONARD CASE.

Deposition taken at Omaha, Nebraska, April 19, 1933.

Direct Examination.

THE WITNESS: I am buyer at the Nebraska-Iowa Wholesale Grocery Company and one of its board of directors. That is an old-line wholesale house, in busi-

ness under that name about fifteen years. We have a few traveling men. We have a man in Iowa and had one in Nebraska up to a few days ago. Most of our business is done by mail; and we have three men in Omaha, working in the street. We sell the O. P. Skaggs System as a customer. They are not affiliated with us in any way; just another customer.

We carry Kellogg's Whole Wheat Biscuit and have had it ever since Kellogg had a biscuit. We also carry the rest of the Kellogg line. We carry Niagara shredded wheat. We have not yet found any confusion between the two products in our organization. I do not recall either one being sent back with the statement the other one was ordered. We know the difference in the package, Kellogg being twenty-fours, and National thirty-sixes. If they do not designate which they want, the only way we can find out is to ask them. If we had an order for just shredded wheat, we would have to find out whether it was twenty-fours or thirty-sixes, to protect ourselves. We would be taking a fifty-fifty chance of sending the wrong one and then have to pay the freight back on it. I believe it would be just as much chance that they would want either. I do not recall any confusion. I believe we would be safe in saying we have had none.

I would say National shredded wheat outsells Kellogg's possibly sixty to forty, just a little more. We service the restaurant trade and handle Kellogg's biscuit in individual cartons. I do not believe we sell any Niagara shredded wheat in individual cartons, just the Kellogg's.

CROSS-EXAMINATION.

THE WITNESS: I never heard shredded wheat referred to as Niagara shredded wheat before Mr. Clarke used that term. I have carried it a good many years

in a package like Plaintiff's Exhibit 1, which I recognize. It is safe to say I have known that as long as I have been in the grocery business, around five and a half years. I have known it longer than that. I was not connected with the grocery business before.

Until Kellogg produced Whole Wheat Biscuit, there was no occasion to add any designation to the term shredded wheat. There was only the one, with no possible chance for confusion, prior t that. That was a very well-known article of trade, and it was always known as shredded wheat biscuit. When a customer called up and asked for shredded wheat, I knew right away what she wanted. When Kellogg put their item on the market, there were naturally two biscuits. If they did not designate which one they wanted, we would have to ask them.

Since Kellogg's biscuit has been available, if a customer orders five cases of shredded wheat, I am not sure what he means. We ask them. If it is a mail order, of which we do a fairly good-sized business, we have to write them, to protect ourselves. We may or may not send the right one. If not, we have to pay the freight back. We have to be sure of ourselves, to save the freight expense. We carry it in our catalogue as Kellogg's Whole Wheat Biscuit, twenty-fours, and shredded wheat, thirty-sixes, I think. I would have to look at the page to be sure. Even with our catalogue carrying it as Whole Wheat Biscuit, we have occasions when customers order shredded wheat and want us to send the Kellogg product. I would say the growth of sales of Kellogg's biscuit has been quite rapid. We have carried it ever since it has been out, about three or four years, I guess, in which time Kellogg's biscuit has grown until it now occupies, I would estimate, forty per cent. of the field. I do not absolutely know how that has been accomplished; but I would say through Kellogg advertising. We put out a bulletin and a cata-

logue. We list both these items in the catalogue. It is in a binder, and we issue mimeographed bulletins to fit the binder, which is something like one of your bound volumes of testimony here. We send the bulletins every week, to keep it up to date. We have special bulletins sometimes. We do not push any one item more than another, merely advising our trade what we have, and letting them order what they want. We purchase our shredded wheat direct from the National Biscuit Company in Omaha.

RE-DIRECT EXAMINATION.

THE WITNESS: The National sell shredded wheat direct. A good many retailers do not know that and naturally buy it from the jobber. I knew what you referred to when you said Niagara shredded wheat. I do not recall having heard it called by any other name in the trade, such as National or original shredded wheat. They usually signify it by either thirty-six or twenty-four. We kind of take that as a standard, to keep them separated. The retailers are familiar with those different terms; and I might say they are both called shredded wheat, so that retailers who deal with us would say: thirty-six shredded wheat, and: twenty-four shredded wheat; meaning the National and Kellogg's. Sometimes they specify Kellogg's; sometimes not.

RE-CROSS-EXAMINATION.

THE WITNESS: Shredded wheat can be purchased in packages of twelve; but I do not buy them that way. I also know I can buy it in individuals, but I am sure we do not have them.

RE-DIRECT EXAMINATION.

THE WITNESS: I have seen individuals of shredded wheat like the one you show me. Looking at Plaintiff's

Exhibit 21, which you say is a longer shredded wheat biscuit, I have seen the individual shredded wheat package; but I would not know, offhand, whether it was a large or small one.

MR. CLARKE: It is stipulated that Defendant's Exhibit 103, the small carton first shown the witness, was purchased this morning in the dining car of the Northwestern Railroad train, running between Minneapolis, Minnesota, and Omaha, Nebraska, in the presence of Mr. Vilas and Mr. Clarke.

CHARLES L. THOMPSON.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am city freight agent for the Rock Island Railroad Company. I know Mr. Sawyer, the branch manager of the Kellogg Company here, who asked me to testify in the case as a consumer witness.

I have been a user of Kellogg's Whole Wheat Biscuit since there was a sample left at the door, which we tried, and I have been using it almost entirely. There are three in my family, all consumers of Kellogg's biscuit when they eat shredded wheat. We have used the other shredded wheat off and on for a number of years. I have used Kellogg's since the sample was left and like it better. We prefer it because of the smaller size of biscuit. The boy cleans it up better than the other. That is really the reason we swung over to it. I like it better personally.

CROSS-EXAMINATION.

THE WITNESS: I remember shredded wheat back quite a while. We used to have it even while I was still

at home. I recognize the package, Plaintiff's Exhibit 1, and always knew it as shredded wheat. There was no other name for it. Shredded wheat is the only name I ever knew for that. I have been married going on fourteen years. I am in pretty close touch with buying in the household. Up to the time I first saw this sample package, I had been using shredded wheat, off and on, regularly. After trying Kellogg's Whole Wheat Biscuit, we swung to Kellogg's and bought no more shredded wheat since. We always buy it at the same place.

My grocer is Sam Brick. I imagine he carries both lines. He is fully stocked and has practically all standard brands of stuff you want. When I purchase Kellogg's, I ask for Kellogg's Whole Wheat Biscuit, the same as the sample read. He has them marked on the grocery ticket that way. The sample at the door was a small box; but we buy the large package with, I think, fifteen biscuit. I do not recall a window in the package. It just looks like the reverse side of Plaintiff's Exhibit 161, with a picture of the dish with biscuit in it.

RE-DIRECT EXAMINATION.

THE WITNESS: The sample we got was like Defendant's Exhibit 76, as to size and general appearance, that small package.

JAMES H. DUBOIS.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am caterer and manager at the Paxton Hotel, Omaha, having charge of the restaurant and all the eating places, three of them. We carry in

stock Whole Wheat Biscuit in the individual carton, like Defendant's Exhibit 76. We also handle regular shredded wheat in the individual cartons. We carry it in small-sized cartons like Defendant's Exhibit 103. We have also handled Niagara shredded wheat in the larger-sized individual carton, like Plaintiff's Exhibit 21. At the present time, we just carry it in the small-sized carton, like Defendant's Exhibit 76. We do not make a practice of displaying. We keep the cartons in the stock room and serve them on order. If they do not specify what is wanted, we give them whatever the servant cares to give them. If they specify, we naturally give them what they demand. If a customer asks for Kellogg's, we give them Kellogg's. If they ask for Niagara shredded wheat, we give them Niagara. If they ask for Whole Wheat, we give them Kellogg's. If they ask for just shredded wheat, that is up to the discretion of the servant. It is served in the carton, which is displayed to the customer and opened up in his presence. We have never had any complaint about either product; nor have we ever had a case of either being sent back, that I know of.

CROSS-EXAMINATION.

THE WITNESS: We do not specify names of firms on any menu cards, nor names of cereals. We just say cereals in general. I changed it just a few weeks ago to say "All cereals." I can send and get one of our current breakfast menus. I only know one thing: that I have handled both kinds of merchandise. Whatever the public asks for they get. Aside from that, I know nothing. I think Kellogg's is a pretty good product and shredded wheat. We never get any complaints.

I have been handling Kellogg's biscuit two or three years; but shredded wheat, Oh, Lord, I have seen the first package that was brought out of Niagara Falls,

many years ago. I have been through the Niagara Falls plant. It is a wonderful plant. I have seen shredded wheat made. I have seen it in a package like Plaintiff's Exhibit 1. I was in the building about 1914. It was plenty old at that time and was always known as shredded wheat. Until I saw this Kellogg package, I never had anything else like it, that I recollect. I do not recall selling any other shredded wheat during those years.

I now have a menu card here, Kellogg's Corn Flakes, or Post Toasties, shredded wheat. It is specified merely as shredded wheat. This is the coffee-shop menu, in general use, not dated. Those are under the heading Cereals with cream. Kellogg's Whole Wheat Biscuit is not printed on there. When our customers order shredded wheat from this menu, it is up to our waitress whether she gives them one brand or the other. It is carried on that menu, Plaintiff's Exhibit 230, merely as shredded wheat.

Plaintiff's Exhibit 231 is the main dining-room menu, regular breakfast menu in current use, with Kellogg's Bran, Post's Bran Flakes, Post Toasties, Shredded Wheat, and other items. My testimony about that is the same as I gave about the coffee-shop menu. When a customer calls for shredded wheat, he gets one or the other, as it happens to be.

The card, Plaintiff's Exhibit 232, is our room-service menu, used for service in rooms only, and likewise carries shredded wheat, among other items. The same is true about that as I have just testified. I regard the situation as now disclosing two items that may be used for shredded wheat, either one of which will fill the order. I recognize shredded wheat and have known it many a day, as carried on the carton. Whole Wheat is the name of the other product. No complaint of either product has ever come to my attention.

RE-DIRECT EXAMINATION.

THE WITNESS: If a customer were served one product and said he would like to have the other, there would be nothing to do but serve him with the other one, which we would do.

RE-CROSS-EXAMINATION.

THE WITNESS: I have no comparative figures of quantities of either product used. I will be glad to look it up.

RE-DIRECT EXAMINATION.

THE WITNESS: I buy the individual cartons in case lots. The Kellogg salesman calls and solicits my business. The small individual cartons of shredded wheat are ordered through jobbers. We get the service of salesmen through Kellogg and order National through jobbers. I have not yet had anybody from National call on me.

B. FAY HOSMAN.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I operate the W. O. W. Cafeteria, the Chamber of Commerce Dining Room, and the Keene Coffee Shop restaurant. We handle Kellogg's Whole Wheat Biscuit in all three places, in individual cartons, like Defendant's Exhibit 76. We also handle Niagara shredded wheat at Chamber of Commerce Dining Room and W. O. W. Cafeteria. I do not buy personally for the Keene Coffee Shop, but they did have it there. I have always used the large shredded wheat individual carton, like Plaintiff's Exhibit 21. I do not recall a smaller one. I have seen it. I have a case in

the Chamber of Commerce Dining Room not opened yet, so I do not know which size it is. I could not say whether I would be charged the same price for the small package.

At the cafeteria, where I have best knowledge of them, either kind, they are put out on the counter. The customer just picks up a bowl with the dry cereal carton in it and carries it forward on the tray. At the coffee urns, the girl opens it up and leaves the material in the carton for the customer to empty. When I have both on hand, either is equally well displayed. We have had as much selling service on one as on the other. The Kellogg people are in the building and look after me a little better. I do not think the National makes a lot from me. It is a little side line. The Kellogg Company, being in the building, naturally watch my cereal business pretty close. I try to keep all my cereals up, including Shredded Wheat. I run out of it more than I do Kellogg's Corn Flakes or Whole Wheat Biscuit, because there is no one to jog my memory to look it up. Both products are equally displayed on the counter, and the choice is up to the customer. To my knowledge, I never had a request for either one separately. There have been times when I have been out of shredded wheat and also times when I have been out of Kellogg's biscuit. I do not remember having anyone saying he wanted the other kind. I prefer the small size to serve, because I think the customer, although he might think he prefers the large size, when he gets through with two large-sized shredded wheat, has had a big meal, too much of one item. The small size is like any other cereal, about right. A man does not care to make a meal of oatmeal, or cream of wheat, or shredded wheat, but on balanced foods.

I do not like a customer to go out feeling overextended. There is, also, a selfish reason, that two

large biscuit will take a little more cream. On both grounds, I would rather serve Kellogg's small size than National large size. I order the individual-sized packages by the case. I handle other Kellogg cereals, also. I would not say that the sale of either product compares with a cereal like Corn Flakes, as to volume, which is a much larger seller.

CROSS-EXAMINATION.

THE WITNESS: I have never had anyone, to my knowledge, request shredded wheat. At the Chamber of Commerce, the kitchen opens the package and the chef sends it in in a dish. At the cafeteria, I have never had anybody ask for one in preference to the other. They do take one or the other, and some customers will take shredded wheat and some Kellogg's. We sell both. That is the way we have to do. We do not charge for cream, so we really profit a little better if they take the Kellogg small biscuit. The distribution of shredded wheat has been very poor of late, because no one made any great effort to sell me the National biscuit. I think they put in a carton a couple of months ago, and I looked around for a case two weeks ago.

We have both products displayed in our cafeteria, and they both sell. I think there is no question that Kellogg's sells the most. If equally displayed, I have no opinion whether shredded wheat would outsell Kellogg's or not. We display both there. I so often run out of one or the other, you really have no comparable or equal basis. At times I am out of Kellogg's and at times out of Niagara shredded wheat; then there will be only one on the counter. I have no way of knowing which one is most in demand. We never have it occur that a customer comes in, looks around, and asks for it. They just take what is there. As far as

I know, nobody has come in and asked for shredded wheat, as long as I have had Kellogg's. I was more than three years at the Hamilton and handled Kellogg's exclusively when I was up there. I have been in the restaurant business eight or nine years. Before Kellogg's biscuit was out, I used shredded wheat only. I have known shredded wheat a long time, under that name. I had nothing else like it when Kellogg's came out. The Chamber of Commerce restaurant is not a cafeteria. We have menu cards there. As it is just a luncheon place, we have no breakfast menu card and we do not list cereals. It is just some case where some elderly man feels he wants a dish of breakfast food. I imagine we sell as much Corn Flakes there as we do shredded wheat. If someone asks in that restaurant for shredded wheat and we are out, he would probably get Kellogg's Biscuit; but we now have shredded wheat there. We never had any complaint there of people getting one and wanting the other. If a customer asks for shredded wheat and gets Kellogg's, he does not say anything more about it.

W. O. W. is a cafeteria, and Keene Coffee Shop is a straight restaurant proposition. I do not buy for it. I have seen shredded wheat there in the past. I do not imagine he makes a practice of carrying both. I think it is listed as dry cereals, but I do not remember. We had only one change in menus since he started, over two years ago.

I imagine she would serve the original shredded wheat there in a dish, carrying it to the cream dispensary and opening it there; but she would serve either one she happened to have, on an order for shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I get right now and have in the past received better selling service from the Kellogg Com-

pany than from shredded wheat. I think that is why I have more often been out of the National product than the Kellogg product; although we think these dry cereals have a fair keeping quality and do not worry about having too many on hand. The more you have on display, the more you sell. We carry Kellogg's Corn Flakes and Post Toasties, because we feel some will want one and some the other. When we run out, we have no difficulty in replenishing the supply, just call up and get it. We have girls there, and I am not snooping in the cereal cabinet every day. I have to have somebody jog my memory.

If we run out of Corn Flakes or Post Toasties, we have no friction with the customers because we do not have one. Sometimes a man will like one better. In the way of cereals, we had no one complain. The corn flake proposition is different, because both Kellogg's and General Foods are located right in the building and both take good care of me. If we do not get a complaint, we do not feel a customer is suppressing indignation. For each ten customers who will not complain, one will. Out of a great number, you are bound to get one complaint; but we never had any complaint on these two products to my knowledge. I have not had anyone ask for the other.

MR. CLARKE: I offer Defendant's Exhibit 104 as an addendum to the testimony of Mr. Twentyman, it being stipulated that, if Mr. Twentyman were recalled, he would testify to the facts stated in this letter.

MR. VILAS: All right.

RAY W. SAWYER.

Deposition taken at Omaha, Nebraska, April 19, 1933.

Direct Examination.

The Witness: I am district sales manager of the Omaha branch of the Kellogg Company, with whom I have been connected for nine years. I worked in the retail trade from Cedar Rapids, Iowa, for five years; and I have been in charge of the Omaha district for four years, embracing the State of Nebraska, twenty-three counties in Western Iowa, and the Black Hills area in South Dakota. I have ten salesmen and two office workers. Those salesmen cover the territory I have just outlined. They sell the complete Kellogg line: Corn Flakes, Pep, Whole Wheat Biscuit, Krumbles, Rice Krispies, Bran Flakes, Whole Wheat Flakes, Kaffee Hag Coffee, and All-Bran.

We have secured one hundred per cent. distribution of Whole Wheat Biscuit in the better grade stores, and 70 per cent. of approximately all the stores in my territory; and I would say 75 per cent. in all the restaurants, 100 per cent. in the better grade restaurants.

There is a consumer demand in my territory for Kellogg's Whole Wheat Biscuit, which has been created by sampling, house-to-house selling, coupon postal cards, newspaper advertising, and our salesmen continually calling on the trade, day after day. We have had a lot of dealer co-operation, in creating consumer demand, such as window displays, store displays, and newspaper advertising. I regard house-to-house sampling, the way we have been working it, as the most effective way of creating interest and consumer demand for a new product. Those methods have been effective on Kellogg's Whole Wheat Biscuit, and a substantial business in it has been built up.

The product is serviced to the restaurant and hotel trade through jobbers, also our salesmen, who buy through jobbers and sell to the restaurant trade. It is serviced to the hotel and restaurant trade in a small case, sixty individual packages to the case. Very few restaurants get it in the large package any longer. Maybe a few hamburger stands in Omaha still buy a big package now and then, because they have not been solicited by jobber or Kellogg salesmen. They usually buy those through neighborhood grocery stores, for the smaller-sized restaurants. You see a large package occasionally in a better type of restaurant, which he has gotten while awaiting delivery of individuals. The smaller-sized carton is growing in popularity in the restaurant trade. There was a time when individuals of dry cereals were on the down grade, I think; but they are coming back better now.

I think the individual gives the restaurant man a package he can serve handily. From the manufacturer's standpoint, it advertises the product to the consumer, because the individual packages may be displayed on the counter but would not be in the old big package. In some of our cereals, the sample is larger than the individual package, as on Corn Flakes. In other instances, they are the same, except one is marked *sample* and the other *individual*.

We furnish advertising display material to the stores, which our men believe are responsible for a lot of trade; posters, jumbo cartons, cut-out material, advertising pieces of various kinds. Large window displays are furnished to dealers. We have Saturday store sales, demonstrations, where we have talked about our products and explained where they are different than, perhaps, some other products. In those store sales or demonstrations we have combinations of packages with all our salesmen, every Saturday.

We have done that on Whole Wheat Biscuit from the time we have been pushing the sale. We do it either by giving one Whole Wheat Biscuit package free with the purchase of one, or we have Whole Wheat Biscuit in combination, the customer buying it and getting another product free. Usually, we give the Whole Wheat Biscuit free. Those coupons are sent to lists furnished by our retail trade; and they entitle the customer to one free package, if he buys one package of Whole Wheat Biscuit.

We have used the little Jungle Land Books, the Story Book of Games, and the Wheel of Knowledge. Those are premiums with two packages, usually. We have not had so many of the cellophane-front packages, only about the last three or four months. The bulk of this business has been built up without the use of the cellophane-front packages. It seems that the premiums are valuable in attracting notice to the Whole Wheat Biscuit. It always gets a volume of business when we put on a proposition of that kind in any city.

There is no advertising allowance whatsoever made by the Kellogg Company for dealer advertising. When the dealer advertises Kellogg's biscuit, they connect up activities in their store, such as newspaper or circular advertising. In Grand Island, Nebraska, last week, we put a coupon to every house in town, entitling the recipient to a package of Whole Wheat Biscuit free. We got several mentions in grocery ads, stating, if they brought in the coupon, they could get a package of Kellogg's Whole Wheat Biscuit free with the purchase of one package.

A genuine consumer demand for Kellogg's Whole Wheat Biscuit has been created in our district. I have had reports of instances of confusion with Niagara shredded wheat, dealers sending back our product and

saying they had ordered the other, or vice versa; but I do not recall just where. One report I had, probably three or four years ago, when the biscuit first came out, a salesman would sell a case of Kellogg's biscuit. It would go to the warehouse and they would ship out Niagara shredded wheat in place of it. The jobber would take the loss, because the price of our product is less than the cost of Niagara shredded wheat. I recall no case of that kind where it was sent back to the jobber. I cannot recall any recent reports of that nature.

Our salesmen sell the product as Whole Wheat Biscuit now. At first it was called Shredded Whole Wheat Biscuit. We get many dealer ads, advertising it as Kellogg's Whole Wheat Biscuit. Occasionally, a dealer will, as they will on any product, call it Kellogg's post toasties, or shredded wheat, or something like that.

I know of no case where they asked for Niagara shredded wheat and got Kellogg's, but I have heard lately of just the opposite, especially in restaurants.

I do not believe the sales of Niagara shredded wheat have been pushed in this territory as hard or in the same way as the sales of Kellogg's biscuit since the National took over shredded wheat. I believe Kellogg has put more effort, because, since National changed its salesmen and gave them cookies and crackers to sell, also; I feel that, at times, their salesmen overlook asking for an order for shredded wheat. I have not found National distributing packages of shredded wheat to the trade. They did sampling, the same as we have done, to the trade here in Omaha, but not in any way comparable to our sampling. I have not encountered their displays in stores, except an occasional large display piece, especially in a window or on a ledge.

I do not find competition in the sale of our Whole Wheat Biscuit to compare with the competition on our Corn Flakes. We get a good deal harder competition on Corn Flakes. Defendant's Exhibit 105 is a case used for packing Niagara shredded wheat, marked on one end: "The original trade-mark Shredded Wheat, Registered U. S. Pat. Off." and, on the other end: "Thirty-six cartons, twelve biscuit each, the original Shredded Whole Wheat. Shredded Wheat bakeries, Niagara Falls, New York; Oakland, California, National Biscuit Company, Uneeda Bakeries." It is marked on both sides: "Shredded Whole Wheat, Shredded Wheat, Niagara Falls, New York, Oakland, California. National Biscuit Company, Uneeda Bakeries."

Kellogg's biscuit has been introduced into all chain stores in this territory except the Atlantic & Pacific, who have eight stores here. They are just starting to open them up here. The other chain stores have them in stock. The policy of chain stores is that it usually takes pretty good proof that there is a consumer demand before they take a new product in. They usually demand that; because they are usually pretty well stocked up, and they have no way to bring a message to the customer

All our chain stores are run on the self-service basis: Safeway, Piggly-Wiggly, Hinky-Dinky and O. F. Skaggs. Kellogg's Whole Wheat Biscuit are in those stores. I do not know exactly, but I feel safe in saying we sell as many if not more than they do of Niagara shredded wheat.

I am familiar with the restaurant and hotel trade. I have encountered in this territory some small-sized individual Niagara shredded wheat, like Defendant's Exhibit 103. They appeared here about six months ago. Before that they were all in the large individual package, like Plaintiff's Exhibit 21. There has been

just a case here and there of the smaller package, whatever the restaurant orders. I presume they will use that always, now, for their restaurant trade in this area. I know you still see both in the restaurants.

At Saturday sales of Kellogg's biscuit, our salesman picks out a good cash-and-carry or cash service store, where a lot of people come in. He makes an arrangement with the man, or, if a chain store, with headquarters, for a Saturday demonstration. We spread out a display of all our products, show them to our customers, what they are, from Corn Flakes, clear on through. We work up a purchase deal to the customers: three packages of our products at regular price and giving them as a sample a full-sized package of our Whole Wheat Biscuit, being careful to explain to them the way our biscuit is put together. We know that has created a lot of consumer demand, because we go back and check up.

The points of distinction we have emphasized are that our biscuit is smaller in size, and fifteen biscuit to the package, a half ounce more weight in the package, and toasted on both sides. We have had a great many compliments on the small-sized biscuit.

I believe our biscuit is selling one or two cents higher than Niagara shredded wheat. Occasionally specials are run on both. We have had many people say, if it has Kellogg's name on it, it must be good. We regard it as an advantage.

In recent years the customers are a little more picky and choosy than they used to be. The customers are doing more shopping than ever before. Housewives who go out and shop for groceries call on more stores than ever before. In the old days they would call up John Smith and say, "Send me out" so and so. That was all there was to it. In the new stores there has been a great deal more proprietary interest than was ever thought necessary before.

In the self-service stores in this territory the customer comes in, picks up a market basket, goes through a stile on the right. Some do not have a stile, but all have market baskets. They go around and shop. A clerk or girl is asked sometimes, but they usually call it by name. No sales effort is applied to the customer in a cash-and-carry store to sell any particular thing. They take what they want off the shelf, go to the cash register, pay for the goods, which are put in a sack, and they go on their way.

Kellogg's biscuit was probably on the market seven or eight years before the National put out their small-sized individual biscuit. Assuming Kellogg's biscuit was put out first in the fall of 1927, we saw this small National product, like Defendant's Exhibit 103, for the first time, about six months ago. Until that time Kellogg was putting out a small biscuit and the National a larger biscuit. Since, the National has been putting out the larger biscuit in big cartons, and, in this territory, is introducing a smaller biscuit in individual cartons, apparently. I have never encountered the smaller biscuit of National in any other than individual cartons, never in any of the big cartons. Our large cartons are packed twenty-four to the case. We have sixty to the case of the individual cartons. We have an assorted case of individuals for the restaurant trade, containing corn flakes, Pep, Rice Flakes, Whole Wheat, and All-Bran, a total of a hundred and seven individuals in the assorted case.

I do not recall seeing any assortment of National Biscuit individual cartons to a case. Their large cartons are packed thirty-six to the case. There are twelves, and I believe there was a time when they had twenty-fours.

We have institution bidding in this territory. I attend to that. The invitations are mailed to me. I

fill them in and mail them to the quartermaster or purchasing agent. When I get a bid: "A wheat product, must be shredded, similar to shredded wheat," I am very particular to write in: "Kellogg's Whole Wheat Biscuit, packed twenty-four twelve-and-a-half-ounce cartons to the case," and they have always bought it. I have never had any confusion in bidding, never had any deliveries rejected as not being what the bids called for. I do not know how the other product, shredded wheat, is described when they bid. I have never seen one of their bids.

When witnesses in this case have referred to the National salesman as a cracker or cookie man, I suppose they usually mean the cookie salesman, a man carrying a line of cookies and crackers for sale. I would not say that that line is closely akin to the cereal line in any way. I would not say a cracker or cookie man is a regular cereal salesman. I think the picture has been changed somewhat since things have been consolidated. I do not think the cookie or cracker men work as hard on shredded wheat as the regular cereal man would. Their big volume of business is in cookies and crackers, and they are apparently more interested in selling them. I feel it is just as if I would sell pickles along with my cereals. I would not know as much about pickles as I do about cereals that I have been selling for years and years. These men have sold cookies and crackers for years.

I recall the situation of the Shredded Wheat Company before National took it over. They had wagons and trucks, made house-to-house canvasses, put on store sales, a package free with one or two. They did an exceptional job of promotional work. That was real competition. When National took over, they disbanded those trucks and wagons and everything, as far as I know. They did not take over the shredded wheat salesmen they had at that time, with a few exceptions,

where they found employment for the shredded wheat men. They disbanded that organization for the most part, the selling organization, and turned that part of the business over to the cookie men. They made a change in the old shredded wheat method of distributing their product through jobbers; and they are now selling direct, with their cookies and crackers. They also have shredded wheat in jobbers' stock, the jobber being permitted, I believe, to sell it at whatever price he wants to. I have heard the grocer does not exactly know, sometimes, what he is paying for shredded wheat.

The Kellogg product is not sold direct to the retail trade, but just through jobbers. We get jobber and wholesale co-operation in the sale of Kellogg biscuit, through their salesmen traveling the territory, because the National deliver a lot of Shredded Wheat direct; and the jobber knows he gets no profit on that. So the entire Kellogg business is done through jobbers and wholesalers; and only part of the National business on Shredded Wheat is done through jobbers. I would say those direct sales put the National in competition with their own wholesalers and jobbers. The retail trade would be solicited by both the National and the jobbers.

CROSS-EXAMINATION.

THE WITNESS: I am thirty-six, and I have been with Kellogg nine years. I was not in the cereal or food business before. I was a banker. I had not previously been connected with any food company. I have never been in the cookie game.

Crackers, cookies, Shredded Wheat and summer cereals are all sold in grocery stores. There is no objection whatever to a cracker salesman carrying cereals, if he has them for sale. The old Shredded Wheat Company used some of the methods of sales

promotion I have described as being used by Kellogg, in their house-to-house work and store sales. They were very extensive advertisers in those old days. Shredded wheat, when it first came out, was a novel product. There had been nothing else that I recall produced just like it. It was necessary for the Shredded Wheat Company to do a lot of pioneer work, not only to introduce it, but to teach people to like and use it. That is true on every new product, that is a novelty. Shredded wheat was a novelty, and people had to be taught to like it and ask for it.

I will concede that over the period of years shredded wheat was being promoted, a lot of pioneer work was done, and people had become accustomed to using shredded wheat. When the Kellogg Company came into the field with their biscuit, at least, they were not confronted with introducing a novelty. I have no doubt our Whole Wheat Biscuit is in direct competition with shredded wheat. Some of our selling points necessarily compare it with shredded wheat. It is a smaller biscuit and fits the dish better, is browner, fifteen to the package. All those things necessarily compare it with shredded wheat; and, at once, the two items are put in comparison in the customers' minds.

When I say I think we have a hundred per cent. distribution in all the better stores, I mean that, in all the better grade stores, our product will be found. That does not indicate the volume of sales. You might have a case of our product and not sell a package. The same is true of yours. That simply means that it is to be found there for sale.

I have seen in self-service stores a supply of chewing gum or some small item by the cash register which the manager wants to introduce and will suggest to the customer. I have never seen a checker with a supply

of shredded wheat or Whole Wheat Biscuit or any big package goods that he could suggest to his customers.

We started the intensive work of pushing Whole Wheat Biscuit in this territory the day they shipped it to us from the factory, and we have been going ever since. They were then shipping it out as Shredded Whole Wheat Biscuit. We have continued our efforts along the lines already indicated from the first, but we have introduced some new ways of merchandising it and getting the message to the consumer. The extent of our effort has been continuous in getting it under way. I would say we put more effort in the last two or three years than before, since the National started distributing shredded wheat direct to grocers, and we have had more co-operation from our jobbers, who are not particularly pleased with being deprived of shredded wheat and are more willing to co-operate with the Kellogg Company. The reason probably is that they co-operate with us very well on all our Kellogg line; and it is just another Kellogg item to the jobber. At the same time, it was a new item that they could use in place of shredded wheat.

In my district, there are army bases, who call for bids on regular forms, including specifications, which sometimes read shredded wheat. They usually do. I believe Fort Cooke, especially, specifies shredded wheat, twelve-and-a-half-ounce package. On the others, it is all cereal wheat, and Kellogg's Whole Wheat Biscuit is put in. A twelve-and-a-half-ounce package specification could only be filled by our product. That form of specification was not suggested or introduced by me to the Army Base. I do not know who suggested it.

Army bids usually specify shredded wheat or similar, or shredded wheat product, the Army Bases. All Army bids call for the twelve-and-a-half-ounce packages. I think I have seen shredded wheat, twelve-ounce package on some bids. I scratch that off and write in:

Kellogg's Whole Wheat Biscuit, twelve-and-a-half-ounce package. It is up to them, whether they want to accept the substitute or not, in that particular instance. Sometimes they do, and sometimes not. We do not always get the business. The Army posts are particular about specifications. When they ask for shredded wheat, they have sent some of them back, in some cases. In others, we have succeeded in getting the business. We have bids for all the institutions in the State of Nebraska, asylums, hospitals, penitentiaries; all bid on by the jobber. I have seen their specifications, which call for Kellogg's shredded wheat biscuit. They specify our brand, which is doubtless the work of our sales organization. We showed them our product, and they have liked it and specified it. I have never seen a State bid that specified shredded wheat. I would not say that was universal with State institutions. All I know is what I have control of, one set of State institutions here, who bid through the Board of Control at Lincoln, Nebraska. Those are all bid upon and filled by jobbers. I do not really have anything to do with that at all. We just supply the jobbers. We do take Army Base orders direct.

RE-DIRECT EXAMINATION.

THE WITNESS: The bids specify wheat, shredded. That would be correct, as far as I know. The Shredded Wheat Company emphasizes, by placards, and so forth, that there are twelve big biscuit and twelve ounces. I think I have seen the word *big* biscuit in newspaper advertisements, and on placards. I have also seen the big placard representing Niagara Falls, with "More power to you," at the top, and "twelve big biscuit," down at the side.

RE-CROSS-EXAMINATION.

THE WITNESS: I recognize the printed list, Plaintiff's Exhibit 233, dated January 1, 1932, headed:

"Board of Control, Lincoln, Nebraska, specifications for Class 2, groceries, canned goods," and so forth. I have seen them. I do not know whether it is just like this one, but it is the regular form they put out. I recognize this as a form the Board of Control puts out at Lincoln, the regular form for bids on that class of goods. I notice item 142, wheat, shredded, biscuit, Kellogg's, twenty-four, twelve-and-a-half-ounce packages to the case, under the head of cereals. I do not see any other mention of shredded wheat there. Placing it on there in that particular manner is not the result of Kellogg salesmanship. Samples were shown to the Board of Control, also to the superintendents and stewards of each institution, our complete line. They picked out what they wanted and put it on the specifications that went into the Board of Control. After they get various inquiries from the various institutions, they put it on that Key Sheet. Then our salesmanship is exercised on the buyers of the various institutions to call for biscuit, and we give them that information on it. It calls for twenty-four twelve-and-a-half-ounce packages to the case. That is the way ours are packed, I do not think the National packages are packed that same way according to that same specification. I do not believe they would fit it.

RE-DIRECT EXAMINATION.

THE WITNESS: All the information on this Board of Control list could be secured from anyone with a case of Kellogg's biscuit before him. Plenty of literature of the Kellogg Company tells that the packages are twenty-four to the case and twelve and a half ounces to the package. In addition, we have sampled all the stewards and superintendents of every institution with all our products several times.

It is very difficult to even get a hearing of the Board of Control as to what they put on there. These requests to the Board of Control come from the institutions that are to use the product. They make requests, and the Board of Control consolidates them in a list for general bidding, simply a Key Sheet to guide them on all these different items in their bid.

MRS. WILLIAM BURGER.

Deposition taken at Omaha, Nebraska, April 19, 1933.

Direct Examination.

The Witness: I am a housewife, with my husband only, no children, and I am a consumer of Kellogg's Whole Wheat Biscuit. My grocery store had a special on cereals one day. She often asks if she may send me, this or that. I usually say yes, because she is a reliable girl. This happened to be a bundle of Kellogg cereals with Whole Wheat Biscuit. It was new to me. We liked it very much. We have used it ever since. When I was a girl at home, they had Niagara shredded wheat, but I never used it, because it is a much larger-sized biscuit than I care to eat, anyway. I have not used it in recent years. I now use Kellogg's biscuit and have used quite a lot of it in a month. We have had quite a few guests. I always ask for Kellogg's Whole Wheat Biscuit and have no trouble getting it, through my store.

Cross-Examination.

The Witness: My grocer is Mr. Bichel. I remember shredded wheat when I was home, as a girl. I recognize the package, Plaintiff's Exhibit 1. That is the package my mother served from at that time. I can remember it always, not a great deal; but, I remember

we did have it. When I commenced keeping house myself, I never bought it or had any in the house, probably because I thought it was a little too much for a serving. When my grocer sent me this little sample package, I tried it and liked it. That was probably a month ago.

RE-DIRECT EXAMINATION.

THE WITNESS: I was not brought into the case through anybody connected with the Kellogg Company. I think Mrs. Gillogly gave my name as a user of Kellogg's Whole Wheat Biscuit.

MRS. ALICE MAY GILLOGLY.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with three in the household now. My mother is with us for a time. We use Kellogg's Whole Wheat Biscuit. We have used other Kellogg products for quite a while and the biscuit within the last year or so. I have always used Kellogg's Bran Flakes and things like that. The grocer suggested it one day. I bought it, and we all liked it very much and have continued to use it ever since. We have used the other biscuit, Niagara shredded wheat, quite a while ago. My mother used to use it; but I have not used it for several years. I used it before I was married, but not in my own married household. I have continued to use Kellogg's Whole Wheat Biscuit as a cereal. I order it by that name and have no trouble getting it. I have never had shredded wheat of Niagara Falls delivered to me when I asked for Kellogg's shredded wheat or Kellogg's Whole Wheat Biscuit, because I trade at a cash-and-carry store. I wait on myself there.

CROSS-EXAMINATION.

THE WITNESS: I was familiar with shredded wheat for a good while. I knew what it was, knew it at home. My mother used it. I have eaten it at home but not in my own home. My husband never used it. I use the other, and he eats that. It was first suggested to me by my grocer who asked me to try it. I did so, because we always use Kellogg's for muffins and All-Bran and things like that. I have used a lot of Kellogg products.

My husband is head of the securities department of an automobile finance corporation. I came here today to testify, because the grocery man gave my name to a man who came out to see me. I told him about these other girls. We all play cards together. We all came down here together. We are all users of Kellogg's Whole Wheat Biscuit. My grocer is the Hinky-Dinky Store, corner of Leavenworth Street, a self-service, cash-and-carry store.

RE-DIRECT EXAMINATION.

THE WITNESS: I just go in the store, wait on myself, and check out with my goods. They have both kinds there, also all the Kellogg products. I have seen the Niagara Shredded Wheat Biscuit there.

MRS. HELEN E. BARRETT.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with five in the household, and I am a user of Kellogg's Whole Wheat Biscuit, the only shredded whole wheat biscuit used in my household at the present time. It seems to me I have known about it a year and a half or so. I used

Kellogg's Corn Flakes and Rice Krispies and liked them. I saw this on the shelf in a practically self-service store and asked for it and tried it. The rest of the family like it and we have continued to use it.

I have used the other Niagara or old shredded wheat, quite some time, about five or six years. We have youngsters at home. We like Kellogg's biscuit better than that. It seems to me it has more taste. Cream seems to make the bottom of the Niagara biscuit sort of soggy. This is better toasted, and I like the size. I have no trouble in buying it in stores where I wait on myself. I get it through my grocer, too, ordering it by telephone as Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I may have asked for Kellogg's shredded wheat, but I do ask for it as Kellogg's Whole Wheat Biscuit. I am familiar with the old shredded wheat and knew it at home. I had it in my own home when I was first married, a few times. When I tried Kellogg's biscuit, I have not had any shredded wheat since, and I had had none for some time, then. I have bought Kellogg's biscuit since then.

I do not remember what kind of box I first saw Kellogg's biscuit in. I have seen it on the display shelf in a cellophane window box, but I do not remember the first one. It had the picture, like the other side of Plaintiff's Exhibit 161, and I saw the two biscuit in the dish. It was new to me, so I thought I would try it. When I saw it, it reminded me of shredded wheat. It looked like shredded wheat to me. My grocer is the Miller Park Grocery, Mr. Loreas. I sometimes go to the store and sometimes order by telephone. I suppose I might have asked him for Kellogg's shredded wheat at times. I serve it at home usually with fruit and cream. I do not bring the box on the table. It is

served in the pantry and brought on the table in a dish. My husband is a pharmacist. I am one of the bridge party who all came down today.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not know anyone connected with the Kellogg Company.

MRS. JOHN E. HENLEY.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. There are just two in my household, my husband and I. We are users of Kellogg's Whole Wheat Biscuit. I have known of that product approximately a year. I was at a friend's house. She had it. I asked what it was. Since then, I bought it. I purchase it by telephone as Kellogg's Whole Wheat Biscuit and have no trouble in getting it. We had the old Niagara shredded wheat at home a lot, but I never used it until after I was married, and then I got this. I like the Kellogg biscuit very much, much better than the other, because the other one seems to get so soggy, and this one does not.

CROSS-EXAMINATION.

THE WITNESS: I had known shredded wheat in this package, like Plaintiff's Exhibit 1, and had it as a girl at home. I used it at that time. After I went to housekeeping, I did not buy any until I tasted this shredded Whole Wheat Biscuit of Kellogg's. I did not use it at home. I have been keeping house about four years and use a lot of dry cereals; but I have not been buying any shredded wheat. I first came across the Kellogg

product at some friend's house and liked it. I have been using it since. I have not bought any shredded wheat since. My husband is with a finance company, a different one from Mrs. Gillogly's husband, different line.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not know anybody connected with the Kellogg Company before Mrs. Gillogly spoke to me about this.

EDWARD DELANEY.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of the Redick Tower Grocery Company and have been in the grocery business about six months. I was an efficiency man before that for Anthony, who has ten meat-markets here in town. I was in that business for six years. We are an independent grocery store with just one store; but he still owns the ten meat markets. We are self-service, cash-and-carry, and we do not make deliveries. He employs, in meat and grocery departments about thirteen, of which six are in the grocery.

We carry Kellogg's Whole Wheat Biscuit in that store; also, Niagara shredded wheat. There is a consumer demand for both those products, or I would not have them on the shelf. We sell mostly the National shredded wheat, about sixty-five per cent. or more, and thirty-five per cent. of Kellogg's.

I have not been there long enough to tell whether the Kellogg product is a growing demand. Since I was there, we have never advertised either product. Both of them have been advertised in that store. They sell both for the same price. We are self-service; but

we wait on customers of they want us to. If we see a puzzled customer, we approach him and help him, if we can. Otherwise, they wait on themselves and bring the goods to the checking counter and pay out. Our clerks never practice substitution in helping customers. If a product is asked for and it is not in stock, they naturally try to make a sale by suggesting some other item near that product. I would not really call that substitution. That would be merely making a sale, where we explain we do not have it but have something else. A substitution would be where you have never carried the product and carry a substitute. If we did not carry the product at all, the answer would be that we do not handle it, but we will have it in a short time. We would not try to sell that customer anything else in the meantime, but, if it were a nationally-advertised product, we would try to have it soon.

If I asked her to try a new nationally-advertised product, I would not call it substitution. If it was not nationally advertised, I would call that a substitution, because you are really substituting something not advertised. Bread would be a little different item, but if a customer asked for a certain kind and I told her we did not have it but I would like her to try another kind, I would, I believe, call that a substitution.

As a rule, when we put in a new product, we put it in the window, make a floor display of it, and explain it to the customers as we go along. We aim to solicit our whole trade at the same time to try the product, on sale days, as a rule. The creation of consumer demand for Kellogg's biscuit must have occurred before I came to the store. As a rule, they come in and ask for shredded wheat. When they ask for Kellogg's, they ask for Kellogg's Whole Wheat Biscuit. I do not find a bit of confusion between the two products in our store. I never have had either one sent back with the statement it was the other they wanted.

CROSS-EXAMINATION.

THE WITNESS: What I meant when I said we do not practice substitution and emphasized the word *practice,* I meant we do not practice it. It is a self-service store, and we really do not have the time. We have little occasion to, in any way. We sometimes see a puzzled customer. It is natural not to let a customer get away.

If I saw a customer looking for something, went up to her and asked if I could help her, and she said she was looking for shredded wheat, and I happened to be out of it, I might call her attention to Kellogg's Whole Wheat Biscuit. I will not say we are out of either of them. We always keep them on hand. That might occur, however, that might be called a form of substitution, although I would tell her what I am giving her. You really explain it to her when you are making the substitution, "Would you mind trying this?" That is what you would naturally say. I have found you can hardly push an article on a customer. Nowadays, they know what they want. If they want Kellogg's or Puffed Wheat, they know what they want.

I have known shredded wheat for quite a while, a long while. When I got my grocer experience, my father used to run the store, and I knew it then. I have been brought up in the grocery business all the time. My father always had shredded wheat in the store, for many, many years. When he ran the store, we always had it. I do not remember Kellogg's Whole Wheat Biscuit then. Shredded wheat was the only kind on the market, and it was always known as shredded wheat; but my actual personal experience has been in the present store I have told you about. When I went there, it was fully stocked; so I am not personally familiar with the bringing in of Kellogg's biscuit and the means used to introduce it.

RE-DIRECT EXAMINATION.

THE WITNESS: I have not had customers ask for Kellogg's shredded wheat. They have always specified Whole Wheat.

HERBERT BICHEL.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer, operating a grocery store with my father, under the name of Henry Bichel, a general old-line independent retail store. I have charge accounts where they are justified, make deliveries, and take telephone orders. We serve the customers. We handle Kellogg's Whole Wheat Biscuit. I think we had it just as soon as they put it on the market here. There is a consumer demand for that product. We also handle the Niagara shredded wheat and have for some years, as long as I have worked there, seventeen years. The Niagara biscuit sells the most in our store, about two to one. We have customers ask for Kellogg's shredded wheat. We give them Kellogg's Whole Wheat Biscuit. If customers ask for shredded wheat, we usually ask them if they want Kellogg's or the other. We do not try to push or substitute. If someone asks for an article, we try to find out what it is. If they say shredded wheat, we would ask them whether they wanted Kellogg's or Niagara.

After Kellogg's biscuit was on the market, but before I adopted the practice of asking which one she wanted, it has happened that, when I gave them Niagara in response to a request for shredded wheat, the customer turned it back and said she wanted Kellogg's. Our present practice is to ask anybody who calls for shredded wheat whether they want Kellogg's

or Niagara, just as with bran flakes or corn flakes, we say, "Which one?"

The two products sell at different prices. The Niagara is the highest, selling two for a quarter; and Kellogg's sells for ten cents. We do no advertising in the newspapers; nor do we do display advertising in the way of pamphlets or circulars. We treat both products alike. As a retailer, I have not done anything to create consumer demand for the product, just leaving that up to the manufacturer to create a demand for his own product. If someone wants something different, they could try another thing. That would be the only way. If they get tired of the same coffee, you can suggest another coffee.

CROSS-EXAMINATION.

THE WITNESS: My father had that store about thirty years. I have been with him seventeen years, since I was in high school. All the time I have been with him and before, I have known about Shredded Wheat, like Plaintiff's Exhibit 1, to the best of my knowledge, and my customers have known about that, to the best of my knowledge. It has been a household word and a well-known article, shredded wheat, since I have known it. Before Kellogg's biscuit came on the market, I cannot remember anything similar to it on the market. When customers asked for shredded wheat in the old days, I knew right away what they wanted, and it was just this one package that filled that same order. Then came Kellogg with Whole Wheat Biscuit. I cannot remember when the confusion among my customers or between me and my customers as to which one they would want, arose.

We have had Kellogg's Whole Wheat Biscuit since they have been out. We stocked them right away, just like any other breakfast food. I could not say if it was Kellogg's Shredded Whole Wheat at that time.

I cannot remember the name on the package before. I know what is on there now. I do not remember when it was called Kellogg's Shredded Whole Wheat Biscuit.

I cannot remember whether customers who were former users of shredded wheat are now users of Kellogg's biscuit, or whether they are new shredded wheat users. It is a fact that I sell both articles now. Since Kellogg's Whole Wheat Biscuit came on the market, it has gotten up to where it sells in our store at least half as much as shredded wheat. Some people have called for shredded wheat and then rejected the National product we sent them, which may have indicated that, in those customers' minds, at least, there was another shredded wheat. So far as our store is concerned, at the present time there are two shredded biscuits. I cannot remember the name on the package. I have handled plenty of them. I cannot say if Plaintiff's Exhibit 161 is the package I have in my store now. It says Kellogg's Whole Wheat Biscuit. Then, they are put out like that right now. We have had some packages with the window in it. We have none now. The last few cases did not have any. I do not know whether the salesman let them order it. I do not believe there was one like that to a case.

When a customer asks for shredded wheat, in order to keep from making a mistake, I always ask her. If she asks for shredded wheat, I ask her whether she wants Kellogg's or the Niagara shredded wheat. It is fair to say that some of those customers have been users of shredded wheat and are now users of Kellogg's biscuit. In cases like that, we know what they want, and we do not ask. As in coffee or bread, with a lot of regular customers, we always know and give them what they want. When we do not know what they want, we take no chances on confusion. I know which one they mean when they say shredded wheat.

AUSTIN D. CREW.

Deposition taken at Omaha, Nebraska, April 19, 1933.

Direct Examination.

The Witness: I am a grocer, with a retail grocery store, Charles D. Crew & Son. It is a service store, making deliveries, and carrying charge accounts where justified. We have four assistants in the store, no self-service. We carry Kellogg's Whole Wheat Biscuit, also the old Niagara shredded wheat. Those two products sell, in our store, about half-and-half, right now.

Some customers call for Kellogg's shredded wheat, some for Whole Wheat Biscuit, and some for Kellogg's Whole Wheat Biscuit. I do not know exactly whether they ask for Kellogg's shredded wheat biscuit or whole wheat biscuit. If a customer asks me for shredded wheat, my usual practice is to get her the old style, Niagara shredded wheat. If we know she might want Kellogg's, we tell her we have both, give her a preference. Lots of times we know what they want. If a customer asks for shredded wheat, we sometimes ask her what she wants, maybe in the case of a new customer when we did not know what she wanted. I do not believe we have had any sent back with the statement she wanted the other one. They usually sell for the same price, a dime a package.

We have sometimes given the Kellogg Company co-operation in creating consumer demand for its biscuit, about the same treatment as we have given the National. There is a genuine consumer demand for both products in our store. We buy the Kellogg product through the jobber, through the Buy-Rite Association, not a Kellogg salesman. We buy the National product from the National Biscuit salesman, the same

one who takes orders on crackers and cookies. We handle practically the full National Biscuit line, including shredded wheat biscuit.

We handle the full Kellogg line, and Kellogg products are very good selling products in our store. Buy-Rite is a voluntary buyers' chain organization. They work through the wholesale house of Holmes-Wildhaber, mostly, owned by Mr. Holmes.

CROSS-EXAMINATION.

THE WITNESS: We probably advertised both products at different times, either in our Buy-Rite Association ad in the newspapers, or just on our individual circulars. I would not say that 50 per cent. of Kellogg's biscuit sales are wholly or largely at the expense of Shredded Wheat. I think shredded wheat sells as much as it ever did. I know there are some of our customers who have switched over from shredded wheat, who used to buy it, and no longer buy it but buy Whole Wheat Biscuit.

My family has been in the grocery business twenty-five years. I have conducted this present store five years. My mother and elder brother were in it before, in fact, the whole family. It is an old service store of long standing, and my connection with it has been since 1914, about nineteen years. During that time, we were carrying the old shredded wheat. I have been very familiar with it. For years, there was nothing like it. It was a well-known name. When a customer asked for shredded wheat in those days, I knew right away what they wanted. There was no question about it. It is fair to say that shredded wheat was a household word. I imagine it was made so by the efforts of the old Shredded Wheat Company, introducting their products as a new product, and teaching people to use it and like it.

Now, sometimes, when a customer asks for shredded wheat, I have some doubt what they mean, because I have this new kind of shredded wheat which resembles somewhat the old shredded wheat. In that event, I ask them which they mean. When I do I find that, sometimes, it is the Kellogg product they want, and sometimes the shredded wheat. It does not make a lot of difference. Sometimes they are willing to take either one. Sometimes they say they want Kellogg's biscuit.

WILLIAM T. KLINE.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer for the Hinky-Dinky Stores, Omaha, self-serve, cash-and-carry chain of thirty grocery stores, twenty-seven of which are in Omaha. Those stores carry Kellogg's Whole Wheat Biscuit and Niagara shredded wheat. There is a consumer demand in the stores for Kellogg's Whole Wheat Biscuit. At the present time, of the two, we are selling more Kellogg's biscuit. Our stores cooperate with Kellogg in creating consumer demand for the biscuit, by coupon sampling and different things on that order; advertising, literature, pamphlets, etc., and we advertise it ourselves. We have distributed with it Jungle Land Books and the Wheel of Knowledge.

There is no confusion whatever between these two products in our stores. We do not have one returned with the statement the other one was ordered or wanted. We have both items on the shelves, and the customers pick out what they want and check out at the counter, so there is really no confusion between

them. The retail price is the same on both products. We do no wholesaling, have our warehouse, but just to take care of our stores.

CROSS-EXAMINATION.

THE WITNESS: The wholesale price on Kellogg's is a little better than on shredded wheat; so we make a little more on Kellogg's. I have personally been in the grocery business about ten years, and with the Hinky-Dinky about seven years. I am assistant buyer. Sam Newman is the head buyer. I am connected with headquarters. Mr. Newman, the president, has charge of the retail outlets. I assist him. We do all the merchandising and everything. We direct the merchandising policy of all the thirty stores.

I have been familiar with shredded wheat for many years. It is an old product. I have known it as shredded wheat, and we still purchase it and carry it in our warehouse, distributing it in our stores, as called for. Until Kellogg's biscuit appeared on the market, it was the only product of its kind, as far as I know. Now, we have two products, equally displayed on the shelves of our stores. We exert no salesmanship in our stores, show no discrimination of any kind. We do not display or suggest a new product. We carry Muffetts. I have seen the new Loose-Wiles product, Rippled Wheat, but we do not carry it at all. I do not know whether any retail organization carries it. We carry the Loose-Wiles cracker line, but not the National line. We purchase our shredded wheat direct from National.

I would say Kellogg's biscuit sells three to one of National shredded wheat; all due to the sales efforts put on the item on the part of the manufacturer. I think the Kellogg Company has been more active in pushing this product in recent years. Once in a while,

we advertise these items. We use newspaper ads and feature Kellogg's Whole Wheat Biscuit sometimes. We have not featured shredded wheat for six months to a year. Whenever we advertise it, we have special prices. The fact we have not featured shredded wheat for some time might, to some extent, account for the sales of Kellogg biscuit; but the sales of Kellogg's biscuit passed those of shredded wheat before we stopped advertising shredded wheat. We have made no attempt to push shredded wheat at the present time.

RE-DIRECT EXAMINATION.

THE WITNESS: There is a special reason why we do not push National shredded wheat. They will not sell us on a direct basis as other manufacturers do.

RE-CROSS-EXAMINATION.

THE WITNESS: We buy through the National but not as a jobber, as a retail outlet. We do not get the regular chain store discount. We get 15 per cent., and we think we should get seventeen and a half, but they do not see it that way, so we are not particularly interested in National shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: We just have shredded wheat in stock, in our warehouse, for the stores that desire it. We do not do anything improper.

The self-service type of store is, I think, gaining in popularity in my territory. I think people are getting more independent and like to do as they please, do not want to be bothered, like to pick up a package and examine it and put it down again. They depend on their own judgment more than in the past. Our stores have uniform fronts.

RE-CROSS-EXAMINATION.

THE WITNESS: The Kellogg Company gives no inducement for advertising their products, except occasionally they have a deal on it, one case free in ten, or something like that. They do not in any way participate in our advertising expense when we have a free deal or something like that, no advertising allowance whatsoever.

R. L. DEYO.

At Denver, Colorado, April 21, 1933.

MR. CLARKE: It is stipulated, with the same force and effect as if the witness had been regularly called, sworn, examined, and cross-examined, that R. L. Deyo, manager of the Skaggs Store at 2412 East Colfax Street, if called as a witness in this case, would testify that he is regularly carrying both Kellogg's Whole Wheat Biscuit and the original shredded wheat; that the price of the Kellogg's Whole Wheat Biscuit is twelve cents per carton, and of the original shredded wheat is ten cents a carton, and that he sells about the same quantity of Kellogg's Whole Wheat Biscuit as he does of shredded wheat; that his store is a regular self-service store, in which the customer comes in and takes a basket and goes to the various shelves and helps herself, then pays for the products at the check-out counter; and that he would also testify that, for many years past, he has handled shredded wheat, and that it was called for as shredded wheat.

MR. VILAS: Yes; and that he has had the Kellogg product a comparatively short time.

PAUL COPELAND.

Deposition taken at Denver, Colorado, April 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am district sales manager of the Kellogg Sales Company and have been connected with them twenty-two years. The first six years, I was salesman and advertising man, regular work connected with selling to retail stores. I went to the Denver office in December, 1917, as Denver district sales manager and have been such ever since. We have in our territory, Colorado, New Mexico, Southwest Texas, Arizona, Utah, Southern Idaho, Montana and Wyoming.

Taking the territory as a whole, I would say we have secured from 75 to 80 per cent. distribution of our Whole Wheat Biscuit in the better grade stores, and about the same in the restaurant and hotel trade. Of our restaurant and hotel trade, 95 per cent. is in individuals and 5 per cent. in the large packages. We would rather sell individuals nothing else to serve, just enough, so the customer who asks for it will get the individual package. The Kellogg Company believe it is more sanitary to use individuals than regular packages. We have a mixed case of several of our products for the hotel and restaurant trade, giving us practically the same distribution on biscuit. We sell a lot of biscuit separately, sixty packages to the case. It is the policy of the company to push the sale of individuals as much as possible. We want them served in the individual carton wherever possible. At a lunch counter, the individuals are on the counter, and the girl will bring a package down, put them in the bowl, and set them in front of the customer.

From our past work, we know if Kellogg's biscuit are on store shelves, especially in self-service stores,

they will repeat, once we have done our work of sampling, or postcard deal, or house-to-house work. We know consumers will come back, because they like the biscuit. We have had best success in self-service stores, because the consumer can take any package she wants. Through those methods I know a consumer demand has been created for Kellogg's biscuit, because we have done research work on consumer demand and know they are coming back and buying more. Our man in Iowa tells me we are selling as many of our biscuit as the other people are selling Shredded Wheat.

Over the territory we do one thing in some sections and another in others. We have done house-to-house work, selling the housewife a package and giving her one free. They get enough of it in two packages to try it and like it. We have not had to do so much follow-up work on that. We have sampled in various localities, with not so much newspaper advertising in cities as out in the territory. We have gone into Albuquerque, Tucson, Phoenix, Cheyenne, Casper, and Pocatello. We can do that because the newspaper advertising does not cost much. After the right kind of distribution newspaper advertising was released.

The territory has been throughly worked in those various ways. The business in our biscuit is increasing. We have a fifteen per cent. increase this year over last.

We have not had a single complaint of confusion in my district between Niagara shredded wheat and Kellogg's Whole Wheat, from a jobber, or retailer or grocer or consumer. I have not heard any instance of a package being sent back with the statement the other product was wanted and ordered.

The methods we have used in pushing the sale of our biscuit are very much the same as those we used pushing other products, like Wheat Flakes and Corn Flakes. We have done the same work on biscuit

as we have on the other. Those are methods used in introducing any new product of Kellogg.

We have encountered competition on Corn Flakes and Wheat Flakes, and cereals of that sort. Other manufacturers work more or less along the same line we have. I was connected with the Kellogg Company when the Shredded Wheat Company had the Niagara Falls biscuit. I would say they did more work then than now. Every year, sometimes twice a year, we would see their sample wagon in the territory, working them thoroughly. I do not remember when they sampled last. We have not encountered National Biscuit competition in the last few years such as we had from others. I have seen no sample wagons in the district recently. I happened to know the man in charge of this territory until National took them over. He told me he understood practically all the offices in the United States had been closed.

I know, of my own knowledge, of a change in the method of distributing shredded wheat after the National took over. At the time the old Shredded Wheat Company was in this territory, it was distributed solely through jobbers. I know the National is now selling shredded wheat direct to the retail grocers. The National Biscuit continues to sell the wholesale grocer; but quantity buyers, larger retailers and chains, get shredded wheat biscuit at the same price jobbers do. When the change was made, jobber after jobber told me they were going to discontinue the National line. I know a number who did discontinue the line but later put it back. They tell me they handle it merely to give service to the retail grocery man. I do know some jobbers discontinued handling it.

We have had Saturday sales in this territory, putting a salesman in the store to sell three packages and give one free. We have used premium cups, Wheels of Knowledge, and Jungle Land Books, in con-

nection with the sale of Whole Wheat Biscuit. We have also used the coupon system on a mailing list furnished by retailers, redeemable in a free package by buying one package.

Retail dealers have co-operated with us very well; because they know these methods will sell the merchandise, and they will have 95 per cent. newspaper advertising and little handbills. We have made no advertising allowances for those.

The self-service is a growing type of store in this territory. We have chain store distribution in the territory as a whole. One chain in the Denver market, the Safeway, does not handle our biscuit. The other chains do. The prices on the two products are rather even. Ten, eleven and twelve cents a package are the prices. In some instances our package costs one cent more. In the main, they are about the same.

In pushing sales on our biscuit in competition with the original or Niagara product, we have emphasized the fact that we have a tastier biscuit that will fit the bowl, fifteen to the package, toasted on both sides. Once we sell a customer, we find they come back for more. Our packages are a half ounce heavier.

I have noticed in this territory that the National have emphasized their product as twelve big biscuit in the package. I have seen their store placards with the Niagara Falls picture made very prominent.

CROSS-EXAMINATION.

THE WITNESS: When I said that a customer will repeat once we sell him, I did not mean that a hundred per cent. People break away. They may go to some other cereal. I mean, if we go into a town and do our work, sell the consumer, the merchants' business repeats. There is some repeat on it. Some merchants have tried it and discontinued it, too. I do not mean

to be understood as saying every consumer who happens to purchase a sample of our biscuit immediately becomes a user of it. We do not convert them all. I mean that, when we go into a town and put on Saturday sales, and sampling, we find when we go back that it has been repeating. When we get it started, it will go. I do not claim at all that we have converted all Shredded Wheat users into users of Kellogg's biscuit.

The territory under my jurisdiction is one of the more sparsely settled sections of the United States, with some cities, but the territory is not so largely settled as in some of the eastern sections. When I describe our distribution as being 80 per cent., I have reference to the entire territory, as a whole. I do not mean to be understood as saying that we have distributed samples throughout and our product is carried in all the various sparsely settled rural sections of this district. I will say that, generally speaking, the better class of stores have our biscuit, all through the territory. There is a large amount out through the territory; but I would not say they have gotten into every little store. The National Biscuit Company have a hundred per cent. distribution on Niagara shredded wheat in this territory, as close as you can call a hundred per cent. on any product, through our market. In the little stores, some of which do not carry our product, they carry shredded wheat. It is a pretty good seller.

There are country districts, however, miles and miles of ranches and many acres of ground, in this territory, in which there is hardly any habitation and such stores as there are are just general stores. We have gone into those country districts, but we have not worked the districts at all. We have gone into a few of the better stores. We do not claim we have anything like a hundred per cent. distribution in chain stores in this district. I think we are selling prac-

tically all the chain stores in the territory. We never asked Battle Creek for newspaper advertising in Denver, because we spent more money working outside points, figuring we will get more results to the dollar. We have had the Red & White, and the Home Owned. In the Home Owned we have 50 per cent., and in Red & White, ninety-odd. They are repeating.

I do not mean to say the National has just laid down on shredded wheat and done nothing about it. We see their advertising, and they are doing some work. They did some extensive sampling in Denver last summer; but, as a comparison, I do not believe they worked them as hard as in years past. I do not know of their doing sampling the year before that.

I said there is no confusion among jobbers. A dealer knows them apart. They are entirely different-colored and different-shaped packages. I do not think a jobber could make any mistake, on account of the price. We have a two-dozen package, whereas theirs is thirty-sixes. Even a checker would catch it. On prices there is usually no confusion in the two cases.

I know our product is sometimes asked for as shredded wheat or Kellogg's shredded wheat. In fact, it was called Kellogg's Shredded Wheat a couple of years ago. I can see how it could happen that an order for shredded wheat would be filled with our package, if the merchant only had our case in the store. I think the consumers pretty well know what they are getting. There is a big difference in the two packages. It may be that consumers are often not very discerning.

We bid only on some government business; but that does not apply here. We have so bid in the southern part of the territory, direct out of Denver on some El Paso army business only. We sell no Government institutions direct. We permit that to go through jobbers. We get invitations both ways, either calling for provisions of shredded wheat, or specified

more in detail. Where we work with them and sell them our line, we ask them to specify Kellogg's Whole Wheat Biscuit. They have some through that way. We have been successful in some instances. In others the specification is for shredded wheat. Our jobbers will bid on those and supply our product.

RE-DIRECT EXAMINATION.

THE WITNESS: If they bid our biscuit, they change the name and weight of the package.

RE-CROSS-EXAMINATION.

THE WITNESS: At the Fort, they will all the time ask for shredded wheat. We will ask the jobber if he will not ask for Kellogg's Whole Wheat Biscuit, twelve and a half ounces. Ordinarily, they will just stick in bids at a price, without changing it. I know that. I hear about those things and endeavor to contact the proper army officials, to get them to specify Kellogg's Whole Wheat Biscuit.

Defendant's Exhibits 110-A and 110-B are a request for bid for Fort Logan, cereal wheat, shredded, Kellogg's ninety-six packages, dated April 11, 1933. I believe I can get you more from the office that read the same. I do not know that, until very recently, they have always specified shredded wheat. We get copies of those from various points.

We sell the Piggly-Wiggly Stores, or the Continental, which is their wholesale name. Our biscuit are not in those stores in this district, nor in the Safeway Stores, owned by Piggly-Wiggly. We have put on several sales in Safeways; but I cannot tell offhand whether they handle it or not. I do not think so. That is one chain not handling it: Piggly-Wiggly, Safeway, MacMarr, a large chain.

RE-DIRECT EXAMINATION.

THE WITNESS: We have hopes of being able to sell them. The Safeway here is a branch of the West Coast chain. This unit comprises only about ten or fifteen per cent. of Safeway. I know on the West coast, Utah, Arizona, and in our part of Texas, Safeway are handling our biscuit. This is the one branch we have not sold. The branches operating from here, at Colorada Springs, Lamar, and Grand Junction, are handling our Whole Wheat Biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: To put it in a word, we are trying to give shredded wheat a good run, anyway.

(A package of Egypt Stick Candy, with picture of a camel, was marked "Defendant's Exhibit 111.")

The following photostats of newspaper advertisements referring to early shredded wheat operations and products, also advertisements of grocers referring to shredded products, taken from newspaper files obtained from the records of the publishers, or from the records of newspapers in the public library containing complete files of the newspapers in question:

Page 5, *Denver Times,* Saturday, March 17 1894, Defendant's Exhibit 112.

Page 5, *Denver Times,* Saturday, March 10, 1894, Defendant's Exhibit 113.

Page 8, *Daily News,* Denver, Wednesday, July 17, 1895, Defendant's Exhibit 114.

Page 8, *Daily News,* Denver, Sunday, July 14, 1895, Defendant's Exhibit 115.

Page 8, *Daily News,* Denver, Saturday, July 27, 1895, Defendant's Exhibit 116.

Page 8, *Daily News,* Denver, Sunday, July 7, 1895, Defendant's Exhibit 117.

Page 8, *Daily News,* Denver, Wednesday, July 10, 1895, Defendant's Exhibit 118.

Page 8, *Daily News,* Denver, Sunday, July 28, 1895, Defendant's Exhibit 119.

ANDREW ROSS.

Deposition taken at New York, N. Y., May 3, 1933.

Direct Examination.

The Witness: I was connected with the Ross Food Company at Batavia, New York, organized in the latter part of 1914 or the early part of 1915, but not now in business. I should think it ceased to do business some time in 1916. If you say the United States Circuit Court of Appeals in the case of Shredded Wheat Company against Humphrey Cornell Company and Frederick H. Towne, handed down a decision on February 20, 1918, I would revise that statement and say the company was nominally in business for some little time after that decision was rendered, but that it did not very actively promote the sale of its product after 1916.

We manufactured a shredded wheat biscuit, putting it on the market in package form. Defendant's Exhibit 91 is the carton the Ross Food Company used in its business. It had no other carton except that. In those cartons were packed biscuit made from shredded wheat, of substantially the appearance of the biscuit illustrated on Defendant's Exhibit 91. Ten biscuit were packed to the carton.

Q. 17. Did those biscuit get into wide distribution, or what was the fact, when the Ross Food Company was in existence?

A. Well, we had a pretty general distribution in New England and New York, except New York City, a substantial part of Pennsylvania, and scattering distribution in other parts of the country.

THE WITNESS: Those biscuit were first put on the market about the middle or summer of 1915. The Shredded Wheat Company took the action which you described as having been decided by the Circuit Court of Appeals in the Second District. That was not against the Ross Food Company, but against the Humphrey Cornell Company, of New London, Connecticut, and Fred Towne, one of the officers of the Ross Food Company. Our company was located at Batavia, New York, and the Shredded Wheat Company was at Niagara Falls, New York, fifty-nine miles away. The Shredded Wheat Company went to Connecticut and sued one of our dealers there. I believe they also went into Connecticut and sued the Kellogg Company, some years later. I am not familiar with that.

We got into production about the summer of 1915, and it was about October 15, 1915, that Humphrey Cornell and Fred Towne were sued by the Shredded Wheat Company.

(Copy of record in the case, decision on appeal of which was reported in 250 Federal Reporter, p. 960, and in 163 C. C. A., p. 210, was marked "Defendant's Exhibit 120."

A photostatic certified copy of the opinion of the majority members of the U. S. C. C. A. in the case, the original typewritten opinion of Judge Learned Hand, containing two deletions, was marked "Defendant's Exhibit 121.")

MR. VILAS: It may appear on the record that, in response to a short petition for rehearing, the deletions referred to were made by Judge Ward and initialed, and were made after the filing of the

opinion and after the filing of the petition for rehearing.

(The said copy of petition for rehearing was marked "Defendant's Exhibit 122.")

THE WITNESS: Prior to the filing of the suit, the Shredded Wheat Company interfered with our getting the rolls from the people from whom he ordered them, the Brown & Sharpe Manufacturing Company, of Providence, Rhode Island. That delayed our getting started. After accepting our contract and delivering some rolls, the Brown & Sharpe people began to be slow about deliveries. When I called to discover the reason, they finally told me they had a contract with Shredded Wheat Company, under which they could not continue to furnish us with rolls. They gave us the names of others who might be able to make rolls for us, and we had to go to other sources for rolls. We were very much delayed in our operations by reason of that.

I think probably I was served with a summons in the action and was subsequently dismissed therefrom, as being a citizen of the same State as Shredded Wheat Company. There was lack of jurisdiction in the Connecticut court, as against the Ross Food Company. There was a great deal of interference with the shipment of our goods and with our customers at that time, by the Shredded Wheat Company. They bribed the chief clerk of the New York Central freight office at Batavia to give them a list of our shipments as they were made from time to time; and they saw the buyers and tried to persuade them not to handle our product, and intimidated them. A great many of those goods were returned to us. There was publicity with regard to the suit. A man named Wessels, in Philadelphia, was advertising agent of a large group of grocery trade papers, and they worked with him. He prepared a statement in reference to this litigation, submitted it

to the Shredded Wheat Company for their approval, and held it until it was released by the Shredded Wheat Company by telegraph. It was then sent out by Wessels to a majority of the trade papers in the country. I think it was prepared before suit was filed and released by telegraph when suit was filed, held by Wessels in his office until released.

The Shredded Wheat Company wrote to our customers with regard to the suit. I think Reed-Murdock Company, of Chicago, furnished us with copy of letter from Shredded Wheat Company, shortly after they got word through a clerk in the New York Central that we made a shipment to Reed-Murdock. I think there was something said about pending litigation and the possibility of other litigation; but it is a long time ago.

The Shredded Wheat Company called on the Kellogg Company and tried to get them to bring action against us, claiming our machine for cutting the biscuit was an infringement on some machinery Kellogg had. Not succeeding, they tried to buy the Kellogg patent on the cutting machine, to use it against us. That was brought out by Mr. W. K. Kellogg in testimony in an action by the Federal Trade Commission against the Shredded Wheat Company.

The Ross Food Company also had sample cartons, like the big cartons, one side being a virtual reproduction of this Defendant's Exhibit 91, in miniature size, just large enough to hold two biscuit. The other side had a message to the housewife to whom the sample was given. It was a miniature carton, with the tartan design and figure like the big carton. We had no so-called individual cartons for distribution in the restaurant trade. I think such cartons were not at that time used anything like so extensively as at present in restaurants. Prior to then, my experience was they were used largely for advertising purposes, the theory being we could afford to sell them without profit, because de-

livering to the final consumer in package form had an advertising value. My experience at that time was with Kellogg's Toasted Corn Flakes Company. The idea originally was to get the individual carton to consumers in restaurants, solely as a means of advertising. We sold them without profit. The volume of them was very small at that time, of Corn Flakes. The Ross Food Company had no individual cartons at all.

At or around the time of the Humphrey Cornell litigation the Shredded Wheat Company was using the glass globe displays, filled with their biscuit, in restaurants. In a very general way, I am familiar with the restaurant trade now. It is a long time since I have seen one of those glass globes.

The Ross Food Company was still in existence in a small way, when Judge Learned Hand's decree was handed down in 1918; but it was not distributing its product to the trade. We experimented as to what might be done to comply with the requirement of the second clause of the modified decree, concerning the marking of the biscuit with a letter, cross, or other plain symbol, although we felt, with all proper respect to the Court, they had no conception of trade conditions or they never would have made such a decision. For example, we might easily sell a quantity of the goods in this large package to a wholesale grocer in good faith, and he, in reselling them to the trade, might sell ninety-five per cent. of them to grocers who might sell them to consumers in this form; yet we would find ourselves in contempt of that decree by goods going out that way into the hands of restaurants, finally sold to consumers outside the carton. We made experiments as to what might be done to mark the biscuit.

We tried to make an impression in the top and found it frequently broke the shreds and distorted the biscuit, spoiling it. When it did not, we found when the biscuit rose in the baking, the marking disappeared.

We tried having a raised mark in the bottom of the pan, so the delicate shreds when they were fed out of the pan, would adjust themselves to that raised portion, so that it might leave a mark in the baking. We found it distorted it and was a very poor mark. We found no practical way of complying with that requirement.

We did not apply, at the end of six months, to be relieved of that second requirement, as being impossible to carry out, because, by that time, our capital was exhausted. We had no resources with which to do anything on those matters. The winding up of that business was caused by this litigation. The experiments we made convinced me it was impossible to mark the biscuit physically. It was obvious a paper tag or band could not be put around the biscuit, except at an expense that would make competition with the Shredded Wheat Company impossible, from a practical standpoint. It would involve the hand banding of each individual biscuit. No machine we could find would do it.

MR. VILAS: In proceeding with the cross-examination of this witness, I understand it is still done with the reservation of the objections made and without the waiving of any objection to the entire deposition.

MR. CLARKE: Oh, yes.

CROSS-EXAMINATION.

THE WITNESS: I was employed at one time by the Shredded Wheat Company, about the year 1901, the latter part, or January 1, 1902, until 1908. I was a clerk in the Niagara Falls office. I was there something like seven or eight months, during which I think I became familiar with the methods of making Shredded Wheat Biscuit. I had occasion to go through the factory, seeing how it was done. Subsequently, I went to Chicago with the company, and I was connected with the

promotional and sales end of the business about seven or eight months out there. I was then recalled to Niagara Falls. For a short period, I was nominally sales manager of Shredded Wheat. Mr. Perky was there and Mr. Alexander Porter, and Mr. Rankin. I said I was sales manager. That was my title, but I had no more authority than any of you gentlemen have. We had an executive committee, and my duty as sales manager was to transmit to the people out in the field the decisions of the executive committee. That is the way I was sales manager. I was their mouthpiece. My discretion in the conduct of the routine business of the company was pretty limited. I did carry out the orders of the executive committee. They made the policies and I tried to execute them. My communications were signed by me as sales manager. That continued, I think, only a few months. After that, I went to Philadelphia and had charge of their office there for five or six years. I had charge of six or seven states, there, and I was a real sales manager in that territory. I think it was pretty much left to me there. During that time, our company was engaged in promotional work. I did sampling, had a staff of demonstrators, and sent machines over the territory, showing people how the biscuits were made. It was Mr. Perky's idea that it was necessary to teach people how to use and like shredded wheat; but a lot of us did not agree with him.

The biscuit Mr. Perky brought out first at Worcester, Massachusetts, and then at Niagara Falls, was among the first cereal food of its kind, but I am not clear whether it was the first or not. It was the first shredded wheat biscuit. I thought you meant was it the first dry wheat cereal. It was a novel product, and people had to be taught to use it. I do not know they had to be taught to like it, because I think it is a natural taste. At any rate, Mr. Perky's idea was to edu-

cate people in the ways of using shredded wheat; and he had a whole school of young ladies who went out and prepared meals for customers. He gave a great many illustrated lectures.

With regard to selecting Niagara Falls for a factory site, one of the principal stockholders in Shredded Wheat Company, before they went to Niagara Falls, was Mr. D. O. Mills, of New York. He was one of the leading factors in what was then a new thing, the development of power at Niagara Falls, and one of the principal stockholders in the Niagara Falls Power Company. I think it was his influence that took Shredded Wheat Company to Niagara Falls, to use the power being produced there by the Niagara Falls Power Company.

It was one of Mr. Perky's ideas to have the plant at Niagara Falls, so visitors would come there and see the process of making the product. A great many people did come and see it. That was further carried out by demonstrations on machines in my territory, such as I spoke of, and by sampling crews from house to house. We gave away many thousands of samples and used newspaper and magazine advertising, and all the means customarily used in promoting the sale of a new food product. A great many thousands of dollars were spent.

I was in Philadelphia until about 1908, when I went to Kellogg's. I resigned from the Shredded Wheat Company and went to the Toasted Corn Flakes Company, the title of the concern at that time. I went immediately to Battle Creek and became sales manager there. I think Mr. Jim O'Brien succeeded me in Philadelphia shortly after that, and then went to Boston. I have known him for many years. He was with the Shredded Wheat Company at Detroit at that time. In 1910, while he was district sales manager for the Shred-

ded Wheat Company in Philadelphia, he was employed by the Kellogg Company, or about that time.

I was with the Kellogg Company until about 1914. Just before I left, I was vice-president and sales manager, and I left because Mr. Kellogg and I disagreed as to certain policies that ought to be pursued. I resigned, either the first of June or the thirty-first of May, 1914. Prior to then I had not even contemplated or considered going into business for myself. The Kellogg Company was making shredded wheat then. They started making it, I should say, about 1912. They made a pressed biscuit, that was not permitted to rise. It differed in appearance from the shredded wheat made by the old Shredded Wheat Company, because of the flavor introduced into the wheat. It was a flavored and pressed biscuit. It had been passed through shredding rolls quite different from those at Niagara Falls. They were not the rolls devised by Valentine. The first rolls were made, I think, under specifications of John L. Kellogg, the son of W. K. Kellogg.

Mr. Valentine, a former employee of the Shredded Wheat Company, was employed by the Kellogg Company during the time I was there. While I was with the Kellogg Company, we sold the shredded wheat biscuit. They were not called that. I do not remember what they were sold as, because we never did very much with it. It went all right at the start but did not keep. There was some trouble about the manufacture. The machinery was finally used in putting out loose shreds, Krumbles. We were just getting into that when I was getting out of the picture. It is not clear in my mind. This biscuit was not widely sold, and I think it was later discontinued and it was on the market ever since as Krumbles.

Defendant's Exhibit 123 is a Kellogg's Biscuit carton used about 1910 to 1912. The biscuit marketed at that time had substantially the appearance of the bis-

cuit illustrated on the sides of the carton, as to shape, at least. It is entitled: Kellogg's Whole Wheat, made by Kellogg Toasted Corn Flake Company, Battle Creek, Michigan, and contains an illustration of a plate with three flat biscuit therein. The representation of the biscuit is not far from accurate in color, I would say, because the biscuit we produced was distinctly darker than Shredded Wheat. I think the the sweetening used, when they were exposed to the heat, resulted in the darkness.

Defendant's Exhibit 124, from 1913 or 1914 to sometime in 1915, with front panel entitled: Kellogg's Toasted Wheat Biscuit, manufactured by Kellogg Toasted Corn Flakes Company, and an illustration of a dish with three biscuit thereon, on the ends; and Defendant's Exhibit 125, from 1915 until 1918 or 1919, with, on the front face, Copyright 1910 by Kellogg Toasted Corn Flakes Company. Kellogg's Toasted Wheat Biscuit, net weight, ten ounces, and on the side: Kellogg's Toasted Wheat Biscuit, made from whole wheat, carefully selected, granulated, cooked, shredded, and toasted. In damp weather, heat for a few minutes in a modern oven, with door open, to renew crispness, are so nearly alike, I could not be certain about them at all. No. 125 carries a picture of the biscuit and has on the side: Every package of Kellogg's Toasted Wheat Biscuit is now protected by Waxtite, the perfect package. I do not recall that. It says in ink: used from 1915, to about 1918 or 1919. That was after my time. I left there in 1914. I do not know how much of the Toasted Wheat Biscuit was marketed.

I recall having testified before the Federal Trade Commission in an action against the Shredded Wheat Company. I do *not* recall this question and answer, reported in the printed record of that testimony, in volume three, at page 1227:

"MR. BREED: So the height, so far as you know, of the sales of the Kellogg Toasted Corn Flakes Company's shredded wheat biscuit, for the period of operation from 1911 to 1914, did not rise above seventy-five thousand to one hundred thousand cases?

"Answer: MR. ROSS: Somewhere in that vicinity, I think."

I should think that, if that is the record, why that is the record.

At the time I left the Kellogg Company, I had not contemplated going into the shredded wheat business. The following question and answer asked by Mr. Breed of me in that same proceeding, on page 1230, folio 3690, is about in harmony, I think, with what I said before:

"You had considered the question of starting in this business prior to leaving the employ of the Kellogg Toasted Corn Flakes Company?

"Answer: MR. ROSS: Considered it casually, yes."

At any rate, I had probably given it some thought before I left the Kellogg Company, no serious thought. I think it was six or seven months after May 31, 1914, when I left the Kellogg Company, that I proceeded with the formulation of my plans for entering into the making of shredded wheat myself. I do not remember testifying in answer to Mr. Breed that I was considering it but did not begin any plans until August.

I remember going to a meeting of, I think, the National Wholesale Grocers' Association, at Minneapolis. I did answer to Mr. Breed in the same way when I was testifying. That was about the middle of June, 1914. I do not remember talking with Ellis Howland about my plans for going into the shredded wheat business. Reading from the Federal Trade Commission case, from page 1231: "I had a conversation with Ellis

Howland, who is grocery editor of the Journal of Commerce;" he was at that time. He has gone to his great reward now. He was a friend of mine and had been formerly employed by the Kellogg Company while I was there.

My answer, as recorded on page 1232: "I told him that I was thinking of organizing a company to go into the shredded wheat biscuit business; and he tried to dissuade me from it, telling me that he thought the reputation the Kellogg Toasted Corn Flakes Company had established, as opposing imitations, would operate against me in this business I was thinking of launching." Sounds very much like my language. I do not remember it. If I were so recorded, I would not say I did not say it. I certainly do not remember the conversation to which you now direct my attention. That was eighteen years ago. I do not even remember that Ellis Howland was at Minneapolis, although the evidence is he was there.

At any rate, during the summer of 1914, I conceived and undertook the organization of the Ross Food Company, and it was later incorporated. I was busy from then until about August 1, 1915, when we started operating, assembling our machinery and procuring a plant, having our cartons designed and made to start operations. I think we completed our organization about December, 1914. Shortly thereafter, I submitted a biscuit to somebody for a design for the carton, Plaintiff's Exhibit 91, which we subsequently adopted.

I think I recall having a letter from the Shredded Wheat Company about April 26, 1915, of the general tenor that they called our attention to the possible confusion which would result from our making a biscuit like theirs and intimated that they would be disposed to defend their legal rights; but I do not remember it exactly. I could not say the exact time we

received it. I remember the language in substance as you quote it to me from the Federal Trade Commission Record, as follows:

> "In order to avoid any confusion of your product with ours in the minds of any possible purchasers, we state to you that we consider the form of our biscuit as characteristic, which belongs to us alone; and we shall be disposed to defend what we believe are our legal rights in this respect."

I do not recall consulting our attorney at that time. I know we consulted him in the beginning and we were advised the Shredded Wheat Company patents had expired, or the form of the biscuit had been patented and that had expired, and all this was dedicated to the public, and we were strictly within our legal and moral rights. My recollection is that we did not reply to the letter of the Shredded Wheat Company in 1915.

The answer which you read me from the same proceeding at page 1240:

> "MR. ROSS: I happened to be in New York when that was received and forwarded to me; and I consulted Mr. Nolan, our counsel, who again stated to me that that form of a biscuit had been patented, and that the patent had expired and been dedicated to the public; and that we had an unquestionable right to make a biscuit in that form, and advised me to reply to the Shredded Wheat Company in the form I did reply in May, 1915."

Does not refresh my recollection at all. Yet, undoubtedly, it was the truth. My recollection was we did not reply.

The biscuit we undertook to and did manufacture at that time was of substantially the same size and ap-

pearance as the shredded wheat biscuit made by the Shredded Wheat Company, but it was a little larger and a little heavier. My recollection is that the ten biscuit we had in the package weighed the same as the twelve they put in theirs. It differed in appearance, in that it was rounded at the bottom and browned on the bottom; whereas the shredded wheat made by the Shredded Wheat Company at Niagara Falls was flat on the bottom. Our biscuit was toasted on both top and bottom. I think it got its additional weight by additional thickness. It was practically the same length, but I think it had more wheat in it for the same size.

After this letter, which I testified in a former proceeding I received and answered, I continued with my preparations and did actually start operations, after which this action was brought by the Shredded Wheat Company against a distributor, the Humphrey Cornell Company, in Connecticut. The Ross Food Company was, I think, originally a defendant in the action, but were dismissed because lack of jurisdiction. The Ross Food Company and their attorney did defend the case, and the expense thereof was borne by the Ross Food Company. When I testified the Shredded Wheat Company bribed one of the New York Central freight employees, that was not a matter of hearsay. I did not see them pay the bribe, but I heard witnesses testify to that. I was not present. I know the Shredded Wheat Company authorized that. They paid the bill, I know. That came out in the testimony. I do not remember that very distinctly or any of this very definitely. That is a long time ago. At any rate, the outcome of that suit was an injunction in favor of the Shredded Wheat Company; and the Ross Food Company took an appeal on it to the Circuit Court of Appeals; which resulted in a decree of modification, as

evidenced by Judge Hand's opinion; and the decree of Judge Thomas was modified and reversed, if I read it correctly. What was left of it was that we were to try to market the biscuits to the consumers out of the cartons. That is all. Looking at the photostatic copy of the decree, I notice the closing words: As so modified, the decree is affirmed without costs. I have a feeling, however, that those closing words are not in conformity with the rest of the opinion. If Judge Thomas' decree says there is a judgment for costs against Humphrey Cornell Company, $623.90, it did. I do not remember. I suspect that judgment was never paid, but I do not know. It is a fact that, shortly after the affirmance of the decree, the Ross Food Company ceased doing business.

(A certified copy of resettled final decree in the U. S. District Court for Connecticut in The Shredded Wheat Company against Humphrey Cornell Company and Frederick H. Towne was marked "Plaintiff's Exhibit 237.")

(A certified copy of mandate of the United States Circuit Court of Appeals was marked "Defendant's Exhibit 126.")

THE WITNESS: As I testified, I attributed the final cessation of our business to the litigation. It was not also in part due to the product not being generally accepted by the public; quite the contrary. It is not a fact that it may have been due, in whole or in part, to the deficient working capital of the Ross Company.

We had a cash capital of approximately a hundred thousand dollars paid in, not entirely expended in the plant, some of it in the promotion of the business. I think we had about fifty-eight thousand in plant and equipment and the remainder, which would be about forty thousand, as working capital.

After that suit had been brought and while it was pending, a proceeding was started by the Federal Trade Commission against the Shredded Wheat Company for unfair competition, it being alleged that it interfered with the production of machinery and rolls for the Ross Food Company. I think that complaint was issued as the result of our representations; but I am not entirely clear on how that originated. Such a proceeding was brought. They would start a little and then go to sleep for six or seven months, and then start all over again. That went on for two or three years, for a long time after the Humphrey Cornell case had been decided and was out of the way. Testimony of both John L. and W. K. Kellogg was taken at Battle Creek; also of Ellis Howland and many other witnesses. I testified. I do not recall whether Mr. Valentine testified. Many witnesses were examined, and many pages of testimony were taken. Ultimately, in 1920, the Commission dismissed that complaint, as I recollect. That was the final outcome of that. I think my connection with the shredded wheat business came to an end before that. I was starving to death by that time. About 1918, I joined the Armour Grain Company in a tentative way. I worked for them by the day. Then I still came to Batavia and worked. That continued about a year. Then I joined the Armour Grain Company and worked for them exclusively.

As I testified, we had difficulty in obtaining rolls from Brown & Sharpe, of Providence. When I called on them, they told me they had a contract arrangement with the Shredded Wheat Company that they could not furnish rolls to others. I was informed they had a contract with the Shredded Wheat Company, under which they would furnish rolls to no one else.

In selecting the particular size and shape of biscuit to manufacture, I think I was influenced by Val-

entine, our engineer. He designed the rolls we used. He gave those specifications to Brown & Sharpe. I had a notion that, if we had longer rolls, we could turn out more shreds economically. He said there was a danger, if we made them wider, that the pressure would be so great the rolls would heat, and that was as wide as was practicable. Having shorter or narrower rolls would run into expense.

I do not recall testifying in the Humphrey Cornell case that the cost of a shorter biscuit, substantially square in plan, would be twenty-one cents a case greater than the present size and shape; but unquestionably it would be greater, to make a smaller biscuit than that made by the Shredded Wheat Company. If you narrow the rolls, you get less production and make it more expensive. I know the Kellogg Company today is making a shorter biscuit and selling it in competition with Shredded Wheat. I do not know their prices. I do not know that they are selling it in practically all parts of the country at a less price per dozen cases than shredded wheat. I know that, weight for weight, it would cost them more to produce it. I base that on the perfectly obvious proposition that, if you narrow those rolls, you get less production out of them. The less production you get, the higher your cost. You can have two sets of rolls, and then you have two sets of motors and of power and of operators. You add to your expense the moment you cut down the size.

It is a fact that the Kellogg Company is making a shorter biscuit and competing with shredded wheat. I know nothing about the costs of making the Kellogg biscuit.

Referring to our carton, Defendant's Exhibit 91, the words immediately below the picture or representation of the biscuit on a blue panel, Manufactured by

the Ross Food Company, Inc., Batavia, N. Y., U. S. A., that was always on that carton. No change was made after the decision of the Circuit Court of Appeals. The Court had it before then when they made that decision.

That picture was taken from one of the Ross Food Company's biscuit. We made a single set of rolls, cooked the wheat in a wash boiler, and shredded it on the set of rolls, put it in a pan, got a biscuit, and baked it in a little gas oven, such as you can buy in any ordinary hardware store. We made some model biscuits. I made thousands of them, sent some to our carton makers, and they used them. That was before we had a factory equipped with machinery. The biscuit produced by our factory after it was equipped were very much like the model biscuit I have just described making. I cannot tell you the dimensions of the rolls. They were designed by Valentine, who had been in the employ of the Shredded Wheat Company and also the Kellogg Company. He was a mechanical man and had made some inventions with regard to shredded wheat, which the Kellogg Company afterward acquired. After he joined the Kellogg Company, he produced rolls both of which had grooves.

I cannot tell you the dimensions or depth of the shredded wheat grooves, and I do not know the size of the shreds. There was testimony showing how they differed from those of the Shredded Wheat Company, but I do not recall how they differed. I think there was a substantial difference in the depth of grooves, which would affect the size of the shreds. They delivered a substantially larger shred. The biscuit, when completed, looked substantially like the old shredded wheat biscuit, except for the differences I have described.

Throughout all the history of the Ross Food Company we have gone over, the National Biscuit Com-

pany was never in the picture in any way at all. I assume they had no interest in shredded wheat until about 1930, when they made, I understand, a purchase of the entire plant. Prior to that time, they were not in the picture in any way. I have no grievance against them. On the contrary, I have the friendliest feeling toward the National Biscuit Company.

I remember a man named Ford, the original patentee of most of the shredded wheat machinery. I did not know him, but I knew of him. He lived out Watertown way, I believe. I do not remember ever seeing him or of his being on the stand in the Federal Trade Commission proceeding. I think I was present during practically all of it, but I never knew him. I did not even know he is now dead.

Defendant's Exhibit 91 is the only kind of package the Ross Food Company ever used, except a sample package which was a miniature imitation of or facsimile of the larger package on one side, and the other side had a message to the women folks to whom it was delivered. There was no room on the smaller package for all the reading matter on the side panel here.

RE-DIRECT EXAMINATION.

THE WITNESS: As we got on production basis in August or September of 1915, of the Ross Food Company biscuit, we cleaned the wheat with wheat-cleaning machinery and cooked it in a closed steam retort under pressure. We felt that was a better process of cooking than that used by the Shredded Wheat Company. As a result, the taste of the wheat remained. We introduced it to the shredding machines, which shredded it and delivered it to the pans, which formed the biscuits. The pans traveled automatically to the oven and automatically through the oven, for about forty minutes, and they came out browned top and

bottom. It was a traveling oven, and the Shredded Wheat Company, I believe, used a reel oven. The traveling oven principle enabled us to brown the bottom, whereas theirs was white. After they left the oven, they were moist in the center. We dried them out in a chamber, and they then went to the packing tables.

Judge Thomas issued a very sweeping injunction against the biscuit in the large carton as well as the biscuit itself. The operation of that injunction was not stayed pending the appeal. As I recall, it was kept in effect. Our business must have been suspended from the time the injunction issued. My recollection is that nothing was done to suspend the operation of the injunction.

By the time the Court of Appeals held that, as to more than 90 per cent. of our business contained in the cartons, I should be allowed to do business, our business was practically ruined. We were not able to resume. My capital was exhausted.

The Kellogg's Toasted Wheat Biscuit, such as was marketed in a carton like Defendant's Exhibit 123, was a flavored biscuit. It was, otherwise, like Shredded Wheat, made out of wheat grains. In order to introduce the flavor into the wheat, we broke it up into a very coarse flour, in granual form, then made it into dough and introduced the flavor in making the dough, baked large loaves of bread, broke them into crumbs, and shredded the crumbs, after tempering it, holding a large batch of it in a bin and letting it stand for a period so the moisture in it would spread itself evenly over the whole mass. So Toasted Biscuit was both a wheat biscuit and a dough biscuit, put into the final form of flat shredded biscuit.

I think the threatening of the trade by the Shredded Wheat Company was the most damaging

thing to us in a business way, aside from the injunction. I knew about Mr. Perky's efforts to shred other products and heard he was going to shred turkey and spinach and carrots. The first organization was the Cereal Machine Company. Mr. Perky's idea was to sell machines, so a housewife would have a shredding machine in her house and would shred most of the things she was using, turkey, chicken, vegetables, wheat and everything. That was the general idea, shredded wheat, shredded cereals.

I was with the Kellogg Company when they first began to call their corn product Kellogg's Toasted Corn Flakes. When it first came out it was called Sanitas Toasted Corn Flakes, in 1906 or 1907. When I joined them in 1908 they were changing or had just changed to Kellogg's Toasted Corn Flakes. I am not clear on a period between those times when it was just called Toasted Corn Flakes. I do not recall that.

I counted the brands of corn flakes on the market at one time, and I should say there were a hundred and eight. I knew of some litigation by Kellogg's against the Quaker Oats Company, for putting out corn flakes. It was about the time the product was called Kellogg's Corn Flakes. My recollection is that the name Kellogg's was very small at first and then was gradually enlarged, until it rather dominated the package.

The production of Defendant's Exhibit 123 has refreshed my memory as to when Valentine joined us out there at Battle Creek, which I thought was around 1912. The fact this was marketed about 1910 at the beginning makes me now think it must have been then or prior to that when Valentine joined us.

RE-CROSS-EXAMINATION.

THE WITNESS: According to our process, after the wheat went through the rolls, it came out in long threads or strings and was fed directly into pans.

There was a belt that carried the pans that formed the biscuit. The biscuit traveled underneath a gang of shredders in pans. I think there were twenty-eight in a gang. The pans traveling underneath caught the filaments that came from the shredders or rolls. There was a knife at the end that cut the biscuit. The width of the pans determined the length of the biscuit, and the spacing of the knives or the cutter would determine its width.

There was a slight difference in width and length, too, I think, between our biscuit and those dimensions used for the biscuit of the Shredded Wheat Company. At any rate, it resulted in our getting a heavier biscuit and getting ten biscuit to the package instead of twelve, with the same weight to the package.

RE-DIRECT EXAMINATION.

THE WITNESS: There was no reason for that. We intended ultimately to cut down the weight and deliver about ten ounces of product to the consumer for ten cents. We thought ten cents' worth was a more acceptable quantity to the consumer than twelve cents' worth.

RE-CROSS-EXAMINATION.

THE WITNESS: Our carton had ten biscuit to the carton and twelve ounces. The carton says ten ounces, because you must not overstate weight, but you can understate it. I mean the actual weight was twelve ounces. You can prepare this biscuit, shipping some to Atlantic City and some of the same product to Denver. You will find the weight is quite different on arrival. Our idea was to deliver ten ounces for ten cents, just the same as shredded wheat biscuit, twelve biscuit, twelve ounces.

RE-DIRECT EXAMINATION.

THE WITNESS: I am appearing here under subpœna today.

PLAINTIFF'S PROOF IN REBUTTAL.

EARL P. WEBSTER.

DIRECT EXAMINATION.

THE WITNESS: I am a mechanical engineer, employed by National Biscuit Company, at Niagara Falls, N. Y., in connection with the Shredded Wheat Bakery —the manufacturing of Shredded Wheat. Prior to being employed by National Biscuit Company, I was research engineer for the Shredded Wheat Company, and have been connected with the latter company since 1916. I have a New York State professional engineer's license, and my work with both companies has been largely mechanical in the way of research work and mechanical equipment. From 1930 on I have been practically in constant connection with the production in the way of research on all processes including manufacture and processing of the biscuit as well as the machinery itself. I have had actual experience manufacturing Shredded Wheat and have operated ovens and machinery in production.

Yesterday, at our counsel's request, I conducted some experimental baking of Shredded Wheat, and I produce the results of what I did. The first carton which you show me is a carton of double Shredded Biscuit made on our regular equipment. The product was taken from one shredder and put back through another shredder, reshredded. In making this biscuit the equipment was operated in the very same way it is usually operated for our standard product with the exception that when the biscuits were panned, the green biscuits were returned back to the shredder and fed back through the hoppers again and reshredded. We used 26 hoppers, the first shredding, and down to 22 when we reshredded it. All of the unbaked shreds

were picked up and put through the shredders the second time. None of it was reprocessed more than once. After that they were carried right on through the oven in the normal way, the same temperatures and the same length of time and also were evaporated the same. Our regular machinery, shredder, ovens and evaporators were used for this purpose. All of the biscuit in the package now produced were made yesterday in the manner I have just described and, in my opinion, are merchantable biscuit.

(Package received in evidence and marked "Plaintiff's Exhibit No. 266.")

I now produce a package containing biscuit, made the same as in a previous exhibit, double shredded, the difference being in the time of bake and temperature. These biscuits were baked at a temperature of 400 degrees for 90 minutes. They were baked in an oven constituting part of the regular equipment of the company, and in other respects were reprocessed in the same manner as the exhibit previously introduced. It is not necessary to put these through the evaporator. We intended to but it was not required because they were fully baked right straight through and practically charred. The biscuit in this exhibit are just as they came out of the oven after an hour and a half of baking. Ordinary baking time is 18 minutes.

MR. VILAS: If your Honor please, one of the defendant's witnesses produced biscuit that had been baked I think an hour and a half in their ovens.

THE COURT: That is not what I asked. I asked what variation this was from the normal baking by the plaintiff.

MR. VILAS: I asked him that and he said that the normal time was 18 minutes.

THE WITNESS: Yes, and this is 90 minutes.

When these biscuit came from the shredding rolls, they contained approximately 47 per cent. of moisture. When the biscuit came out of the oven, after an hour and a half's baking, they were bone dry. These biscuit are absolutely not a merchantable product.

(Received in evidence and marked "Plaintiff's Exhibit No. 267.")

THE WITNESS: This was done yesterday at the same time as the other. I now produce a biscuit made on the same equipment as the previous samples, and the difference is that the double shredding occurred only in the center of the biscuit for ten heads. There were 22 heads used, ten of them double shredding reprocessed, while the balance of twelve were divided up between the top and bottom of the machine so that they were the single processed or once through. This was baked in the regular run of temperature and time, and went through the evaporator in the regular way. These biscuits are merchantable and very good.

(Received in evidence and marked "Plaintiff's Exhibit No. 268.")

CROSS-EXAMINATION.

THE WITNESS: These biscuits in 267 and 268 were tested as to weight. They ran about the usual weight of our regular product, all three packages. There is no noticeable variation in the weight. They ran from 11.70 to over 12. I did not put the record down. I weighed them particularly to bring cartons that were within our limit, our variations. There were not any of them that were packed that would not be allowable. We tested them as we usually do, and they are perfectly shippable and will ship and carry, and that is the only test and appearance. Forty-seven per cent. is

the normal moisture content. I would not say that you cannot distinguish these biscuit from the normal single processed biscuit. They are a different looking product. I think they are dressed up a little more and are neater looking in their finish. They are not better than the regular run. They are a little smoother looking, a matter of appearance, and that is attributable to the double shredding. In other words, double shredding gave it a little smoother appearance. It would break up the various ingredients a little more thoroughly than single shredding, but the difference would be very readily distinguishable under a magnifying glass. In the single run biscuit, the bran would appear a little larger; and in the double run the bran and gluten would be mixed up. That would not make a stickier biscuit. You would not know the difference if you shut your eyes and held both in your hand. They are a good product and as good as our single run biscuit. Our standard biscuit is a single run, with the exception of the scrap which we feed back, and which amounts to probably 1 per cent.

Our standard run of biscuit carry about 50 per cent. Durum. Not being a chemist, I could not go into the difference caused by the presence of Durum wheat; I can only tell you what the appearance is. Durum is a wheat with a color of a slightly different appearance. It is a little more toward the red. It is a hard wheat, not exactly what you would call a hard winter wheat.

Our normal practice in baking is to leave them in the oven 18 minutes. I know nothing about the practice in the defendant's plant. From the statement that the defendant uses 45 minutes for baking, it would indicate that you had lower temperature. Our temperatures run from 500 to 550 degrees. Our lower practical temperature would be not under 480 degrees, and a maximum around 550. None of the wheat in these two bis-

cuits went through the rolls more than twice. Assuming that the Shredded Wheat came from the rolls with the moisture content around 40, instead of 47, and was subjected to 500 degrees of heat in the oven for 90 minutes after double-shredding, it would have been charcoal at our temperatures. Forty-seven degrees is the normal moisture of our Shredded Wheat. If it ran to 49, it would come out of the baking oven with a little greater content of moisture and would have to be evaporated a little longer. At the shredding rolls, there is a limit that you must keep within as to moisture. We try to keep within 46 or 47 per cent. The wheat at the rolls is at atmospheric temperature. We never run any wheat through at a moisture content of around 40. It would probably result in a short shred being too dry. The lowering of the moisture content would reduce the tensile strength of the shred as it comes from the rolls, so it would break of its own weight.

RE-DIRECT EXAMINATION.

THE WITNESS: We used a temperature of 500 degrees in the oven on certain of the biscuit; and, on the second package which I produced, the temperature was 400 degrees. I have nothing to do with the purchase of wheat for the Shredded Wheat Company.

RE-CROSS-EXAMINATION.

In the two samples, first and second samples produced by me, there was a variation in temperature of 100 degrees.

(Witness excused.)

MR. COOPER: A few miscellaneous exhibits I would like to offer in evidence that have been marked for identification at one time or another. There was a book of photographs marked for identification in connection with the examination of Dr. Oakes, that illustrated the

plaintiff's mechanism, which was known as Exhibit A for identification, and I am offering that in evidence.

(Received in evidence and marked "Plaintiff's Exhibits Nos. 266, 267, 268, and 269," respectively.)

MR. COOPER: Then there was a lady, Mrs. Burns, called by the defendant. In cross-examination a carton was identified by her and was marked for identification as Exhibit E, and I want to offer that.

(Received in evidence and marked "Plaintiff's Exhibit No. 270.")

MR. COOPER: Then there was an Exhibit F for Identification that I want to offer in evidence, a carton of the Kellogg product.

(Received in evidence and marked "Plaintiff's Exhibit No. 271.")

MR. COOPER: Then Plaintiff's Exhibit G for Identification, that was identified on cross-examination of Mr. Kellogg.

(Received in evidence and marked "Plaintiff's Exhibit No. 272.")

MR. COOPER: Then there was for identification Plaintiff's Exhibit 261, another carton identified on the cross-examination of Mr. Kellogg, and I will offer that in evidence.

(Received in evidence and marked "Plaintiff's Exhibit No. 261.")

MR. COOPER: Plaintiff's Exhibit for Identification No. 263 was a report of an investigation by the Curtis Publishing Company, which was identified on cross-examination of Mr. Jordan.

THE COURT: The tender on behalf of the plaintiff of the publication of the Cyrus Curtis Publish-

ing Company is excluded. It is violating all of the well-known rules of the admissibility of evidence.

MR. COOPER: May I have it preserved as an exhibit under Rule 46?

THE COURT: Oh, I think so.

(Received in evidence and marked "Plaintiff's Exhibit A under Rule 46.")

Now, if your Honor please, in the examination of Dr. Oakes, there were introduced as exhibits, Plaintiff's Exhibits 240 to 245, inclusive, those various shapes of biscuit that he testified about, and I have had those photographed, and the photographs bear the mark of the exhibit number to identify them, and I should like to offer as exhibits, which might be marked 240-A to 245-A, photographs of those several different kinds of biscuits.

MR. CLARKE: I have no objection to their going in as photographs of those exhibits, subject to any correction, if any should develop. We are not accepting them in place of the physical exhibits.

MR. COOPER: Not at all. Between mice and moth and rust, those exhibits might disappear, but the photographs will not.

(Received in evidence and marked "Plaintiff's Exhibits Nos. 240-A to 245-A," inclusive.)

MR. COOPER: There are exhibits attached to the interrogatories as Plaintiff's Exhibits 1 to 5, inclusive. I am not sure that they have been formally offered in evidence, and I should like to offer those in that order in which they are attached to the interrogatories.

(Received in evidence and marked "Plaintiff's Exhibits Nos. 1 to 5," inclusive.)

MR. COOPER: My brother on the other side offered in evidence, among other patents belonging to the Natural Food Company or its successor, Shredded Wheat Company, a certain design patent No. 28,688, dated September 17, 1895. I want to offer in evidence an opinion of Judge Kohlstaat and a decree in a suit between the Natural Food Company and Bulkley and others, whereby he declared that patent to be invalid.

THE COURT: This is a hearing for the purpose of hearing witnesses and taking proof. Now, I think that is clearly proper within the ruling heretofore made, and it is excluded.

MR. COOPER: Then I will have, in order to preserve my rights, if I may—I will have to offer both the opinion and the decree under Rule 46. That is all I can do to save my place in the Court of Appeals on the point.

(Received in evidence and marked "Plaintiff's Exhibits B and C, Under Rule 46.")

THE COURT: You have tendered a decree, as well as an opinion?

MR. COOPER: Yes, sir.

THE COURT: My decision is to rule the decree in and exclude the opinion, so I desire to continue that ruling here.

MR. COOPER: Then I will re-offer the decree as evidence. This exhibit, as I understand, is evidence in the case.

THE COURT: It is.

(Received in evidence and marked "Plaintiff's Exhibit No. 273.")

MR. COOPER: Your Honor has ruled out the opinion, and I take an exception on that, and offer the opinion under Rule 46.

MR. CLARKE: Would your Honor permit me to re-offer the transcript in the Williams-Natural Food case, to come under the same ruling?

THE COURT: Transcript of what?

MR. CLARKE: In the case of Williams v.——

THE COURT: Transcript of the testimony?

MR. CLARKE: No, the transcript—I will just offer the transcript of the pleadings from that case. I will not make the offer of the testimony itself.

MR. COOPER: I am not offering the pleadings here or any part of it.

THE COURT: Do you desire to put in under Rule 46?

MR. CLARKE: Yes, I make the offer of the pleadings—that is, the application and opposition of all of the proceedings in the Patent Office, except the testimony.

THE COURT: I shall not vary the ruling heretofore made. You are permitted to introduce the record that you offer under Rule 46.

(Received in evidence and marked "Defendant's Exhibit A, Under Rule 46.")

EARLE T. OAKES (Recalled).

Testified in rebuttal as follows:

DIRECT EXAMINATION.

THE WITNESS: Upon the assumption that there was a 27 per cent. scrap re-worked or re-processed, the additional cost would be less than one per cent. of a re-

processed shred. I know this because I was production manager for Shredded Wheat Bakeries for nearly four years, and my work there required that I know every fraction of per cent. of cost from the start to the finish of the production.

In the actual operation of the plaintiff's process, if there is any stretch of the shreds or filaments in the production of Shredded Wheat, it is very slight. In most of our machines there is none at all. As the shreds drop from the roll to the accumulator belt, it might happen that a few of the shreds were stretched. Our belt is geared to run at the same speed at which the shreds are delivered from the roll, so that in the regular production there is no stretch; but I can conceive that two might be caught and stretched, but not in our production. It is not planned that way—does not operate that way.

Speaking from my experience as a biscuit man for many years, if we were to start production of Shredded Wheat Biscuit of exactly the same character that the plaintiff produces now and were required to build the most advantageous type of machinery for that production, I do not believe we would use this same kind of machinery which we are now using and which we bought from the Shredded Wheat Company. We would base it more on the accustomed machinery for the biscuit baking industry. Throughout the biscuit industry the material is laid on canvas or felt aprons, and the cutting is done by a head operating through the material above the apron itself, over a cutting bed, which leaves the material on an apron which can be conveyed along and deposited on pans later on. It leads to greater capacity and an easier way of handling the material and a greater variety of forms of product throughout.

With that type of machinery, the plaintiff produces a great variety of forms of biscuits. I should say that

of around 500 varieties, two-thirds to three-quarters of them would be much more fragile than the Shredded Wheat Biscuit. The most prominent of these would be Uneeda Biscuit which we manufacture around a half a million cartons a day, and that is much more fragile. All of our chocolate goo... and all of our marshmallow varieties and most of our sugar wafer varieties. In the marshmallow variety there is a base cake that is baked and the marshmallow deposited on top of it, and that might be either dusted with cocoanut or chocolate or have a nut placed on top of it. The base cake itself is fragile, but at the time of baking, but then it softens up from the marshmallow and the marshmallow cannot be touched without harming the biscuit itself and many of our marshmallow varieties are iced with a water icing which is extremely fragile and cannot safely be handled without breaking the icing itself or cracking it.

Uneeda Biscuit is a soda cracker, square with the corners clipped. We make many varieties of soda crackers and butter crackers as fragile as Shredded Wheat Biscuit. We do not use the same shape cartons for all products. They may be square or rectangular, round, or various shapes. We pack a great many round biscuits in square or rectangular packages. We do have round containers for many of our products and for some of our leading lines. The grocers take them and put them on their shelves for retail. These cartons are of pasteboard as well as of tin. I do not recall any round varieties that we are using pasteboard on now. There are many of them of tin that we have used, and I hav... o doubt that we are using now round pasteboard variety.

In connection with our cracker cartons, we use transparent wax paper. The carton which you now show me, called "Champion Flake Butters" with a carton encased in wax paper, is one of our regular

products, and the wax paper is such as is used on other varieties of products beside that and is waterproof and transparent so that the lettering on the cartons may be read underneath as it is on this package.

(Received in evidence and marked "Plaintiff's Exhibit No. 274.")

THE WITNESS: In my opinion, various forms of biscuits and crackers could be produced and packaged as advantageously from the manufacturing point of view with respect to cost and appearance as the pillow form of the plaintiff's and defendant's Shredded Wheat here in issue.

With respect to the present regular machinery purchased from the Shredded Wheat Company, if the five or six center grooves in the grooved roller of the last pair of rolls in the shredding machine were omitted, you would get a band of wheat rolled out in ribbon form about one-quarter of an inch wide. The same thing could be done on the defendant's apparatus testified to here.

In Defendant's Exhibit 198, the green tint on the inside of the paper comes in contact with the contents of the box. I cannot see that there is any great difference from a sanitary standpoint between the defendant's present Shredded Wheat cartons with the green tint on the inside and the parts of the plaintiff's paper cartons and separators that touch the biscuit. In the sense that the paper is dyed, the green coloring on the inside of defendant's carton is a foreign substance. The plaintiff has, to my knowledge, used corrugated separators in marketing its product for fourteen years. The defendant's corrugated separator is made of what is known as sulphite pulp, and I would be willing to take their word for it. Sulphite pulp usually has newsprint in it, as a regular part of the manufacture. The paper composing plaintiff's separators that are shown

on Exhibit 215 is sterile when it comes from the paper machine. We make no effort to keep it sterile except that we keep it clean. It is impossible to keep anything sterile out in the atmosphere. It is a matter of sanitation rather than sterility. We practice great care in the matter of sanitation, both containers and goods.

Besides round crackers, the National Biscuit Company produces other shapes, such as heart shape, irregular outlines, scalloped, triangles in cake. Among the irregular shapes, the company produces pretzels in large quantities in package and in bulk. We have a rectangular package for the odd shaped pretzels which are very fragile. Great care has to be taken in production and packaging against loss.

CROSS-EXAMINATION.

THE WITNESS: A pretzel will weigh from forty to the pound up to two or three hundred to the pound. We have no ounce or ounce and a quarter pretzels but we have some that come very close to it. On the round cardboard cartons I spoke of, the weight varies from eight ounces up to maybe two pounds. A product in round cardboard cartons that weighs two pounds would be cake, and these are packed by the case or by the bundle. We ship those round cakes up to two pounds in cases, six or twelve cakes to the package, packed one on top of the other, and also side by side. These cases will run in weight from six to twelve pounds. Sometimes there is packing around the edges of the case. I think those cases would be marked "handle with care."

The plaintiff has never used cushion partitions in regard to Shredded Wheat. I have been with the Shredded Wheat bakery since February, 1929, about four years. I spoke of trouble with the operators running ribbon threads through the middle of the biscuit.

I thought they were trying to make uniform biscuit, and that did not make uniform biscuit. It made a ribbon through the middle of the biscuit. Radiant heat would pass through the interstices between shreds in a different way from what it would pass through a solid ribbon. We never ran any biscuit with an external ribbon on them except accidentally. The plaintiff has never conducted any experiments that I know of in the way of marking its own biscuit. I never had any instructions to experiment on anything of that sort and never had any personal experience with it of any kind. I am quite sure that round cartons are still used for cakes by the plaintiff company. Very often crackers and cookies are displayed right in the same shelf department with breakfast cereals. Very often they are separated from them. We try to get our cereals in with crackers and cookies, if we could, so does everybody else.

With respect to the two biscuit, plaintiff's and defendant's, I would not assume, that the smaller biscuit was any less fragile than the larger biscuit. I do not think fragility has got anything to do with the size. I do not think Uneeda Biscuit cartons are marked handle with care. I am not certain about that. I would say that those biscuits in the glass globe, Plaintiff's Exhibit 36 might be described as being in a considerable condition of dilapidation.

I have never designed any machinery for the manufacture of Shredded Wheat. I am not a machine engineer. At the present time, I am visiting the factory about once a month, although I have no definite system that I intend to follow. The actual production work in the factory is wholly in charge of the men there. I have been up there in order to correct something that went wrong with the machinery in the nature of a breakdown. The fact is that I am notified of the situation in Niagara Falls. If there is anything unusual, I am

notified and they ask me to come up. If I think I can be of use to them and I am not asked I go up without any set rule or procedure or anything else. It is decided on the nature of the occasion. I am a chemist by profession, and about half my working time is now taken up in the laboratory in New York City on West Fourteenth Street and the rest of it as a desk man in the executive offices of the production department. There is an experimental food laboratory at Niagara Falls in charge of Mr. Hadden; it is much smaller than the one in New York, and is devoted entirely to Shredded Wheat and Triscuit. Mr. Hadden is manager of the bakery at Niagara Falls, and I do not think he maintains anyone in the laboratory all of the time. It is a purely physical baking laboratory and not chemical. It is not technical but experimental. In our laboratories in New York, they are engaged on other products beside Shredded Wheat and Triscuit, that would be general cracker line. Yes, there is more work on the National line, their line outside of Shredded Wheat, than there is on Shredded Wheat. I know nothing about the actual practical conditions in the Kellogg plant at Battle Creek, except as you have described. I have never been in their Shredded Wheat plant and have no idea as to the amount of help along the line of production of defendant's Shredded Wheat Biscuit. My only idea is based on your description of your process; and I should say that you probably have one man cooking wheat, and one or two men attending the shredders, and probably a couple of men on the oven, maybe three or four. You possibly have fourteen to twenty girls packing biscuit. That is my surmise based on what was said about the making of the defendant's product. We have, in making Shredded Wheat, run accumulator belt at a rate of speed to produce a stretch on the shred, but we no longer follow

that practice. We have not always made the product of the mixture of Durum and white wheat. I testified the other day that we did not always do that. Sometimes we run on pure white winter and sometimes it is a mixture and the mixture may be from nothing up to 50 per cent. There have been occasions when our wet scrap ran higher than one per cent., but it has always gone into reprocessing. Yesterday we used 100 per cent., reprocessed.

Each down spout is in the nature of a sleeve that slips up by and telescopes so that each head can be freed by a telescoping of the down spout together. I think we probably had machines that have only one hinged down spout, but I think most of them have two or more because we always want one that can be hinged and thrown back and if that particular one happens to be in the process of changing the rolls, we would not say exactly how many we have. We have one or more on each machine that is hinged. And these hinged heads permit the introduction of wet scrap without telescoping the whole head. We very often feed the reprocessing scrap in on top. The hinged heads would probably be toward the middle of the machine. Very often for hours at a time we feed in the green scrap on top of the biscuit. It is a matter of convenience to a certain extent. If it is more convenient to feed it in on top, we do that; and if the center head is operating in good shape, we will take it back to the center of the machine.

These rolls wear as time goes on and bearings wear and get hot, and sometimes we have to take a head down and renew the bearings, and sometimes we have to renew the rolls themselves, and sometimes we have to remove an obstruction from a pair of rolls, and sometimes we have to clean out oil holes so that the bearings can get proper lubrication. So that if the

rolls were under repair, we would not feed any wheat in. We would usually put green scrap in if the head was operating properly. But it is fair to say that if the rolls which have the hinged heads are operating at all, and receiving wheat to be shredded, then we would feed the green scrap through the hinged head; and the only time we telescope the other head is when either or both of these hinged heads are out of order. In the plaintiff's biscuit that are baked on the bottom as well as on the top, they are baked about two minutes less and are evaporated about ten minutes less than the regular biscuit. It is a shorter process all the way through. The difference is that these biscuit are in individual pans, one row on a pan, and the oven is arranged entirely different and does the work in less time. The biscuit that are not browned on the bottom in our regular production are baked longer than these baked in the traveling oven. This does not make the regular line of biscuit any lighter on the top than those baked in the traveling oven.

I might explain the whole process a little more in detail. The regular biscuit, baked on the reel oven which you speak of, as 80 to 85 per cent. of our production, those are baked on a wire pan, a screen, and are placed on a solid shelf in the oven, so that the biscuit has a wire screen underneath it, and a solid steel shelf underneath it that swings around with the biscuit all the time that it is being baked. Eighteen minutes is the regular time for baking them at temperature. If the fire goes down a little bit, we might have to give them another revolution in the oven. If by any chance the baker figures they are not quite finished and gives them another turn, that might brown some of the biscuit considerably more than our regular production. In other words, we have got a leeway of three turns in the oven, and if you take them out when they are just brown, you can give them another turn, when they

will be thoroughly well browned, and still another turn, when they will be bording on the dark side, and another turn will give you a very dark biscuit on the top; but browning on the bottom has nothing at all to do with browning on top. I do not think there is any great difference other than to be brought about by the construction of the oven.

With reference to my statement that with 27 per cent. wet scrap to be reprocessed, there would be an increase in production cost of 1 per cent., I am speaking of our bakery now. The only additional cost in our case would be the incidental cost price of driving a conveyor that would carry that 29 per cent. back into the machine itself for reshredding, and the cost of driving the machine itself for reshredding 25 per cent. more, we would have merely a 25 per cent. increase in the power cost of driving the shredding machine itself, and the equipment necessary to carry the shreds back in there would be on less material and on less production. Our shredder is not the bottle neck for our operation, so that it is merely a question of how much it costs us to convey that back and reshred it.

The cost of making biscuit is made up first of the cost of the wheat, and then the cost of warehousing that wheat, and the cost of cleaning it, and the cost of cooking; and it is all automatically conveyed from one place to another, so that there is no handling of this in any part of it; and the cost of the power of running the shredder. and the upkeep on the shredder. The total cost of shredding is less than 1 per cent.; so that if we had to reshred or if we had to double our shredding cost, it would not add more than 1 per cent. to our total cost of operation. I do not know about the Kellogg machine. We can increase the speed of our own machine. We have not reached the limit of speed in our shredding equipment. We have reached

the limit of our baking capacity in our oven. If we speed our shredders up, we cannot take care of it without putting in more ovens, which we do not do; but if we had to reprocess 27 per cent. of this instead of cutting our production 27 per cent., we would increase the speed of our shredder 27 per cent., which we know is possible, and get the same output as this 27 per cent. increase as we have now in our present speed. There is no more labor attached to it. We would use the same number of ovens for the same production. There is not any more material going to the oven. If you speed your machine up 27 per cent. and take 27 per cent. of it away from the oven, you would only get the same original amount going to the oven, so that there is no occasion for building more ovens. It is exactly as if you have one hundred men carrying a pile of sand from this end of the room to the other, and each man carries a bucket an hour. If you have 127 men carrying each of them a bucket an hour to the other end of the room, and 27 of those men bring a bucket back with them, you only have 100 buckets left at the other end of the room each hour with 127 men except instead of having more men, we have more machinery or faster production of the machinery. In other words, we speed the machine up 27 per cent. It delivers per minute or per hour, 27 per cent. more material at the end of the machine, but 27 per cent. of that material goes back to the machine to be reprocessed, so that there is only the sam original amount that goes to the ovens for baking. I am afraid I have not made that clear, have I?

I have never seen a Kellogg Shredded Wheat plant, but I have seen the Corn Products end of it, going through as a visitor conducted by the regular guide. I did not make myself known to the officers of the company as I understood the plant was open the same as ours to any visitors that went through.

Some of the fragile crackers I have spoken about, made by National Biscuit Company, are packed by automatic machinery and some are packed by hand. In the case of Uneeda Biscuit, each pan comes down between two rows of girls and the crackers are in definite alignment as they come from the oven and the girl simply picks these up and makes a sack of them and slips them into the cartons.

RE-DIRECT EXAMINATION.

In an ordinary oven you cannot cook Shredded Wheat for an hour and a half at 400 degrees without charring or carbonizing the product. That is based upon my knowledge and experience with Shredded Wheat. If you have temperature high enough to toast, it will eventually carbonize and char black. I was in full charge of production of the Shredded Wheat factory for a little over three and a half years, and lived at Niagara Falls, and was in the factory every day.

(Witness excused.)

(Note: At this point, defendant's counsel read a summary of some of the depositions taken by the defendant for use in the case. The same is here omitted as the depositions are completely summarized elsewhere in this record.)

MR. VILAS: My friend will permit an interruption here in connection with Ross's deposition. I direct attention that there was offered the entire record on appeal in the Second Circuit case. In view of rulings that have been made during the progress of this trial, I think that that record should be stricken out, or that exhibit should be stricken out. I refer to Defendant's Exhibit No. 120 offered in connection with the direct examination of Ross of Defendant's Volume V, page 2832.

THE COURT: I think the deposition should conform to the ruling of the Court.

MR. CLARKE: I may have an exception on that, if your Honor please.

THE COURT: Certainly. You already got the record in under the rule.

MR. CLARKE: The record is marked for identification and I will reoffer that record under the rule.

THE COURT: Rule 46.

MR. CLARKE: Yes.

THE COURT: Very good.

ROSS T. ADAMS.

Recalled for the defendant in sur-rebuttal.

DIRECT EXAMINATION.

THE WITNESS: Since the last hearing, I visted the offices of the duPont Company here in Wilmington and secured latest price information on cellophane, and I am prepared to give that. I have a current price list on cellophane both transparent, also moisture proof cellophane in small quantities and large quantities. The No. 300 moisture proof transparent cellophane, which the question was asked me this morning as to the price, is quoted in the duPont circular at 58 cents a pound, in lots of 500 pounds or over. I also have a specimen of this moisture proof cellophane as given me by the duPont organization. In order to effect the comparison between the cost of moisture proof cellophane and wax paper, I have prepared some figures.

The waxed paper used by the Kellogg Company as the inside liner on the Corn Flake, all bran, and

certain other cereal packages, sells at a certain price per pound and that price is five cents a pound. The wax paper is generally figured on a ream weight basis, in other words, 480 sheets, size 24 inches by 36 inches, constitutes a ream, and the weight of that ream is 33 pounds. In order to compute the area of the ream of paper in square inches, it will therefore be necessary to multiply the 36-inch dimension by 24 inches and then again multiply that figure by 240 sheets, which would give the total square inches of paper in a ream weighing 33 pounds. That computation figures 414,-720 square inches in a ream of paper weighing 33 pounds and the cost is five cents a pound, making the total cost of a ream of wax paper $1.65.

The duPont moisture proof cellophane is priced at 58 cents a pound, and there are 19,500 square inches of moisture proof cellophane in a pound of cellophane. Therefore, dividing 19,500 square inches into the 58 cents which is a net pound price, we arrive at a figure of .0297 cents per thousand square inches of moisture proof cellophane.

In order to arrive at the cost of 414,720 square inches of cellophane, which is the number of square inches in a ream of wax paper, which is normally used by the Kellogg Company, we multiply that figure 414,-720 by the price per thousand square inches, which is .0297. The result is 12.31 for the cost of 414,720 square inches of moisture proof cellophane.

Going back to the cost of wax paper, which is $1.65 per ream, we divide $1.65 into $12.31 and get a result of 7.4 times, which indicates that the cellophane costs 7.4 times as much as wax paper. This gives effect to the difference in thickness.

The various district sales offices of the defendant are charged more when they order Whole Wheat Biscuit in cellophane cartons than when they order in the

ordinary cartons. The effect of that is to penalize those cellophane window packages as compared with the others.

These packages of National Biscuit, Uneeda Bakers Butter Thin Biscuit, Uneeda Graham Crackers, large National Biscuit Uneeda Biscuits, and Uneeda Bakers Premium Light Crackers, I purchased this noon in a store on Market Street. I did not find the words "Handle With Care" on any of them.

(The packages were received in evidence and marked respectively "Defendant's Exhibits Nos. 259, 260, 261 and 262.")

CROSS-EXAMINATION.

THE WITNESS: The leaflet to which you referred as having been received from the duPont Company shows on the first column of figures cut to size sheets. And No. 330 moisture proof and transparent is priced on a cut-to-size sheet in quantities of seven million square inches and up at 3.7 cents per thousand square inches. But when the same material is bought in stock size sheets in 6000 sheets and upwards approximately 40 inches wide and 40 inches long, its price per thousand square inches is 3.3 cents per thousand. I did no figuring on the basis of stock size sheets for my requirement for the reason that had I used stock size sheets, the price would have been somewhat higher than the figures that I figured. I figured the price of .0297 cents per thousand square inches based on roll stock, whereas the figure you have just given is .033, which is somewhat higher.

I asked the duPont Company for ton and carload prices and was advised that the price as indicated in the circular was the standard price and not subject to further discount for larger quantities. The No. 300 moisture proof cellophane is not as thick as the wax

paper which we use on our products. I cannot give you the difference but the wax paper is approximately 50 per cent. thicker than cellophane. I would say offhand. I have computed the cost of the two papers, wax and cellophane, on a square inch basis. I think moisture proof cellophane is slightly more moisture proof than wax paper. I think cellophane of the thickness specified here gives a little more protection.

MR. COOPER: If your Honor please, I have opened here in court one end of Defendant's Exhibit No. 259, which is the carton marked Butter Thin Wafer, which the witness said he bought today.

THE WITNESS: I observe that the top cracker or Butter Thin Wafer is broken in two. I did not subject this package to any rough handling after buying it.

(The price list from the duPont Company, produced by the witness, was received and marked "Plaintiff's Exhibit No. 275 for Identification.")

(Witness excused.)

RICHARD POOLE.

Recalled for the defendant in sur-rebuttal.

DIRECT EXAMINATION.

THE WITNESS: In the operation of our shredding machine and accumulator belt, which receives the shreds from the shredding rollers, we cannot speed up that accumulator belt or the relation between the accumulator belt and the shredding rolls, because they are going at maximum speed now. We have a variable speed on the belt which puts a slight stretch on the shreds, and we have tried from time to time to get in-

creased speed for our shredding heads and on the belt, but we found that it is going at maximum speed now for the quality which the Kellogg Company demand.

CROSS-EXAMINATION.

THE WITNESS: The variable speed is connected with the traveling receiving chain or belt below to get the exact speed to take care of the shreds coming from the mills. We have tried from time to time to run at a higher speed, but had to go back to the speed that we now run. We cannot run it faster and make the quality of biscuit that we have to make. Mechanically we could run it at higher speed, but we do not want to because we would get a diminution in quality. The shreds would be shorter and do not hold up. We find that it does not take the part the way it does when it is going the proper speed, and the quality in general is not as good as it is at the speed it is now running. Of course, if you break the shreds when they tend to come up, it makes a soft top biscuit, and is inferior. At the speed at which we operate the machine, we get a well puffed biscuit.

(Witness excused.)

WILLIAM P. PENTY.

Recalled for the defendant in sur-rebuttal.

DIRECT EXAMINATION.

THE WITNESS: We have tried reprocessing wet scrap over a period of years at different times in the experimental room with the uniform conclusion reached by the defendants that we would not reprocess scrap for the reasons that I have already stated that it did not make a practical biscuit.

The biscuit which we run through our ovens, represented by Defendant's Exhibit No. 198, was at a temperature of 400 degrees and they were there one hour and 30 minutes, along with our regular biscuits; and the oven was operated under regular, normal conditions with no deviation from the standard operating conditions. We left them in there as I stated until we tried to puff them and get a proper color, and it took one hour and 30 minutes.

Referring to Plaintiff's Exhibit 268, which is a standard large size of plaintiff's biscuit, and Exhibit 266, the carton containing a double-processed biscuit, the one that has been double-processed is much firmer and harder than the regular biscuit. The size where the cutting edge is, is harder than what it is on the double-processed one. The double-processed one is narrower in comparison to the other. The shreds on the double-processed biscuit welded here together instead of being more of a separate fluffy shred drawn in straighter lines.

The biscuit from Plaintiff's Exhibit 246 are practically the same as the biscuit from Plaintiff's Exhibit 268.

The degree of moisture in the defendant's biscuit as it comes normally from the shredding room to the accumulator belt is about 42 per cent., and the normal toasting time in the oven is 45 minutes at 400 degrees of heat. The evaporator temperature is 210 degrees, and the biscuits are run when passing through.

CROSS-EXAMINATION.

XQ. 18. Now, is it your understanding that the biscuit 268—from the Exhibit 268 is one of the plaintiff's regular biscuits?

A. Apparently it looks identical, not quite as much puff.

XQ. 19. Is it your understanding that that is plaintiff's regular production?

A. It is my understanding that that was put through with 10 mills, but it was double-processed.

XQ. 20. You cannot find any difference between that and the plaintiff's regular biscuit, can you?

A. Only a slight difference in the puff.

XQ. 21. Now, I take a biscuit out of another package that I hold in my hand, which is an exhibit in this case, and I will ask you to compare that with the biscuit in Exhibit 268, and say whether the one that I handed you from the other box, not 268, is in your judgment the plaintiff's regular production?

A. With the exception of being broken off here, as far as I know it is.

XQ. 22. You think the one I last handed you is the plaintiff's regular production?

A. As far as I know, sir. It is puffed more than this one. That is the only difference I see between the two before me.

XQ. 23. The one I took out is from Plaintiff's Exhibit 246.

MR. CLARKE: The fact is that there is one of the regular run biscuits.

MR. COOPER: I will stand on the record on that.

MR. CLARKE: You mean by that that was one of the biscuits that was in Defendant's Exhibit 246, is that it?

MR. COOPER: Yes, I took it out in your presence and in the presence of the Court from the carton No. 246.

THE COURT: Where it belongs?

MR. COOPER: Where it belongs.

RE-DIRECT EXAMINATION.

There is a great deal of difference discernible between the biscuits taken from Plaintiff's 246 and the one from Plaintiff's 266 as to width. This is much harder and firmer than this one. The harder one is the 266, and the strands are straighter and very firm and hard while these are more fluffy and loose, and this shows the same effect on the bottom of the two biscuits. No. 245 and 268 have very little difference. The puffing on 266 is just a little less than the other one. Outside of that, they apparently look the same, the edges on 268 are just a little sharper and harder.

(Testimony closed.)

PLAINTIFF'S PROPOSED FINDINGS.

(Filed August 1, 1933.)

Plaintiff presents the following as its proposed findings of fact and conclusions of law to be made by the Court.

FINDINGS OF FACT.

1. Plaintiff, National Biscuit Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, a citizen and inhabitant of said State.

Defendant, Kellogg Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is a citizen and inhabitant of said State.

2. This Court has jurisdiction of the parties and of the subject of the suit which involves, exclusive of interest and costs, more than the sum of $3,000.

3. Plaintiff is the owner by purchase in 1930 of the assets, going business, trade-marks and all property of the Shredded Wheat Company, a New York corporation, the name of which was changed from Natural Food Company in 1908; that said Natural Food Company in or about 1900 succeeded to the going business, trade-marks and property of the Cereal Machine Company, a Colorado corporation, later known as the Shredded Wheat Company.

The said Cereal Machine Company was organized by one Henry D. Perky, who was the originator and inventor of the process of reducing cereals to filamentous or thread-like form and was the originator of the product made in distinctive form known by the trade-mark "Shredded Wheat" at or prior to the year 1892.

4. Plaintiff and its several said predecessors in interest have manufactured continuously since at least the year 1892 and have sold a biscuit in distinctive form which is described as pillow shaped and made from filaments or threads produced from whole wheat by the Perky process and which has been continuously and is now known throughout the United States, Canada and England as "Shredded Wheat" (sometimes applied as "Shredded Whole Wheat Biscuit").

5. From the year 1892 until the present time, plaintiff's said predecessor's and plaintiff have manufactured and sold said whole wheat biscuit in the same distinctive shape and appearance without material alteration or change.

6. The said biscuit so manufactured by plaintiff's predecessors and plaintiff has during all the said period, from 1892 to the present time, presented an appearance by which it was always recognized and readily distinguishable from any other form of food product on the market in the United States.

7. The biscuit of the manufacture and sale of plaintiff's predecessors and plaintiff has come to be and now is known to the trade and public by its distinctive design and appearance.

8. The said form, shape and color of the plaintiff's said biscuit have come through long and exclusive use and extensive advertisement to have the meaning and significance of the product and biscuit of the plaintiff only.

9. During all said period, except for the acts of the defendant and of one other company, the Ross Food Company, whose activities were enjoined in 1916, the plaintiff and its predecessors have been the sole manufacturer of whole wheat biscuit of such form, shape, color and character.

10. Plaintiff is vested with the exclusive right to manufacture and sell to the public in the United States such biscuit.

11. The said biscuit as so manufactured and sold by the plaintiff and its predecessors for more than forty years in such form, shape and color has become widely and universally known as the product of the plaintiff, and known to the public under the name of "Shredded Wheat", which said words were originally applied to said product by the plaintiff's predecessors.

12. The words "Shredded Wheat" have come through long and exclusive use upon the packages of said biscuit and in extensive advertisement thereof by the plaintiff and its predecessors to have the meaning and significance of the said biscuit product of the plaintiff only.

13. The defendant in the year 1922 manufactured and sold and designated by the name "Shredded Whole Wheat Biscuit" a biscuit manufactured by a process substantially the same as that of the plaintiff and exactly resembling the biscuit of the plaintiff with the single exception of size, and that defendant, upon notice from the plaintiff, ceased to manufacture said biscuit in October, 1922.

14. In the year 1927 defendant again began the manufacture and sale of a whole wheat biscuit made in imitation and simulation of the biscuit of the plaintiff as to form, shape, appearance and color, differing from the plaintiff's biscuit only in size, and the defendant sold and now sells its said biscuit as "Shredded Whole Wheat Biscuit" and/or "Shredded Wheat" in competition with the said biscuit of plaintiff.

15. Plaintiff is the owner of and vested with the exclusive right in and to the following trade-marks

which were duly registered in the United States Patent Office, to wit:

"Shredded Wheat", registered January 15, 1924, No. 178,725, for biscuit and crackers;

"Shredded Wheat", registered May 25, 1926, No. 213,456, for biscuits, crackers and cereal foods;

A picture of a dish with two whole wheat biscuit, registered August 17, 1926, No. 216,593, for biscuit, crackers and cereal foods.

16. All of said trade-marks, identified in paragraph numbered "15" hereof, have been used by the plaintiff in connection with the sale of its said biscuit for many years, and have been so associated with plaintiff's product that they have been and are indicative of source of origin in the plaintiff or its predecessor, the said trade-mark "Shredded Wheat" having been used since the year 1892.

17. The volume of sales of the plaintiff's said biscuit of distinctive design and appearance continuously increased from the year 1892 until 1928 when 2,521,751 cases were sold by plaintiff.

18. Both the plaintiff's and the defendant's biscuit reach the ultimate consumer in many instances, in restaurants, cafes, hospitals, institutions and homes, outside of and without the display of the package to the ultimate consumer.

19. The defendant has since 1927 used (in competition with the said biscuit of plaintiff) the expression "Shredded", "Shredded Wheat", "Shredded Whole Wheat", "Shredded Whole Wheat Biscuit" on its packages containing its whole wheat biscuit made in imitation of plaintiff's said biscuit of distinctive design and appearance and in its advertisements in connection with the sale of its said whole wheat biscuit.

20. The defendant has employed upon its cartons containing its whole wheat biscuit made in imitation of plaintiff's said biscuit of distinctive design and appearance and in its advertisement a picture of a dish with two of plaintiff's biscuit therein.

21 Defendant has shown representations of plaintiff's said biscuit of distinctive design and appearance upon its cartons and in its advertisements and has caused the same to be shown in the advertising of its dealers.

22. Defendant has sold its said biscuit in cartons with cellophane windows devised and designed to expose the ends of its biscuit and calculated to deceive the public into believing that the contents of said box is the said biscuit of distinctive design and appearance of plaintiff.

23. The defendant has falsely represented and continues to represent that the contents of its cartons are "A Shredded Wheat Product" and are the "original" of said product which in fact was originated by plaintiff's predecessors.

24. Defendant's said imitation biscuit has on numerous occasions been passed off by storekeepers and restaurant proprietors as and for the said biscuit of plaintiff of distinctive design and appearance.

25. Customers in stores, restaurants, institutions and private homes have received and consumed the defendant's biscuit in the mistaken belief that it was the biscuit of plaintiff.

26. The acts of the defendant were intended to and do in fact deceive the public into the belief that the said biscuit of defendant is the biscuit of plaintiff.

27. The defendant has competed unfairly in interstate trade in the United States with plaintiff and has

perpetrated a fraud upon the public by manufacturing and selling in the channels of trade in the United States its biscuit made in imitation and simulation of plaintiff's biscuit of distinctive design and appearance.

28. The plaintiff has established the truth of all the material facts alleged in the bill of complaint.

29. The plaintiff has been diligent in notifying the defendant of its rights, of the violation thereof by the defendant and in promptly bringing action to prevent infringement of its rights.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and the issues raised under the pleadings.

2. The distinctive form, shape and appearance of the plaintiff's biscuit has acquired a secondary significance as representing the product of the plaintiff.

3. The whole wheat biscuit manufactured and sold by defendant is made in imitation and simulation of the plaintiff's biscuit and by such manufacture and sale defendant has been guilty of unfair competition in trade in the United States in interstate commerce with plaintiff and of the perpetration of fraud upon the public.

4. The words "Shredded Wheat" have acquired a significance as meaning only the product of plaintiff.

5. The representation or picture of plaintiff's biscuit of distinctive design and appearance shown in a saucer or dish is a true trade-mark for said biscuit and plaintiff is vested with the exclusive right in and to the same.

6. Defendant has infringed upon trade-marks of plaintiff, consisting of the words "Shredded Wheat"

and the representation of a biscuit placed in a saucer or dish and has been guilty of unfair competition in trade with plaintiff and the perpetration of fraud upon the public.

7. The plaintiff is entitled to the relief prayed for in the complaint.

8. Plaintiff is entitled to an injunction against the defendant, its officers, agents, attorneys, workmen, employes, its successors or assigns, and all others acting by or under its direction or authority perpetually restraining and enjoining all of them and each of them, from directly or indirectly

(a) Manufacturing or selling whole wheat biscuit made in imitation or simulation of the said whole wheat discuit of the plaintiff of particular and distinctive shape, appearance and structure;

(b) Employing upon cartons or advertisements or otherwise the words "Shredded" or "Shredded Wheat" or "Shredded Whole Wheat" in connection with said biscuit;

(c) Employing in advertising or upon cartons containing its biscuit a cut or picture of said biscuit in simulation of the plaintiff's biscuit, either alone or in association with the word "Shredded";

(d) Using or employing on packages or in advertising or otherwise the trade-mark "Shredded Wheat" or a simulation or colorable imitation thereof;

(e) Using or employing on packages or in advertisements or otherwise the trade-mark consisting of the representation of the plaintiff's biscuit of particular and distinctive shape, design and appearance, placed in a saucer or dish or a simulation or colorable imitation thereof;

(f) Representing that defendant's product is the "original" of Shredded Wheat Biscuit;

(g) In any other manner or by any other device aiding, assisting or inducing others to advertise, sell, pass or palm off the defendant's whole wheat biscuit as and for the whole wheat biscuit of the plaintiff of distinctive design and appearance.

9. The plaintiff has not been guilty of laches.

10. Plaintiff is entitled to an accounting against the defendant of all of defendant's profits, gains and advantages and the damages suffered by plaintiff by reason of defendant's said acts of unfair competition.

11. Plaintiff is entitled to recover its costs to be taxed.

Respectfully submitted,

HUGH M. MORRIS,
Solictor of Plaintiff.

DRURY W. COOPER,
CHARLES A. VILAS,
THOMAS J. BYRNE,
HENRY J. SAVAGE,
Of Counsel.

August 1, 1933.

DEFENDANT'S PROPOSED FINDINGS.

(Filed September 30, 1933.)

Defendant presents the following as its proposed Findings of Fact and Conclusions of Law to be made by the Court.

FINDINGS OF FACT.

1. Plaintiff is a corporation of the State of New Jersey.

2. Defendant is a corporation of the State of Delaware.

3. Plaintiff was organized in the year 1898 and in 1930 purchased the business of The Shredded Wheat Company but did not announce its successorship on its cartons or packages of shredded wheat.

4. The history of The Shredded Wheat Company is as follows: Cereal Machine Company was incorporated under the laws of the State of Colorado on June 8, 1893. Henry D. Perky was the founder of the business and was its president. On or about the 17th day of May, 1900, the name Cereal Machine Company was changed to The Shredded Wheat Company; in 1900 the Natural Food Company was organized as a corporation under the laws of the State of New York. The Natural Food Company changed its name on the 5th of May, 1908, to The Shredded Wheat Company.

5. Perky's original idea and plan was to sell machines for shredding cereals and other products in the kitchen.

6. One of the products of Perky's shredding machine was shredded wheat on which he applied for and obtained United States Letters Patent covering the product, its design, the process of making it, and special machinery for its manufacture.

7. Up to the year 1915, and later, plaintiff's predecessors carried, printed prominently upon the packages of said shredded wheat, the following notice:

> Patented, September 17, 1895, October 15, 1895. This Food, The Process of Making it. The Special Machinery for Its Manufacture are Under The Protection of The United States Government By Virtue of Many Patents As Follows:

502378	August	1, 1893	532698	January	15, 1896
520496	May	29, 1894	533551	February	5, 1896
521810	June	26, 1894	533552	February	5, 1895
532286	January	8, 1895	533553	February	5, 1895
532480	January	15, 1895	533554	February	5, 1895
532481	January	15, 1895	533555	February	5, 1895
532697	January	15, 1895	533821	February	5, 1895
24688	September	17, 1895	287285	June	7, 1898
548086	October	15, 1895	614338	November	15, 1898
548087	October	15, 1895	618288	January	24, 1899
25318	March	31, 1896	625696	May	23, 1899
571284	November	10, 1896	681656	May	27, 1901
571285	November	10, 1896	35511	December	31, 1901
593745	February	8, 1898	684788	October	22, 1901
685671	October	29, 1901	681655	August	27, 1901
683100	September	24, 1901	713795	November	18, 1902
684789	October	22, 1901	746145	December	8, 1903
683101	September	24, 1901	770159	September	14, 1904
678127	July	9, 1901	797604	August	22, 1905
667892	February	12, 1901	785554	March	21, 1905.
678625	July	16, 1901			

8. The said patents gave to the plaintiff's predecessors a monopoly in the manufacture and sale of said food product.

9. The product made by the plaintiff and its predecessors is wheat formed into shreds and baked in the form of a pillow-shaped loaf.

10. The words shredded wheat were first used in connection with said product about January 1, 1894.

11. The words shredded wheat accurately describe said product.

12. The pillow-shaped loaf is the necessary and unavoidable product of the said Perky special patented machinery for the manufacture thereof.

13. The patents set out in paragraph 7 above, the numbers of which appeared appended to the notice on the package of plaintiff's predecessor until 1915 and after, have all expired and the principal Perky patents expired in 1912.

14. Shredded wheat biscuit was the only name by which said product was known during the existence of such patents.

15. The pillow form of plaintiff's biscuit is illustrated and described in the Perky design patent No. 24,688 of September 17, 1895.

16. No secondary meaning of the name shredded wheat as designating plaintiff's manufacture rather than the pillow-shaped biscuit itself has been shown.

17. The name shredded wheat is understood to describe the product and does not indicate origin of manufacture.

18. Shredded wheat is the only current or known descriptive name for the products of both parties.

19. The pillow-shaped biscuit is the necessary result of the process and machinery of manufacture used by plaintiff and defendant.

20. The mechanical structure of the loaf is functional. The two long edges result from the squeezing or welding together of the cut shreds of the biscuit and serve to bind the shreds of the biscuit together and to shape them into loaf form and appearance. The shreds are porous and capable of absorbing several times their weight in milk or cream. The shreds are relatively separated except at their welded ends and thus facilitate easy crushing of the biscuit when being consumed. The shredded form and structure of the biscuit permits it to rise or puff up under heat without the use of yeast, baking powder, shortening or leaven.

21. The pillow-shaped form of the biscuit has no significance as indicating origin of manufacture.

22. The illustration of two shredded wheat biscuits in a bowl, appearing on the plaintiff's package, is merely descriptive advertising and does not indicate origin of manufacture.

23. Plaintiff has applied for and secured the following trade-mark registrations:

1. No. 52,858, registered May 22, 1906, consisting of the Goddess "Ceres" with a torch in one hand and a sheaf of wheat in the other. Use claimed since January 1, 1894.

2. No. 85,186, registered January 30, 1912, for a picture of a saucer containing a shredded wheat biscuit, milk and a spoon. The registration states, "No claim being made to the representa-

tion of a shredded wheat biscuit", referring to the biscuit shown in the saucer. Use is claimed "since Sept. 15, 1909".

3. No. 89,071, registered November 5, 1912, consisting of the representation of plaintiff's Niagara Falls factory and the phrase "The Home of Shredded Wheat". The registration states that the trade-mark is used "for shredded wheat", and also that "no claim is made herein to the words 'The Home of Shredded Wheat' ". Use is claimed since March 1, 1910.

4. No. 216,593, registered August 17, 1926. The alleged trade-mark is displayed as a saucer containing two shredded wheat biscuit. Use is claimed since September 15, 1909. The registration states that "Applicant disclaims any exclusive right to the representation of two biscuits apart from the mark shown in the drawing".

The above described registrations were all issued under the Trade-mark Act of February 20, 1905. The following registrations were procured under the Trade-mark Act of March 19, 1920:

5. No. 178,725, registered January 15, 1924. The alleged trade-mark is displayed as the words "Shredded Wheat", for biscuit or crackers and use as a trade-mark is claimed since January 1, 1894.

6. No. 213,456, registered May 25, 1926. The alleged trade-mark is displayed as the words "Shredded Wheat" for use on goods described as "biscuits, crackers, and cereal foods cooked or prepared for consumption". Use of the alleged trade-mark is claimed since January 1, 1894.

24. Plaintiff up until 1915, and later, associated with its carton and biscuit its registered trade-mark No. 32,858, representing the goddess Ceres.

25. Plaintiff, since approximately 1908, has prominently associated with its packaged product or advertising the words "Niagara Falls", and the representation of Niagara Falls.

26. Plaintiff for many years since 1910 has associated with its packaged product the picture or representation of its factory at Niagara Falls, called by it "The Home of Shredded Wheat".

27. Plaintiff since 1927 has prominently printed upon and prominently associated with its cartons and cases of shredded wheat the word "original".

Plaintiff's product is known in the trade to many grocers and users as Niagara Shredded Wheat or Original Shredded Wheat.

28. Defendant is successor in business of Kellogg's Toasted Corn Flake Company and operates a factory in Battle Creek, Michigan.

29. From 1912 to 1919, defendant manufactured and sold a shredded biscuit made out of wheat flour and flavored. This biscuit was marketed in cartons marked "Kellogg's Toasted Wheat Biscuit". These cartons during most of the period from 1912 to 1919 carried the words "Shredded" on the panel.

30. Defendant first marketed its small size shredded wheat biscuit in the Fall of 1921. The marketing of this product was continued until the Fall of 1922, when its marketing was interrupted until the Fall of 1927.

31. Defendant's shredded wheat biscuit was marketed during the period from the Fall of 1921 until the present time in cartons marked "Kellogg's Shredded Wheat Biscuit".

32. Since July, 1930, defendant has also marketed its small shredded wheat biscuit in cartons marked "Kellogg's Whole Wheat Biscuit". Both the Kellogg's Shredded Whole Wheat Biscuit and the Kellogg's Whole Wheat Biscuit have been marketed concurrently by defendant since July, 1930, and are still being marketed.

33. The general appearance, printing and decorative effects and colors of plaintiff's and defendant's cartons are distinctly different.

34. The name "Shredded Wheat" on defendant's packages has always been accompanied with the name Kellogg and defendant's corporate name in conspicuous type.

35. Defendant's use of an illustration consisting of two biscuits in a bowl is descriptive of defendant's product and explanatory of its use.

36. Defendant's packages bear no resemblance to the plaintiff's and could not be mistaken therefor.

37. Defendant's shredded wheat biscuit is pillow-shaped but about two-thirds the size of plaintiff's and is darker in color and is readily distinguishable from plaintiff's as to size, color and taste.

38. There is no practical method of distinction apart from the cartons other than those of size, color and taste as voluntarily adopted by the defendant.

39. Neither plaintiff nor defendant sells finished shredded wheat biscuit loose or in bulk, but only packaged in cartons.

40. Defendant makes and sells only one size of shredded wheat biscuit and plaintiff two sizes, one of which is similar in size to defendant's biscuit.

41. Plaintiff's large or regular size biscuit has been made and sold by plaintiff, substantially unchanged in size, for approximately forty years.

42. Plaintiff's small size shredded wheat biscuit was first marketed by plaintiff in or about June of 1932.

43. Defendant first began to manufacture its small size shredded wheat biscuit in the Fall of 1921 and, with the exception of approximately five years between the Fall of 1922 and the Fall of 1927, has continuously made, packaged and sold its said small size biscuit since 1921.

44. From 1912, until interrupted about 1919 by War regulations, defendant marketed a shredded biscuit made from wheat dough and described the same on its cartons as "Shredded".

45. Plaintiff's large or regular size shredded biscuit is and always has been packaged twelve biscuits to the large carton and two biscuits to the small or so-called "individual" and sample cartons, but plaintiff's small size biscuit has never been packaged or sold by plaintiff in the large or twelve biscuit cartons, but solely in the small so-called individual or two-biscuit cartons.

46. The distribution of plaintiff's said small size biscuit, in said two-biscuit cartons, has been confined by plaintiff to the restaurant, lunchroom and hotel trade.

47. Plaintiff announced this new size of biscuit to the jobbing trade in a letter reading as follows:

"National Biscuit Company
Uneeda Bakers

Denver, Colorado,
June 2, 1932.

To All Jobbers:

We have put out a smaller sized Shredded Wheat biscuit in Individual Cartons, for restaurant use, and these are listed at $1.35 per case of 72, your regular discount applies.

We will continue to carry our regular size biscuit in Individual Cartons at $1.60 per case of 72.

Our reason for this change has been the fact that there has been a smaller biscuit put out by one of our competitors and some of the restaurant trade have been confused with the thought that our price was out of line.

In ordering out this merchandise please designate 'Small Size' for the new cartons and 'Large Size' for the standard cartons. We know, there are a great many restaurants who do not care to change because the consumer in general is used to the larger size biscuits but we want your salesmen to be in line with competition on price, and if this new package is used only when needed it will serve its purpose.

We will see that our salesman shows you samples.

Yours very truly,

National Biscuit Company,
(signed) C. K. Bruce, Manager."

48. Both parties encourage or push the sale of their regular size shredded wheat biscuit to the restaurant, lunchroom and hotel trade in their individual cartons, and neither party desires nor encourages the service of its biscuit in hotels, lunchrooms or restaurants apart from their cartons.

49. Approximately 97½% of defendant's trade is supplied with its biscuits in the large fifteen-biscuit

cartons. The remaining 2½% is divided into two parts; 98% of this 2½% receives the biscuits in individual service cartons; the remaining 2% of this said 2½% of defendant's total business are served with its small size biscuits apart from their cartons.

50. Neither plaintiff nor defendant desires, encourages or controls the sale of their biscuit apart from their cartons and it has not been proved that the biscuit are so served for any improper purposes.

51. As far as the record discloses, no purchaser has ever mistaken defendant's package for plaintiff's.

52. As far as the record discloses, no purchaser has ever mistaken defendant's shredded wheat biscuit for plaintiff's when purchased apart from the carton.

53. The defendant's product is known to the trade and public as a product of different origin competing with plaintiff's.

54. Large numbers of dealers advertise in newspapers, circulars and otherwise substantially as follows: "Shredded Wheat, Niagara or Kellogg's."

55. There is no testimony showing any deception, passing off, or confusion between defendant's goods and plaintiff's.

56. Defendant's predecessor marketed a shredded biscuit from 1912 until interrupted by war conditions in 1919. It advertised this biscuit as shredded. Defendant's present small shredded wheat biscuit was first marketed from the Fall of 1921 until the Fall of 1922 when operations were interrupted until the Fall of 1927, since which time defendant has continuously marketed its small shredded wheat biscuit as Kellogg's Shredded Wheat Biscuit. The Shredded Wheat Com-

pany sued two of defendant's dealers in Connecticut in the Spring of 1928. After depositions were taken in 1928, the Shredded Wheat Company moved no further until that suit was ripe for dismissal for want of prosecution in the Summer of 1930. The present plaintiff had acquired the business of the Shredded Wheat Company in 1929 and on its initiative the said action was dismissed without prejudice. At and prior to the time of the dismissal, defendant was marketing its shredded wheat under the two names of Kellogg's Shredded Wheat Biscuit and Kellogg's Whole Wheat Biscuit and it has since continued to market its biscuit under said names without cessation or change. The present action was started in the Spring of 1932 and tried in the Spring of 1933, depositions having been taken during the Winter of 1932-33. Defendant's business has grown from zero in the Fall of 1927 to a volume which exceeds plaintiff's volume in many stores and greatly exceeds plaintiff's volume in self-service stores.

57. Plaintiff and its predecessors have known of defendant's operations and manufacture of shredded biscuit from wheat since 1912, *i. e.*, for twenty-one years.

58. Plaintiff's predecessor filed application to register the words "Shredded Whole Wheat" as a secondary-meaning trade-mark under the ten-year clause of the 1905 Trade-mark Act. Its application was opposed by William E. Williams. The opposition was sustained by the Patent Office and on final appeal the judgment of the Patent Office was affirmed in all respects by the Court of Appeals of the District of Columbia.

59. Plaintiff did not announce in connection with its use of its alleged trade-marks in issue, its succession to the business of the Shredded Wheat Company.

CONCLUSIONS OF LAW.

1. The name "Shredded Wheat" is descriptive of the goods of both parties.

2. The name "Shredded Wheat" is the generic name for the product of the Perky patents and is open to public use.

3. Defendant has the right to make shredded wheat biscuit and to use the name Shredded Wheat.

4. The pillow-shaped form of biscuit became open to public use upon the termination of Perky design patent No. 24,688 of September 17, 1895, and of the process product and machine patents relating thereto and listed by plaintiff's predecessor on packages thereof.

5. Defendant has the right to make shredded wheat biscuit in a pillow-shaped loaf.

6. Plaintiff has no trade-mark right in the words "Shredded" and "Shredded Wheat".

7. Plaintiff has no trade-mark right in the form of shredded wheat biscuit.

8. Defendant is guilty of no unfair competition against plaintiff by using the words "Shredded" and "Shredded Wheat".

9. Defendant has been guilty of no unfair competition with plaintiff by making shredded wheat in the form of a pillow-shaped loaf.

10. Defendant has not infringed any of plaintiff's rights or competed unfairly with it by displaying on its packages the illustration of its goods in a bowl.

11. Plaintiff has been guilty of the conduct of which it complains of defendant by adopting defendant's small size of biscuit for use in the only trade in which biscuit are occasionally sold apart from their cartons.

12. Plaintiff, by adopting and thus wiping out defendant's size distinction, has estopped itself to ask the imposition of additional distinctiveness upon defendant's biscuit even if it had been proved that additional distinctiveness were possible and practical.

13. Plaintiff has acquiesced in defendant's operations.

14. Plaintiff has not come into court with clean hands.

15. Plaintiff, by marking its carton with patent notices until 1915 and later, has estopped itself to allege that its product was not a patented product and subject to the operation of law as such.

16. Plaintiff, by disclaiming the representation of a shredded wheat biscuit as a trade-mark in 1912, precluded itself from ever thereafter setting up trade-mark claims in the appearance, form, or illustration of the biscuit.

17. Plaintiff, by disclaiming in 1912, the words "The Home of Shredded Wheat" as a trade-mark "for shredded wheat", precluded itself from thereafter setting up a claim of trade-mark rights in said words "shredded wheat".

18. It has been conclusively adjudged as against plaintiff's predecessor, that the words "shredded

wheat" are descriptive and not capable of appropriation and use as a trade-mark, and not in fact used as a trade-mark by plaintiff's predecessor.

19. Plaintiff's bill of complaint should, therefore, be dismissed for want of equity at plaintiff's cost.

Respectfully submitted,

WARD & GRAY,
Wilmington, Delaware,
Solicitors for Defendant.

CRICHTON CLARKE,
EDWARD S. ROGERS,
ARTHUR B. SEIBOLD,
J. CARLISLE SWAIM,
E. ENNALLS BERL,
Of Counsel.

PLAINTIFF'S PRÆCIPE FOR TRANSCRIPT.

(Filed February 20, 1935.)

Please incorporate into the transcript on appeal in the above-entitled cause the following portions of the record, to-wit:

1. The docket entries.

2. Bill of complaint.

3. Answer of defendant.

4. Plaintiff's reply to defendant's affirmative defense.

5. Plaintiff's interrogatories and exhibits attached thereto and defendant's answers to said interrogatories. (To be printed together with answer following interrogatories, the exhibits to be printed in black and white.)

6. Condensed record of the proceedings at trial in narrative form with order of approval by the Court.

6-a. Plaintiff's requests for findings of fact and conclusions of law.*

6-b. Defendant's requests for findings of fact and conclusions of law.*

7. Plaintiff's Exhibits Nos. 10, 83, 84, 85, 114, 115, 149, 150, 202, 239, 241-245 (photos), 247, 248, 252.

8. Defendant's Exhibits Nos. 79 and Patent No. 548,086 from Exhibit 242.

9. Opinion of Court.

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*Added by stipulation filed July 31, 1935.

10. Final decree.

11. Plaintiff's petition for appeal.

12. Assignment of errors.

13. Order allowing appeal.

14. Bond on appeal.

15. Citation.

16. This præcipe for transcript of record and acknowledgment of the service thereof.

(Sgd.) HUGH M. MORRIS,
Solicitor for Plaintiff-Appellant.
(Sgd.) CHARLES A. VILAS,
Of Counsel for Plaintiff-Appellant.

To: H. C. Mahaffy, Jr., Esq., Clerk,
United States District Court,
District of Delaware.

Service of a copy of the foregoing præcipe acknowledged this twentieth day of February, A. D. 1935.

(Sgd.) E. ENNALLS BERL,
Solicitor for Defendant-Appellee.

DEFENDANT'S ADDITIONAL PRÆCIPE.

(Filed April 23, 1935.)

Please incorporate into the transcript of record on appeal in the above-entitled cause, the following portion of the record in addition to those included in the plaintiff's præcipe:

1. Plaintiff's Exhibits Nos. 9, 11, 237, and 251 (addition to paragraph 7 of plaintiff's præcipe).

2. Defendant's Exhibits Nos. 9, 10, 95, 108, 121, 122, 126, 222, 234, 235, 236, 242, 243, 244 and 245 (addition to R. 8 of plaintiff's præcipe).

(Sgd.) E. ENNALLS BERL,
Solicitor for Defendant-Appellee.

To: H. C. MAHAFFY, JR., Esq., Clerk,
United States District Court,
District of Delaware.

Service of copy of foregoing præcipe acknowledged this twenty-third day of April, 1935.

(Sgd.) HUGH M. MORRIS,
Solicitor for Plaintiff-Appellant.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF DELAWARE, } *ss.:*

I, HENRY C. MAHAFFY, JR., Clerk of the District Court of the United States for the District of Delaware, do hereby certify that I have carefully compared the writings annexed to and accompanying this certificate, in five volumes, viz:

Volume I, Pleadings and Testimony, pages 1 to 698, inclusive;
Volume II, Pleadings and Testimony, pages 699 to 1386, inclusive;
Volume III, Pleadings and Testimony, pages 1387 to 2066, inclusive;
Volume IV, Exhibits, pages 1 to 208, inclusive;
Volume V, Exhibits, pages 1 to 516, inclusive;

and find the same to be true and correct copies of their respective originals so full and complete as the same now remain on file and of record in my office, being a complete exemplification of the record and proceedings in the case of National Biscuit Company, Plaintiff, v. Kellogg Company, Defendant, No. 980 in Equity, pending in said Court, made up in accordance with the præcipes of counsel for the respective parties filed in said cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at (Seal) Wilmington, in said district, this thirtieth day of July, A. D. 1935, and the Independence of the United States of America, the one hundred and sixtieth.

(Sgd.) H. C. MAHAFFY, JR.,
Clerk, U. S. District Court,
District of Delaware.

Vol. III-A.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 2

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

No. 56

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONS FOR CERTIORARI FILED { SEPTEMBER 10, 1937. MAY 23, 1938.

CERTIORARI GRANTED MAY 31, 1938.

TRANSCRIPT OF RECORD

(IN FIVE VOLUMES)

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 5801. **October Term, 1935.**

NATIONAL BISCUIT COMPANY,

Plaintiff-Appellant,

v.

KELLOGG COMPANY,

Defendant-Appellee.

Volume III-a.

Proceedings in Circuit Court of Appeals.

(Pages 2067 to 2243 inclusive)

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Filed August 11, 1937.

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REFERENCE TO ARGUMENT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,

v.

KELLOGG COMPANY,
Defendant-Appellee.

And afterwards, to wit, the third day of December, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the sixteenth day of January, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,

v.

KELLOGG COMPANY,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

OPINION.

(Filed January 16, 1936.)

Before BUFFINGTON, DAVIS and THOMPSON, *Circuit Judges.*

Per Curiam:

As stated by the court below, "the bill charges unfair competition. It avers that plaintiff is vested with the exclusive right to whole wheat biscuit made in a particular and distinctive shape, appearance and structure; to the name 'Shredded' and 'Shredded Wheat' in connection with whole wheat biscuit; and to the representation or picture of whole wheat biscuit made in a particular and distinctive shape, appearance and structure generally and shown in a saucer or dish"

After proofs, that court filed an opinion which discussed in great detail the questions involved and, in pursuance thereof, entered a decree dismissing the bill. Whereupon plaintiff took this appeal.

After due consideration had of all questions raised in the cause, we are of opinion no error was committed and the judgment below should be affirmed. In view of the full and satisfactory discussion by the trial court of all issues involved, we find no occasion to write a further opinion and, with a view to avoiding needless repetition, we confine ourselves to stating that on the expiration of plaintiff's patent No. 548,086, the exclusive right to make and sell the food product therein described ended. And on the expiration of plaintiff's design patent No. 24,688, the exclusive right to the designed biscuit also ceased. In that regard we agree with the Judge below, namely:

> "In this case plaintiff claims in perpetuity the monopolistic right to the descriptive word 'shredded' and a monopolistic right in the shape or form of the biscuit. Any right of plaintiff must be based upon the wrong of defendant. Relief must be based upon confusion or palming off, otherwise relief should be denied. Originally patents covered every phase of plaintiff's business. There were product, process and design patents which secured plaintiff a perfect monopoly of the business. These patents have expired and *the case falls into the class of expired patent cases* and is controlled by the Singer case."

The food product which was covered by these patents was made by the mangling or, as they called it, shredding of wheat in the process and the product was given the form of an elongated, circular topped biscuit which was described by them as shredded wheat and became known to the trade and consumers by the descriptive words "shredded wheat". However closely

that term may have become associated with the plaintiff's business during the life of its patents, the fact remains that on the expiration of the patents, the public could use the patented process both in making the patented product and in making it in the form described in the design patent and in calling it "shredde ", provided in doing so it avoided simulating the product so as to prevent confusion and lead buyers into the belief they were buying plaintiff's product. This, in the judgment of the court below and of this court, the defendant has done in compliance with the requirements of Singer v. June, 163 U. S. 169, for the product of the defendant has at all times, in its cartons and otherwise, been marked with its own name, in words and colors (green and red) of such distinctive character, that buyers thereof knew they were getting defendant's product and were not buying that of the plaintiff. Moreover, it is clear that the word "shredded" was a descriptive word, aptly describing the process to which wheat grains were subject by any one using shredding or mangling in processing wheat grains. It is clear, therefore, the use of the word "shredded" is open to all shredders of wheat, provided that in the use of the descriptive word "shredded", they so use the said word "shredded" as not to mislead and confuse the public into the belief that they are buying the product of some other shredder. Now, that no confusion, misleading or deceit is shown in this case, is clear. In that regard we agree with the court's summary:

> "Where the name is the only name by which the article can be described and is the only name by which it was described during the existence of the patent that name becomes public property upon the expiration of the patent. Here the patented biscuit was known as Shredded Wheat or Shredded Wheat Biscuit. Upon the expiration of the patent that name became public property.

Evidence that Shredded Wheat or Shredded Wheat Biscuit has been understood by the public for years to mean a product produced only by the plaintiff does not establish plaintiff's right to that name. Where a secondary meaning is established even to the exclusion of any other meaning, a competitor has the right to use that name provided he clearly distinguishes his goods. So where a man distinguishes his goods he has fulfilled his duty to his competitors and to the public. What normal person desiring plaintiff's biscuit would take defendant's package and think he was getting plaintiff's package. Or what person seeing defendant's package would think it was plaintiff's package. Such confusion can not be inferred from the circumstances of the case and there is no proof of it.

The testimony of a hundred witnesses from all parts of the country establishes there was no passing off of defendant's biscuit for plaintiff's or deception of the public to any appreciable extent."

So regarding, the decree below is affirmed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

ORDER AFFIRMING DECREE.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,

v.

KELLOGG COMPANY,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause, be, and the same is hereby affirmed, with costs.

Philadelphia, January 16, 1936.

Per Curiam,

BUFFINGTON,
Circuit Judge.

(Endorsements): Order Affirming Decree Received & Filed Jan. 16, 1936 Wm. P. Rowland, Clerk

PETITION FOR RE-HEARING.

(Filed February 15, 1936.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

National Biscuit Company,
Appellant,

against

Kellogg Company,
Appellee.

The appellant above named respectfully prays this Court for a re-hearing of this cause. The grounds for this request are as follows:

1. The Court adopts the ruling of the District Court that, because certain patents covering the process and machinery used in the plaintiff's business have expired, the case thereby falls into the class of expired patent cases and is controlled by the case of *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169. We believe the Court did not give sufficient weight to the fact that while these patents expired in 1912 it was not until 1927, fifteen years later, that the defendant seriously undertook to avail itself not only of the patented process and the machinery, but also of the plaintiff's trade name and the good will which had been created for it by the expenditure of at least $17,000,000 after the expiration of the patent. We feel that this point was not sufficiently stressed upon our brief and possibly not in the oral argument which turned upon other phases of the case. The courts in the Second Circuit and the Court of Appeals for the District of Columbia (*Scandinavia Belting Co. v. As-*

bestos & Rubber Works, 257 Fed. 937 (C. C. A. 2d); *McKesson & Robbins v. Phillips Chemical Co.*, 23 Fed. (2d) 763 (C. A. Dist. Col.); and *Dupont Cellophane Co. v. Waxed Products Co.*, 6 Fed. Supp. 859 (D. C. E. D. N. Y.) apparently recognized that Congress in the Trade Mark Act of 1905 (U. S. C. Title 15, Sec. 85) had enunciated a public policy to the effect that a trade mark which otherwise might be invalid should be afforded judicial protection if it had been used in interstate commerce exclusively by the owner or its predecessors for ten years or more. In the quotation from *Scandinavia Belting Co. v. Asbestos & Rubber Works, supra*, found in appellant's brief at page 95, reference is made to the registration of the trade mark under the ten years' clause. In *Thaddeus Davids Co. v. Davids & Davids*, 233 U. S. 461 at page 470, the Supreme Court says:

> "Their exclusive use as trade-marks for the stated period was deemed in the judgment of Congress a sufficient assurance that they had acquired a secondary meaning as the designation of the origin or ownership of the merchandise to which they were affixed. And it was manifestly in this limited character only that they received a statutory recognition, and, on registration, became entitled to protection under the act."

We urge that the foregoing authorities may be properly construed as recognizing that Congress by the Act of 1905 enunciated a public policy applicable to all trade marks used in interstate commerce exclusively by the owner for ten years or more, and that such public policy should be applied by all Federal Courts as to trade marks used in interstate commerce. Trade marks in the present day of extensive advertising play such an important part in commerce, and unfair competition has increasingly taken on such

subtle and varied forms and is so rampant, that we respectfully submit that this court should examine and decide the question which we thus raise, as well as that to be now stated.

If the Act of 1905 may not be fairly said to be declaratory of a public policy, still under general *equitable* principles we submit that the application of the doctrine of *Singer v. June* to the case at bar was an unjustified and an unwarranted extension of that doctrine, entirely out of harmony with the recent decision of the Supreme Court to be referred to (*post*, p. 4). No one, for fifteen years after the expiration of the patent, sought to use the name "Shredded Wheat", and then only this defendant. Meanwhile appellant had spent in advertising substantially more than $17,000,000, the inevitable effect of which was to connect the product "Shredded Wheat" with petitioner. What possible equitable consideration entitles this defendant to avail itself of plaintiff's good will created not only by the vast sums expended for advertising ($16,000,000 during the life of the patent and $17,000,000 during the next fifteen years) (Ex. 84, R. Vol. IV, p. 41; Ex. 150 (*ibid.*), p. 51) but by the almost universal recognition of the excellent quality of the product and its healthful properties?

2. The Court in its opinion states that the food product covered by the patents "was given the form of an elongated circular topped biscuit" and that "however closely that term may have become associated with the plaintiff's business during the life of its patents, the fact remains that upon the expiration of the patents, the public could use the patented process both in making the patented product and in making it in the form described in the design patent and in calling it 'shredded',". We believe that, doubtless because of omission to press the point in oral argument, the Court

overlooked the important consideration that the process patent No. 548,086 in this case falls short of producing the "elongated circular topped biscuit" which became known as "Shredded Wheat" (see appellant's original brief, pages 7 to 10 inclusive and pages 92 and 93) (*ibid.*, p. 81).

3. Upon the expiration of a patent there falls into the public domain only what is covered by the patent. The expiration of a patent does not carry with it the patentee's good will and other intangibles. The defendant here seeks to take more than the patent included, to wit, petitioner's good will admittedly worth many millions of dollars. This is unnecessary to the full enjoyment of the patent as is proven by the Quaker Oats Company which for years has used the process patent to produce "Muffets", a product clearly distinguishable from the plaintiff's both in name and appearance.

4. The Court also, we believe, overlooked the ruling of the Circuit Court of Appeals for the Second Circuit in *President Suspender Co. v. MacWilliams*, 238 Fed. 159 (certiorari denied, 243 U. S. 646) holding that the use of a name prior to the issuance of a patent prevents the application of the doctrine of *Singer v. June*, although the Court recognized the force of this doctrine in *Amiesite Asphalt Co. of America v. Interstate Amiesite Co.*, 72 Fed. (2d) 946.

5. The modern doctrine of unfair competition has been stated by the United States Supreme Court to cover not only misrepresentation but also "misappropriation of what equitably belongs to a competitor" (*Schechter Poultry Corporation v. United States*, 295 U. S. 495 at page 532). We have here a case of a staple article of food, the name of which has become

a household word throughout the United States and Canada. The supposed claim of the plaintiff to a monopoly has been stressed to the exclusion of due consideration of the rights of the public to protection. For nearly forty years the plaintiff and its predecessors have furnished a service to the public and the public has learned to call for the plaintiff's service by the name "Shredded Wheat" and to expect to receive upon such call the very article with which it has during all those years been served. Whether these words be descriptive, or not registerable as a trade mark for any other reason, they have been respected throughout the years by all competitors but the defendant, and public policy demands some measure of protection for the consumer. This was recognized by the Circuit Court of Appeals for the Second Circuit nearly twenty years ago in *Shredded Wheat v. Humphrey-Cornell Co.*, 250 Fed. 960 (vid. appellant's brief, p. 77), but this important consideration appears to have been overlooked in this case and undue emphasis laid upon the supposed monopoly which might result to the plaintiff; but we have pointed out that the plaintiff seeks and can obtain no monopoly and this is proven by the fact that it already has two strong competitors in the manufacture of the Perky biscuit who have not found it necessary in enjoying the fruits of the patent to appropriate also the plaintiff's good will.

Respectfully submitted,

HUGH M. MORRIS,
DRURY W. COOPER,
THOMAS G. HAIGHT,
CHARLES A. VILAS,
Counsel for Appellant.

February 14, 1936.

Certificate of Counsel.

I, CHARLES A. VILAS, one of the counsel for appellant, hereby certify that I believe the foregoing petition for rehearing to be well founded in law and in fact and that it is not interposed for the purpose of delay.

CHARLES A. VILAS,
Of Counsel for Appellant.

ORDER GRANTING PETITION FOR REHEARING.

(Filed May 7, 1936.)

IN THE UNITED STATES CIRCUIT COUPT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

SUR PETITION FOR REHEARING.

AND Now, to wit, May 7, 1936, after due consideration, the petition for rehearing in the above-entitled case is hereby granted.

Philadelphia,
May 7, 1936.

JOSEPH BUFFINGTON,
Circuit Judge.

REFERENCE TO REARGUMENT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

And afterwards, to wit, the eighth day of October, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for reargument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the twelfth day of April, 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,

v.

KELLOGG COMPANY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

OPINION ON REARGUMENT.

(Filed April 12, 1937.)

Before BUFFINGTON, DAVIS and THOMPSON, *Circuit Judges.*

DAVIS, *Circuit Judge.*

When this case was here before we affirmed the decree of the District Court by a per curiam adopting the opinion of that court. It is before us now on reargument. The District Court and this court felt that the case was controlled by Singer v. June, 163 U. S. 169, on the ground that the name, "Shredded Wheat" was a descriptive term, describing the product of the plaintiff and that, in any event, upon the expiration of the Perky patent No. 548,086, issued October 5, 1895, the name passed into the public domain, remained there

and became public property. Consequently we held that the appellant, hereinafter called plaintiff, did not have the right to the exclusive use of the name.

After exhaustively reviewing the authorities, Mr. Justice White in Singer v. June, supra, declared the law on this subject to be as follows:

> "The result, then of the American, the English and the French doctrine universally upheld is this, that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact."

Therefore, upon the expiration of the patent the defendant was free to adopt the name of "Shredded Wheat" to designate its product with some adequate explanation that the product was made by it and not by the plaintiff. This, however, it did not do, but waited ten years and then when it attempted to do so immediately stopped upon complaint of the plaintiff and did not start again for five years.

In or about the year 1893 Henry D. Perky put into commercial use a new process for a form of food manufactured out of whole wheat and called the product "Shredded Wheat". The evidence shows that the

process consisted in cleaning, curing, drying and boiling the wheat and thereafter passing the softened grains between two rollers. The surface of one of these was flat and the other contained grooves. The rollers exerted great pressure upon the wheat which came out in long filaments or threads which were later cut, made in the form of a pillow-shaped biscuit; placed in an oven at a temperature of approximately 500 degrees Fahrenheit and baked until all but a small percentage of the moisture had been removed. The biscuits were then sold under the name of "Shredded Wheat", and "Shredded Wheat Biscuit".

With the exception of the Ross Company, for a short time in 1915, and the defendant, for a short time in 1922, no one, in the fifteen years after the expiration of the patent, used the name "Shredded Wheat", to designate his product and they both immediately stopped on complaint of plaintiff.

In 1927, however, the defendant began again to manufacture biscuits and sell them under the name of "Shredded Whole Wheat Biscuit". Suit was brought against it in the District Court of Connecticut. While that suit was pending, the defendant in 1930 abandoned the name of "Shredded Wheat" to designate its product and instead used the name of "Kellogg's Whole Wheat Biscuit". Thereupon the suit was discontinued.

But in 1932, the defendant started to use in its advertisements the name "Shredded Wheat" and the plaintiff's trademark consisting of a dish, containing two biscuits submerged in milk, to identify its product.

During that period of fifteen years, after the expiration of the Perky patent in 1912, the plaintiff and its predecessors spent more than $17,000,000 in advertising, and creating good-will in the name of "Shredded Wheat" and in its trademark.

They thus built up a large business and a very valuable good-will. Between 1896 and 1932 they sold

in the United States 45,353,320 cases, containing 19,592,634,240 biscuits. In 1932, the product was found upon the breakfast tables of more than 25,000,000 families. It is undisputed that at the time defendant adopted the name "Shredded Wheat", and the trademark of the plaintiff to designate its product, the trade and consumers generally had come to regard the name and trademark as identifying the plaintiff's biscuit.

If the name "Shredded Wheat" were purely descriptive of plaintiff's product it could not have been the subject of a patent for "whatever is mere description is open to all the world". Cheavin v. Walker, 5 Ch. Div. 850; Singer v. June, 163 U. S. 169, 194. Defendant contends that the name is descriptive, and may be used by it, but we do not think it is. The evidence shows that in reducing the grains of wheat to the product called "Shredded Wheat" there is no cutting or tearing into small pieces or shreds. As above stated, after the wheat has been cleaned, cooked, cured and partially dried, it is passed between two rollers of highly tempered steel in contact at high pressure, one roller having a flat surface and the other having grooves in its circumference varying in depth from .017 to .024 inches. The grains of wheat are thus forced into the grooves, mashed and the component parts thoroughly macerated. They come from the rolls in the form of long filaments or threads. These threads of wheat come out or extrude from the rollers just as steel rails do when steel is passed between rollers, and just as copper wire does when copper is passed between rollers. But it has never been suggested that in making steel rails or copper wire the steel or wire was "shredded". Neither can it be said that the wheat is "Shredded", in the plaintiff's process. It is mashed and mangled. The name at most is merely suggestive, and words suggestive of the qualities or characteristics of an article may be used as valid trademarks. Penn-

sylvania Salt Co. v. Myers, 79 Fed. 87; Globe-Wernicke Co. v. Brown, et al., 121 Fed. 185; Trinidad Asphalt Manufacturing Co. v. Standard Paint Co., 163 Fed. 977; Van Camp Sea Food Co. v. Stewart Organizations, 50 Fed. (2d) 976. The true descriptive name for this product is "whole wheat biscuit". This has been recognized by the appellant's competitors and many others. Twenty-seven states, including Delaware, and many foreign countries have accepted and registered the word "Shredded Wheat" as a legitimate trademark which could not properly be done if the name were simply descriptive.

But assuming, merely for the sake of argument, that the word "shredded" was originally a descriptive term and used to describe the action upon the wheat, it would manifestly be unfair after all these years and the expenditure of vast sums of money, when the name has acquired a secondary meaning, and has come to stand for the product itself, to allow the defendant to use it as it has done and thus acquire the trade which rightfully belongs to plaintiff.

In 1912, when the Perky patent expired, the defendant or any competitor might have used the name and form of the biscuit under proper restrictions, to designate his product, but the fact is that nobody did it, and nobody attempted to do it, with the exception of the defendant and the Ross Company, as above stated. During all this time the defendant and all other competitors sat by and allowed the plaintiff at great expense to make "Shredded Wheat" a household word and the form of its biscuit known throughout the world as its own product. Some competitors sold their product which in a sense is similar to the plaintiff's under descriptive names. For instance, the defendant called its product "Kellogg's Whole Wheat Biscuit". This is exactly what it is. It is a biscuit made from whole wheat by Kellogg. But this did not enable the

defendant to get the property which the plaintiff had built up in the name of "Shredded Wheat" and so it abandoned its effort to sell its product as "Kellogg's Whole Wheat Biscuit". The Quaker Oats Company manufactured a biscuit in accordance with the process of the Perky patent and called it "Muffets". The Ross Company called its biscuit "Whole Wheat Biscuit" and the Loose Wiles Biscuit Company called its biscuit, "Rippled Wheat".

The case now stands in equity just as it would have stood if there had been no patent before 1912 and the plaintiff's competitors had sat by and allowed it from that time on to build up at great expense a valuable good-will in the name. If defendant had desired to use the name at the expiration of the patent, it should have seasonably done so, but it did not. It rather slept away its rights for fifteen years and now comes in, adopts the name and trademark and tries to appropriate the fruit of the plaintiff's labor and money. The adoption by any one of the name and form of an article under which a competitor has been selling it, caries with it the presumption that he expects to derive benefit from this adoption and intends to mislead the public with probability of success. Shredded Wheat Company v. Humphrey Cornell Co., 244 Fed. 519, affirmed in 250 Fed. 960.

When a person, after the expiration of a patent, has spent such enormous amounts of money during a period of fifteen years to create a valuable property right in the name and form of his product, equity today will not permit another to apply the name and form of the merchandise to his product and thus appropriate it to his own use and advantage and to the injury of the one who has created the good-will. Upon the expiration of the patent, the property right in the name passed to the public, but if the public wished to retain

this right in its domain, it had to avail itself of the right within a reasonable time. 18 Corpus Juris 72.

This is a case of unfair competition and not of the infringement of a patent. When a name, admittedly descriptive, has acquired a secondary meaning and has come to stand for the article itself, equity will not permit a competitor to use the term as a trade name, as defendant in this case has done. In the case of Barton v. Rex-Oil Co., 29 Fed. (2d) 474, the word "Dyanshine" was involved. This was a purely descriptive term and in the beginning was open to the world, but it had been used long enough to acquire a secondary meaning and was a trade name for the shoe polish itself which dyed and shined shoes at the same time. In that case we said:

> "At the rehearing the appellants contended, and have succeeded in convincing us, that as a matter of fact the only way to prevent such confusion and deception in this case is to enjoin the appellee from using these words as the name of its product and from using them so positioned, spelled and printed on its cartons and advertising matter as to resemble a name for its product. Moreover, the complainants have satisfied us that on a definite and unequivocal finding of fact of this kind the law affords the remedy of injunction against the use of words which in instances such as this have acquired only a secondary meaning when those words are used as the name of a product as distinguished from their use in describing it."

We held that the defendant was guilty of unfair competition and enjoined it "from using the words 'dye and shine' in any way, form, arrangement, or manner of spelling as the name, or as resembling a name, of its product, leaving it free, of course, to use these words merely and exclusively in describing the qualities and characteristics of the product." This the defendant in the case at bar is free to do, but may

not, as it has been doing, use the words "Shredded Wheat" as the trade name of its product.

In the case of Nu-Enamel Corp. v. Armstrong Paint & Varnish Works, 81 Fed. (2d) 1, Judge Evans speaking for the Circuit Court of Appeals for the Seventh Circuit said:

> "Some there are whose conception of business integrity and fair play is rather hazy, and generally ruled by self-interest, who attempt to justify efforts to acquire the business which another has developed through many years of fair dealing and through the expenditures of vast sums in advertising and in establishing a good will. This illegitimate activity has increased because in the past few decades the practice has grown among established enterprises of giving a name, or a particular form of container, or form of product, or other mark of identification to a product it makes or sells so that the public may know its product. Good will has followed familiarity with and use of the commodity. In some instances, the product has been patented. After the patent has expired, the same strenuous efforts are made to familiarize the users with the name or a word, which in its beginning may have been descriptive, but which because of form of container, combination of letters, etc., has identified it as the product of a certain individual or company. By so doing a property right is developed which should be respected."

In Scandinavia Belting Co. v. Asbestos & Rubber Works, 257 Fed. 937 (C. C. A. 2) it was contended that the trademark, "Scandinavia" in addition to being invalid because it was geographical, had passed into the public domain and had become public property upon the expiration of the patent covering the product to which the trademark had been applied during the life of the patent. In disposing of that contention the court said:

"But there is another and conclusive reason why this claim that the name 'Scandinavia' became open to the public on the expiration of the patent is of no avail to the defendant, for if it were to be conceded that the doctrine of the Singer Case originally applied the evidence shows that the public did not avail itself of the right, and that now because of the registration of the trademark under the 10 years' clause it is not at liberty to violate the plaintiff's exclusive right."

In the case of McKesson & Robbins v. Phillips Chemical Co., 23 Fed. (2d) 763, the validity of the registration of the trademark "Milk of Magnesia" was involved. The product manufactured by the owner of the mark was patented but the patent had expired. The owner of the mark had exclusive use of the trade mark for ten years preceding the Trade-Mark Act of 1905. The Court of Appeals of the District of Columbia in discussing the effect of the expiration of the patent and the doctrine of Singer v. June as applied to the facts of that case said:

"Where the public fail to avail itelf of the right to manufacture the patented article and use the name by which it was designated, and 10 years' exclusive use of the mark intervenes prior to the Trade-Mark Act of 1905, the party using the mark is entitled to registration under the 10-year clause of the Act."

Section 5 of the Trade-Mark Act of 1905 (U. S. C. A. Title 15, Section 85) provides that when the applicant for the registration of a trademark or his predecessor has had actual and exclusive use of the mark as a trademark for ten year prior to the passage of the Act, nothing in the Act should prevent its registration. This provision of the Act was in effect declaratory of the equitable doctrine that the exclusive use of a trademark by a person for ten years

after the expiration of the patent entitles him to the exclusive use of it thereafter.

The defendant appropriated not only the name of the plaintiff's product, but also its form and shape which has characterized the biscuit for more than forty years. The expiration of the design patent did not confer any rights upon the defendant for the reason that the patent was held by Judge Kohlsaat to be invalid before its expiration on the ground that the design had been in use for more than two years prior to filing the application for the patent and for the further reason that if it had not been declared invalid for that reason, the plaintiff and its predecessors used the particular form, appropriated by defendant, for its biscuit for forty years and equity will not permit the defendant to use the name and trademark to designate its product. The case stands as it would have stood if there had been no patent and the plaintiff had started with a new and unpatented product, in 1912 calling it by the trade name of "Shredded Wheat" which it had sold in a particular form and for fifteen years had spent $17,000,000 in advertising it and had built up an invaluable good-will in the name which it had exclusively used.

In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, "The original has this signature: W. K. Kellogg". That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff. This equity will prevent by injunction.

In view of the fact, that "Shredded Wheat" is the plaintiff's trade name, that defendant deliberately started out to acquire by unfair competition and misstatements the trade which equitably belonged to the plaintiff and that it is practically impossible for the defendant to use the name and form of plaintiff's biscuit to designate its product without confusion, deception of the public and unfair competition with the plaintiff, a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant from the use of the name "Shredded Wheat" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

ORDER REVERSING DECREE, ETC.

(Filed April 12, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with direction to the said District Court to enter a decree enjoining the defendant from the use of the name "Shredded Wheat" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade-mark; with further directions to the said District Court to order an accounting for damages and profits. The decree of this Court of January 16, 1936, is vacated and set aside.

Philadelphia, April 12, 1937.

J. WARREN DAVIS,
Circuit Judge.

APPELLEE'S PETITION FOR REHEARING.

(Filed May 7, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,

against

KELLOGG COMPANY,
Defendant-Appellee.

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APPELLEE'S PETITION FOR REHEARING.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

This is a petition for a second rehearing. For the reasons which appear in the petition counsel believe that such a rehearing should be granted.

Counsel are not unaware, however, of the difficulty which confronts them in attempting to persuade this Court to reconsider a case in which it has handed down two diametrically divergent opinions. Yet this case, if for no other reason than that two such opinions have been written, *does* require reconsideration.

Counsel for the appellee-defendant have never had an opportunity to present an argument upon the questions covered by the Court in its second opinion. Plaintiff had specifically conceded that an injunction as broad as that now ordered could not issue. Defendant had accepted that concession as binding upon plaintiff and the Court and did not argue the point.

[2] We do not believe that the Court's treatment of some of the questions will stand analysis. We are confident that this position is capable of demonstration.

Accordingly counsel respectfully suggest to the Court that if it cannot see its way clear to grant a

(Note: Figures in bold type refer to pages of Original Petition.)

rehearing (which counsel very much hope that it can) then, in the alternative, the Court certify the questions involved to the Supreme Court of the United States.

Such action would be peculiarly warranted in a case in which the Court has definitely reversed itself, not to mention the conflict between the last decision of this Court and the decision of the Circuit Court of Appeals for the Second Circuit upon the same set of facts.

The Circuit Court of Appeals for the Second Circuit has held (*Kellogg Co. v. National Biscuit Co.*, 71 Fed. (2) 662) that on those same facts this defendant has a cause of action against this plaintiff. The first decision of this Court was not inconsistent with this conclusion but the second one is.

This Court by its second decision in this case has held on the same facts that the plaintiff has a cause of action against this defendant.

The last decision of this court holding that the words shredded wheat are not descriptive of the goods, were not so used by plaintiff and are capable of exclusive appropriation by plaintiff is in conflict with the decision of the Court of Appeals of the District of Columbia (*Natural Food Company v. Williams*, 30 App. D. C. 348) in which a contrary conclusion was reached on substantially the same issues and in which plaintiff acquiesced.

The last decision of this Court, holding that plaintiff may lawfully appropriate exclusively the form (and thus the right to manufacture) the biscuit in issue is also in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Shredded Wheat Co. v. Humphrey Cornell*, 250 Fed. 960, in which an opposite conclusion was reached.

[3] On the same state of facts, the same issues as are involved herein were decided between subsidiaries of

the same parties by the five judges of the Court of Appeals of Ontario who cited and followed the decision of the District Court in this case in unanimously affirming the judgment of Mr. Justice McTague, dismissing the complaint (*Canadian Shredded Wheat Company Limited v. Kellogg Company of Canada, Limited*, decided November 30, 1936, copy filed herein).

The Canadian law as applied in this case is the same as the American, English and French law. So that, defendant's business south of the Canadian line is now held to be outlawed whereas north of the line it is held to be lawful. This is a serious and important conflict in every way.

The last decision of this Court is also, we believe, in conflict with the decisions of the Supreme Court of the United States in *Singer v. June*, 163 U. S. 169, regarding the effect of patent expirations upon the form and name of a patented article and of decisions of the same court in *Beckwith v. Commissioner of Patents*, 252 U. S. 538, and *Rahtjen v. Hoizapfel*, 183 U. S. 1, holding that disclaimers embodied in trademark certificates are irrevocable. This court's decision is contrary to *Delaware & Hudson Canal Co. v. Clark*, 13 Wall. 311, *Standard Paint Co. v. Trinidad Asphalt Manufacturing Co.*, 220 U. S. 446, and *Warner v. Eli Lilly*, 265 U. S. 526, which decide that the invariable rule is that relief in trademark infringement and unfair competition cases alike rests upon the wrongs of the defendant in passing off its goods as plaintiff's and not upon any alleged right of a plaintiff to be protected in a name or form which under the guise of a trademark will set up monopolies in products which all are free fairly to make and sell. The decision is also in conflict with that of the Supreme Court in *Warner v. Eli Lilly*, 265 U. S. 526, and other cases holding that a Court has power only to restrain the use of orna-

mental, fanciful or non-essential features of dress or appearance and not the use of func- [4] tional forms or essential features and thus to stop the defendant from all competition whether fair or not.

The last decision of the Court is also in substantial conflict with its own view of the law as applied in *Amiesite v. Interstate Amiesite Co.*, 72 F. (2d) 946, and also with the decision of the Circuit Court of Appeals for the Second Circuit in *Du Pont Cellophane v. Waxed Products*, 85 Fed. (2) 75 Cert. den. 57 Sup. Ct. 194.

Finally, the decision is novel beyond all precedent in holding in effect that as to goods which reach the final consumer in cartons, the purchaser can be confused about the contents which he cannot see. Even the plaintiff admits the obvious fact that the cartons which cover the contents at the point of purchase are incapable of being confused or substituted one for the other.

On these matters of grave and important conflict it is respectfully submitted that the Court should grant the defendant the right of full oral argument which on both hearings the court specifically requested defendant to forego, and that, should this for any reason be denied, the Court in fairness and justice not only to defendant but to other litigants affected by the conflicts of decision as pointed out, should certify the questions involved to the Supreme Court of the United States for its determination. However, it is confidently believed that a full rehearing should be granted upon the following grounds:

FIRST: That at none of the hearings has the defendant been permitted fully to present its case by oral argument.

Second: That the injunction as ordered is barred by specific statutory and other disclaimers of plaintiff and by final judgments binding on plaintiff.

Third: That this Court lacks constitutional power to create and enforce the two perpetual monopolies conferred on plaintiff by the proposed injunction.

Fourth: That the Court should not give exclusive trademark rights in the word shredded.

[5] Fifth: That the ten year proviso of the Federal Trade Mark Statute does not apply.

Sixth: That the words shredded wheat have no secondary meaning and that even if they did defendant has a right to use them in a non-deceptive way.

Seventh: That the defendant has not misrepresented its goods nor has its use of the name shredded wheat deceived or misled anyone or produced confusion.

To consider these contentions in order.

I.

In none of the hearings has the defendant been permitted to present its case by oral argument.

Plaintiff has now had two complete oral hearings by different counsel and the Court on the second hearing reversed its per curium opinion given after the first hearing.

Defendant has never had a chance to make a complete oral argument. On the first hearing defendant's counsel were stopped before any argument had really started. On the second hearing the Court asked defendant's counsel to direct their arguments to the question of descriptiveness of the words shredded wheat. And this was done.

Defendant's case obviously was not considered even on the briefs presented, as shown by the fact that no reference is made to plaintiff's concession of defendant's right to make the biscuit. Defendant accepted the concession and assumed the Court would act on it. Also the important fact of the specific statutory disclaimers pointed out in defendant's briefs as an absolute bar to the injunction decreed.

The Court by its proposed mandate has ordered the District Court to create in plaintiff three exclusive and perpetual monopolies, irrespective of any wrongs of defendant.

[6] 1. In any kind of food product, whatever its form and whether truly shredded or not, if defendant should sell it under the name shredded wheat.

2. In a pillow shaped biscuit irrespective of the name applied to it.

3. In a dish shown upon a food package.

We reiterate that the proposed perpetual monopolies are to be based on alleged rights of the plaintiff irrespective of wrongs of the defendants. For example, defendant on this record is guiltless of any fraud or deceit. Its packages are incapable of being passed off as plaintiff's and its biscuit are clearly distinguishable by size from plaintiff's. Yet defendant is to be enjoined from all competition fair or unfair. Even though defendant might attach to each biscuit a crimson placard as large as a ship's anchor stating its manufacture, it would still be perpetually enjoined. Even though it was proved by defendant and not disputed by plaintiff that hundreds of food manufacturers display dishes on their packages, even though a dish is the most commonly used advertising device in the package food business, even though a dish could not possibly indicate origin of manufacture in any one

manufacturer or enable another, by its use, to pass off its product as plaintiff's, yet—defendant is to be restrained from placing a dish on its package.

The proposed three perpetual monopolies which the District Court is ordered to confer upon the plaintiff are far wider and broader than any patent protection plaintiff had during the life of its machine, product, process and design patents on shredded wheat.

For example dozens of patents were granted on wheat shredding machines during Perky's patent monopoly, and it was proved and held in *Williams v. Natural Food Company*, 30 App. D. C. 348, that Williams used such machines to make and sell shredded wheat under that name during the first ten years of plaintiff's monopoly without infringement of plaintiff's patents, yet Williams [7] could not use his shredding machines to make shredded wheat biscuit or call his product shredded wheat or place a dish on his package without now infringing the perpetual monopolies which the District Court has been ordered to create.

Defendant has worked out patented machines for making shredded wheat which would not infringe the Perky patents if they were still alive, but the operation of those machines would infringe the patent, name and dish monopolies which the District Court is ordered to create by perpetual injunction.

In decreeing these three perpetual monopolies of form (and therefore of machines and processes for producing) of name and of display dish, the Court has disregarded:

1. The Constitution which authorizes such monopolies only for limited times and when based on inventions or creations of authorship.

2. The long established and heretofore unquestioned principles of perpetual dedication of name and

form by expiration of patent and of perpetual dedication by specific statutory disclaimer of both name and form, and of specific disclaimer renewed upon the rehearing herein.

3. The heretofore universal and unquestioned rules

a. That the limit of the Court's power is to restrain defendant from passing off its goods or wares as plaintiff's, not to enjoin defendant from competition not resulting in deception or confusion of goods.

b. That the Court may enjoin only matters of dress and appearance which can be altered without destroying defendant's indubitable and paramount right to compete.

c. That if confusion arises solely from defendant's indisputable right to compete, plaintiff must suffer it as the Courts have no power to set up perpetual rights in functional features, processes, machines or designs.

[8] Defendant therefore respectfully questions and denies the power or the constitutional and statutory authority of the Court to order the District Court to set up the monopolies of form, machine, process, name and display as ordered by this Court, and in view of the fact that the Court on both hearings requested defendant to shorten, limit and omit oral argument and that defendant was misled by a specific disclaimer made by plaintiff, accepted by defendant and thought to have been accepted and binding on the Court, defendant hereby applies for an opportunity to be heard on the issues raised by the proposed mandate.

II.

The injunction ordered is barred by specific statutory and other disclaimers of plaintiff and by final judgments binding on plaintiff.

A disclaimer is final and cannot thereafter be revoked. In *Beckwith v. Commissioner*, 252 U. S. 538, 545, the Supreme Court said:

> ". . . the registrant would be precluded by his disclaimer from setting up in the future any exclusive right to the disclaimed part of it."

In *Rahtjen v. Holzapfel*, 183 U. S. 1, the same rule was laid down.

The trademark and disclaimer record of plaintiff is as follows:

1. *Goddess Ceres*, No. 52858 (R. V. 5, p. 193) filed June 3, 1905, issued May 22, 1906, covering picture of "Goddess Ceres", for use on "biscuit or crackers", used "since January 1, 1894." Use of "Goddess Ceres" trademark was dropped in 1915. So that plaintiff's registered trademark until 1915 was the Goddess Ceres.

2. The rejected "Shredded Whole Wheat" application. This was filed in June 1905 under the ten year clause [9] of the 1905 Trademark Act. Filing under this clause was an actual admission of descriptiveness. The drawing showed the word "shredded" to which the words "whole wheat" were subsequently added. This ten year clause application was opposed by William E. Williams on the ground of concurrent use. The two tribunals of the Patent Office sustained the opposition and were affirmed by the Court of Appeals of the District of Columbia in a decision reading in part as follows (*Natural Food Co. v. Williams*, 30 App. D. C. 348):

"It appears that . . . Williams . . . early in 1894 built a machine the function of which was to convert the whole grains of wheat into shreds . . . in 1902 he was enabled to build an improved machine and has since constructed others . . . and from that time Williams has continued without interruption to manufacture and sell shredded whole wheat . . . *He also offered in evidence several patents some of which were granted in 1894 which disclose machines for converting cereals, including whole wheat into shreds* . . .

"The appellant for ten years prior to 1905 had not exclusively used the word which it sought to have registered . . . it is open to question whether appellant in fact used these words as a trademark until after the enactment of the ten year clause in 1905. . . . The Natural Food Company claimed the figure (of Goddess Ceres) as its trademark *and not* the words 'Shredded Whole Wheat' *which were apparently then used to merely describe the contents of the package.*" (Italics ours.)

This decision was rendered February 4, 1908.

So that in 1908 plaintiff was specifically and finally refused the ten-year clause monopoly which this Court by pure judicial legislation is attempting perpetually to bestow on it in 1937.

3. Judge Nields found as follows:

"On September 17, 1895 Perky took out a design patent No. 24,688 upon a biscuit shown in accom-[10] panying drawings. One drawing showed a biscuit in plan view. The other drawing showed an end view. This patent would expire by limitation September 17, 1909. In 1908 Judge Kohlsaat declared this design patent invalid upon proof that Perky in his application swore falsely that the design had not been in public use more than two years. Natural Food Company *v.* Henry P. Bulkley, et al. No. 28,530 N. Dist. Ill., East Div. Instead of removing notice of the Perky design patent from the carton or otherwise notifying the public

it was no longer claiming protection under the patent, plaintiff continued for seven years thereafter to warn the public not to make the biscuit as it was under the protection of the government by virtue of this design patent. By its professions and conduct plaintiff secured a monopoly not for fourteen years but actually for twenty years."

Plaintiff accepted and acted on the final judgment in the *Williams* case by specific disclaimer of name and form as follows:

4. **The Dish and one-biscuit registration with "Shredded Wheat" biscuit disclaimed.** (R. V. 4 p. 197). This was filed May 11, 1911 under the 1905 Trademark Act. It illustrates one shredded wheat biscuit in a dish with a spoon and cream. The registration, No. 85186, issued June 30, 1912, states that plaintiff: "has adopted for its use the trademark shown in the accompanying drawing, **no claim being made to the representation of a shredded wheat biscuit**, for **cereal biscuit** in Class 46 Foods and Ingredients of Foods", use claimed since September 15, 1909. This one-biscuit dish is no longer used on plaintiff's packages.

5. The Factory-picture trademark **for "shredded wheat" in Class No. 44**, Foods. Filed December 7, 1911 under 1905 Act. The certificate states that plaintiff: "has adopted and used the trademark shown in the accompanying drawing (factory picture) for shredded wheat, in Class 46, Foods . . . the trademark has been . . . used . . . since March 1, 1910 . . . . No claim is made herein to the words 'The home of Shredded Wheat' ".

[11] Here was specific adoption of the finding of the District of Columbia Court of Appeals that "shredded wheat" was the description of the product and irrevocable disclaimer of (a) the picture of the biscuit and

(b) the words "the home of Shredded Wheat" as trademarks.

6. Ross' indubitable right to make. The Ross biscuit was indistinguishable from plaintiff's and was put out in 1914 or 15 and continued for several years until Ross' operations were terminated by bankruptcy. Ross' right to make was upheld by all four judges in the case (*Humphrey Cornell v. Shredded Wheat Co.*, 250 Fed. 960).

Judge Thomas on the trial held that Ross should be restrained (D. Ex. 126 V. 4 p. 165).

> "unless there is clearly and unmistakably marked on each biscuit words stating that such biscuit is made by the defendant."

In the Court of Appeals Judge Ward dissented, holding that the bill should be dismissed, and Judges Learned Hand and Hough, held that Judge Thomas' injunction which permitted Ross to make but required all biscuits in and out of cartons to be marked, was too broad. The Court of Appeals vacated the injunction as to all biscuits reaching the final consumer in cartons and as to biscuit serv[illegible]art from cartons held that Ross should endeavor to mark, and if he could not do so without destruction of his "indubitable right" to make the injunction applying to the restaurant trade also would be dissolved, which would have left no injunction outstanding. The Ross Company went bankrupt before it could apply to the Court to vacate the restaurant injunction.

But this case left Ross' right to compete, intact, inviolate and unquestioned by either trial or appellate court. That was in 1918. In short, in 1908, the Court of Appeals in Washington held that Williams had concurrent user with plaintiff and that plaintiff could have no exclusive rights in the term "shredded wheat" and plaintiff em- [12] bodied this ruling in its formal stat-

utory disclaimer of both the form of the biscuit and the words "The Home of Shredded Wheat" and clinched the whole thing by describing the product on which its factory trademark was used as "shredded wheat".

Then the Court of Appeals in New York in 1918 fully sustained the indubitable right of Ross to make plaintiff's exact biscuit in 1918. This was in line with plaintiff's specific disclaimer of "the representation of a shredded wheat biscuit" and the words "the home of Shredded Wheat" as its trademark.

So that in 1908 and 1918 plaintiff was held to be barred from any exclusive rights in name or form by two final court judgments and these judicial bars were buttressed by irrevocable disclaimers and by patent expirations as to machinery, process, product and design.

7. Defendant entered the field in the winter of 1921-2 and remained in the field for a year. No suit was brought by plaintiff.

8. Plaintiff's 1924 disclaimer by registration. Plaintiff on November 14, 1923 filed application (R. V. 4, p. 201) to register "shredded wheat" in accordance with the Act of March 19, 1920. This application under the 1920 Act was an admission that the words were descriptive. The Act was put through to permit registration of descriptive words. Use was claimed since January 1, 1894. This is a statutory admission that there was no prior or independent use of shredded wheat before Perky applied for his patents in 1893.

9. Plaintiff's 1926 admission that "shredded wheat" is a descriptive term. (R. V. 4, p. 203). Plaintiff again registered "shredded wheat" under the descriptive term act of 1920.

10. Plaintiff's renewed disclaimer in 1926 of the form of the biscuit. (R. V. 4, p. 205). Plaintiff filed

application under the 1905 Trademark Act for a dish. Shown [13] in the dish are two shredded wheat biscuit. The illustration is clear and indisputable, following that of the 1912 registration above. The shreds are shown and the ends of the biscuit. The registration contains this irrevocable disclaimer of the two shredded wheat biscuit shown in the drawing: "Applicant disclaims any exclusive right to the representation of two biscuits".

Here are the several irrevocable and specific statutory disclaimers of record in this case:

1. January 30, 1912, (R. V. 4 p. 197) "no claim being made to the representation of a shredded wheat biscuit" as shown in the drawing, the words being used in a purely descriptive sense as meaning the biscuit shown in the drawing.
2. November 5, 1912. Applicant has adopted the factory picture as shown as a trademark for "shredded wheat in class 46, Foods and Ingredients of Foods . . . no claim is made herein to the words 'The Home of Shredded Wheat' ".
3. January 15, 1924. Descriptiveness of words formally conceded by registration of shredded wheat under 1920 Act (R. V. 4 p. 201).
4. May 25, 1926. Descriptiveness of words formally conceded by registration of shredded wheat under 1920 Act (R. V. 4 p. 203).
5. August 17, 1926. Plaintiff illustrates two shredded wheat biscuit in drawing and disclaims them as a trademark (R. V. 4 p. 205).

Defendant re-entered the field in 1927 one year after plaintiff's renewed disclaimer of the shredded wheat biscuits shown in the drawing, as its trademark.

The Court incorrectly states that the defendant abandoned the use of the words shredded wheat. This was not done although for a time defendant marketed a portion of its product in the other package referred

to. During that time it continued to sell shredded wheat to the complete knowledge of the plaintiff.

We confidently submit that these irrevocable statutory disclaimers, and the final decisions of two courts of appeal, [14] constitute an absolute bar to the injunction ordered by this Court and that rehearing must be granted if the Court is to be controlled by law.

The foregoing disclaimers are thought to be conclusive upon the matter of rehearing but they do not end the record.

10. Plaintiff's disclaimer of November 1935. In this Court at the first argument in November 1935, Judge Haight as counsel for plaintiff, explicitly conceded defendant's right to make the biscuit in issue, in response to questions asked by Judge Buffington.

11. Judge Haight's disclaimer was specifically made of written record in this cause by the filing of plaintiff's brief on rehearing which specifically concedes defendant's right to make at page 34.

> "We confidently submit that the decree . . . should be reversed and the case remanded with instructions to enter a decree for the plaintiff:
>
> 2. That the defendant be enjoined from manufacturing or selling or offering for sale Whole Wheat Biscuit in substantially the form and shape of plaintiff's biscuit, *unless each biscuit be branded or marked in such a distinctive manner as to state clearly that it is a product of the defendant and not of the plaintiff.*" (Italics ours.)

Defendant relied on the above disclaimer (Defendant's Brief on Rehearing, p. 5) and that closed the matter and put it beyond the power of the Court to disregard or set aside without hearing defendant upon the issue.

In the face of the above record, nowhere touched on in the Court's opinion, it is not seen how rehearing in law or justice can be denied.

[15]

III.

This Court lacks constitutional power to create and enforce the two perpetual monopolies conferred on the plaintiff by the proposed injunction.

This Court proposes to prohibit defendant from making a biscuit in pillow shaped form. Prohibition to make the form is prohibition to make the thing. Plaintiff therefore is given a perpetual monopoly to manufacture an unpatented article of commerce. No court is empowered to create such a monopoly.

The proposed injunction in effect reinstates and makes perpetual the design patent invalidated on account of Perky's false oath by Judge Kohlsaat in 1908 and long since expired by limitation, as well as the long-expired machine and process patents, which plaintiff used during their life to exclude competitors.

Twenty or more judges have now ruled on the right of the public to make this form of biscuit: the District Judge and the judges of the Circuit Court of Appeals of the Second Circuit in the *Humphrey Cornell* case; the District Judge and this Court in this case; the District Judge and the judges of the Circuit Court of Appeals of the Second Circuit in *Kellogg Co. v. National Biscuit Co.*, 71 F. (2d) 662; the trial judge and the five Appellate Judges in the Canadian litigation; the three judges of the Court of Appeals of the District of Columbia in the *Williams* case, affirming two tribunals of the Patent Office.

Not one of these judges ever questioned the indubitable right of every one to make the ordinary, patent-expired article of commerce, shredded wheat, until this Court so decided on this reargument.

Considering the important constitutional question involved and the fact that defendant rested its case on the written concession of the plaintiff, defendant

should be heard before such an injunction is ordered. **[16]** No case is known to defendant's counsel in which any plaintiff has been permitted perpetually to monopolize the functional shape or appearance of a product. This Court once gave a plaintiff such a right and was reversed by the Supreme Court—*Warner v. Eli Lilly Co.*, 265 U. S. 526, reversing *Eli-Lilly Co. v. Warner*, 275 Fed. 752.

In that case, although actual fraud and deception on the part of the defendant were expressly found the Supreme Court said at pages 531-2:

> "The petitioner or anyone else is at liberty, under the law, to manufacture and market an exactly similar preparation containing chocolate and to notify the public that this is being done . . . If petitioner had been content to manufacture the preparation and let it make its own way in the field of open and fair competition there would be nothing more to be said. It was not thus content, however, but availed itself of unfair means, either expressly or tacitly, to impose its preparation on the ultimate purchaser as and for the product of the respondent. Nevertheless, the right to which respondent is entitled is that of being protected against unfair competition not of having the aid of a decree to create or support, or assist in creating or supporting, a monopoly of the sale of a preparation which everyone, including petitioner, is free to make and vend. . . . The use disassociated from the fraud is entirely lawful, and it is against the fraud that the injunction lies. . . .
>
> The Court of Appeals held that Petitioner should be unconditionally enjoined from the use of chocolate. We think this case goes too far, . . ."

The Court then decreed merely that Defendant's containers should be fairly labelled. This the Kellogg Company has always voluntarily done.

This Court has held that because plaintiff, until its pretensions of monopoly were challenged by the

defendant, has succeeded in prolonging the life of its patents for ten years beyond the dates of their expiration, therefore, the dedication resulting from the expiration can be [17] recalled. In this respect, the Court differs from the Circuit Court of Appeals for the Eighth Circuit. In *Centaur v. Heinsfurter*, 84 Fed. 955, where an attempt was made, as here, to distinguish the Singer-June case on a like ground, Mr. Justice Brewer said (958):

> "Counsel seek to distinguish this case in that there the controversy arose immediately after the expiration of the patent, while here the plaintiff continued in the exclusive manufacture of Castoria for some ten years thereafter, and hence it is insisted that, during the time when the right to manufacture and sell was common, it acquired a trademark in the name. But this matter of time makes no difference. But the word has become known as the name of the thing, and as such it could not be appropriated as a trade-mark."

IV.

The Court should not have given plaintiff trade mark rights in the word shredded.

No one has ever asserted that the word wheat is anything but descriptive. The question is thus narrowed to the single word shredded. Is plaintiff's product shredded or not? Plaintiff has always said that it is. This Court now disagrees with the plaintiff and says that it is not.

Plaintiff never, at any time until the necessities of this case required it, considered the word shredded "suggestive" or otherwise than as completely and accurately descriptive of the goods it sells. This Court has ignored the plaintiff's admissions that shredded wheat is descriptive of its goods when in its second opinion it is said:

"Defendant says that the name is descriptive . . . but we do not think it is . . . neither can it be said that the wheat is shredded in the plaintiff's process."

The District Judge properly found the fact that

"throughout these (the plaintiff's) patents the word 'Shredded' is used repeatedly and always as descriptive of the product."

[18] The patents themselves amply support this finding. Examples are in the margin:

Perky Patent No. 520,496, May 29, 1894, for a machine for the manufacture of food products from cereals,

"the resulting product * * * in the form of films, strings, or **shreds** are deposited * * *."
"these **shreds**, strings or films fall upon this roll * * *."
"which catches such **shreds**, strings or films * * *."

Perky Patent No. 521,810, June 26, 1894, for a machine for the manufacture of food products from cereals,

"in uniformly irregular shapes of **shredded** or filamentous form * * *."

Perky Patent No. 532,286, January 8, 1895,

"to receive the **shredded** or thread-like product * * *."

Perky Patent No. 532,480, January 15, 1895, for a roll-machine for reducing cereals for food,

"to the form of long threads or **shreds** * * *."
"which disposes said threads or **shreds** lengthwise * * *."
"discharged in thread or **shred**-like form * * *."
"these **shreds** or threads * * *."
"to receive the **shreds** or threads * * *."
"disposes these continuous **shreds** * * *."
"disposition of the **shreds** or threads * * *."

Perky Patent No. 532,481, January 15, 1895, for a perforated-roll machine for reducing cereals for food,

"for reducing grain to thread-like or **shred**-like form * * *."
"in the form of threads or **shreds** * * *."

Perky Patent No. 532,687, January 15, 1895, for a roll-machine for reducing cereals for food,

"for the reduction of grain to **shredded** or thread-like form * * *."
"the threads or **shreds** of the food product * * *."
"the grain or other material to be **shredded** * * *."
"the material to be **shredded** * * *."
"to receive the **shredded** or filamentous discharge * * *."

[20] Anyone has a right to describe an article made under a patent by the words used by the patentee and

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Perky Patent No. 532,698, January 15, 1895, for a groove roll machine for reducing cereals for food,

"for reducing grain or other articles for food to **shredded** or thread-like form * * *."

"discharged from these grooves in **shred** or thread-like form * * *."

Perky Patent No. 533,551, February 5, 1895, for a roll-machine for reducing cereals for food,

"to reduce the material to **shred**-like or filamentous form * * *."

"discharging the same in thread-like or **shred** form * * *."

Perky Patent No. 533,552, February 5, 1895, for a roll-machine for reducing cereals for food,

"for the reduction of grain to **shredded** or thread-like form * * *."

"the threads of material * * * in **shredded** or thread-like form * * *."

Perky Patent No. 533,553, February 5, 1895, for a roll-machine for reducing cereals for food,

"circumferentially grooved **shredding** roller * * *."

"to thread-like or **shredded** form, the threads or shreds being discharged therefrom * * *."

Perky Patent No. 533,554, February 5, 1895, for a roll-machine for preparation of cereals for food,

"in the shape of continuous fine threads or **shreds** * * *."

"discharged the threads or **shreds** of food * * *."

[19] Perky Patent No. 535,555, February 5, 1895,

"one of the **shredders** in section * * *."

"a series of reducers or **shredders** * * *."

"Each reducer or **shredding** device * * *."

"in the form of continuous threads or **shreds** * * *."

"the discharged threads or **shreds** * * *."

"adherence of the **shredded** or threaded product * * *."

"the threads or **shreds** of material * * *."

Perky Patent No. 548,086, October 15, 1895, for bread and method of preparing same,

"their rough and porous thread-like or **shred**-like form * * *."

Perky Patent No. 571,284, November 10, 1896, for machine for reducing and preparing cereals for food,

"to thread-like or **shredded** form * * *."

"a series of reducers or **shredding**-heads * * *."

"reduced by their grooved rollers to **shred** or thread-like form * * *."

"a layer of the **shred**-like product * * *."

"a series of reducing or **shredding** heads * * *."

"the series of reducing or **shredding** heads * * *."

"in a grain **shredding** or reducing machine * * *."

"a grain **shredding** or reducing machine * * *."

"in a grain reducing or **shredding** machine * * *."

Perky Patent No. 571,285, November 10, 1896, for machine for reducing cereals,

"a small quantity of the **shredded** or filamentous product * * *."

in addition to illustrate the article itself from the drawings.

Perky Patent No. 598,745, February 8, 1898, for roll reducing-machine for preparing food,

"the prepared grain above referred to or **shreds** of the same * * *."

"the discharge of the **shreds** or strips * * *."

Perky Patent No. 614,338, November 15, 1898, for machine for reducing cereal food products to form for use,

"several sets or gangs of **shredding** devices * * *."

"the number of **shredding**-heads in each set * * *."

"these roll-**shredders** discharge the material in the form of threads or **shreds** * * *."

"the threads or **shreds** are transferred * * *."

"the **shredding** or reducing head * * *."

"a comminuting or **shredding** effect * * *."

Perky Patent No. 618,288, January 24, 1899, for apparatus for making folded wafers,

"the reducing or **shredding** rolls * * *."

"the **shreds** or threads of the material * * *."

"to **shredded** form, the **shreds** or threads being discharged * * *."

"the threads or **shreds** are transferred * * *."

Perky Patent No. 625,696, May 23, 1899, for a machine for reducing and baking cereals in form,

"continuous layers of **shred** or thread-like form * * *."

"continuous threads or **shreds** * * *."

Perky Patent No. 667,892, February 12, 1901, for apparatus for manufacturing cereals into forms of food or bread,

"to **shred** or thread-like form, each head depositing a layer of the **shred**-like threads * * *."

Perky Patent No. 678,127, July 9, 1901, for machine for reducing food material to form and distributing same,

"reduced to **shred** or thread-like form * * *."

[20] Perky Patent No. 678,625, July 16, 1901, for penumatic panning or distributing machine,

"formed by **shredding** the grain * * *."

Perky Patent No. 681,656, August 27, 1901, for continuous cutting-machine,

"machines for cutting **shredded** wheat * * *."

Burbank Patent No. 684,789, October 22, 1901, for distributive depositing or panning machine,

"sections or cakes of **shredded** wheat * * *."

Perky Patent No. 713,795, November 18, 1902, for filamentous cracker,

"a cracker of filamentous or **shredded** wheat or other grain * * *."

Perky Patent No. 797,604, August 22, 1905, for machine for preparing food,

"the fibered, filamentous, or **shredded** form of the reduced grain * * *."

"which **shred** the grain * * *."

It was said in *Bristol Co. v. Graham* (C. C. A. 8) 199 Fed. 412:

> "The defendant or any one else having a right to make the lacing, he had a right to describe it as it was described in the specification in the patent. In describing it he was not limited to the words used by the patentee in telling what the patent was. He was entitled to describe it by drawings. The registered trade-mark is nothing more than a pictorial description of the article made."

Plaintiff has always used shredded and shredded wheat descriptively in presenting its product to the public. Plaintiff's carton announced: "Shredded Wheat is made of the whole wheat and is made digestible by steam cooking, shredding and baking." In its advertisements, plaintiff speaks of "our shredding process"; "The whole wheat steam cooked, shredded and baked", "just whole grains of wheat steam cooked, shredded and baked to a crisp golden brown." "It is the shredding process that puts the 'eat' in the whole wheat."

These are merely a few of literally thousands of instances. If the Court is interested in pursuing the [21] matter further we refer to pages 3 to 13 of defendant's "Memorandum after Rehearing," where all of these statements are quoted and record references given. Plaintiff has said for over forty years that its product is shredded and has used the words shredded wheat as a description. For this Court to say that the word shredded does not describe plaintiff's product, is not only to disregard the facts of language, but ignores the plaintiff's own assertions and the specific finding of fact by the Court below and in this Court's first opinion, as follows:—"Moreover, it is clear that the word shredded was a descriptive word, aptly describing the process to which certain grains were sub-

jected by anyone using shredded or mangling in processing wheat grains." See also the almost identical language and finding in *Natural Food Co. v. Williams*, supra.

V.

The ten-year proviso of the Federal Trade Mark Statute (U. S. C. Tit. 15, Par. 85) does not apply.

The *McKesson-Robbins* case cited on page 9 of the Court's opinion, was reviewed in a bill under Section 4915 of the revised statutes brought by the defeated party. The Circuit Court of Appeals for the Second Circuit (53 Fed. (2d) 342; 53 Fed. (2d) 1011) vacated the decree of the Court of Appeals of the District of Columbia and cancelled the registered marks involved.

If public policy requires a new ten-year period other than that next preceding the date of the passing of the 1905 Trade Mark Act, this should be for Congress to decide. No such public policy has ever been declared by Congress or by any court.

The Court, in referring to the Ten Year Clause of the Trade Mark Act of February 20, 1905, apparently overlooked the fact that the plaintiff attempted to secure protection under this provision of the law and failed **[22]** (*Natural Food Co. v. Williams*, 30 App. D. C. 348) where shredded wheat was held to be descriptive and not used by plaintiff as a trade mark. Plaintiff acquiesced in this ruling by applying for registration of the same mark under the Act of 1920 (U. S. C. Title 15, Sec. 121). This act, unlike the Act of 1905, (U. S. C. Title 15, Sec. 96) confers no presumption of validity (*Rouss v. Winchester Co.* (C. C. A. 2), 300 Fed. 706, 712; *Kellogg v. National Biscuit Co.* (C. C. A. 2), 71 Fed. (2d) 662, 666), so holding with respect to the identical marks involved here and between these parties.

Moreover the plaintiff acquiesced in denial of registrations as above set forth, and others in which it expressly disclaimed all right either to the name or to the representation of the form.

The cases cited in the opinion of the Court on this point are all cases in which the ten-year proviso—which plaintiff unsuccessfully invoked—actually applied. In none of them had an unsuccessful attempt been made to qualify under it and in none had there been a disclaimer.

VI.

The words shredded wheat have no secondary meaning and even if they had defendant has a right to use them in a non-deceptive way.

In its present opinion, the Court says (p. 5) "when the name has acquired a secondary meaning and has come to stand for the product itself, to allow the defendant to use it as it has done and thus acquire the trade that rightfully belong to the plaintiff . . . ". The District Judge, who considered the evidence, found as a fact (Rec. 225) that there was no secondary meaning of the term shredded wheat. This Court now says that a name has acquired a secondary meaning when "it has come to stand for the product itself". This is not secondary meaning. A name [23] which stands for the product itself, identifies the product, not the maker. Secondary meaning is exactly the reverse. A name, to have a secondary meaning, must stand for the maker, not the product.

If the Court is right in holding that plaintiff has had such continuous occupation of the shredded wheat field that no competitor may now enter it, then the Court is necessarily wrong in holding that secondary meaning has arisen, as secondary meaning can be found only where there is competition. Secondary meaning

is distinguishing meaning. To be distinguishing there must be something to distinguish from.

The so-called doctrine of secondary meaning, and indeed the term itself, originated in England, whence our law on the subject was derived.

The "secondary meaning"-rule was first applied to a descriptive term in *Reddaway v. Banham* (1896) A. C. 199, 13 R. P. C. 218—the celebrated Camel Hair belting case—and within a few years, due to efforts to misapply it, was explained by the House of Lords in *The Cellular Clothing Company v. Maxton and Murray*, 16 R. P. C. 397. Lord Davey saying, (409, 10):

> "The other observation which occurs to me is this, that where a man produces or invents, if you please, a new article, and attaches a descriptive name to it, a name which, as the article has not been produced before, has of course not been used in connection with the article, and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the Plaintiffs' goods alone, is of a very slender character, for this very simple reason because the Plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, and no merchant or manufacturer to resort to except the Plaintiff. Of [24] course, my Lords, that is a matter of express decision in the case of a Patent. If a man invents a new article and protects it by a Patent, then, during the term of the Patent, he has of course a legal monopoly, but when the Patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the Patentee has attached to it during the time when he had the legal monopoly of the manufac-

ture. But, my Lords, the same thing in principle must apply where a man has not taken out a Patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article—all the world may make the article and all the world may tell the public what article it is they make, and for that purpose they may *prima facie* use the name by which the article is known in the market."

. . . . . .

"My Lords, the second class of proof is that of witnesses, who say in effect this (I will take one of the best and I think one of the earliest witnesses —*Mr. Hanley*): 'If I heard anybody in the trade speak of "Cellular goods" I would understand that he meant the product of the Cellular Clothing Company'. Well, my Lords, so long as the Cellular Clothing Company were the only company who were making cellular goods that would not be astonishing, and so long as they retain the monopoly no doubt that might be the case; but, as I have already said in speaking of the proposition generally, it is in fact very slender evidence upon which to found the superstructure which the Pursuers' Counsel endeavoured to erect upon it, and indeed unless the gentlemen who give evidence of that kind know that there are other manufacturers making similar classes of goods there is nothing to compare it with, and they are merely stating a fact."

In this case the plaintiff, in its bill of complaint, in speaking of shredded wheat avers that "said product was [25] an entirely new product", (Rec. 12). Therefore, the plaintiff having invented or produced a new article and given the name shredded wheat to it, that name became the descriptive name of the article and

was incapable of exclusive appropriation. No one could make this product during the existence of the patents but when the patents expired and the product could be made by others the name and form of course could be used, the only obligation on the new comer being to use both in such a manner as to prevent deception as to the maker. This duty, according to the undisputed facts in this case, defendant has discharged.

In *Kellogg Toasted Corn Flake Co. v. Quaker Oats Co.*, 235 Fed. 657, the Circuit Court of Appeals for the Sixth Circuit held that the plaintiff in that case could have no exclusive rights against the fair use of the name corn flakes for breakfast food even though ample showing of secondary meaning existed.

This Court has previously held in *Barton v. Rex Oil*, 2 Fed. (2d) 402, 404 and in *Fawcett v. Popular Mechanics*, 80 Fed. (2d) 194, 199, that however clearly secondary meaning may be proved, the secondary meaning mark never becomes a trade mark implying the complete exclusion of use by others. This is the rule also in the *Second Circuit*. *Chas. Broadway Rouss, Inc. v. Winchester Co.*, 300 Fed. 706, 714, *Scandinavian Belting Co. v. Asbestos & Rubber Works*, 257 Fed. 937, 951. This court now apparently holds that such secondary meaning marks may become valid common law trade marks so as to be "good against the world"—to use Judge Woolley's phrase in the Dyanshine case—where this Court then held this could never happen.

The Supreme Court holds that even in the case of a valid common law and registered trade mark there is no exclusive right "good against the world"—and that non-deceptive use is legally permissible. In *Prestonettes, Inc. v. Coty*, 264 U. S. 359, Mr. Justice Holmes speaking of the rights of a trade mark owner said (p 368):

[26] "It (a trade mark) does not confer a right to prohibit the use of the word or words. It is not a copyright . . . A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his. . . . When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo."

VII.

Defendant has not misrepresented its goods. Its use of the name shredded wheat and the form of the biscuit has not deceived or misled anyone and has not produced confusion.

Defendant, in the Court's latest opinion, is held guilty of unfair competition even though there is no suggestion that anyone has been confused or that any purchaser has been deceived.

In the original opinion, filed January 16, 1936, the Court adopted the findings of fact made by Judge Nields, saying: "Now that no confusion, misleading or deceit is shown in this case, is clear", and, "In that regard we agree with the Court's summary". The opinion then quotes Judge Nields' finding of fact that there has been no confusion of goods or deception of the public.

The Court's second opinion refers to the transitory use on defendant's containers of the words "the original bears this signature", which was taken from defendant's well known Corn Flake package. No complaint as to this appears in the bill of complaint, no prayer for relief is directed to it and it has long since been discontinued. It was raised for the first time as an afterthought long after the trial and is in no way involved in this case.

The cartons which are in issue are reproduced in Judge Nields' opinion below. They do not carry this

[27] phrase which in advertising appeared on a negligible number of cartons and has long since been dropped. It was never a prominent feature and never caused any confusion. The plaintiff did not suffer from this phrase which was an accidental carry over from defendant's corn flake cartons.

It is therefore submitted that the Court must have overlooked the fact that there can be no unfair competition without some confusion or tendency to it. However long plaintiff or other manufacturers continue to make this product, some confusion or passing off or the probability of it, must be present to constitute unfair competition. In this case none appears and there can be none. It is therefore respectfully submitted that, regardless of the points raised in the opinion on rehearing, still the plaintiff is not entitled to an injunction of any sort.

The law is as stated by the Supreme Court in *Howe Scale Co. v. Wyckoff, Seamans v. Benedict,* 198 U. S. 118, at p. 140:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another; and if the defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

As the Supreme Court held in *Standard Paint Co. v. Trinidad Asphalt Manufacturing Co.*, 220 U. S. 446 (which the Court cites in its present opinion):

> "There is something more of precision given to it in Delaware and Hudson Canal Co. against Clark, 13 Wall 311, 323, 20 L. Ed. 581, 583, where it is said that the essence of the wrong for the violation of a trademark 'consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false rep-

resentation is directly or indirectly made that the party who appeals to a Court of Equity can have relief'."

[28] The Court appears to have been misled by plaintiff's brief with respect to this case. It is cited in plaintiff's brief at page 67. The reference there to the opinion of Judge Sanborn does not state that his is a dissenting opinion or that the majority opinion to the contrary was unanimously affirmed by the Supreme Court, 220 U. S. 446.

CONCLUSION.

If the Court intended to stop unfair competition as the term is used in the cases, namely competition which has an element, deception or the likelihood of it, plaintiff's case here fails on the facts. There is an unequivocal finding that defendant's acts do not confuse or deceive. This being so they do not damage the plaintiff except as they interfere with the monopoly it has so long enjoyed. If, on the other hand, the Court intended to create a new kind of unfair competition—to enjoin as unfair, a kind of competition hitherto, as far as we are aware, regarded as legitimate, we do not wish the Court to do so under any misapprehension. If it is the purpose to limit the right of anyone to make the article of an expired patent in the only shape it has ever had and call it by the only name it has ever borne —concretely to make shredded wheat and call it that, without any deceiving factor—then this court goes farther than any court has ever gone before. It makes new, and we submit, unsound law, not only contrary to accepted principles but in violation of the express provisions of the Constitution of the United States that patents exist for "limited times" and not in perpetuity and that disclaimers, statutory, oral and in printed briefs, are irrevocable.

We regret that these points were not pressed upon the Court upon the argument or in the brief, but since they were not stressed by the Court or opposing parties, a rehearing would constitute defendant's first opportunity to present them orally.

[29] Reconsideration and reversal are requested, and if this cannot be granted, it is respectfully suggested that the issues herein be certified to the Supreme Court of the United States.

Respectfully submitted,

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I, CRICHTON CLARKE, one of the Counsel for Appellee, hereby certify that I believe the foregoing petition for rehearing to be well founded in law and in fact and that it is not interposed for the purpose of delay.

CRICHTON CLARKE,
of Counsel for Appellee.

NOTICE OF MOTION FOR RESTRAINING ORDER, ETC.

(Filed May 18, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

PLEASE TAKE NOTICE that on Thursday, May 13, 1937, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall apply to the United States Circuit Court of Appeals for the Third Circuit or to one of the members thereof at the courtroom of said court in the Post Office Building, Ninth and Chestnut Streets, Philadelphia, Pennsylvania, for an order restraining and enjoining the plaintiff, its agents, attorneys, servants, employees and all persons under its control; from falsely representing to the trade and public that the defendant the Kellogg Company has been enjoined from the manufacture and sale of shredded wheat or from using the name, shape or form of the said product and further restraining and enjoining the plaintiff from in any way using the last decision of this Court or any parts thereof for advertising publicity or trade purposes or otherwise attempting to injure and damage the business reputation of the defendant or from exploiting the business of the plaintiff through the use of the said decision, and from suggesting to the trade that the stocks of Kellogg's shredded wheat

biscuit should be rejected or returned to the defendant or in any way competing unfairly with the defendant, pending the final determination of this cause and for such other and further relief as to this Court may seem just and proper.

Such application will be based upon the affidavits of Crichton Clarke, Esq., John N. Kane and Charles Miller, all sworn to the tenth day of May, 1937, and hereto annexed, together with the exhibits referred to in said affidavits.

Yours, etc.,

CRICHTON CLARKE,
Counsel for Defendant-Appellee.
Office and P. O. Address,
36 West Forty-fourth Street,
Borough of Manhattan,
New York, N. Y.

To: CHARLES A. VILAS,
Counsel for Plaintiff-Appellant,
36 West Forty-fourth Street,
New York, N. Y.

DEPOSITION OF CHARLES MILLER.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

CHARLES MILLER being duly sworn deposes and says:

I reside in Rego Park, Queens, Long Island, and am a jobber salesman for the Kellogg Sales Company, Eastern representatives of Kellogg Company, defendant-appellee herein. My territory covers Manhattan and Brooklyn.

During the past three weeks, particularly in the last week, in calling upon my customers, all of whom are and have been for many years purchasers of various products of the Kellogg Company, I have been told that they would not buy any shredded wheat biscuits from the Kellogg Company. In each instance that I have been told this they have stated that the National Biscuit Company told them that the Kellogg Company was under injunction and that they could not purchase further biscuits or sell them to their customers without becoming involved in the litigation. Among the wholesalers whose buyers have stated this to me are Austin Nichols & Co., Seeman Bros., R. C. Williams & Co., and Francis H. Leggett & Co.

Various jobbers have also stated to me that they could not sell any further orders of this product to the retailers since the retailers had been warned by National Biscuit Company representatives that they would become involved in this litigation if they purchased or sold any further stock of this product.

The buyer for Seeman Bros. showed me certain publicity consisting of a mimeographed statement which he would not permit me to take or copy. He also stated that a salesman for the National Biscuit Company and an "executive of the Company" had just called upon him, furnished him this material and advised him that he could not legally sell the product. As a result of this he stated they will not fill any further orders for this product without a written agreement of indemnity and stated that they would return the stock consisting of some two hundred cases at that time.

From my conversations with wholesalers and jobbers and my observation of the trade, it is apparent that the National Biscuit Company has been using portions of the decision of this Court to intimidate wholesalers and jobbers as well as retailers throughout my territory from continuing the sale of the defendant's product without awaiting the final decision on this cause and has attempted at the same time to increase the sale of their own shredded wheat biscuit as well as their other products.

CHARLES MILLER.

Sworn to before me this tenth day of May, 1937.

LENA ROSEN,
(Seal) *Notary Public.*
N. Y. Co. Clk.'s No. 165, Reg. No. 9-R-245.
Kings Co. Clk.'s No. 66, Reg. No. 9288.
Commission expires March 30, 1939.

DEPOSITION OF CRICHTON CLARKE.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

CRICHTON CLARKE being duly sworn deposes and says:

I am an attorney at law and one of the counsel for the defendant-appellee in the above-entitled cause. I am making this affidavit on behalf of the defendant-appellee in support of an application to enjoin the plaintiff-appellant from circulating in the retail trade various misleading statements and otherwise publicizing the recent decision in this Court on rehearing and using and attempting to use such decision and misleading excerpts therefrom to damage and injure the reputation and trade standing of the defendant-appellee and to increase and promote the sales of plaintiff-appellant's shredded wheat and other products. Annexed hereto and marked Exhibits A, B, C and D are copies of printed and mimeographed circulars which I am informed and believe have been circulated broadside throughout the grocery trade over the entire country at the instigation of the plaintiff-appellant.

Exhibit A as I am informed and believe was secured by a salesman of the defendant-appellee in Pittsburgh, Pennsylvania; Exhibit B at Lynchburg, Virginia; Exhibit C at San Francisco, California, and

Exhibit D at Syracuse, New York. These are put out by wholesale grocers and chain stores at the instigation of plaintiff-appellant.

The sources of my information and the grounds of my belief as to the source and origin of these documents are telephone conversations with the officers of the defendant-appellee corporation in Battle Creek, Michigan, personal conferences with one of such officers in New York, copies of inter-office correspondence and memoranda from salesmen and the affidavits annexed hereto. None of these officers or salesmen are available in New York or Philadelphia at the present time.

In my opinion the excerpts quoted from the decision of this Court place an unfair emphasis upon one incident referred to by the Court rather than upon the merits of the entire controversy or upon the so-called rights of this plaintiff. It is also my opinion that they endeavor to prejudice the general business of the defendant-appellee by reference to this particular incident and to attempt to exploit the plaintiff-appellant's business in all its products by reason of reference to increased discounts and other matters having nothing to do with this cause without awaiting the determination of the petition for rehearing pending herein or of an application for certiorari which defendant-appellee will make should such petition for rehearing be denied.

This publicity being circulated by plaintiff-appellant represents an attempt to use the decision of this Court as an advertising wedge and publicity and to spread this decision throughout the entire trade as news, thereby using the decision of this Court as free publicity.

CRICHTON CLARKE.

Sworn to before me this tenth day of May, 1937.

MARGARET C. HAYDEN,

(Seal) *Notary Public, Westchester County.*

N. Y. Co. Clk.'s No. 717, Reg. No. 9-H-462.

Commission expires March 30, 1939.

DEPOSITION OF JOHN N. KANE.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

JOHN N. KANE being duly sworn deposes and says:

I reside at No. 170-17 Mitchell Avenue, Flushing, Long Island. I am the district sales manager of the Kellogg Sales Company, Eastern sales representatives of the Kellogg Company of Battle Creek, Michigan, and am in charge of the sales of all Kellogg products throughout the States of New York, Connecticut and New Jersey. I have read the affidavits of Crichton Clarke and Charles Miller and have seen the exhibits annexed to the affidavit of Mr. Clarke.

From my conversations with salesmen both in the office and by telephone in other territories, I am informed and believe that the plaintiff-appellant herein has circulated publicity matter identical with and similar to the exhibits annexed to the affidavit of Crichton Clarke broadcast throughout my territory reaching all wholesalers, jobbers and retailers in the grocery trade. Seeman Bros., wholesalers, and Sheffield Farms, a chain store, have requested me to give them written agreements of indemnity against any damages resulting from the disposition of their present stock of Kel-

logg Company shredded wheat biscuits and various others have made similar requests to my salesmen as I am informed and believe.

JOHN N. KANE.

Sworn to before me this tenth day of May, 1937.

LENA ROSEN,
(Seal) *Notary Public.*
N. Y. Co. Clk.'s No. 165, Reg. No. 9-R-245.
Kings Co. Clk.'s No. 66, Reg. No. 9288.
Commission expires March 30, 1939.

Manufacturer-Jobber Associates, Inc.

SPONSORING

FAIRLAWN STORES

11 WEST 42nd STREET
NEW YORK CITY

Phone:
LAckawanna 4-3382

#804-April 26,1937.

TO FAIRLAWN UNITS:

NATIONAL BISCUIT'S SHREDDED WHEAT

In connection with the May 7th-8th scheduled featured sale of Shredded Wheat, the National Biscuit Co. has asked me to quote to you the following excerpts from the National Biscuit Co.'s recently issued Bulletin:-

"NATIONAL BISCUIT COMPANY
WINS SHREDDED WHEAT DECISION
Court Enjoins Kellogg Company from Use of
Shredded Wheat in Name, Shape or Form.

PHILADELPHIA: April 12: U.S.Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Co. vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W.K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N.Y. since 1900."

We comply with N.B. Co's request because of their cooperation with us by way of Headquarters allowance, Table Topics Advertising, Entertainment Contributions, etc.

Fairlawn Jobbers will know better than we do what they must do about their stocks of Kellogg's Product, labelled, "Shredded Wheat Biscuit" and what can they must use in advertising this Product.

The National Biscuit Co. also points out that in the case of several Units, at least, if they would concentrate attention on the National Biscuit Co. lin-

EXHIBIT "A"

EXHIBIT "A"

8. Headquarters allowance, Table Topics Advertising, Entertainment Contributions, etc.

Fairlawn Jobbers will know better than we do what they must do about their stocks of Kellogg's Product, labelled, "Shredded Wheat Biscuit" and what can they must use in advertising this Product.

The National Biscuit Co. also points out that in the case of several Units, at least, if they would concentrate attention on the National Biscuit Co. line, total retail biscuit sales would increase and the allowance basis would run higher than the present 3%.

C.C.Jolliffe, Secretary.

P.S. The New Castle Unit March sales of National Biscuit's average $30.10 per store earning 1/2% extra Headquarters Allowance.

CCJ.

2139

66

EXHIBIT B.

COURT RULING.

In one of the most sweeping decisions ever handed down by the Courts, the Kellogg Company has been disbarred from the further manufacture or sale of their SHREDDED WHEAT, as such. The courts have held that the right to use the words SHREDDED WHEAT is an exclusive property of the National Biscuit Company.

The decision will, of course, disbar jobber and retail sales of any product termed SHREDDED WHEAT manufactured by anyone now or in the future, other than the NATIONAL BISCUIT COMPANY.

EXHIBIT C.

BOTSFORD, CONSTANTINE & GARDNER
Russ Building, San Francisco

FOR IMMEDIATE RELEASE

NATIONAL BISCUIT CO. WINS SHREDDED WHEAT DECISION

Court Enjoins Kellogg Co. from Use of Shredded Wheat in Name, Shape or Form

PHILADELPHIA: April 12: U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade-name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the Court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y. since 1900.

2 copies received May 10, 1937, 4 P. M.

C. A. VILAS,
Atty. for Plaintiff.

PUSH SHREDDED WHEAT NOW!

The U. S. Circuit Court of Appeals reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff".

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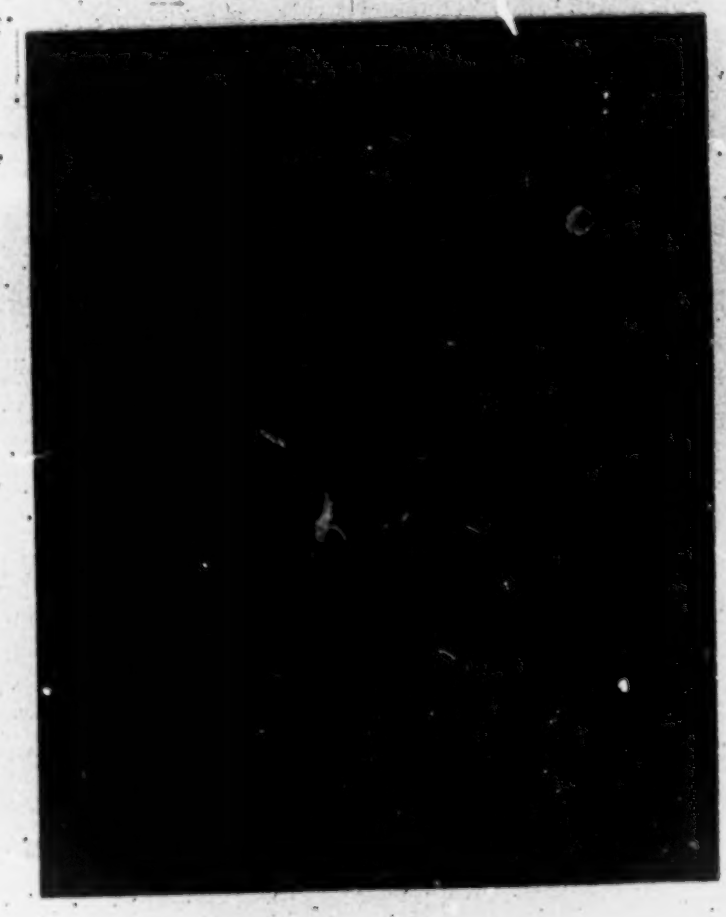
". . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y. since 1900.

The publicity given the above will create an increased consumer demand for "Shredded Wheat" made by the National Biscuit Company. You and your retailers should get your share by aggressive merchandising. The N.B.C. salesmen are equipped to give you advertising displays and other necessary help to carry on an active campaign.



BIDDLE PURCHASING COMPANY

107 CHAMBERS ST., NEW YORK, N. Y.

EXHIBIT "D."

8143

NOTICE OF MOTION FOR WITHDRAWAL OF OPINION, ETC.

(Filed May 18, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

PLEASE TAKE NOTICE that upon the notice of motion herein served upon you on the tenth day of May, 1937, and upon the affidavits of Charles A. Miller, Crichton Clarke and John N. Kane thereto annexed and upon all the exhibits forming part of such application, the undersigned will upon the return thereof and under the prayer of said notice of motion "for such other and further relief as to the Court may seem just and proper" apply to the Court pursuant thereto for an order granting further relief as follows:

1. Denying to the plaintiff-appellant herein any and all relief by virtue of the opinion on rehearing of this Court.

2. Withdrawing the said opinion of this Court and denying the issuance of a mandate thereunder and reinstating the original decision of this Court.

To Charles A. Vilas, Esq.,
Counsel for Plaintiff-Appellant,
36 West 44th Street,
New York, N. Y.

CRICHTON CLARKE,
Counsel for Defendant-Appellee.
36 West 44th Street,
New York, N. Y.

Copy received May 15, 1937.

CHARLES A. VILAS,
Attorney for Plaintiff-Appellant.

AFFIDAVITS IN OPPOSITION TO APPELLEE'S MOTIONS.

(Filed May 18, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

AFFIDAVIT OF CHARLES A. VILAS.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

CHARLES A. VILAS, being duly sworn, deposes and says:

1. I am an attorney and counsellor-at-law and reside at Rye, New York. I am one of the attorneys for the plaintiff in the above entitled action and have been in charge for National Biscuit Company of the prosecution of this action since its inception in 1932. I am familiar with all the proceedings had herein and in other and previous litigation between The Shredded Wheat Company and the Kellogg Company.

2. I have read the affidavits submitted by the defendant in support of its motion for a restraining order against the plaintiff in this action and am familiar with the contents of the same. Immediately after the rendition of this Court's decision on April 12th, 1937, the officers of the National Biscuit Company were advised by me of the fact, and were cautioned by me that while it was entirely lawful and proper that announcement

of the decision of the Court might be made through the press and by communications with its customers, no other or further use of the decision might be made in any such manner as to result in unfair competition or in undue injury to the defendant company. They were further advised that all inquiries by customers as to the legal effect of the decision or as to their future conduct with the Kellogg Company by reason of the decision should not be answered but all customers should be required to determine such questions for themselves. To the best of my knowledge and belief these instructions have been faithfully complied with by the National Biscuit Company, its officers and employees.

3. It will be noted that the allegations contained in the affidavits filed by the defendant in support of its motion are all hearsay and second-hand statements. There are filed herewith affidavits from the salesmen and executives of the National Biscuit Company who have actually contacted the customers mentioned in the defendant's affidavits and their positive first-hand statements and denials are entitled to greater weight and credence than the unsupported hearsay produced by the defendant.

4. Shortly after the decision of this Court on April 12th, 1937, there appeared in a magazine known as "Printers' Ink", issue of April 29th, 1937, page 76, an article apparently sponsored by the defendant company, a true copy of which is attached hereto and marked Exhibit B. Said article refers to a suit brought by the Kellogg Company, defendant here, against National Biscuit Company, plaintiff here, in the Southern District of New York for attempted monopoly in violation of the Sherman Anti-Trust Act and states that it involved the same set of facts and that the decision of the Circuit Court of Appeals for the Second Cir-

cuit upheld the Kellogg Company's complaint and is, therefore, in conflict with the decision of this Court.

5. Inasmuch as the inference carried in said article is erroneous, unfair and deceptive it seems appropriate in this place to record for the information of this Court the true facts. On August 4th, 1932, shortly after the commencement of the suit at bar, the Kellogg Company filed two actions against the National Biscuit Company in the United States District Court for the Southern District of New York, both of them purporting to be based upon alleged attempted monopoly by the National Biscuit Company of the manufacture and sale of Shredded Wheat Biscuit in violation of the Sherman Anti-Trust Act. One of the allegations in the complaints in said actions was that National Biscuit Company had brought a vexatious and unjustifiable action against the Kellogg Company in bad faith in the United States District Court for Delaware. This was the action which has just been decided by this Court in favor of the National Biscuit Company. The decision of this Court is a conclusive answer to the suit in the Southern District of New York and, therefore, the allegation of the defendant in the article referred to, reiterated in its motion for a rehearing recently filed herein, is untrue.

6. Neither is it wholly true that the Circuit Court of Appeals for the Second Circuit has upheld the complaint in the action which was before it. One of the two actions commenced by the defendant against the plaintiff was dismissed by Judge Bondy for lack of jurisdiction, holding that it did not state any cause of action under the Anti-Trust Law and was, therefore, brought in the wrong venue. The second case, a cause of action at law for treble damages, met a like fate at the hands of Judge Caffey but his action was reversed by the Circuit Court of Appeals for the Second Circuit which held that so much of the com-

plaint as dealt with the actions of the National Biscuit Company subsequent to its acquisition of The Shredded Wheat Company would "withstand demurrer". Judge Caffey's ruling as to the balance of the complaint which dealt with events taking place prior to 1930 was affirmed. Subsequently Judge Caffey struck out large portions of the plaintiff's complaint absolutely and other portions conditionally upon the plaintiff amending its complaint. This occurred in the fall of 1934 since which time plaintiff, Kellogg Company, has not yet succeeded in filing an amended complaint to the satisfaction of Judge Caffey. The case, therefore, is not yet at issue.

7. Counsel for the National Biscuit Company, plaintiff in this case, are familiar with the rules of the courts concerning the use in advertising of decrees in patent and trade-mark cases and have carefully advised the officers of the National Biscuit Company concerning their rights and obligations in that regard. I have made diligent inquiry and as a result of my conversations with officers and employees of the National Biscuit Company I verily believe that no improper use has been made by that company or anyone in its employ of the opinion of this Court, and that the difficulties of which the defendant is complaining are those naturally incident to a decision of this kind which finds the defendant guilty of practices regarded by courts of law as unfair.

CHARLES A. VILAS.

Sworn to before me this 13th day of May, 1937.

(Seal) GEORGE H. KLEIN,
Notary Public, Bronx County.
Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.
N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.
Kings Co. Clerk's No. 47, Reg. No. 9188.
Commission expires March 30, 1939.

EXHIBIT B.

APPEALS SHREDDED WHEAT CASE.

The Kellogg Company of Battle Creek, Mich., announced on Monday of this week that it was filing a petition for review in connection with the reversal of the decision made by the U. S. Circuit Court of Appeals in Philadelphia on the Shredded Wheat trademark, announced April 12. If the petition is denied, the company expects to apply for a writ of certiorari from the Supreme Court of the United States.

The litigation is between National Biscuit Company and the Kellogg Company over the Shredded Wheat product.

The suit was first tried in the U. S. District Court at Wilmington, Del., with a decision favorable to the Kellogg Company. This decision was appealed and affirmed by the U. S. Circuit Court of Appeals in Philadelphia prior to the reversal just announced.

On the same state of facts as are involved in the Delaware litigation, the Kellogg Company brought suit against National Biscuit Company in the Southern District of New York, alleging violation of the Sherman Anti-Trust Act for attempted monopoly of the manufacture and sale of patents-expired Shredded Wheat.

The Circuit Court of Appeals of the Second Circuit unanimously upheld the Kellogg Company's complaint as constituting a good cause of action under the Sherman Anti-Trust Act.

The decision of the Court of Appeals in Philadelphia is, therefore, apparently in conflict with the decision of the Court of Appeals in New York.

AFFIDAVIT OF CLYDE S. STILWELL.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

CLYDE S. STILWELL, being duly sworn, deposes and says:

1. I reside at 133 East 64th Street, New York City, New York, and am an attorney and counsellor-at-law of the State of New York and vice-president and general counsel of National Biscuit Company, plaintiff above named, and as such am in charge of its legal affairs.

2. I have read the notice of motion and the affidavits in support thereof, each verified May 10, 1937, and am familiar with the contents thereof.

3. Immediately after the decision of this Court, filed April 12, 1937, I instructed Urban Kreidler and other officials of the sales department of National Biscuit Company that it is legal and proper for National Biscuit Company to advise its customers of the fact of the making of the decision by this Court; I advised them further that it should not be used in any manner whatsoever as a threat or an unfair means of sales propaganda and that all customers of the company

should be permitted to draw their own inferences as to what action, if any, they should take with respect to their dealings with the defendant.

4. Upon information and belief, based upon conversations with officials of the sales department and upon correspondence, these instructions have been faithfully carried out by the officials and employees of National Biscuit Company and to the best of my knowledge and belief no improper or unfair use has been made by the company of the decision.

CLYDE S. STILWELL.

Sworn to before me this eleventh day of May, 1937.

(Seal) A. T. BULLOCK,
Notary Public, Queens Co. No. 204.
Registered in Queens Co. No. 152.
Certificate filed in New York Co. No. 62.
Registered in New York Co. No. 8-B-47.
Commission expires March 30, 1938.

AFFIDAVIT OF WILLIAM W. ROSSITER, JR.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

WILLIAM W. ROSSITER, JR., being duly sworn, deposes and says:

1. I reside at 281 Montrose Avenue, South Orange, New Jersey, and am the sales manager of National Biscuit Company in charge of sales of all of the products manufactured by the company.

2. Immediately after the decision of this Court in the above-entitled case, filed April 12, 1937, I was advised of that fact by the legal department of National Biscuit Company and instructed that it would be proper for the sales department to advise the trade of the fact of the decision but that it should not be used in any manner whatsoever as a threat or as a means of intimidation to the trade and the trade should be permitted to take such action as they might be advised without the suggestion of any representative of the National Biscuit Company. These instructions were passed on to my subordinates who contact

[illegible] Company has been manufactured at Niagara Falls, N. Y. since 1900.

the trade and to the best of my knowledge and belief have been wholly complied with.

3. I have read the affidavits of Crichton Clarke, John N. Kane and Charles Miller, each verified May 10, 1937, and upon information and belief, based upon my instructions to my salesmen and upon correspondence and conversations with salesmen under my control, state that the National Biscuit Company has never made any false representations to the trade concerning the legal effect of the said decision or any attempt to injure and damage the business reputation of the Kellogg Company or to exploit the business of the plaintiff by the use of the decision or to suggest that stocks of Kellogg's Shredded Wheat Biscuit should be rejected or returned. On the contrary, the use which the National Biscuit Company has made of the decision of this Court has been strictly confined to advising the trade of the fact of the decision, furnishing some of the trade with copies thereof, and issuing the announcement thereof comprised in Exhibit A attached to these papers.

WILLIAM W. ROSSITER, JR.

Sworn to before me this twelfth day of May, 1937.

(Seal) A. T. BULLOCK,
Notary Public, Queens Co. No. 204.
Registered in Queens Co. No. 152.
Certificate filed in New York Co. No. 62.
Registered in New York Co. No. 3-B-47.
Commission expires March 30, 1938.

EXHIBIT "A."

NATIONAL BISCUIT CO. WINS SHREDDED WHEAT DECISION

Court Enjoins Kellogg Co. from Use of Shredded Wheat in Name, Shape or Form.

PHILADELPHIA: April 12: U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y. since 1900.

AFFIDAVIT OF HENRY E. MEISTER.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

HENRY E. MEISTER, being duly sworn, deposes and says:

1. I reside at 237-22 93d Road, Queens Village, New York. I am a special salesman in the employ of the National Biscuit Company, Shredded Wheat Division, and my duties include contacting the jobber trade in cities of New York.

2. I have read the affidavit of Charles Miller, verified May 10, 1937, filed by the defendant in support of its motion for a restraining order in the above case.

3. Shortly after April 12, 1937, the date upon which this Court rendered its opinion and decision on rehearing in the above case, I called upon Seeman Brothers, Inc., a jobber in New York City, in company with J. M. Cooper, sales representative, and talked with the buyer or assistant buyer of that firm. We informed them of the fact that a decision had been rendered in the suit of National Biscuit Company against Kellogg Company and showed the buyer a copy of the decision and also a copy of the press re-

lease concerning the same, a copy of which is annexed hereto marked Exhibit A.

4. Neither Mr. Cooper nor I stated to the buyer or to anyone connected with Seeman Brothers, Inc., that Seeman Brothers, Inc., could not legally sell Kellogg's product. The buyer asked us what he should do with the stock of Kellogg's Whole Wheat Biscuit which he had on hand and we replied that we did not know and could not advise him on that subject.

5. I am informed and believe that Mr. J. M. Cooper is the "executive of the Company" referred to in the said affidavit of Charles Miller and that he is at present absent from New York on business.

6. I also at about the same time called on R. C. Williams & Company and Francis H. Leggett & Company, two other jobbers mentioned in the affidavit of Charles Miller, and had similar conversations with them. At no time did I, or to my knowledge any other representative of National Biscuit Company, advise any of the above firms or any other customer upon whom we called that they could not sell Kellogg's product legally or that if they did they would be liable to be drawn into litigation. My instructions from my superiors were simply to call the attention of the customers of National Biscuit Company to the fact that a decision had been rendered by this Court to the effect that the name "Shredded Wheat" was the property of National Biscuit Company.

HENRY E. MEISTER.

Sworn to before me this eleventh day of May, 1937.

(Seal) A. T. BULLOCK,
Notary Public, Queens Co. No. 204.
Registered in Queens Co. No. 152.
Certificate filed in New York Co. No. 62.
Registered in New York Co. No. 8-B-47.
Commission expires March 30, 1938.

EXHIBIT "A."

NATIONAL BISCUIT CO. WINS SHREDDED WHEAT DECISION

Court Enjoins Kellogg Co. from Use of Shredded Wheat in Name, Shape or Form.

PHILADELPHIA: April 12: U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years...

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

"...a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for dam-

AFFIDAVIT OF JAMES M. COOPER.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

JAMES M. COOPER, being duly sworn, deposes and says:

1. I reside at 240 West 57th Street, New York, N. Y. I am a sales representative of National Biscuit Company and my duties comprise visiting the trade in company with the salesmen of National Biscuit Company and generally promoting the sale of products manufactured by the company.

2. I have read the affidavit of Charles Miller, verified May 10, 1937, filed by the defendant in support of its motion for a restraining order in the above case. I have also read the affidavit of Henry E. Meister, verified May 11, 1937, attached to these papers.

3. I am doubtless the "executive of the Company" referred to in the affidavit of Charles Miller, as I accompanied Henry E. Meister when he called upon the buyer of Seeman Brothers, Inc., shortly after April 12, 1937. The facts concerning said call stated in the affidavit of Mr. Meister are entirely correct. Our instructions concerning the use of this Court's opinion

were very definite that it might be communicated to the trade, but that no suggestion should be made by us to any customer as to what he should do with his stocks or as to what attitude he should take with reference to the Kellogg Company by reason of the decision. These instructions were fully complied with by me and by all representatives of the National Biscuit Company of whom I have any knowledge. In the case of Seeman Brothers, Inc., we informed the buyer that we could not give him any advice as to what he should do with the stock of Kellogg's Whole Wheat Biscuit on hand.

JAMES M. COOPER.

Sworn to before me this twelfth day of May, 1937.

(Seal) A. T. BULLOCK,
Notary Public, Queens Co. No. 204.
Registered in Queens Co. No. 152.
Certificate filed in New York Co. No. 62.
Registered in New York Co. No. 8-B-47.
Commission expires March 30, 1938.

AFFIDAVIT OF JOHN B. YODICE.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

JOHN B. YODICE, being duly sworn, deposes and says:

1. I reside at 1130 70th Street, Brooklyn, New York, and am the manager of the Ridgewood Agency of National Biscuit Company, located at 6047 Metropolitan Avenue, Brooklyn, New York.

2. My duties include contacting the jobber trade in my territory for the purpose of selling Shredded Wheat and among others I visit the buyer of Austin Nichols & Company, located at North Third Street and Kent Avenue, Williamsburg, Brooklyn, New York.

3. I have read the affidavit of Charles Miller, verified May 10, 1937, and am familiar with the contents thereof. Shortly after the decision of this Court, filed April 12, 1937, I had occasion to call upon Mr. Vincent Clark, one of the buyers for Austin Nichols & Company. Mr. Clark stated to me at that time that he had noticed the fact that the National Biscuit Company had won its case against the Kellogg Company and that he was glad to hear it. On a later occasion I

again called on Mr. Clark and gave him one of the company's press releases like Exhibit A annexed to these papers. Mr. Clark at that time informed me that he had since the decision of this Court purchased five (5) cases of Kellogg's Whole Wheat Biscuit from the defendant.

4. The above and foregoing is the entire substance of the conversations which I have had with any representative of Austin Nichols & Company concerning the decision in this case. I have never told anyone connected with Austin Nichols & Company nor any other customer of National Biscuit Company that they would become involved in this litigation if they purchased or sold any further stock of the Kellogg Company's Whole Wheat Biscuit, nor have I told any customer of the company that they could not legally sell the Kellogg product.

JOHN B. YODICE.

Sworn to before me this eleventh day of May, 1937.

(Seal) A. T. BULLOCK,
Notary Public, Queens Co. No. 204.
Registered in Queens Co. No. 152.
Certificate filed in New York Co. No. 62.
Registered in New York Co. No. 8-B-47.
Commission expires March 30, 1938.

AFFIDAVIT OF CHARLES A. VILAS.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

CHARLES A. VILAS, being duly sworn, deposes and says:

Supplementing my affidavit, verified May 13, 1937, an article similar to that referred to in paragraph 4 of my said affidavit appeared in the Commercial Bulletin of May 7, 1937, a trade paper published in Los Angeles, California. A copy of page 7 of said paper containing the article is annexed hereto.

A similar article appeared in a trade paper known as the Food Field Reporter, published in New York at about the same time. One of the staff of last-named magazine telephoned me before publishing the article and stated that the article emanated from the Kellogg Company at Battle Creek.

CHARLES A. VILAS.

2166 *Affidavit of Charles A. Vilas*

Subscribed and sworn to before me this eighteenth day of May, 1937.

DAVID J. ORGAIN,
Notary Public, New York County.
(Seal)
N. Y. County Clerk's No. 108, Register's No. 8-O-141.
Bronx County Clerk's No. 6, Register's No. 35-O-38.
Kings County Clerk's No. 59, Register's No. 8095.
Queens County Clerk's No. 960, Register's No. 3621.
Cert. filed with Westchester County Clerk and Reg.
Commission expires March 30, 1938.

ASSEMBLY PASSES STATE PATMAN ACT

(Continued from Page 3)

price to the buyer after the deduction of all discounts, rebates or other price concessions paid or allowed by the seller."

Persons injured by violation or attempted violation may sue for an injunction and if violation is established, triple damages plus attorneys' fees may be collected.

Sales Tax Cut Blocked

Proposed reduction of the state sales tax from 3 to 2½ percent and exemption of restaurant meals from taxation, struck a snag in the Senate Revenue and Taxation Committee this week. The committee refused to act on Assemblyman Ray Williamson's bill to reduce the sales tax claiming such action would mean a loss of $31,000,000 in revenue to the state during the next two years. Elimination of restaurant meals from the 3 percent tax was turned down for a similar reason. The committee's action does not necessarily bar revision of the law, but materially hampers a proposed change in rate.

The senate took a definite stand on the labor situation this week by passing the Parkman bill containing a provision outlawing sit-down strikes.

CALL MASS MEETING TO DISCUSS LABOR PROBLEM

(Continued from Page 3).

action and present a united front to the organizers, the unions will take complete control of the food trade in Los Angeles and Southern California and add hundreds of thousands of dollars to the expense of operation. It will affect not only large operators, but small dealers if the program is carried out which we understand the organizers have in mind. Thus, our only salvation is to act immediately and concertedly."

The attitude of this market can be expressed in both attendance and action at next Wednesday night's meeting.

KELLOGG WILL CONTINUE SHREDDED WHEAT BATTLE

The Kellogg Co. of Battle Creek, Mich., is filing a petition for review of the recent decision of the U. S. Circuit Court of Appeals in Philadelphia holding that the shredded wheat trademark of the National Biscuit Co. has been infringed by Kellogg.

If the petition is denied by the Philadelphia court, the Kellogg organization will take the case to the U. S. Supreme Court, it is declared.

It was pointed out by the Kellogg organization that its complaint has been held by one court to constitute good cause of action under the Sher-

COMMERCIAL BULLETIN
A NEWSPAPER for FOOD TRADE
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LLOYD L. STAGGERS . . . . . Editor and Manager
H. A. GALBRAITH . . . . . Business Manager
R. W. GRESSER . . . . . Associate Editor
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The Commercial Bulletin is the only individual grocer's paper on the Pacific Coast whose circulation is verified by the AUDIT BUREAU OF CIRCULATIONS.

Statewide Regulation Needed

LONG BEACH is about to engage in an interesting experiment, to determine whether or not the operation of meat markets can be curtailed by local regulation. The plan is very simple. Meats cannot be received or sold except during the hours that inspectors of the health department are at work. They do not work nights or Sundays, thus operating hours can be controlled as a health measure.

This plan is presumed to be legal. In any event, it has worked in Fresno for the last several years. Without any attempt to discourage Long Beach market operators, or in any way to criticize their judgment, we hazard the prediction that their program will fail and that the ordinance will be repealed, or made inoperative, after a few months' operation.

This program will fail, because it will cost Long Beach market operators more money than they are willing to lose in exchange for a shorter work-week. That has been the experience in several other Southern California cities and towns and there is no good reason to believe that it will have any greater success in Long Beach.

Here is the picture: Long Beach is not an isolated community. In fact, it is surrounded by smaller towns, or by thriving neighbor-

Proposed reduction of the state sales tax from 3 to 2½ percent and exemption of restaurant meals from taxation, struck a snag in the Senate Revenue and Taxation Committee this week. The committee refused to act on Assemblyman Ray Williamson's bill to reduce the sales tax claiming such action would mean a loss of $31,000,000 in revenue to the state during the next two years. Elimination of restaurant meals from the 3 percent tax was turned down for a similar reason. The committee's action does not necessarily bar revision of the law, but materially hampers a proposed change in rate.

The senate took a definite stand on the labor situation this week by passing the Parkman bill containing a provision outlawing sit-down strikes. This measure was passed with but one senate dissenting vote.

This law makes it a misdemeanor for anyone to enter upon the real property in the possession of another, or remain there without a claim, made in good faith, of a legal right to possession against the expressed will of the person having title to it, or his agent. This prohibition would not apply to fishers.

Progress of Other Bills

The unfair practices act has received favorable attention at Sacramento this session, but members of the trade who are acting as guardians for this measure have had considerable difficulty in preventing its being loaded down with amendments, some of which would materially cirpple the law. Last reports indicate that all of these proposed amendments have finally been sidetracked and that in its present form, it contains changes designed to strengthen and facilitate enforcement of the measure.

In the matter of liquor control, the King bill, which would have restricted retail licenses for the sale of distilled spirits to stores and places of business which do 90 percent liquor sales, was killed in committee this week. The same committee voted to take no action on the Daley bill which would have required all drinkers of intoxicants to obtain licenses. The Assembly Revenue and Tax Committee also voted to approve a 10 percent deduction for earned incomes under the state income tax law, the same as is allowed under the federal law.

[illegible] at next Wednesday night's meeting.

KELLOGG WILL CONTINUE SHREDDED WHEAT BATTLE

The Kellogg Co. of Battle Creek, Mich., is filing a petition for review of the recent decision of the U. S. Circuit Court of Appeals in Philadelphia holding that the shredded wheat trademark of the National Biscuit Co. has been infringed by Kellogg.

If the petition is denied by the Philadelphia court, the Kellogg organization will take the case to the U. S. Supreme Court, it is declared.

It was pointed out by the Kellogg organization that its complaint has been held by one court to constitute good cause of action under the Sherman Anti-Trust act, and that the decision of the Philadelphia court is in conflict with that of the New York Court of Appeals. It was also pointed out that a suit brought by the National Biscuit Co. against the Kellogg Co. of Canada, Ltd. was tried in the Supreme Court of Ontario and dismissed on the ground that the patents on shredded wheat had expired.

Bad Check Warning

Beware of a man with brown curly hair and blue eyes, who claims to be a chiropractor, uses doctor's cards for identification and endeavors to pass small checks, which are made out to himself from some small cafe. Los Angeles police are looking for this man on six counts of forgery. In Los Angeles, the name, Dr. H. J. Houle hac been used. The suspect is about thirty-six years of age, 5 feet, 6 inches tall, and weighs 162 pounds.

Merchants Fined

Walter C. Fox of Torley's Market, 1135 West Valley in Alhambra, was fined $25 on a charge of short weight fish sale. A suspended fine of $50 was fixed upon Walter Miller of Miller's Market at 1518 Mission Road in South Pasadena.

Moore's Market Open

Glenn Moore, long associated with the grocery business in Ontario, has opened a market at the corner of B street and Laurel avenue. Jack Gardner will have charge of the meat department.

[illegible]ment, to determine whether or not the operation of meat markets can be curtailed by local regulation. The plan is very simple. Meats cannot be received or sold except during the hours that inspectors of the health department are at work. They do not work nights or Sundays, thus operating hours can be controlled as a health measure.

This plan is presumed to be legal. In any event, it has worked in Fresno for the last several years. Without any attempt to discourage Long Beach market operators, or in any way to criticize their judgment, we hazard the prediction that their program will fail and that the ordinance will be repealed, or made inoperative, after a few months' operation.

This program will fail, because it will cost Long Beach market operators more money than they are willing to lose in exchange for a shorter work-week. That has been the experience in several other Southern California cities and towns and there is no good reason to believe that it will have any greater success in Long Beach.

Here is the picture: Long Beach is not an isolated community. In fact, it is surrounded by smaller towns, or by thriving neighborhood centers, all of which have large markets. These markets are just about as convenient to a substantial number of Long Beach residents as are those markets located within the city limits. If they cannot buy meats at night or on Sundays in Long Beach, it will be a very simple matter for them to step across, or drive across the city boundary lines and buy anything they need.

A couple of years ago, meat market operators in Pasadena brought strong pressure on the board of City Managers for just such an ordinance. It was adopted, but in less time than it took to get the ordinance on the Pasadena statute books, a loud cry went up demanding its repeal. Instead of waiting until Pasadena markets were open, thousands of customers were going to adjacent towns or neighborhood centers and making their purchases. The loss of business was too severe for the Pasadena operators to stand.

Of course, if the food trade wishes to place itself under the domination of labor union organizers, it can have evening and Sunday closing without an ordinance. But based on the experience of merchants in other cities where unions are in full control, the price would be prohibitive, for large and small operators alike.

There is just one way that hours can be regulated successfully. That is by state legislation. If it were possible to secure the enactment—perhaps by the initiative route—of an evening and Sunday closing law which would "hold water" the question of local competition would be entirely eliminated. Consumers would need to buy as much, or almost as much merchandise as before, and they would buy during the time prescribed by the state.

Such a program is now in contemplation and it deserves most serious consideration.

A grocer who finds himself in trouble because of the possession of a petty gambling device has no one to blame but himself. Even if the authorities do not interfere, the ill will of parents and school organizations far more than offsets any "profit" which may be derived.

8187

AFFIDAVIT OF C. F. BAUMGART.

(Filed July 1, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF MICHIGAN,
COUNTY OF CALHOUN, } *ss.:*

C. F. BAUMGART being duly sworn, deposes and says:

I am the General Salesmen Manager for the Kellogg Sales Company, having charge of the sales of the products of Kellogg Company, the defendant-appellee herein, throughout the United States and foreign countries. In response to a request from Crichton Clarke, Esq., counsel for the Company in such litigation, I requested our salesmen and other representatives to report to me any comments which they heard during their calls upon the retail trade concerning the recent decision of this Court granted upon rehearing, made by representatives, employees or agents of the National Biscuit Company, together with their remarks upon the nature of such comments and the effect thereof upon the trade. In response thereto I have received a large number of direct statements of salesmen. These statements and comments are contained in regular weekly reports and the orginals are in the hands of counsel for the Company to be presented to the Court

upon the hearing in this matter, but since they contain other and irrelevant statements they are not set forth herein in full. Relative portions of said statements are as follows:

Two letters from H. O. Parman, a representative of the Company, from Hotel Lincoln, Vincennes, Indiana, dated June 1, 1937, reading as follows:

"Mr. R. R. Adams

Dear Mr. Adams

On April 24th at the Terre Haute House, Terre Haute Ind., a Mr. Schlump, Gen Foods Man from Evansville, approached the writer saying, 'A National Bis. Co. man in Evansville advised me that Kellogg was going to have to take up all Kellogg Shredded Whole Wheat Biscuits, that the Supreme Court had decided against Kellogg Co.' He stated further that the Courts didn't care for Kellogg Co making Whole Wheat Biscuits but they objected to the slogan 'The original has this signature.'

He asked me if we were picking up the retailers stock yet.

Told him I knew nothing about it.

Yours,

H. O. Parman"

"Mr. R. R. Adams

Dear Mr. Adams:

The National Bis Co gave to the Terre Haute Tribune Terre Haute Ind an article entitled, 'National Bis. Co. wins Shredded Wheat Decision.'

They ask them to print this article advising the case was now settled for good.

Mr. Lou Kiefer, National advertising manager for the Terre Haute Tribune refused to print the article.

Yours,

H. O. Parman"

A letter from J. J. Casey, a Company representative, from Hudson Falls, New York, reading as follows:

"Dear Mr. Prosser:

Friday while in a Grand Union Store in Hudson Falls, I overheard the Asst Supt, a Mr. R. T. Parry, instruct his manager to clear up our s. w. Biscuits at 10¢. On questioning him found that a member of N. B. C. had shown him a letter which led him to believe they (N. B. C.) had won their case.

On my telling Mr. Parry the true state of affairs he became infuriated and asked that a copy of my letter be mailed him so that he could take the representative of N. B. C. to task for his design in trying to misrepresent the facts. Mr. Parry informed me, he believed the N. B. C. story to such an extent he had instructed his managers to clear up at once.

Of course he wouldn't give me the name of the N. B. C. representative. From Mr. Parry, I gathered the N. B. C. outfit were using that method to further their cause and if it has not already been done, it may be a good idea for Battle Creek to forward a copy of the letter to all the chain and large operators.

Mr. Parry's address is:
R. J. Parry
150 Glen St.
Glen Falls, N. Y.

Very truly,
J. J. Casey"

A letter from Mr. Yarnell, a company representative, dated May 15, 1937, from Hotel Berry, Athens, Ohio, reading as follows:

"Mr. Champion

I ran into 3 stores in Athens yesterday where a Mr. Warren of the Natl. Bis. Co. had told the grocers we would not make 324s (shredded wheat biscuit) anymore and the jobbers were unloading what little they had on hand. I have one grocer

Mr. B. Banghouse who promised me he would back up the statement any time in the future. Also the N. B. Co. had forced Kellogg's to quit making it, 324s.

Yarnell

P. S. I told Francis what they were doing."

A letter from R. B. Roll, a company representative, from Pittsburgh office of defendant-appellee, dated May 14, 1937, together with a letter of transmittal thereof from the Pittsburgh branch, reading as follows:

"Dear Mr. Berry:

The National Biscuit Office and salesmen are making it plenty tough to get repeats and new placements of our Biscuit.

They have requested the Co-operative Groups to warn their members to discontinue our Shredded Wheat Biscuit as they also are subject to the terms of the verdict.

I tried to get a letter from the Quality Service Office but without any luck.

Yours very truly,
R. B. Roll, Jr."

"5-18-37

Dear Mr. Swan:

Please note the attached letter which we believe is self-explanatory.

Don't you feel it would be advisable to have just a short note from the Home Office to the effect that we will be responsible for any damage caused our customers as a result of the National Biscuit Company's action.

In other words, you have already sent each one of our men a letter covering the entire transaction, but this type of a letter would not be easy to show to many people as it would take too long to read.

I have heard several comments from our men in the field to the effect that the National Biscuit Company is and has been trying to intimidate some of the trade as a result of this recent verdict.

PITTSBURGH OFFICE."

A letter from H. R. Conillers, a company representative, from Cookeville, Tennessee, dated May 26, 1937, reading as follows:

"Mr. J. F. Barnett
Kellogg Sales Co.
Memphis, Tenn.

Dear Sir:

On calling at the Ideal Gro. Cookeville, Tenn I ran into a situation pertaining to our shredded wheat that may cause us salesmen some trouble in the near future. The buyer has handled and featured Kellogg Shredded Wheat for some months now and has not stocked National Biscuit shredded wheat during that time. I found the National Biscuit product on the shelf this week and asked if he was not letting me down, he had this to say;

'The National Biscuit man told me that Kellogg had been made to stop selling shredded wheat and all there was left for me to do was to stock his product.'

This man was sincere when he told me this and I think it should be called to the attention of the trade at every opportunity that Kellogg is still making it and selling it.

Yours truly

H. R. Conillers"

A letter from O. K. Berry, district sales manager, from Pittsburgh, Pennsylvania, dated June 7, 1937, reading as follows:

"Mr. Crichton Clarke
36 West 44th Street
New York, N. Y.

Dear Mr. Clarke:

We are advised by our salesman, Mr. E. J. McGrade, that Mr. Wm. Howe, of the New Castle Grocery Company, New Castle, Pa., is discontinuing handling Kellogg's WHOLE WHEAT BISCUITS as he is afraid of being sued by the National Biscuit Company.

Mr. Howe would not commit himself as to who advised him regarding BISCUIT, but we do know that a letter went out from the Fairlawn Stores' Headquarters regarding the suit. Copy of this bulletin was sent to Battle Creek sometime ago and is, undoubtedly, in your hands at the present time. We do not know whether Mr. Howe threw out the BISCUITS as a result of this bulletin or not.

Yours very truly,

KELLOGG SALES COMPANY
O. K. Berry,
District Sales Manager"

A letter from O. K. Berry, district sales manager of defendant-appellee, from Pittsburgh, Pennsylvania, dated June 7, 1937, reading as follows:

"Mr. Crichton Clarke
36 West 44th Street
New York, N. Y.

Dear Mr. Clarke:

Mr. W. S. Kuhn, our Uniontown representative, advises that the man in charge of National Biscuit Company's sales in the Uniontown area addressed the United Quality Food Stores' repre-

sentatives, which consists of 30 or 35 retailers, and stated that Kellogg was no longer permitted to make and sell Kellogg's SHREDDED WHOLE WHEAT BISCUITS.

We were unable to get anything on this in writing, but were advised by two of the members that this was the information given them at their meeting.

Yours very truly,

KELLOGG SALES COMPANY
O. K. Berry
District Sales Manager."

Exhibit A is a copy of an issue of the "Kansas Grocer," which is a trade paper circulated throughout the retail trade, and which contains an abbreviated and prejudicial excerpt from the decision of this Court.

Attached hereto and marked Exhibit B and B-1 are two letters received by our representatives in retail stores. Exhibit B in Norfolk, Virginia and Exhibit B-1 in New York City. These letters are sent out by Seeman Brothers, Inc., purchasing agents for National Biscuit Company, to the retail trade, in which it appears that the trade received broadcast these letters stating that the Kellogg Company has been enjoined from the use of the name "shredded wheat" in advertising and in offering this product for sale, by reference to the decision of this Court. Such decision is tied up in the same letter with the proposed "tremendous 1937 shredded wheat sales and advertising drive, the greatest in the history of this famous product. Leading newspapers and magazines will present a constant reminder." Such publicity indicates an attempt on the part of the National Biscuit Company to indicate to the trade that the newspaper and magazine publicity resulting from this decision will present a "constant reminder" of that company's "tremendous 1937 shredded wheat sale and advertising

drive, the greatest in the history of this famous product."

Exhibit C, likewise attached, is a letter circulated by Francis H. Leggett & Co., of New York City, likewise purchasing agent for the National Biscuit Company, but not otherwise identified or associated with Seeman Brothers, Inc., the apparent authors of Exhibits B and B-1. It is interesting to note that this circular letter from Francis H. Leggett & Co. is identical in wording with that purporting to issue from Seeman Bros., Inc., and any comments with reference to Exhibits B and B-1 are equally applicable to Exhibit C. The identity of information in these two exhibits, of course, irrefutably points to a common authorship and the inference is inescapable that the plan of this circularization lay in the offices of the National Biscuit Company.

Exhibit D is a circular received by our representatives in New York City from local grocers and distributed to them by representatives of the National Biscuit Company, and which contains and is made up of unfair prejudicial excerpts from the decision of this Court.

Exhibit E is a further misleading excerpt from the decision quoting only a few words and published in the June issue of "Food," a publication of San Francisco, California.

A report from J. L. Fischen, a company representative, from Denver, Colorado, dated May 8, 1937, reading as follows:

> "National Biscuit Company salesmen asking papers to run special story regarding shredded wheat court decisions. Papers contacted by the writer state they will not publish this story since it reflects against Kellogg's."

A report from T. L. Van Horn, a company representative, from Evansville, Illinois, dated May 15, 1937, reading as follows:

> "National shredded wheat salesmen are telling the grocers that we are having to pay them profit on every package we have ever sold of shredded whole wheat biscuit, and make no small story of it."

A report from Robert B. Roll, a company representative, from Cumberland, Maryland, dated May 15, 1937, reading as follows:

> "National Biscuit putting pressure on retail outlets by letting them believe they will be subject to fine if they continue stocking our shredded wheat biscuit."

A report from E. T. Van Dyke, a company representative from Bluefield, West Virginia, dated May 29, 1937, reading as follows:

> "'Find National Biscuit Co. salesmen informing the trade that Kellogg Co., by court order, cannot continue to make or sell Kellogg's whole wheat biscuit. They (N. B. C.) are trying to give us the black eye by saying to the trade that 'Kellogg stole every patent he has.' Stop this talk is hurting us with the trade."

A report from A. M. Erstad, a company representative, from Aberdeen, Tennessee, dated May 15, 1937, reading as follows:

> "National Biscuit Co. salesman is showing a letter from his Company to jobbers and trade stating that Kellogg is out of the biscuit business. Unable to get signed statement to that effect from trade."

A report from G. W. Wood, a company representative, from Rocky Mount, Virginia, dated May 22, 1937, reading as follows:

"Heard a merchant in a store in Smithfield to make a remark that he had been told that we would have to stop making shredded wheat biscuits. I asked him where he had got the information from. He would not tell me the name of the person who told him this, but he did say 'why you should know.'"

A report from C. P. Harnden, a company representative, from Seattle, Washington, dated May 15, 1937, reading as follows:

"Shredded wheat decision has caused considerable comment from advertising groups. They are given to understand that we will probably discontinue making this product and no more would be available as soon as we cleaned up our present supply."

A report from R. H. Taylor, a company representative, from Rome, Georgia, dated May 22, 1937, reading as follows:

"Notice N. B. Co. is doing a good bit of sampling of their shredded wheat, and informing the trade we will have to discontinue our products on account of the Court ruling recently."

A report from M. F. Stinnett, a company representative, from Lancaster, Pennsylvania, dated May 22, 1937, reading as follows:

"National Biscuit Co. certainly did make sure that the trade knows about their winning the decision in the Supreme Court recently. Quite a bit of the trade wants to know if it is to be discontinued."

A report from W. A. Spencer, a company representative, from Salina, Kansas, dated May 8, 1937, reading as follows:

"National Biscuit Company or someone circulating the rumor Kellogg will have to quit making the shredded wheat biscuit."

A report from Ora Brumbelou, a company representative, from Jackson, Mississippi, dated May 1, 1937, reading as follows:

> "In Meridian National Biscuit Company is showing a clipping and telling trade Kellogg cannot make or use the word 'shredded' any more. Also stating that Kellogg was not going to make shredded whole wheat biscuit."

A report from G. Sheret, a company representative, from Portland, Oregon, dated May 1, 1937, reading as follows:

> "National Biscuit Company salesmen are out telling their trade about their recent winning decision in the Shredded Wheat-Kellogg Co. issue in the court. What will Kellogg do now? That is what the Biscuit Co. salesmen are asking the grocers."

A report from R. D. Gates, a company representative, from Ohio, dated May 1, 1937, reading as follows:

> "National Biscuit Company salesmen are telling the grocers that our whole wheat biscuit will be immediately discontinued and to date with one story on top of another the whole thing has created quite a lot of unnecessary talk among the trade."

A report from J. H. Maize, a company representative, from Poplar Bluff, Missouri, dated May 1, 1937, reading as follows:

> "Our competitors National Biscuits are telling both the retailer and jobbers that we will be forced to remove our shredded wheat biscuit from the markets."

A report from W. P. Emerson, a company representative, from Boston, Massachusetts, dated May 8, 1937, reading as follows:

"National Biscuit Company salesmen are spreading the report in retail stores that the Supreme Court has decided in their favor regarding their action against Kellogg Company over shredded wheat and that we must now take the product off the market."

A report from Peter B. James, a company representative, from Brockton, Massachusetts, dated April 24, 1937, reading as follows:

"National Biscuit Company local mfg immediately on word of the reversed decision on shredded wheat has contacted the larger outlets in Brockton requesting them to remove Kellogg's shredded wheat biscuit from the shelves claiming the same illegal. Inasmuch as these outlets are well stocked and don't care to be dictated to, the request was ignored. N. B. C. in this area has in its questionnaire the distribution of Kellogg's shredded wheat in each saleman's territory."

A report from C. A. Birk, a company representative, from Decatur, Illinois, dated April 24, 1937, reading as follows:

"National Biscuit salesmen are carrying a letter from the St. Louis office and showing it to all retailers where the Court had reversed the decision in favor of their company. In regard to shredded wheat and Kellogg would not manufacture no more biscuits."

A report from Cyril C. Higg, a company representative, from Los Angeles, California, dated April 24, 1937, reading as follows:

"Very unfavorable news story appearing in trade magazines regarding reversion of the decision in the case of National Biscuit Co. against Kellogg Co."

A report from L. R. Hartzen, a company representative, dated April 24, 1937, from Philadelphia, Pennsylvania, reading as follows:

"Men report that the retailers are taking notice of the latest court ruling on shredded wheat, and some men report that N. B. C. salesmen are again active with the retailers putting on pressure to eliminate our biscuits from their stocks."

C. F. BAUMGART.

Subscribed and sworn to before me a notary public in and for the County of Calhoun, State of Michigan, this nineteenth day of June, 1937.

THERESA T. GILLEN,
Notary Public.
My commission expires December 7, 1937.

EXHIBIT "A."

The KANSAS GROCER

Official Publication Kansas Food Dealers' Association.
Published Monthly—C. M. Sandstrom, Editor and Manager

Registered Trade Mark, U. S. Patent Office
(Established 1920)

MEMBER

Editorial and Business Office
814-16-18 Harlan Building
Kansas City, Kansas
Advisory Board
FRED MARTINEK J. B. GODFREY
E. A. SCHALLER

A FOOD TRADE MAGAZINE DEVOTED TO THE ADVANCEMENT OF THE INDEPENDENT FOOD DEALER OF KANSAS. OUR IDEAL IS CO-OPERATION, TO CREATE A BETTER UNDERSTANDING OF FAIR TRADE PRINCIPLES.

Advertising Rates—Supplied on request—detail rates published in Standard Rate and Data. Forms close 20th of each month prior to publication.

New York Representative—Robert Barton, 551 5th Ave. Murray Hill 2-4975, New York City.

Subscription Rates—$1.00 per year—Club Rate 25c per year—single copy 10c.

Owned and Published by The Retail Grocers' Association of Kansas City, Kansas.

Phone DRexel 1626

FORTIETH ANNUAL CONVENTION—NATIONAL ASSOCIATION OF RETAIL GROCERS
BOSTON, "THE HISTORIC CITY." JUNE 20, 21, 22, 23, 24, 1937

VOLUME 16 MAY, 1937 No. 7

National Biscuit Company Wins Shredded Wheat Decision

Court Enjoins Kellogg Company From Use of Shredded Wheat in Name, Shape or Form.

Philadelphia, April 12—U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the ORIGINAL and by implication that the plaintiff's was an IMITATION. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y., since 1900.

"Maine Grocer, 83, Talks to President"

(From "New York Times," April 1, 1937)

For nearly fifteen minutes today President Roosevelt listened to and swapped stories with Albert A. Cole, aged 83, who for more than seventy-three years has been a store-keeper at South Portland, Maine, and is one of the country's oldest active merchants.

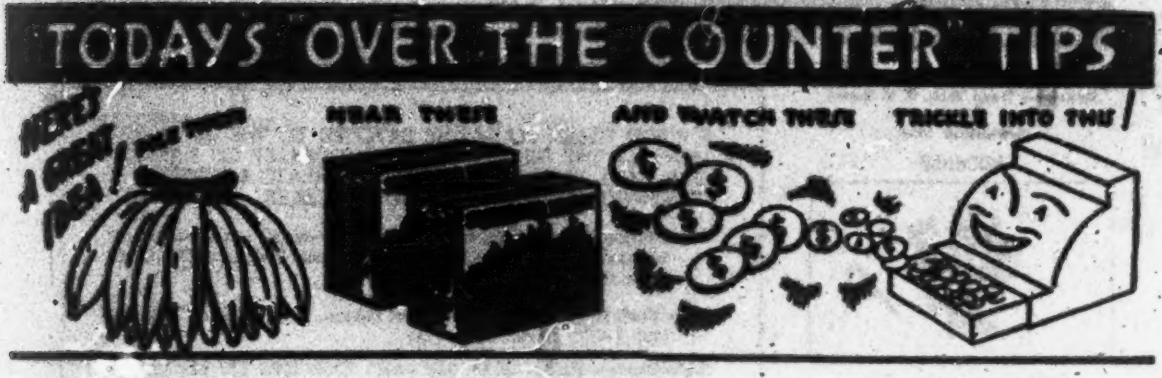
Mr. Cole, who was accompanied by Representative Oliver of Maine and representatives of the National Retail Grocers' Association, told Mr. Roosevelt of the days "when men done the trading" and when the open cracker barrel, brown sugar and pickles, plus a long bench and a fat, red-hot stove, always assured a quorum of men in his community.

But things have changed, he told the President, and only the cold winter days and nights are left to bring back memories of the old days. He is a Republican, but he did not discuss politics with the President.

Photographers fired flashlight bulbs as he left the Executive Office, but the storekeeper did not flinch. He appeared more interested in a white magnolia tree in full bloom and a crowd of visitors who looked on at the scene.

2 4

EXHIBIT "B"



IMPORTANT COURT DECISION.

To Triangle Store Members:

The U. S. Circuit Court of Appeals has handed down an important decision in the case of National Biscuit Company vs Kellogg Company, enjoining the Kellogg Company from the use of the name "SHREDDED WHEAT" in advertising, and from offering for sale its product in the form and shape of N. B. C. Shredded Wheat.

"SHREDDED WHEAT", a product of National Biscuit Company, has been manufactured at Niagara Falls since 1900.

We suggest that you take advantage of the tremendous 1937 "SHREDDED WHEAT" Sales and Advertising drive, the greatest in the history of this famous product. Leading Newspapers and Magazines will present a constant reminder.

Tie-up your store by arranging prominent displays of Shredded Wheat with seasonal fruits such as bananas, peaches, strawberries, etc.

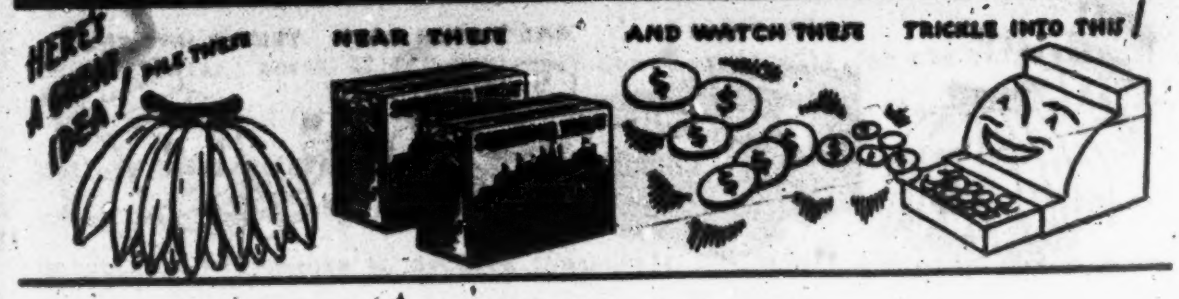
The N.B.C. Salesman will be glad to assist and supply you with attractive timely store display material - Ask him.

SHERMAN BROTHERS, INC.

May 3, 1937

EXHIBIT "B-1"

TODAY'S "OVER THE COUNTER" TIPS



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SEEMAN BROTHERS, INC.

May 3, 1937

EXHIBIT "C."

D

N. Y., 4/29/37

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Tie-in your store by arranging prominent displays of Shredded Wheat with seasonal fruits such as bananas, peaches, strawberries, etc.

The N. B. C. Salesman will be glad to assist and supply you with attractive timely store display material--Ask him.

PREMIER STORES,
Francis H. Leggett & Co.

EXHIBIT "D."

FOR IMMEDIATE RELEASE

NATIONAL BISCUIT COMPANY
WINS SHREDDED WHEAT DECISION
Court Enjoins Kellogg Company from Use
of Shredded Wheat in Name, Shape or Form.

PHILADELPHIA: April 12: U.S.Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

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"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . .a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name "Shredded Wheat" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damage and profits."

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From the Wide

FIELD of FOOD

Products . . . Packages . . . Advertising . . . Displays . . .
Expansions . . . Reports . . . News of the Trade

Shredded Wheat Decision

The United States Circuit Court of Appeals, reversing a former decision in the case of National Biscuit Company vs. Kellogg Company, ruled that the Kellogg Company had infringed upon the rights of National Biscuit Company in marketing Whole Wheat Biscuits with a subtitle "shredded wheat" and the note "the original has this signature: W. K. Kellogg."

National Biscuit Company had manufactured Shredded Wheat since 1900, its patents expiring in 1912.

In reversing the former decision, the court said: "When a person after the expiration of a patent has spent such enormous sums of money . . . equity will not permit another to apply the name of the merchandise to his product."

Root Beer Distributed Direct

Charles E. Hires Company, manufacturer of root beer which in the past has been sold in extract form to licensed bottlers, has begun national distribution direct to the dealer.

Norman Bel Geddes, famous artist, has redesigned the Hires bottles in 12- and 16-ounce sizes, and a national advertising campaign, using 150 newspapers in 100 cities will promote the plan.

New Juices Introduced

Richmond Chase Company, California canning firm headquartered at San Jose and operator of canning plants at San Jose, Stockton and Mountain View for its R-C and Heart's Delight brands, is adding three new fruit juices to its line. The new products, all packed in tin, will be marketed under the names of Plum Nectar, Pear Nectar and Peach Nectar.

Coca Cola Reports Gain

The Coca Cola Company and subsidiaries in their annual report for the year 1936 show a net profit of $20,398,078. This compares with a profit of $15,804,256 in 1935.

Remedy for Frost

Col. Charles H. Rutherford, Phoenix attorney, has invented a process for "washing away frost" from fruits and vegetables. The patent is based upon spraying the fruit and vegetables with chemicals after a frost and before the sun thaws them.

Report Favors Patman Law

Carroll & Pelz, Inc., New York City, has issued a 48-page report of the results of a survey to determine the attitude of the grocery industry toward the Robinson-Patman act, conducted for the Associated Grocery Manufacturers of America.

The report summarizes the replies of 146 grocery manufacturers, 220 distributors and 136 retailers. All three groups expressed opposition to secret rebates, unearned quantity discounts, excessive advertising allowances and inequality of competing buyers. More than 70 per cent favored the intent of the Robinson-Patman law. More than 80 per cent favored legislative action to eliminate loss-leader selling, but only 45 per cent favored mark-up laws.

New Chocolate Drink

Kraft-Phenix Cheese Corporation is marketing Kraftone, a new chocolate-flavored food drink.

Distributors Group Organized

Grocery Distributors Association of Northern California is a newly formed organization of wholesale grocers, chain stores and co-operatives in Northern California, organized to promote the common interests of its members and of the grocery industry in general.

Officers are: President A. J. Falk, S & W Fine Foods, Inc.; Vice-Presidents K. W. Hess, Safeway Stores, Inc., and E. E. Schoolcraft, San Francisco Grocery Co., Ltd. Other directors are: J. A. Traverso, V. Traverso Co.; W. D. Leahy, Louis T. Snow & Co.; Harvey Sorensen, United Grocers, Inc.; E. S. Granucci, G. Granucci & Sons; J. E. Pagish, Oakland Wholesale Grocery Co.; F. A. Russo, Western States Grocery Co.

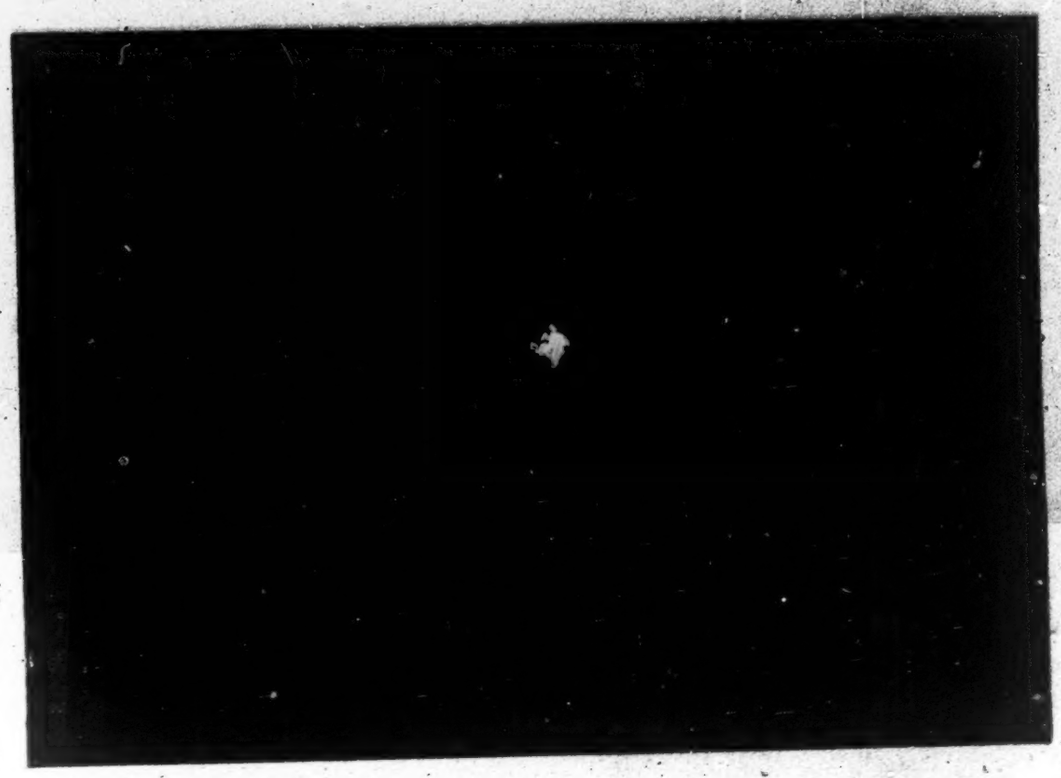
E. G. Williams is secretary-treasurer with headquarters at 444 Market Street, San Francisco.

Gerber Adds Liver Soup

Newest addition to the line of Gerber's strained foods for babies is liver soup, consisting of vegetables and beef liver cooked and strained in such a manner as to preserve vitamins and minerals.

A. M. A. Approves Milk

The packer of Sunny Skies brand evaporated milk has announced that the brand has been accepted by the Council on Foods of the American Medical Association. The seal of the council's acceptance will shortly appear on all Sunny Skies milk labels.



Fruit baskets in Denver's Strauss Market Company are a potent source of extra profits. This downtown market specializes in the sale of fruit baskets ranging in price from $2 to $50, and has established an arrangement with grocers in the leading cities of the United States and most capitals of the world for handling orders on a telegraph basis. The merchandising of the fruit basket service receives constant attention. The window regularly features this service, a neon sign calls attention to it and direct mail and telephone contacts continually publicize it.

EXHIBIT "E"
81

Here's what I've been reading . . .

Only trouble with getting a reputation is, you have to live up to it . . . and that goes for the quality of the scissors-work below, too. Wonder why I started this? JOE HARRISON
Turnstile Editor

. . . Somebody else can have my can—J.S.H.

For Sale! 48,000,000 Cans of Pears

Seattle, Wash.—The nation will be made canned pear conscious if plans of the pear growers of Washington, Oregon and California work out.

The pear growers and canners of the three States have formed the Pacific Coast Canning Pear Stabilization Committee. The purpose of the group is to keep the prices for the 1937 crop up by putting sales and advertising effort behind the 1936 crop now in warehouse and on the dealers' shelves.

The marketing problem is to move the surplus of 48,000,000 cans of pears piled high in the Pacific Coast warehouses owing to a combination of marketing setbacks during 1935-1936.

"Eat More Canned Pears," will be the slogan of an advertising campaign, with the co-operation of the National Association of Food Chains, which breaks this month. Intensive advertising and local sales promotion will reach all cities and towns where links of the national food chains are located.

Railroad executives have promised to help by placing canned pears on dining car menus.

. . . Lots of wives (who aren't blind) cook "in the dark"—judging by results—J.S.H.

Cooking in the Dark

Miss Gretta Griffis is the world's only blind cooking school demonstrator. Miss Griffis was born blind and was reared in El Dorado, Kans. A graduate of McPherson college, she later entered the University of Chicago where she received a master's degree in psychology.

Returning to her home she told her parents that she wished to learn to cook, since she was ambitious to become an efficient home-maker. Fearing to give her the use of an open-flame burner, her father purchased a Hotpoint electric range. Soon her fame as a cook spread through her home town.

The manager in charge of the Edison General Electric appliance store in El Dorado heard about her and one day got a bright idea. Dealers and salesmen were coming into El Dorado for a sales meeting and he asked her to show them how easy it was for a blind girl to cook on a Hotpoint range.

She readily agreed and her career was launched. Other Hotpoint sales executives sought her services and, not long ago, the main office executive in Chicago sent for her. She has developed a precise routine, has been made the "star" of a specially prepared sound film to be shown all over the country, and is now out on the road making personal appearances.

Her first tour started in Vermont and took in a considerable number of eastern points. Besides emphasizing the ease and safety of electric cooking, she has opened up a new field. Electric ranges have been going into the homes of the blind, in surprising numbers. A representative of SM talked with her and she said:

"Cooking is not very difficult for me. I can feel the hands of the clock. I can feel the notches on the heating gadgets. I can tell when to turn a pancake by the sound of the sizzling. I can bake a swell angel food cake. Audiences fussed me up a bit at first but I've gotten over that. I enjoy my work immensely. It's great fun."

—Sales Management.

Keep Meat Inventory

Retailers should take a complete meat inventory and figure meat department results at least every four weeks. To help stores do this, Armour's Voluntary Group Department has worked out a form which saves time for the retailer and enables him to put his finger on the meat department problem without guesswork. This will help retailers plug the leaks and bolster up the weak spots.

—H. G. F. Bulletin.

. . . We're sending Armour's a bill for above free publicity—J.S.H.

How to Sell Produce

Many fresh produce stores run by Italians and Greeks show that their owners know far more about handling produce than does the ordinary grocer. They excel in three points. They buy produce much more carefully, holding down quantities in order to make quick turnover and keep their goods fresh. They closely watch the condition of every item in their stock, picking over and rearranging so that riper and more perishable goods move out. Last, at any time of the day fresh fruit and vegetable displays in these stores look good—they do not have the ragged look of displays in many retail grocery stores after the morning rush.

—Grocers Commercial Bulletin.

. . . Sounds simple, this Italio-Greek formula but some of us need a Mussolini to make us do it—J.S.H.

Plan National Brand Drive

Evidence that the increased sale of private brands is a matter of growing concern to the producers of nationally advertised products was afforded last week by the trial-balloon announcement, issued by Paul Willis of the Associated Grocery Manufacturers of America, which outlined a vigorous program of consumer education. His proposal for marking advertised goods with a label guaranteeing their quality has been enthusiastically received not only in the grocery trade but in drugs and cosmetics as well.

—Business Week.

. . . Piggly Wiggly believes in National Brands but only as long as they sell on sight . . . so hop to it. A.G.M.A.—J.S.H.

National Biscuit Wins Suit

National Biscuit Co. won a five year old suit against the Kellogg Co. when the United States Circuit Court of Appeals decided that Kellogg was guilty of unfair competition and "untruthful statements" in placing on its Whole Wheat Biscuit carton, the famous Kellogg slogan, "The original has this signature." Kellogg was enjoined from using either the name or the shape of Shredded Wheat and was ordered to account for damages and profits.

—Rewritten from Business Week.

They Sold the Market Short

Florida canners of grapefruit segments and juice can testify that recent suggestions from the Food Institute should be heeded by packers of fruits and vegetables and by distributors of canned goods.

We have been telling packers to be cautious in selling short on 1937 packs; telling buyers to conservatively cover ahead when they can get contracts from dependable companies at prices that seem reasonable.

Both suggestions are based on the outlook for business and what is likely to happen to consumption and prices under the influence of inflation, the stronger bar gaining position of the farmers and the activities of the Federal Government.

Five months ago, grapefruit seemed headed for bargain prices. Canners figured that they would secure all the fruit they needed for little more than the cost of picking and delivering.

Juice market looked particularly bad because Texas had no developed outlet for its first large crop of grapefruit.

These conditions caused canners to book several million cases of grapefruit hearts and juice at low prices, selling the market short against production expected during January, February and March.

But these canners failed to anticipate the buying of fresh grapefruit by the Federal Government, the record consumption of fresh grapefruit; and the California freeze which brought higher levels for all citrus fruits.

Now Florida canners are paying about twice as much as they expected for fruit. Some free selling packers are short on their early contracts and are making cash settlements with buyers where they entered contracts guaranteeing any amount of delivery.

Largest pack of grapefruit and juice in history is going to consumption with a rush. Prices have advanced rapidly and may advance more during the summer, when grapefruit and juice are likely to sell well because of citrus fruits being high priced.

This is rather startling support for the following business rules to be followed during the canned goods season for 1937, starting now and running until 1937 packs are ready:

"Canners should protect regular customers by selling under market conditions as they existed but must watch their step when they sell too rapidly.

"Distributors will lose money, as an average, if they fail to conservatively cover ahead on the size and grades which are the backbone of their business."

These common sense business rules for 1937 apply to every important commodity offered at prices in line with previous levels for that commodity and with the general price level for foods.

Canned vegetables may be over-produced in some sizes and in some grades. Nobody can be certain about any crop until farmers are well along in their planting. Nobody can be sure about any harvest until the weather finishes its work of producing the tonnage.

But even with canned vegetables, it is probable that packers will have difficulty securing large supplies unless they get into such a speculative frenzy that they advance their buying offer to levels which will loosen the present resistance from farmers.

With canned fruits and fish, the situation is tighter. Fruit producing plant is limited. Outlook for fresh fruit markets has been strengthened by considerable damage to peach crops in the South Atlantic states.

Take canned pears as an example:

Present trading prices from the Pacific Coast are within about 15 per cent of the bottom during the worst part of the depression.

Canners are unloading inventories at bargain prices in preparation of the feature selling of canned pears from retail stores during April and again in June.

Pears sell in large volume whenever they are aggressively offered. One medium sized chain is actually selling more pears than peaches because it has promoted pears for several years.

Forceful merchandising of pears by chains and independents should sell a lot of pears and open increased consuming demand for the new packs.

Special promoting is part of the plan by the pear growers to collect higher prices for their fresh fruit. Government is assisting them. It will continue the control over shipments that maintained fresh pear prices last season. Export sales of fresh pears are to be subsidized.

This outlook is so obvious that you may well ask, why canners are clearing inventories at bargain prices and most distributors are failing to cover liberally.

The answer is to be found in the way competition operates and the tendency of men to think of the future from their recollections of what has happened in the past.

Canned pear prices have had recurring weak spots

How Fruits Rate in Food Value

The chart below, from "Consumer's Guide," publication of the Agricultural Adjustment Administration, gives information that can be a source of ideas for fruit ads, window and store signs.

*** Excellent; ** Good; * Fair

	Vitamins A	Vitamins B	Vitamins C	Vitamins G	Calcium	Iron	Fuel Value per Pound (Calories)
Apples (fresh)			*	*			290
Apricots (fresh)	***		*				255
Apricots (dried)	***		**		**	***	1,260
Bananas	**	*	**	*			445
Blackberries (or dewberries)	**		*			**	285
Blueberries (or huckleberries)	*		*			**	310
Cantaloupe (see Muskmelon)							
Cherries	**		**				310
Cranberries	*		**				240
Currants (fresh)			***				275
Currants (dried—see Raisins)							

California Tries Food Price Control Plan

The food industry eyes current experiment in California wherein major distributors of mayonnaise are establishing price contracts with retailers under provisions of the State's fair trade law. Unlike drug and liquor manufacturers, food producers are hesitant about issuing resale price contracts. Reason—voluntary and chain groups handle two to three times as great a percentage of the total volume in grocery field as they do in drugs. Chains, responsible for 75 per cent of total volume, have not been subject to as strong cut-price pressure as drug chains, are less [illegible] price.

EXHIBIT

chology.

Returning to her home she told her parents that she wished to learn to cook, since she was ambitious to become an efficient home-maker. Fearing to give her the use of an open-flame burner, her father purchased a Hotpoint electric range. Soon her fame as a cook spread through her home town.

The manager in charge of the Edison General Electric appliance store in El Dorado heard about her and one day got a bright idea. Dealers and salesmen were coming into El Dorado for a sales meeting and he asked her to show them how easy it was for a blind girl to cook on a Hotpoint range.

She readily agreed and her career was launched. Other Hotpoint sales executives sought her services and, not long ago, the main office executive in Chicago sent for her. She has developed a precise routine, has been made the "star" of a specially prepared sound film to be shown all over the country, and is now out on the road making personal appearances.

Her first tour started in Vermont and took in a considerable number of eastern points. Besides emphasizing the ease and safety of electric cooking, she has opened up a new field. Electric ranges have been going into the homes of the blind, in surprising numbers. A representative of SM talked with her and she said:

"Cooking is not very difficult for me. I can feel the hands of the clock. I can feel the notches on the heating gadgets. I can tell when to turn a pancake by the sound of the sizzling. I can bake a swell angel food cake. Audiences fussed me up a bit at first but I've gotten over that. I enjoy my work immensely. It's great fun."

—Sales Management.

Plan National Brand Drive

Evidence that the increased sale of private brands is a matter of growing concern to the producers of nationally advertised products was afforded last week by the trial-balloon announcement, issued by Paul Willis of the Associated Grocery Manufacturers of America, which outlined a vigorous program of consumer education. His proposal for marking advertised goods with a label guaranteeing their quality has been enthusiastically received not only in the grocery trade but in drugs and cosmetics as well.

—Business Week.

. . . Piggly Wiggly believes in National Brands but only as long as they sell on sight . . . so hop to it. A.G.M.A.—J.S.H.

National Biscuit Wins Suit

National Biscuit Co. won a five year old suit against the Kellogg Co. when the United States Circuit Court of Appeals decided that Kellogg was guilty of unfair competition and "untruthful statements" in placing on its Whole Wheat Biscuit carton, the famous Kellogg slogan, "The original has this signature." Kellogg was enjoined from using either the name or the shape of Shredded Wheat and was ordered to account for damages and profits.

—Rewritten from Business Week.

How Fruits Rate in Food Value

The chart below, from "Consumer's Guide," publication of the Agricultural Adjustment Administration, gives information that can be a source of ideas for fruit ads, window and store signs.

*** Excellent; ** Good; * Fair

	Vitamins A	Vitamins B	Vitamins C	Vitamins G	Calcium	Iron	Fuel Value per Pound (Calories)
Apples (fresh)	*	*	*	*	.....	.....	290
Apricots (fresh)	***	...	*	.....	.....	.....	255
Apricots (dried)	***	...	**	.....	**	***	1,260
Bananas	**	*	**	*	.....	.....	445
Blackberries (or dewberries)	**	...	*	.....	.....	**	285
Blueberries (or huckleberries)	*	...	*	.....	.....	**	310
Cantaloupe (see Muskmelon)							
Cherries	**	...	**	.....	.....	.....	310
Cranberries	*	...	**	.....	.....	.....	240
Currants (fresh)	.....	...	***	.....	.....	.....	275
Currants (dried—see Raisins)							
Dates	**	*	...	.....	**	***	1,570
Figs (fresh)	*	*	*	*	**	.....	395
Figs (cured)	*	*	...	*	***	***	1,425
Gooseberries	.....	...	***	*	.....	.....	215
Grapefruit	.....	...	***	*	.....	.....	200
Grapes	*	*	*	.....	.....	.....	335
Guava	**	*	***	*	.....	.....	335
Lemons	.....	...	***	.....	.....	.....	200
Limes	.....	...	***	.....	**	.....	240
Mangoes	***	*	***	**	.....	.....	335
Muskmelon	**	*	***	*	.....	.....	125
Oranges	*	**	***	*	.....	.....	230
Papayas	***	*	***	*	.....	.....	195
Peaches (fresh) Yellow	***	...	**	.....	.....	.....	200
Peaches (dried) Yellow	***	...	***	.....	**	***	1,335
Pears (fresh)	.....	...	*	**	.....	.....	315
Pears (dried)	.....	**	.....	**	**	**	1,490
Persimmons (Japanese)	.....	...	*	.....	.....	.....	295
Pineapples	*	**	*	*	.....	.....	205
Plums (or fresh prunes)	.....	...	*	.....	.....	.....	315
Prunes (dried)	***	**	*	***	**	***	1,345
Raisins (including currants)	*	...	.....	*	**	***	1,480
Raspberries	.....	...	***	.....	.....	**	305 (Red)
						**	175 (Black)
Strawberries	.....	...	***	.....	.....	.....	175
Tangerines	.....	...	***	.....	.....	.....	185
Watermelons	*	*	*	*	.....	.....	140

California Tries Food Price Control Plan

The food industry eyes current experiment in California wherein major distributors of mayonnaise are establishing price contracts with retailers under provisions of the State's fair trade law. Unlike drug and liquor manufacturers, food producers are hesitant about issuing resale price contracts. Reason—voluntary and chain groups handle two to three times as great a percentage of the total volume in grocery field as they do in drugs. Chains, responsible for 75 per cent of total volume, have not been subject to as strong cut-price pressure as drug chains, are less friendly to price-maintenance. Worse, if they dislike either price-level or profit-margin, they can switch to private brands more easily than can be done in other fields.

The "big three" in mayonnaise (Best Foods, Durkee, Kraft-Phenix) are proceeding cautiously in California. None, as manufacturers, have made price agreements. Best Foods and Durkee have worked through distributors, Kraft-Phenix have made no move but are expected to follow the others.

Only other "fair trade" food manufacturers in the state consist of Hormel's soups and canned meat items, Ovaltine, Canada Dry products, two or three specialty condiments, and a few dog foods.

—Rewritten from Business Week.

packs are ready:

"Canners should protect regular customers by selling under market conditions as they existed but must watch their step when they sell too rapidly.

"Distributors will lose money, as an average, if they fail to conservatively cover ahead on the size and grades which are the backbone of their business."

These common sense business rules for 1937 apply to every important commodity offered at prices in line with previous levels for that commodity and with the general price level for foods.

Canned vegetables may be over-produced in some sizes and in some grades. Nobody can be certain about any crop until farmers are well along in their planting. Nobody can be sure about any harvest until the weather finishes its work of producing the tonnage.

But even with canned vegetables, it is probable that packers will have difficulty securing large supplies unless they get into such a speculative frenzy that they advance their buying offer to levels which will loosen the present resistance from farmers.

With canned fruits and fish, the situation is tighter. Fruit producing plant [illegible] limited. Outlook for fresh fruit markets has been strengthened by considerable damage to peach crops in the South Atlantic states.

Take canned pears as an example:

Present trading prices from the Pacific Coast are within about 15 per cent of the bottom during the worst part of the depression.

Canners are unloading inventories at bargain prices in preparation of the feature selling of canned pears from retail stores during April and again in June.

Pears sell in large volume whenever they are aggressively offered. One medium sized chain is actually selling more pears than peaches because it has promoted pears for several years.

Forceful merchandising of pears by chains and independents should sell a lot of pears and open increased consuming demand for the new packs.

Special promoting is part of the plan by the pear growers to collect higher prices for their fresh fruit. Government is assisting them. It will continue the control over shipments that maintained fresh pear prices last season. Export sales of fresh pears are to be subsidized.

This outlook is so obvious that you may well ask why canners are clearing inventories at bargain prices and most distributors are failing to cover liberally.

The answer is to be found in the way competition operates and the tendency of men to think of the future from their recollections of what has happened in the past.

Canned pear prices have had recurring weak spots in recent years, reflecting weakness in other fruits but principally because pears haven't had a well developed volume movement to consumers.

Both these influences are not likely to be strengthening pear prices during the next 18 months. Few fruits will be on the bargain counter, provided California growers succeed in present plans for keeping the peach pack under the control permitted by their state law.

Canned fish market has quite definitely passed under the influence of the current outlook for inflating costs and sustained consumption.

Salmon market, which is the big trading place in canned fish, has reached new price levels as packers have finally faced the dominant position of the maritime unions in fixing costs for the new season's pack.

Be cautious about selling 1937 markets short.

Be conservatively far-sighted in protecting your distributing requirements of the vegetables, fruits and fish that you expect to need before the 1938 packs.

EXHIBIT [illegible]

8191

AFFIDAVIT OF CRICHTON CLARKE.

(Filed July 1, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

CRICHTON CLARKE, being duly sworn, deposes and says:

I am counsel for the defendant-appellee, the Kellogg Company, in the above-entitled proceeding and counsel upon this application, which is made for an order enjoining the plaintiff-appellant from using the interlocutory decision of this Court, granted on rehearing, as a means of spreading publicity in favor of its product at the expense of the defendant, and to recall said decision by reason of such unfair publicity and propaganda. There is now pending before this Court an application for rehearing of the said decision which is as yet undecided.

On the seventeenth day of May, 1937, when this motion originally came on to be heard, it was adjourned at the direction of Judge Buffington, then presiding, in order that it might come before the Court as constituted upon the hearing of the appeal and for that purpose was adjourned without date until such

time as the Court as so constituted might be sitting. Upon my request it was further directed by Judge Buffington that pending such hearing, counsel might submit supplemental or additional affidavits setting forth additional instances of the use of the said decision as an advertising medium or such other facts as might be pertinent upon such application.

On the seventh day of May, 1937, I received a copy of a letter addressed to the Court by counsel for the National Biscuit Company, appellant, with reference to the application for rehearing, which is annexed hereto and marked Exhibit "A." I respectfully ask the Court to note that on page 2 of the said letter, counsel for National Biscuit Company repeats its concession of the right of appellee to make the biscuit in issue in substantially the form or shape used provided that each biscuit be marked with a distinctive mark. Subsequent to the receipt of this letter, I addressed a letter to the Court, sending a copy to counsel for National Biscuit Company, which is annexed hereto and marked Exhibit "B," and asked the Court to note that in this letter we drew attention to the fact that we had distinctively marked each biscuit, by enclosing in a sealed and distinctively marked carton and by making each one shorter and of different dimensions, than those of the plaintiff. It is pointed out in such letter that plaintiff actually thereafter copied the biscuit which Kellogg Company had made as to size and thereby voided the distinction which defendant had voluntarily adopted. In spite of the fact that this is so clearly pointed out in such correspondence, there has been no reply to this statement by counsel for the National Biscuit Company.

We are submitting herewith an affidavit of C. F. Baumgart, general sales manager of Kellogg Company, sworn to on the nineteenth day of June, 1937.

This affidavit refers to many instances which have come to his notice concerning statements made by salesmen for the National Biscuit Company and claims made by them with reference to the force and effect of the interlocutory decision of this Court granted upon rehearing and their attempts to use the same as an unfair sales argument. Said affidavits also contain a large number of press releases and clippings from press and trade journals, which it is alleged were released by publicity agents for the said National Biscuit Company.

Subsequent to the making of this affidavit, I have received from the Kellogg Company from its various sales offices throughout the country and likewise from many press clipping bureaus, a large number of such press releases and also copies of further statements made by salesmen. Copies of these press releases and statements are annexed and originals will be exhibited to the Court upon subsequent hearing.

Specifically I refer to the following:

A report from R. H. Woodbine, directed to the Denver office, reading as follows:

"Denver Office
June 1, 1937

I was unable to sell Mr. Helpe any biscuits this trip because a week ago a National Biscuit Company man was in and told him Kellogg's was going to have to pay them $4,000,000, and discontinue making the biscuits.

On account of this information he placed his order for biscuits this trip through National.

Was unable to find out if this was an Idaho or Montana salesman. . . .

R. H. Woodbine"

A report received at the office of the district sales manager at Memphis, Tennessee, from Ora Brunbelou,

representative in Southern Mississippi, reading as follows:

"Hotel Parks
Louisville, Miss.

June 12, 1937

While in Kosciusky today Mr. Jim White of City Grocery Store told me M. Hood, salesman for National Biscuit Company of Greenwood Office told him after he sold all the w. w. (whole wheat) biscuits he had in the store he would not get any more as Kellogg was infringing on their rights, using the word shredded, that Kellogg could not use that word again. Mr. White said he had been selling as much of Kellogg's as National Biscuit Co.

Ore Brunbelou"

A report from M. Krumdieck, of Philadelphia, Pennsylvania, dated May 24, 1937, reading as follows:

"Monday, 4/1937

While working in Wilmington I encountered Nabisco (National Biscuit Company) salesman at the Haldas Store, 5th and King Streets, when he saw me displaying the two cases, 324's (shredded wheat biscuit) I had sold them, he came over to me and said in a voice that could be heard all over the store 'I don't see why you people are still trying to sell that imitation (meaning 324's) (shredded wheat biscuit) when the Supreme Court has reversed the decision of the Court in Philadelphia and you will soon have to take it off and pay us $1,000,000. for damages.

M. Krumdieck"

A letter from Williamsport, Pennsylvania, dated May 15, 1937, directed to the sales representative for that district, reading as follows:

"Wenner Hotel
Williamsport, Pa.
May 15, 1937

Mr. Lewis:

The circular letter referred to in the attached letter was picked up in the store of R. C. Rager in Muncy, Pa. The National Biscuit Company salesmen are circulating a lot of reports in this area in reference to the reversed decision in this suit. They have let a great many merchants under the impression that they will be subject to prosecution for handling this product. I have had this question asked me a number of times in the past two or three weeks. In fact some have hesitated in buying the tumbler deal for this reason. However, we have no proof of this statement other than what the merchants tell us. Nevertheless I believe the letter which I forwarded substantiates these remarks."

A report received by the office of National Biscuit Company from its sales representative H. Lorma, reading as follows:

"Lawrenceville, Ill.
June 3, 1937
Mr. R. R. Adams:

Dear Mr. Adams:

On June 2d National Biscuit Company salesman called on J. E. Wesin & Co., Robinson, Illinois. Mr. Wesin states this man, he does not know his name, told him to lay off Kellogg shredded whole wheat biscuit. That the Courts had ordered Kellogg Co. to quit selling this item. Asked Mr. Wesin if he mentioned the reason and he advised the salesman said that the Courts ordered Kellogg Company to stop making biscuits, that it was an infringement on rights of National

Biscuit Company. Asked several (3 grocers) if they knew this man and they did not. They call him Bitz.

H. Lorma"

In addition to the reports to which specific reference has been made, I have in my possession a great collection of newspaper and trade journal clippings, photostatic copies of a small portion of which are annexed and marked Exhibits "C" to "K" inclusive.

Exhibit "C" is a page from The Oregon Merchants' Magazine, a trade journal which runs on one page a partial excerpt from the opinion of this Court together with display advertising for the National Biscuit Company's shredded wheat. The extracts from the Court's opinion, although headed by the statement directly below the display advertising "Herewith we reproduce Judge J. Warren Davis' opinion," is obviously not the opinion, of course, but simply a collection of highly prejudicial excerpts taken therefrom, interlocked with the comments of the plaintiff thereon.

The language of this particular excerpt is identical with many which recur constantly throughout the widespread publicity which has been circulated, as I am informed, by the plaintiff. Its source is to be found in Exhibits "D" and "D-1." "D" is a direction by the plaintiff's advertising department to its district managers directing them to secure in local papers the insertion "for immediate release" of the attached clipping "verbatim." The attached clipping marked "D-1" which is annexed hereto, it will be seen, is identical with this excerpt and identical with Exhibit "E," and also with the excerpts from the following trade journals shown in the annexed exhibits:

Exhibit "F"—"Super Market Merchandising" for May, 1937, "Kansas City Grocer" for May 25, 1937, "West Coast Trade" for May, 1937.

Exhibit "G"—"Butcher & Grocery Clerk Journal" for May, 1937.

Exhibit "H"—"Grocers' Commercial Bulletin," of Minneapolis, Minn., for May, 1937.

Exhibit "I"—"California Retail Grocers' Advocate" for April 23, 1937.

Exhibit "J" contains eight extracts from the general press in widely scattered sections of the country and is submitted as typical of a vast collection of such articles in my possession, which it is considered too burdensome to set forth in full herein.

CRICHTON CLARKE.

Sworn to before me this twenty-eighth day of June, 1937.

MARGARET C. HAYDEN,
Notary Public, Westchester County.
N. Y. Co. Clk's No. 717, Reg. No. 9-H-462.
Commission expires March 30, 1939.

EXHIBIT A.

May 7, 1937

National Biscuit Co. v. Kellogg Co.

Hon. Joseph Buffington,
Hon. J. Warren Davis,
Hon. J. Whitaker Thompson,
United States Circuit Judges
Philadelphia, Pa.

Sirs:

We have read and considered "Appellee's Petition for Rehearing", and do not intend to submit a reply or, more properly speaking, ask the Court for permission to file a reply. We see nothing new in the petition or anything but a re-hash of the arguments advanced in the defendant's briefs on the first hearing

and on the rehearing. As the Court has, of course, considered those arguments, it will not, we assume, wish a reply thereto. The defendant persists in disregarding the broad features upon which this Court's decision on rehearing is based and tries to confine the case in the narrow groove of technicalities, in which light it induced the Court on the first hearing to view the case, and which treatment of the case was found to be incorrect and was discarded by the Court after the rehearing. There are two statements made in the petition, however, which we wish to refute.

(a) It is claimed that defendant has never had an opportunity to present "a full oral argument" in the case. This we deny. On the rehearing, both Mr. Clarke and Mr. Rogers were heard, so far as we recollect, as fully as they expressed a desire to be heard. Our recollection is that they consumed substantially all of the time which the rules of the Court permit. In addition, subsequent to the argument, defendant filed a brief entitled "Defendant's Memorandum After Rehearing". This consists of 14 pages. Again, on November 24, 1936, nearly two months after the argument, counsel for the defendant wrote the Clerk of this Court a long letter calling attention to the fact that a writ of certiorari had been denied in a case cited in its brief on rehearing. Still later, counsel for the defendant brought to the Court's attention the opinions of the Court of Appeals in Ontario. How it is possible, in view of these facts, for the defendant to now contend that it has not had a full and fair opportunity to be heard is beyond our comprehension.

(b) It is now stated that plaintiff "specifically conceded that an injunction as broad as that now ordered could not issue". Defendant refers to the matter of the form or shape of the biscuit. Again, we are

unable to understand how it can make that statement in view of Point V of our brief on rehearing which is in bold-face type. We quote the same:

> "IRRESPECTIVE OF WHETHER PLAINTIFF IS ENTITLED TO THE EXCLUSIVE USE OF THE NAME 'SHREDDED WHEAT', DEFENDANT SHOULD EITHER BE ENJOINED FROM MAKING ITS BISCUITS IN SUBSTANTIALLY THE FORM OR SHAPE WHICH HAS CHARACTERIZED PLAINTIFF'S BISCUITS FOR MORE THAN FORTY YEARS, OR, AT ANY RATE, REQUIRED TO PLACE UPON EACH BISCUIT SOME DISTINCTIVE MARK."

We are, of course, sending a copy of this letter to counsel for the defendant.

Respectfully,

David A. Reed
Thomas G. Haight
Drury W. Cooper
Charles A. Vilas
Counsel for Plaintiff-Appellant

EXHIBIT B.

May 14, 1937

Hon. Joseph Buffington,
Hon. J. Warren Davis,
Hon. J. Whitaker Thompson,
United States Circuit Judges
Philadelphia, Pa.

Re: National Biscuit Co. v. Kellogg Co.

Sirs:

We have received and considered a copy of a letter addressed to you by the plaintiff's counsel under date of May 7, 1937 in which issue is taken with only two statements made in the petition for rehearing, namely,

(a) That defendant was induced to forego a full argument of the case on both hearings, at the first hearing by suggestion of the Court and at the second hearing by suggestion of the Court and concessions made by plaintiff at the first hearing, and in plaintiff's brief on the rehearing. Defendant respectfully insists that the Court has never heard it on the question of an injunction restraining it from making the biscuit under any name or in any kind of a carton or whether marketed by the most scrupulously fair methods of competition that can be suggested. We cannot be too emphatic about this. Judge Haight specifically conceded under questions by Judge Buffington at the original hearing that the Court had now power to issue such an injunction. This concession was specifically included in the plaintiff's brief on rehearing and quoted at page 14 of defendant-appellee's petition for rehearing. The same concession is included in the very matter quoted in plaintiff's counsel's letter of May 17th which states ". . . defendant should be either enjoined from making its biscuit . . . or, at any rate required to place upon each biscuit some distinctive mark." This is precisely what defendant did. It enclosed each biscuit in a sealed and distinctively marked carton and it made each so much shorter than plaintiff's biscuit that plaintiff actually copied defendant's small biscuit as to size and thus cancelled the substantial size distinction which defendant had voluntarily adopted. Defendant, therefore, at both hearings received and acted on the specific concession of the plaintiff and in doing so refrained from arguing its conceded indubitable right to make the biscuit itself. The attention of the Court is respectfully directed in this respect to page 5 of the defendant-appellee's brief on rehearing which states in black faced type

"Plaintiff's belated concession of defendant's indubitable right to make the patent expired biscuit, necessarily concedes defendant's equally indubitable right to call it by its patent expired name."

Defendant respectfully insists that in fairness and justice it should be heard in opposition to a contention which was specifically abandoned by the plaintiff and that such rehearing should be had before such a heretofore unheard of type of injunction going far beyond any injunction ever ordered in any unfair trade case shall be decreed. Defendant's counsel know of no prior case in which a Court had disregarded distinctive cartons and enjoined the distinctively sized contents. Such an injunction, if the Court has power to issue and enforce it, (which we respectfully deny) would give the defendant a monopoly on its cornflakes much more valuable than any right it has ever exercised on shredded wheat.

(b) Plaintiff's point (b) answers itself. The bold faced matter quoted by plaintiff from its brief on rehearing is a second written concession of the defendant's right to make the biscuit.

(c) We welcome plaintiff's reply for the reason that it emphasizes more than anything which has yet occurred in the case the fact that plaintiff simply has no reply to the point that in the most solemn statutory manner it repeatedly disclaimed trademark rights in both the words shredded wheat and in the form and shape of the biscuit for the specific purpose of being able to register other things as its trademark.

This point has been pressed upon the Court in every brief filed in this Court and in the District Court. The defendant has called to the attention of the Court

the fact of plaintiff's disclaimers. The decision of the District Court and the first decision of this Court were based on grounds which made it unnecessary to consider the statutory disclaimers. The plaintiff in no brief and on none of the arguments has attempted to answer this point which necessarily arises as an answer to the ground on which the Court on rehearing based its opinion. We respectfully emphasize the suggestion—that the reason the plaintiff has never offered the Court any argument, suggestion, reply or avoidance of these statutory disclaimers is that no reply is possible, and that the plaintiff can only hope that the Court will overlook it.

We earnestly insist that the injunction ordered as to both name and form is completely barred by these irrevocable statutory disclaimers. The point is nowhere touched upon in either decision of this Court and should be considered on rehearing.

It was not necessary for either Court to consider these disclaimers so long as the bill was ordered dismissed on other grounds. But when the Court proposed to hold that both name and form of the biscuit are or have become exclusive trademark property, it then becomes necessary for the Court to decide specifically how these irrevocable disclaimers can be avoided, if at all. Otherwise they stand as an insurmountable barrier to the injunction ordered as to both name and form. This Court we feel cannot fairly allow its present decision to stand without hearing from the plaintiff on this point. We further feel that after consideration of the point, this Court should include its view in its opinion for the benefit of the United States Supreme Court for its consideration upon a petition for writ of certiorari. If the questions are certified, this is one of the questions to be so determined.

We are, of course, sending a copy of this letter to counsel for the plaintiff.

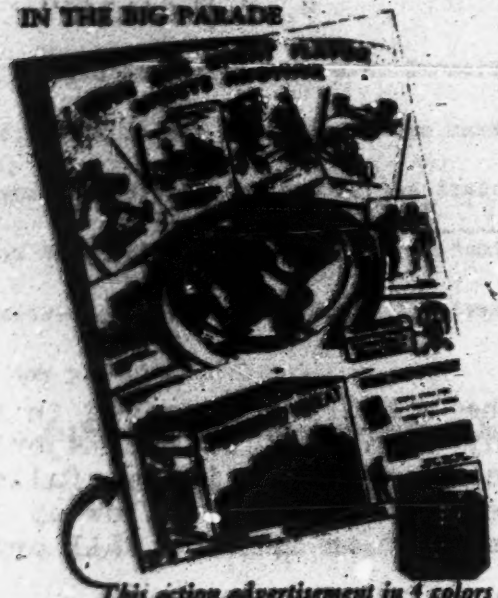
Respectfully,

Crichton Clarke,
Edward S. Rogers,
A. B. Seibold,
Robert T. McCracken,
Counsel for Defendant-Appellee.

EXHIBIT "C."

2207

STAR PERFORMER IN THE BIG PARADE



Put this DOUBLE FEATURE PROFIT HIT to work NOW!

The top of the strawberry season is here.

Now is the time to cash in on that famous volume team—Shredded Wheat and strawberries.

Your National Biscuit Company salesman has a brilliant new parade of display material. Ask him about it.

Feature this team in your own advertising.

And remember, we're right behind you with a big powerhouse of advertising. Two out of every three families in your neighborhood see the flow of dominating, colorful, advertisements in thirty leading magazines, the American Weekly, Comic Sections, Associated Weekly Group, and scores of local Western newspapers.

A PRODUCT OF
NATIONAL BISCUIT COMPANY

Shredded Wheat is made in the modern Oakland, California, plant

This action advertisement in 4 colors appears in the May 16th magazine section of

San Francisco Chronicle, Oakland Tribune, Sacramento Union, Los Angeles Times, Long Beach Press-Telegram, San Diego Union, Phoenix Republic, Portland Oregonian, Tacoma Ledger, Seattle Times, Spokane Spokesman-Review, Salt Lake City Tribune

National Biscuit Co. Wins Shredded Wheat Decision

Court Enjoins Kellogg Co. From Use of Shredded Wheat in Name, Shape or Form

Herewith we reproduce Judge J. Warren Davis' opinion.

PHILADELPHIA, April 12.—U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competitive and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendants placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

. . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat," a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y., since 1900.

You Are Old When—

You no longer thrill at the thought of work.
You begin to doubt your ability to hold on.
You no longer have a thirst for knowledge.
You begin your day's work without enthusiasm.
You no longer laugh at adversity and ignore danger.
You begin to measure time by the calendar rather than by accomplishments.—*Capper's Weekly.*

EXHIBIT "D."

N. Y., 4/15/37

HERE IS SOME BIG NEWS!

To MANAGERS:

We know you will be vitally interested in the attached release which has already been sent to the majority of daily papers throughout the country. Read it carefully, and then check with your local newspapers as a follow-up to see whether it either has been printed or if they will print it immediately.

The newspapers have undoubtedly received their copy of the release sent by our publicity agency and it has probably gone through their regular editorial channels. However, as a double check, we wish you would pass it along to them with a definite request to print it verbatim.

Please send us tear sheets of the issues in which it appears.

ADVERTISING DEPARTMENT.

EXHIBIT "D-1"

FOR IMMEDIATE RELEASE

NATIONAL BISCUIT COMPANY
WINS SHREDDED WHEAT DECISION
Court Enjoins Kellogg Company from Use
of Shredded Wheat in Name, Shape or Form.

PHILADELPHIA: April 12: U.S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . .a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y. since 1900.

The Louisiana Grocer

Entered at the Post Office at New Orleans, La., as Second Class Matter

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Fair Trade Laws

Fair trade practice laws have been enacted by 12 states since January, and bills proposing such laws are pending in 15 other states, a summary of fair-trade acts made public by the American Retail Federation shows. Fifteen states had such laws at the close of last year.

Only Connecticut and Vermont have defeated fair trade practice proposals in current legislative sessions.

Fair trade bills have been passed and signed by the governors in the following states:

Arkansas (H. 98), Georgia (S. 72), Indiana (S. 23), Kansas (S. 96), Kentucky (H. 13), Montana (H. 70), Nevada (H. 130), New Mexico (H. 23), South Dakota (S. 8), Tennessee (H. 320), West Virginia (H. 204), Wyoming (S. 15).

Bills have been passed by one or both houses of the legislature in the states of—

Colorado (H. 513), Idaho (H. 315), North Carolina (H. 435), North Dakota (H. 209), Oklahoma (S. 45), South Carolina (H. 409).

Nine other states have fair trade bills pending. They are: Delaware (S. 61), Maine (H. 115, S. 265), Massachusetts (H. 397, H. 548, H. 549, H. 975, H. 1106, S. 122, S. 296), Michigan (H. 32), Minnesota (H. 277), S. 65), Missouri (H. 118, H. 119), Nebraska (Bill 131), New Hampshire (H. 62), Texas (H. 58, S. 24, S. 163).

No fair trade bills have been introduced in the legislatures of Alabama or Utah.

Amendments to or substitutes for existing fair trade laws are pending in these states:

Maryland (H. 41), New Jersey (S. 131), New York (H. 414, S. 82), Ohio (S. 263), Washington (S. 70).

National Biscuit Company Wins Shredded Wheat Decision

PHILADELPHIA: U. S. Circuit Court of Appeals for the Third Circuit reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellog.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y., since 1900.

KANSAS CITY GROCER MAY 25, 37

National Biscuit Company Wins Shredded Wheat Decision

Court Enjoins Kellogg Company From Use of Shredded Wheat in Name, Shape or Form.

Philadelphia, April 12—U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the ORIGINAL and by implication that the plaintiff's was an IMITATION. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

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"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y., since 1900.

SUPER MARKET MERCHANDISING
NYC
5/37

National Biscuit Co. Wins Court Decision

Philadelphia, Pa.—U. S. Circuit Court of Appeals for the Third Circuit reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

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"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

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Mass Display of Shredded Wheat

"Shredded Wheat," a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y., since 1900.

WEST COAST TRADE MAY. 1937

1416

National Biscuit Co. Wins Shredded Wheat Decision

Philadelphia, Pa.—The U. S. Circuit Court of Appeals for the Third Circuit, in session here in April, reversed a former decision in the case of National Biscuit Company vs. Kellogg Company, involving use of the trade name "Shredded Wheat."

Following is an excerpt from Judge J. Warren Davis' opinion: (Our authority being a news release from the publicity division of National Biscuit Co.)

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than 40 years . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object or doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

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EXHIBIT "E"

that the plaintiff's was an imitation. There could have been but one object in doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiffs biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

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of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y. since 1900.

NORTHWESTERN . MERCHANT
"Leading Pacific Northwest Food Journal"
Seattle, Wash.
MAY 1937

about getting a Bureau Report,—and bring us, in proportion to Trade Volume, the largest element of our ultimate losses. This Group formerly represented about 21-22% of the General Public, and constitutes the chief reason for the maintenance of Credit Bureaus.

We must now deal with a suddenly visible shift in the respective Group Percentages as set forth above. Wherefore, those percentages should be kept in mind as we proceed, in ensuing Issues, to deal with the facts of and the causes for such relatively sudden Shifting of Credit Position and Credit Attitude among so large a portion of our Trade and of the Public generally.

United States Circuit Court Reverses Former Decision

PHILADELPHIA: April 12: U. S. Circuit Court of Appeal for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belong to the plaintiff.

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"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y since 1900.

NATIONAL BISCUIT COMPANY WINS SHREDDED WHEAT DECISION

Court Enjoins Kellogg Company From Use of "Shredded Wheat" in Name, Shape or Form.

PHILADELPHIA, April 12: U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

" . . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

BUTCHER & GROCERY / CAKE KITS JOURNAL, SAN PARK. 12, 5/1937

EXHIBIT "G"

221

DELICATESSEN MERCHANT
"Official Publication of Metropolitan Delicatessen Merchants Association and the Only Trade Paper Serving the Delicatessen Industry"
45 West 45th Street, New York City
MAY 1937

National Biscuit Co. Wins Decision

Philadelphia, Pa.—U. S. Circuit Court of Appeals for the Third Circuit reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

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"Shredded Wheat," a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y., since 1900.

This article was clipped from
THE CRACKER BAKER
"The only journal in the world devoted to the Biscuit and Cracker Industry"
New York
MAY 1937

Court Upholds National Biscuit Shredded Wheat

The Federal Circuit Court of Appeals at Philadelphia on April 12 upheld the National Biscuit Co. in its suit to prevent the Kellogg Co. from using the name, "Shredded Wheat" on any of its products.

The court reversed a previous opinion upholding the U. S. District Court for Delaware. It directed the Kellogg company to refrain from advertising or offering its products for sale in the form and shape used by the biscuit company.

Judge J. Warren Davis in granting the injunction said, that the Kellogg company had appropriated not only the name Shredded Wheat, "but also its form and shape which has characterized the biscuit for more than 40 years. In order to secure the property of the plaintiff (National) and the name and form of its product, the defendant (Kellogg) placed upon its cartons the words 'The original has this signature: W. K. Kellogg.' That is, the defendant . . . claimed that his product was the original and by intimation that the plaintiff's was an imitation."

CLIPPING FROM
GROC'RS COM'L. BUL. (MNPLS., MINN.)
MAY 1, 1937

NATIONAL BISCUIT CO. WINS SHREDDED WHEAT DECISION

U. S. CIRCUIT COURT of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of Plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat," a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y. since 1909.

CLIPPING FROM
FOOD FIELD REPORTER (N. Y. C.)
MAY 31, 1937

A MISNOMER: Recently when the U. S. Circuit Court in Philadelphia held that the Kellogg Company was in infringement of the trade mark, "Shredded Wheat," owned by the National Biscuit Co., it had the following to say about the name: "These threads of wheat come out or extrude from the rollers just as steel rails do when steel is passed between rollers. But it has never been suggested in making steel rails or copper wire that steel or wire was 'shredded.' Neither can it be said that wheat is 'shredded', in the plaintiff's process. It is mashed and mangled. The name at most is merely suggestive."

EXHIBIT "H"

22115

ADVERTISER SHORTS

In Court

After the original patents on Shredded Wheat expired in 1912, National Biscuit Co. (NBC) knew it couldn't object when other companies manufactured a similar product. But it could and it did when Kellogg Co. brought out Whole Wheat Biscuits, subtitled them "shredded wheat," added insult to injury by plastering the carton with: "The original has this signature: W. K. Kellogg."

Two years ago NBC fretted when the U. S. Circuit Court of Appeals in Philadelphia found Kellogg within its rights.

It felt better last fortnight when the same court reversed itself in words that admen found significant: "When a person after the expiration of a patent has spent such enormous sums of money . . . to create a valuable property right . . . equity today will not permit another to apply the name . . . of the merchandise to his product. . . . There could have been but one object for doing this, and that was by unfair competition and untruthful statements to deceive the public."

SHREDDED WHEAT OWNERSHIP SET

The U. S. Circuit Court of Appeals yesterday held that the National Biscuit Company is entitled to the sole use of the "Shredded Wheat" trade-mark.

In its decision the court reversed its former ruling handed down in January, 1936, when it held that the Kellogg Company was entitled to use the trade-mark because the National Company's patent on it had expired. The latest ruling, however, points out that Kellogg adopted the mark after National spent nearly

DY'

CALIFORNIA RETAIL GROCERS ADVOCATE
"State Grocers' Publication"
San Francisco, Cal.
APR 23 1937

4.2/8

Kellogg Barred from Shredded Wheat Name Use

Philadelphia, April 15.—Kellogg Co., Battle Creek, Mich., this week was enjoined against use of the trade name, "Shredded Wheat" in advertising or sale in the form of the similar product of National Biscuit Co., Niagara Falls, N. Y. The injunction was issued by the U. S. Circuit Court of Appeals here in reversing a previous decision in the long legal fight in favor of Kellogg.

The decision says the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff." Particularly cited was use of the words on the cartons, "The original has this signature: W. K. Kellogg."

The court held this statement implied the National Biscuit product was an imitation.

Florida to Exhibit at Cleveland Show

The Florida Citrus Commission has approved an appropriation of $10,000 for participation in the Great Lakes Exposition during the summer.

The citrus exhibit will be staged in conjunction with that showing the resources of the entire state.

National Biscuit Co. Wins Shredded Wheat Decision

Court Enjoins Kellogg Co. from Use of Shredded Wheat in Name, Shape or Form

PHILADELPHIA.—U. S. Circuit Court of Appeals for the Third Circuit reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the uses of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

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"Shredded Wheat", a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y., since 1900.

CLIPPING FROM 5/37
Pacific Coast Biscuiteer
San Francisco, Calif.

National Biscuit Company Wins Shredded Wheat Decision

The U. S. Circuit Court of Appeals for the Third Circuit last month reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

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EXHIBIT "I"

2211

MARITIME MERCHANT
HALIFAX N.S., Canada

5/6/37

Shredded Wheat Wins Decision

The United States Court of Appeals for the Third Circuit, a recent despatch from Philadelphia states, reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". As a result of this decision the Kellogg Company is "enjoined from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits." Shredded Wheat has been manufactured at Niagara Falls since 1900.

[redacted] AMERICAN MILLER 7.567

"A Business and Technical Milling Journal"
Chicago, Ill.

MAY 1937

Kellogg Loses Suit

THE Kellogg Co., Battle Creek, Mich., was enjoined this month against use of the trade name, "Shredded Wheat" in advertising or sale in the form of the similar product of National Biscuit Co., Niagara Falls, N. Y. The injunction was issued by the U. S. Circuit Court of Appeals in Philadelphia in reversing a previous decision in the long legal fight in favor of Kellogg.

PROGRESSIVE GROCER
NYC.
5/37 76.811

KELLOGG LOSES IN REVERSAL OF "SHREDDED WHEAT" DECREE

The U. S. Circuit Court of Appeals, Philadelphia, last month reversed a former decision in the case of the National Biscuit Company versus Kellogg Company involving the use of the trade name "shredded wheat" and directed a decree enjoining the defendant (Kellogg) from the use of the name "shredded wheat" as its trade name and from advertising or offering for sale its product in the form and shape of the National Biscuit Company's biscuit. It also issued directions ordering an accounting for damages and profits.

WASHINGTON PA REPORTER
SATURDAY MAY 8 1937

National Biscuit Co. Wins Court Decision

PHILADELPHIA, May 8.—U. S. Circuit Court of Appeals for the Third Circuit Court of Appeals for the Third Circuit recently reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

JEWISH FOOD MERCHANT
"Official Publication of Retail Delicatessen Industry, Independent Delicatessen Association of Chicago, Independent Retail Jewish Grocers Association"
Chicago, Illinois

975

MAY 1937

NATIONAL BISCUIT COMPANY WINS SHREDDED WHEAT DECISION

PHILADELPHIA—U. S. Circuit Court of Appeals for the Third Circuit received a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

"Shredded Wheat", a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y. since 1900.

This article was clipped from
GROCERS' SPOTLIGHT
"Semi-monthly Food Trade Newspaper Which Blankets the Food Industry Personnel, Retail and Wholesale, in Greater Detroit, with Plus Circulation in Leading Michigan Cities"
1013 Fox Building, Detroit, Michigan

MAY 1 1937

Kellogg Loses To Shredded Wheat

In a reversal of a previous decision gained in a long legal fight, a United States Court has awarded a verdict to the National Biscuit Company, against Kellogg Company, awarding rights in the name "Shredded Wheat" to National Biscuit, present owners of the Shredded Wheat Biscuit Company, which originated this product many years ago.

Kellogg Company was enjoined against use of the trade name, "Shredded Wheat," in advertising or sale in the form of the similar product of National Biscuit Company. The injunction was issued by the U. S. Circuit Court of Appeals at Philadelphia in reversing a previous decision in favor of Kellogg.

The decision says the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff." Particularly cited was use of the words on the cartoons, "The original has this signature, W. K. Kellogg."

The court held this statement implied the National Biscuit product was an imitation.

Walla Walla (Wn) Union
April 27, 1937

6.501

National Biscuit Wins A Reversal

PHILADELPHIA, April 26.—United States circuit court of appeals for the third circuit has reversed a former decision in the case of National Biscuit company vs. Kellogg company involving the use of a trade name, "Shredded Wheat." The court declared that the Kellogg company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and conscience belonged to the plaintiff."

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"Shredded Wheat" Name and Form Cause of Lawsuit

The U. S. Circuit Court of Appeals, third circuit, last month found in favor of the plaintiff, the National Biscuit Company, in its suit against the Kellogg Company over the use of the name "Shredded Wheat" and the form and shape of the product.

The Kellogg Company has been enjoined from further use of the name, and from manufacture and sale of the product, and has been required to render an accounting to the National Biscuit Company, according to Clem Hildebrand, manager of the central agency for National Biscuit Company.

Shredded Wheat has been manufactured at Niagara Falls since 1900, Mr. Hildebrand stated, and the trade-name has become a household word.

EXHIBIT "F"

EXHIBIT "K"

Ask for the package showing the picture of Niagara Falls and the red N.B.C. Seal

SHREDDED WHEAT

A Product of NATIONAL BISCUIT COMPANY

THE EAST COAST STORES SUGGEST
THAT YOU USE NOTHING BUT

THE ORIGINAL

SHREDDED WHEAT

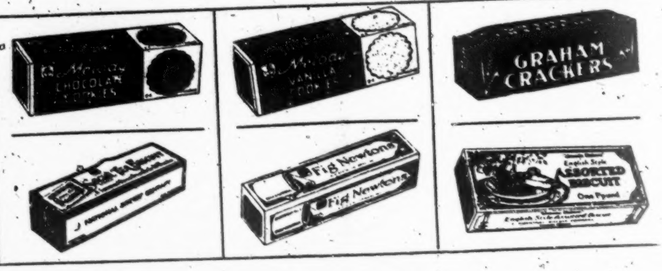
FOR YOUR BREAKFAST

THIS AND MANY OTHER FINE NATIONAL BISCUIT COMPANY VARIETIE
BE OBTAINED FROM YOUR GROCER

RITZ

America's most popular cracker

The most delicious cracker ever ... Eat them alone or with soups, salads, cheeses, beverages. Order a package today.

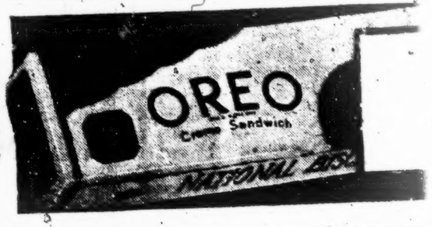


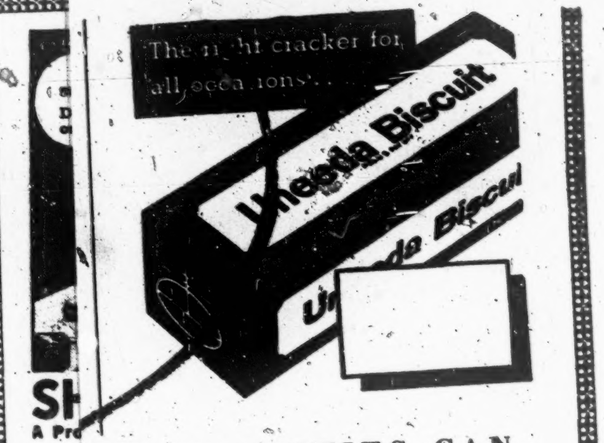
There's real nourishment in these popular crackers

They make soups, salads, cheese, spreads taste twice as delicious.

OREO SANDWICH

A delicious chocolate wafer with a creamy smooth filling.





ANY VARIETIES CAN

AY 25 1934

4. The instructions contained in said letters Exhibit A and Exhibit B reach the entire selling organization of National Biscuit Company through the respective managers of its selling agencies, and to the best of my knowledge and belief have been communicated to every employee of National Biscuit Company engaged in selling its product. It is also my information and belief, based upon reports from the various agencies of the company and upon conversations with managers, that the instructions contained in said letters have been and will continue to be fully complied with.

WILLIAM W. ROSSITER.

Sworn to before me this seventh day of June, 1937.

(Seal) A. T. BULLOCK,
Notary Public, Queens Co. No. 204.
Registered in Queens Co. No. 152.
Certificate filed in New York Co. No. 62.
Registered in New York Co. No. 8-B-47.
Commission expires March 30, 1938.

EXHIBIT "A."

Circular to all Agencies.

N. Y., 5/13/37.

To MANAGERS:

Some of the circulars addressed by the District Sales Managers and Managers to their organizations indicate a slight misunderstanding as to the present status of the litigation against the Kellogg Company concerning Shredded Wheat. You recently received copies of the opinion of the Circuit Court of Appeals for the Third Circuit, together with news releases. That opinion directs the issuance of an injunction but the injunction has not yet been issued by the District Court. While it is entirely proper for a successful litigant to advise his organization, and his customers also, of a court decision in his favor, care should be taken not to anticipate the completion of the case by our Legal Department.

In this connection, your communications to the trade should be confined to a statement of the fact of the decision of the Court of Appeals. You should decline to offer any suggestions as to what your customers should do with respect to the Kellogg's stocks on hand or with respect to continuing purchases and sales. Above all things, no threats of any kind should be indulged in.

The Kellogg Company is seeking a rehearing of the case and if that is denied they may appeal the case to the Supreme Court of the United States. In such event it may be several months before the case is reduced to final judgment. When that takes place you will be duly advised.

SALES DEPARTMENT,

W W Rossiter

MANAGER.

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EXHIBIT "B."

Circular to all Agencies.

N. Y., 5/26/37.

To MANAGERS:

Supplementing our circular letter of May 13, 1937, please make no use whatever of the recent decision or opinion of the United States Circuit Court of Appeals for the Third Circuit in the action against the Kellogg Company concerning "Shredded Wheat".

The Kellogg Company has recently complained to the Court that an improper use has been made of the decision and opinion. So far as our investigation has revealed, this complaint is not justified. The National Biscuit Company does not wish, however, to have any of its agents or employees do anything which may possibly be construed as an improper use of the decision or opinion.

If anyone is asked about the decision or opinion or its effect, the reply should be as set forth in the last two paragraphs of the circular of May 13, 1937, reading as follows:

"In this connection, your communications to the trade should be confined to a statement of the fact of the decision of the Court of Appeals. You should decline to offer any suggestions as to what your customers should do with respect to the Kellogg's stocks on hand or with respect to continuing purchases and sales. Above all things, no threats of any kind should be indulged in.

"The Kellogg Company is seeking a rehearing of the case and if that is denied they may appeal the case to the Supreme Court of the United States. In such event it may be several months before the case is reduced to final judgment. When that takes place you will be duly advised."

SALES DEPARTMENT,

W W Mossett

Manager.

AFFIDAVIT OF LEWIS CHARLES BLEIL.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

LEWIS CHARLES BLEIL, being duly sworn, deposes and says:

1. I am a route salesman employed by National Biscuit Company and I reside at Saratoga Springs, New York, and am working out of the Schenectady agency of National Biscuit Company under Mr. P. J. Beilman, manager. I have been with National Biscuit Company for twenty-one years and have been in this territory about sixteen years.

2. Among the customers which it is my duty to visit is Mr. R. J. Parry, assistant superintendent of Grand Union Tea Company, with headquarters at Glens Falls, New York, and having jurisdiction over the Grand Union Tea Company's stores in the northern district, including Glens Falls, Hudson Falls, Saratoga Springs, Plattsburg—approximately ten stores. Shortly after the decision in this case filed April 12, 1937, I had occasion to call on Mr. Parry, at which time I showed him the news release describing and quoting from the opinion of the Court. He expressed his satisfaction at not being required in the future to handle two kinds of Shredded Wheat.

3. Upon a second visit, Mr. Parry told me that a representative of the Kellogg Company had called upon him and told him it was not true that National Biscuit Company had won its case and that the Kellogg Company would continue to supply him with Shredded Wheat in any quantity he wished.

4. I have read a purported copy of a letter from J. J. Casey contained on page 3 of the affidavit of C. F. Baumgart, verified June 19, 1937, and I am the personal representative of the National Biscuit Company referred to in that letter, and the conversations narrated above are the only conversations I had with Mr. Parry concerning Shredded Wheat or the decision in this case.

5. I have read the sales department circulars dated respectively May 13th and May 26th, 1937, and have fully complied with the instructions therein contained in every respect. I have never used the decision for the purpose of furthering the sales of Shredded Wheat other than to state the facts as I have above narrated. Indeed, I have been too busy selling other products of National Biscuit Company to spend any time in attempting to make an unfair or improper use of the decision.

LEWIS CHARLES BLEIL.

Sworn to before me this second day of July, 1937.

GEORGE H. KLEIN,
Notary Public, Bronx County.
Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.
N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.
Kings Co. Clerk's No. 47, Reg. No. 9188.
Commission expires March 30, 1939.

AFFIDAVIT OF WALTER S. LARSON.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

WALTER S. LARSON, being duly sworn, deposes and says:

1. I am sales manager of the National Biscuit Company agency in Williamsport, Pennsylvania, and have held that position since January, 1931, and have been with the company since 1918. I have read the letter from Williamsport quoted on page 4 of the affidavit of Crichton Clarke, verified June 28th, 1937, in which the statement is made that National Biscuit Company salesmen are giving the impression to merchants in my territory that they will be subject to prosecution for handling Kellogg's Whole Wheat Biscuit. I can say positively that this statement is wholly untrue. I have six salesmen under me, all of whom I know well and all of whom have been carefully instructed to make no derogatory statements concerning the Kellogg Company or the decision in this litigation, and the instructions contained in the sales department

circulars of May 13th and May 26th, 1937, respectively, have been strictly adhered to by me and by all salesmen under my jurisdiction.

WALTER S. LARSON.

Sworn to before me this first day of July, 1937.

GEORGE H. KLEIN,
Notary Public, Bronx County.
Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.
N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.
Kings Co. Clerk's No. 47, Reg. No. 9188.
Commission expires March 30, 1939.

AFFIDAVIT OF WILBUR A. MOSER.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

WILBUR A. MOSER, being duly sworn, deposes and says:

1. I reside in Uniontown, Pennsylvania, and am sales manager of the National Biscuit Company agency located in that city. I have been in that position since January 1st, 1927, and have been with the company in the sales department since April, 1915. I have read page 6 of the affidavit of C. F. Baumgart, verified June 19th, 1937, in which is quoted a letter from O. K. Berry, district sales manager of Kellogg Sales Company, addressed to Mr. Crichton Clarke, in which the statement is made that "the man in charge of National Biscuit Company's sales in the Uniontown area addressed the United Quality Food Stores' representatives, which consists of thirty or thirty-five retailers, and stated that Kellogg was no longer permitted to

make and sell Kellogg's Shredded Whole Wheat Biscuit.

2. The statement quoted is wholly untrue. There are two groups of retail stores in Uniontown, one called United Quality Stores and the other called Quality Food Stores. The former consists of thirty or thirty-five stores, the latter of about fourteen stores. The United Quality Stores hold meetings every Tuesday evening and I have attended every meeting for at least three years. I have never addressed the meeting and I have never made the statement that Kellogg is no longer permitted to make and sell Shredded Whole Wheat Biscuit, nor any statement substantially to that effect, nor any statement about the litigation between National Biscuit Company and Kellogg Company other than in private conversation to tell customers of the fact of the decision of April 12th, 1937. No other representative or official of the National Biscuit Company has ever addressed a meeting of United Quality Stores at any time within the past three years, and, to the best of my knowledge and belief, no such statement by any representative of National Biscuit Company has been made either publicly or privately in my territory.

3. The Morning Herald and the Evening Genius, both daily newspapers of Uniontown, printed on April 20th, 1937, a statement of the fact of the decision of the Court with extracts from the opinion so that members of the trade reading the daily papers were advised of the fact.

4. I have received and read the sales department circulars dated respectively May 13th and May 26th, 1937, and have communicated the contents of the same to the salesmen under my jurisdiction. No statement

in any way derogatory or damaging to the Kellogg Company has been made in my territory to the best of my knowledge and information.

WILBUR A. MOSER.

Sworn to before me this first day of July, 1937.

GEORGE H. KLEIN,
Notary Public, Bronx County.
Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.
N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.
Kings Co. Clerk's No. 47, Reg. No. 9188.
Commission expires March 30, 1939.

AFFIDAVIT OF SYDNEY P. ALBERT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

SYDNEY P. ALBERT, being duly sworn, deposes and says:

1. I reside in Brockton, Massachusetts, and I am sales manager of the National Biscuit Company agency located in that city. I have been in that position since October 1st, 1936, and have been with the company continuously in the sales department since 1919.

2. I have read that portion of the affidavit of C. F. Baumgart, verified June 19th, 1937, relating to a report from Peter B. James, of Brockton, in which it is stated that we had requested the large outlets in Brockton to remove Kellogg's Shredded Wheat Biscuit from the shelves, claiming the same illegal. I am the person who regularly contacts the larger retail outlets in my territory in and about Brockton which handle Shredded Wheat Biscuit and also handle the Kellogg products. The statements just referred to found on page 10 of the said affidavit are wholly untrue. The most that I have said to any customer of

National Biscuit Company concerning the decision of April 12th, 1937, is to inform them of the fact thereof.

3. I have received and read the sales department circulars dated respectively May 13th and May 23d, 1937, and have communicated the contents thereof to all of the salesmen under my jurisdiction, of which there are nine. I state positively that the instructions in those circulars have been strictly complied with by me and to the best of my knowledge and belief by each and every one of the salesmen under my jurisdiction.

SYDNEY P. ALBERT.

Sworn to before me this first day of July, 1937.

GEORGE H. KLEIN,
Notary Public, Bronx County.
Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.
N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.
Kings Co. Clerk's No. 47, Reg. No. 9188.
Commission expires March 30, 1939.

PLAINTIFF'S AFFIDAVITS.

(Filed July 6, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

AFFIDAVIT OF WILLIAM W. ROSSITER.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

WILLIAM W. ROSSITER, being duly sworn, deposes and says:

1. I am manager of the sales department of the plaintiff above named, National Biscuit Company, and reside at 281 Montrose Avenue, South Orange, New Jersey.

2. On May 13, 1937, upon the instructions of counsel for National Biscuit Company, I prepared and caused to be mailed to the manager of each selling agency of National Biscuit Company, of which there are approximately 260 throughout the United States, a circular letter of which a true copy is hereto annexed and marked Exhibit A.

3. On May 26, 1937, upon similar instructions from counsel for National Biscuit Company, I prepared and caused to be mailed to the managers of all sales agencies a letter of instructions a true copy of which is annexed hereto and marked Exhibit B.

AFFIDAVIT OF BENJAMIN L. MINGES.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

BENJAMIN L. MINGES, being duly sworn, deposes and says:

1. I am sales manager in charge of the sales agency of National Biscuit Company in Wilmington, Delaware. I have been with National Biscuit Company Sales Department since 1921 and have been manager at Wilmington since February, 1934. I have read the purported letter set forth on page 4 of the affidavit of Crichton Clarke, verified June 28, 1937, in which it is stated that National Biscuit Company salesmen made certain statements at the Haldas Store, Fifth and King Streets, Wilmington. I am the person who visits the Haldas Store and I recall being in the store at the time the Kellogg Company's salesman was selling a bill of goods to the buyer of that store. I heard him mention Shredded Wheat and asked him if Kellogg

sold Shredded Wheat. He said: "Yes, lots of it." I said: "I thought there was only one Shredded Wheat." I said that I had seen in the paper that the Kellogg Company had lost the suit of the National Biscuit Company against them. He said: "No, that is not right. We are going to continue to sell Shredded Wheat right along."

2. Later, as I was informed by the buyer, the Kellogg salesman inquired who I was, indicating that he did not know at the time I was the National Biscuit Company salesman. I did not make the statement attributed to me in the said affidavit; I did not say that the Supreme Court had reversed the decision of the Court in Philadelphia; I did not say that the Kellogg Company would have to take Shredded Wheat off the market, and I did not say they would have to pay a million dollars in damages, nor did I make any statement in substance like those quoted in the said affidavit.

3. Upon a second interview with the buyer of the Haldas Store, I showed him a small clipping from a Philadelphia paper announcing that the Circuit Court of Appeals had reversed itself and found in favor of the National Biscuit Company. I made no further comment upon the decision either to the Haldas Store buyer or to any other customer of National Biscuit Company or of the Kellogg Company.

4. I have received and read the sales department circulars dated May 13 and May 26, 1927, respectively and have communicated the contents of the same to all of the salesmen under my jurisdiction, of whom there are six. From my knowledge of the activities of these salesmen I verily believe that the instructions contained in the said circulars have been strictly complied with, and that no derogatory statements of any kind concerning the Kellogg Company as to the effect of the

said decision have been made by me or any of my salesmen.

BENJAMIN L. MINGES.

Sworn to before me this first day of July, 1937.

GEORGE H. KLEIN,
Notary Public, Bronx County.
Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.
N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.
Kings Co. Clerk's No. 47, Reg. No. 9188.
Commission expires March 30, 1939.

REFERENCE TO ARGUMENT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

And afterwards, to wit, the sixth day of July, 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on appellee's motions, etc., before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the thirteenth day of July, 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, enters the following orders:

ORDER,

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

Before BUFFINGTON, DAVIS and THOMPSON, *Circuit Judges.*

And now, to wit, July 13, 1937, after due consideration and after hearing the arguments of counsel on both sides, appellee's motion for an order restraining and enjoining plaintiff-appellant, etc., is hereby denied.

By THE COURT,

BUFFINGTON,
Circuit Judge.

ORDER.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

Before BUFFINGTON, DAVIS and THOMPSON, *Circuit Judges.*

And now, to wit, July 13, 1937, after due consideration and after hearing the arguments of counsel on both sides, appellee's motion for withdrawal of the opinion of this Court filed on April 12, 1937, etc., is hereby denied.

By THE COURT,

BUFFINGTON,
Circuit Judge.

ORDER DENYING PETITION FOR REHEARING.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

SUR APPELLEE'S PETITION FOR REHEARING.

AND Now, to wit, July 13, 1937, after due consideration, the petition of defendant-appellee for rehearing in the above-entitled case is hereby denied.

Philadelphia,

By THE COURT,

BUFFINGTON,
Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.:*
THIRD JUDICIAL CIRCUIT.

I, WM. P. ROWLAND, clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of record (Volumes I, II and III) and proceedings in this court (Volume IIIa) in the case of National Biscuit Company, Plaintiff-Appellant, v. Kellogg Company, Defendant-Appellee, No. 5801, on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this
(Seal) eleventh day of August, in the year of our Lord one thousand nine hundred and thirty-seven and of the Independence of the United States the one hundred and sixty-second.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[fol. 2244] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

vs.

KELLOGG COMPANY, Defendant-Appellee

PETITION TO WITHHOLD INJUNCTION MANDATE

To the Honorable the Judges of the Circuit Court of Appeals:

Your petitioner, Kellogg Company, respectfully represents:

1. On April 12, 1937 this Court on a rehearing of its former decision, directed an interlocutory decree in the following language:

"* * * a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

[fol. 2245] 2. Thereafter your petitioner duly moved this Court for rehearing of its said decision. The said rehearing was denied.

3. Thereafter your petitioner made application to the United States Supreme Court for the issuance of a writ of certiorari to review such interlocutory decision and the said Supreme Court declined to entertain the said writ and likewise denied a petition for rehearing and application to withhold its order denying the writ of certiorari.

4. Your petitioner believes that the Supreme Court of the United States declined to entertain the said writ upon the grounds as specified in the case of The Hamilton-Brown Shoe Company v. Wolf Brothers & Company, 240 U. S. 251, 258, namely, that the said decree being of an interlocu-

tory nature only, should not at this time be reviewed, but that such review, if any, should be withheld until the said decree became final upon the final accounting thereby ordered.

5. The issuance of an order herein and the enforcement of a mandate of injunction pending the accounting to be had between the parties, would be an extreme hardship to the petitioner. For this loss, pending final decree and possible review by the United States Supreme Court, no adequate compensation to your petitioner is possible.

6. The controversy involved in this litigation commenced in January, 1922, and petitioner has so far never been enjoined in the manufacture and sale of this product. A delay of the enforcement of such injunction pending the limited time requested can result in no harm to respondents. Peti- [fol. 2246] tioner is an old established concern, having been engaged in business through itself and predecessors for over thirty years, is amply financially responsible, and maintains plants, agencies, and distributing centers throughout the Nation and in Europe, and is fully able to answer for any damages that might result to respondents by reason of such stay. Counsel is now preparing for and will proceed diligently in the making and stating of such account in the form as directed by the decree.

7. There is now pending before the Privy Council at London an appeal from a decision of the Supreme Court of Ontario, Canadian Shredded Wheat Company, Ltd. v. Kellogg Company of Canada, Ltd., 1936 Ont. Rep. 613, which has been set for a hearing, as your petitioner is informed, by the said Privy Council for the 25th day of November, 1937, and which is an appeal by respondents herein from a judgment of the said Supreme Court of Ontario denying to the said respondents an injunction in the form directed by this Court in this case upon a practically identical state of facts. The Privy Council, as a court of last resort, is, therefore, now about to hear and determine the identical issue of law which under its rules of practice the Supreme Court of the United States declined to hear at an interlocutory state of the proceedings.

8. In view of the instructions of the United States Supreme Court as outlined in John Simmons Company v.

Grier Brothers Company, 258 U. S. 82, the said stay is likewise requested until such time as the said Privy Council shall have passed upon the respondents' appeal which is now before it, for the reason that if that decision be affirmed, counsel intend to apply for a rehearing or review herein in [fol. 2247] the manner as indicated by the Supreme Court in such decision.

Wherefore, your petitioner prays that this Court in the exercise of its discretion and in accordance with the provisions of the Act of February 13, 1925, Chap. 229, Sec. 8 (d), 43 Stat. 936, withhold its injunction mandate pending the decision of the Privy Council and pending the accounting and the entry of final decree herein, or authorize an application to the District Court to stay the operation of the injunction.

And your petitioner will ever pray.

Kellogg Company, by Crichton Clarke, of Counsel.

[fol. 2248] State of Pennsylvania,
County of Philadelphia, ss:

Crichton Clarke, being duly sworn according to law, deposes and says that he makes this affidavit on behalf of petitioner, Kellogg Company, and is duly authorized to do so, that the facts stated in said petition are true to the best of his knowledge, information and belief and that said petition is presented to this Court in good faith and not for the purpose of delay.

Crichton Clarke.

Sworn to and subscribed before me this 10th day of November, A. D. 1937. John F. Solomon, Notary Public. My commission expires March 9, 1939. (Seal.)

[fol. 2249] [Endorsed:] In the United States Circuit Court of Appeals for the Third Circuit. October Term, 1935. No. 5801. National Biscuit Company, Plaintiff-Appellant, vs. Kellogg Company, Defendant-Appellee. Petition to Withhold Injunction Mandate. Received & Filed Nov. 10, 1937. William P. Rowland, Clerk. Crichton Clarke, Attorney for Petitioner, 36 W. 44th Street, New York City.

[fol. 2250] UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Delaware, Greeting:

Whereas, lately in the District Court of the United States for the District of Delaware, before you or some of you, in a cause between National Biscuit Company, plaintiff below (appellant) and Kellogg Company, defendant below (appellee)—No. 980 in Equity—a decree was entered in said District Court on January 23, 1935 which decree is of record in the office of the clerk of said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof.

[fol. 2251] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and Thirty-six, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On Consideration Whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with direction to the said District Court to enter a decree enjoining the defendant from the use of the name "Shredded Wheat" as its trade name and from advertising or offering for sale its products in the form and shape of plaintiff's biscuit in violation of its trademark: with further directions to the said District Court to order an accounting for damages and profits. And the said Plaintiff-Appellant, National Biscuit Company, recover against the said Defendant-Appellee, Kellogg Company in the sum of Ninety-Eight and 60/100 Dollars ($98.60) for its costs herein expended and have execution therefor.

Philadelphia, April 12, 1937.

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, at Phila-

delphia, the 7th day of December, in the year of our Lord one thousand nine hundred and thirty-seven.

Costs of Plaintiff-Appellant National Biscuit Company

Clerk,	$78.60
Printing Record	$
Attorney	$20.00
	$98.60

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[fol. 2252] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

vs.

KELLOGG COMPANY, Defendant-Appellee

PETITION OF PLAINTIFF-APPELLANT TO RECALL MANDATE AND TO CLARIFY SAME—Filed March 4, 1938

Thomas G. Haight, Drury W. Cooper, Charles A. Vilas, Counsel for Plaintiff-Appellant.

[fol. 2253] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

vs.

KELLOGG COMPANY, Defendant-Appellee

Petition

Petition of plaintiff-appellant, National Biscuit Company, for an order of this Court recalling its mandate is-

sued in the above entitled cause on December 8, 1937, and for clarification of said mandate.

Petitioner respectfully represents:

1. On April 12th, 1937, this Court filed its written opinion directing reversal of the judgment of the District Court of Delaware in the above entitled action and the issuance of an injunction. On December 8th, 1937, the mandate of this Court, in pursuance of its opinion, was duly issued and transmitted to the District Court whereby the District Court was directed to

"enter a decree enjoining the defendant from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark,"

[fol. 2254] and also to order an accounting for damages and profits.

2. On January 5th, 1938, in pursuance of said mandate, the District Court duly entered its decree, a true copy whereof is hereto attached and marked Exhibit A; and on January 7th, 1938, there was issued out of said Court a writ of injunction, a true copy whereof is hereto attached and marked Exhibit B, which said writ of injunction was duly served upon the defendant on January 8th, 1938.

3. Counsel for the defendant, Kellogg Company, during the arguments as to the form of the said decree and on other occasions has contended in the District Court and still contends that the effect of the said mandate and writ of injunction is to forbid the defendant from selling its product only when the trade name "Shredded Wheat" is applied to a biscuit in the form and shape of plaintiff's biscuit and is accompanied by a representation of a dish with biscuit in it. Defendant further contends that it is not enjoined from making its biscuit in the form and shape of plaintiff's biscuit nor from calling it "Shredded Wheat" unless at the same time it uses upon its cartons plaintiff's trade mark consisting of a dish with two biscuit in it. Defendant has expressed the intention in written and verified petitions filed with the District Court of continuing to manufacture and sell its biscuit in the form and shape of plaintiff's biscuit notwithstanding the decision and mandate of

this Court and the injunction issued pursuant thereto, and, [fol. 2255] as plaintiff is informed and believes, the defendant is now advertising and offering for sale its said biscuit made in the form and shape of plaintiff's biscuit in cartons closely resembling those used by it at the time of and after the bringing of this action.

That is to say, defendant so construes the mandate of this Court as to permit it to sell the same biscuit as it was selling before this Court's decision, and to call it "Shredded Wheat," provided only it does not mark the containing cartons with a dish with biscuit in it.

4. Plaintiff is further informed and believes that the District Judge for the District of Delaware is in doubt as to whether the construction placed by the defendant upon the mandate of this Court and the injunction issued pursuant thereto be not the correct construction as is evidenced by the following quotation from an oral argument which took place before the said District Judge on February 1st, 1938:

"The Court: Do you go this far, Mr. Vilas, that the dedendant Kellogg is enjoined from making the pillow shaped biscuit?

"Mr. Vilas (plaintiff's counsel): There is no doubt about it. I do not know why they should use the language they do, if they did not mean what they said.

"The Court: There may be an honest difference right there."

5. The plaintiff is advised by its counsel and believes that it was the intention of this court clearly expressed in the said opinion of April 12th, 1937, that the defendant should be enjoined from doing each of the three things mentioned in that portion of the opinion quoted in para- [fol. 2256] graph 3 hereof, namely, that it was to be enjoined from using the words "Shredded Wheat" as its trade name, and also from advertising or offering for sale its biscuit in the form and shape of plaintiff's biscuit, and also from making use of the plaintiff's registered trade mark consisting of a dish with two biscuit in it, and plaintiff is further advised by its counsel and believes that unless the said mandate of this Court be promptly clarified the defendant intends to and will continue to manufacture, advertise and offer for sale its biscuit in the form and shape

of the plaintiff's biscuit to the great damage of the plaintiff.

6. The matter is of further importance because an accounting of profits and damages has been referred to a Master, but has not proceeded beyond the issuance of an order upon defendant to state its account of profits and damages; and the scope of the accounting will be obscure until the direction of this Court is made clear.

Wherefore, plaintiff prays that this Court forthwith enter its order recalling the said mandate for the purpose of clarification; and that it thereupon proceed to amend and clarify its said mandate in such manner and form as to set at rest any doubt which either of the parties or the District Judge may have concerning the meaning and intent of this Court's decision; and for such other and further relief in the premises as to the Court may seem just and proper.

Respectfully submitted, National Biscuit Company,
Plaintiff, by (Sgd.) Charles A. Vilas, Its Solicitor.

Dated March 4, 1938.

[fol. 2257] State of New York,
County of New York, ss:

Charles A. Vilas, being duly sworn, deposes and says that he is one of the counsel for National Biscuit Company, plaintiff above named, and has been in charge of the above entitled case from its inception in 1932 and is familiar with all the proceedings had herein; that he has read the foregoing petition, knows the contents thereof and that the same is true except as to those matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true; that the reason this verification is made by deponent and not by the petitioner is that the petitioner is a corporation of the State of New Jersey, and deponent is counsel therefor. This petition is interposed in good faith and not for the purpose of delay and the deponent believes that the said petitioner has good ground in law for presenting the same.

(Sgd.) Charles A. Vilas.

Sworn to before me this 4th day of March, 1938. Frederick C. Walter, Notary Public, Queens County. Queens Co. Clk's No. 1753 Reg. No. 1656. N. Y. Co. Clk's No. 214 Reg. No. 8W125. Commission expires March 30, 1938. (Seal.)

[fol. 2258] Received Jan. 6, 1938. Cooper, Kerr & Dunham

EXHIBIT A

(Copy)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

No. 980. In Equity.

NATIONAL BISCUIT COMPANY, Plaintiff,

v.

KELLOGG COMPANY, Defendant

And now, to wit, this—5th—day of January, A. D. 1938, the mandate of the United States Circuit Court of Appeals for the Third Circuit on the appeal of the plaintiff heretofore taken in the above entitled cause having been transmitted to the clerk of this court and filed herein on the eighth day of December, A. D. 1937 and the same having been brought to the attention of the court, in compliance therewith, it is now, on motion of Hugh M. Morris, Esq., solicitor for plaintiff,

Ordered, adjudged and decreed by the court as follows:

(1) That the decree of this court entered herein on the twenty-third day of January, A. D. 1935 dismissing the bill of complaint be and the same is hereby vacated and set aside and the bill of complaint reinstated.

(2) That a perpetual injunction issue out of and under the seal of this court directed to said defendant, Kellogg Company, its officers, agents, servants, employees and at-
[fol. 2259] torneys and those in active concert or participating with them, its successors and assigns, restraining and enjoining it and them, and each of them, from the use

of the name "SHREDDED WHEAT" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark.

(3) That the plaintiff do recover from the defendant the gains, profits and advantages which the said defendant has derived, received, earned or made or which it shall derive, receive, earn or make by reason of the use by defendant of the name "SHREDDED WHEAT" as its trade name and, advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark, as well as any and all damages which the said plaintiff has sustained by reason of such use or either of them.

(4) That this cause be and the same is hereby referred to—Charles F. Richards, Esq., as special master to take, state and report to this court, with all convenient speed, an account of said profits and damages, and that upon said accounting the testimony heretofore taken by either party in this cause may be used by either party and considered by the master.

(5) That plaintiff have judgment against defendant for the costs awarded to it by the Circuit Court of Appeals for the Third Circuit in the sum of Ninety-eight Dollars and [fol. 2260] Sixty Cents ($98.60) together with its costs in this court up to and including the entry of this decree, including costs incurred by the plaintiff for printing the transcript of record on appeal, said costs to be taxed by the clerk.

(6) That this court reserves for further consideration upon the coming in of the master's report all questions pertaining to costs hereinafter accruing and damages or profits.

(Sgd) John P. Nields, J.

A true copy. Attest: H. C. Mahaffy, Jr., Clerk. (Seal.)

[fol. 2261] Received Jan. 8, 1938. Cooper, Kerr & Dunham

EXHIBIT B

(Copy)

HMM/vcc. 1-1. 1/7/38

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

No. 980. In Equity

NATIONAL BISCUIT COMPANY, Plaintiff,

v.

KELLOGG COMPANY, Defendant

UNITED STATES OF AMERICA
District of Delaware, ss:

The President of the United States of America to Kellogg Company, a Corporation of the State of Delaware, Greeting:

Whereas, in the above entitled cause, lately pending in the District Court of the United States for the District of Delaware, it was, on the fifth day of January, A. D. 1938, ordered, adjudged and decreed by the Court that a perpetual injunction issue out of and under the seal of said court directed to said defendant, Kellogg Company, its officers, agents, servants, employees and attorneys and those in active concert [fol. 2262] or participating with them, its successors and assigns, restraining and enjoining it and them, and each of them, from the use of the name "SHREDDED WHEAT" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark;

Now, therefore, know ye, that you, the said Kellogg Company, your officers, agents, servants, employees and attorneys and those in active concert or participating with you, your successors and assigns, and each of you, are hereby strictly restrained and enjoined under the pains and penalties that may fall upon you in case of disobedience from the use of the name "SHREDDED WHEAT" as your trade name

and from advertising or offering for sale your product in the form and shape of plaintiff's biscuit in violation of its trade mark.

Witness the Honorable John P. Nields, Judge of said court, at Wilmington, in said district, this seventh day of January, A. D. 1938, and the Independence of the United States of America the one hundred and sixty-second.

(Sgd.) H. C. Mahaffy, Jr., Clerk U. S. District Court, District of Delaware. (Seal.)

A true copy.

Attest:

H. C. Mahaffy, Jr., Clerk.

[fol. 2263] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

v.

KELLOGG COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the District of Delaware

ORDER EXTENDING TERM—Filed March 5, 1938

The plaintiff-appellant in the above entitled matter having, on March 4th, 1938, regularly filed a petition and moved to recall the Mandate heretofore issued in the above entitled matter for clarification, and it being impossible for the Court to hear argument on the said petition and motion before the expiration of the existing Term;

It is therefore hereby Ordered that for the purpose of hearing argument on the said petition and motion and making all necessary orders in respect thereto, that the existing Term of this Court be and the same is hereby extended with respect to this cause for the purpose above mentioned; and this Court hereby retains jurisdiction of this cause for said purpose.

Philadelphia, March 5th, 1938.

J. W. Thompson, Circuit Judge.

[fol. 2264] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

against

KELLOGG COMPANY, Defendant-Appellee

Filed March 11, 1938

SIR:

Please Take Notice that the annexed petition was filed by the plaintiff in this Court on March 4th, 1938 and that on March 11th, 1938 at 11 o'clock A. M., or as soon thereafter as counsel can be heard, the plaintiff will move the Court to grant it the relief asked for in the annexed petition, and such other and further relief as to the Court may seem just and proper.

Dated, March 5th, 1938.

Charles A. Vilas, Attorney for Plaintiff-Appellant, Office & P. O. Address: No. 36 West 44th Street, Borough of Manhattan, City of New York.

To Crichton Clarke, Esquire, Attorney for Defendant-Appellee, Office & P. O. Address: No. 36 West 44th Street, Borough of Manhattan, City of New York.

[fol. 2265] [Endorsed:] Index No. 5801. Year ——. United States Circuit Court of Appeals for the Third Circuit. National Biscuit Company, Plaintiff-Appellant, against Kellogg Company, Defendant-Appellee. Notice of Motion. Charles A. Vilas, Attorney for Plaintiff-Appellant (Office and Post Office Address), 36 West 44th Street, Borough of Manhattan, New York City.

[fol. 2206] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT CO., Plaintiff-Appellant,

vs.

KELLOGG CO., Defendant-Appellee

And afterwards, to wit, the 11th day of March, 1938, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on motion to recall mandate, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

[fol. 2267] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No.—

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

v.

KELLOGG COMPANY, Defendant-Appellee

(a) DEFENDANT'S MOTION AND PETITION FOR REHEARING—Filed March 21, 1938

W. H. Crichton Clarke, Edward S. Rogers, Robert T. McCracken, E. Ennalls Berl, Of Counsel for Defendant-Appellee.

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[fol. 2270] UNITED STATES CIRCUIT OF APPEALS FOR THE THIRD CIRCUIT

No.—

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

v.

KELLOGG COMPANY, Defendant-Appellee

Defendant's Motion and Petition for Rehearing

May it Please the Court:

Plaintiff has petitioned this Court to recall its mandate herein and to send down a new mandate, in substance, enjoining defendant (a) from selling its small sized pillow shaped shredded wheat biscuit at all, (b) from calling any shape of biscuit by the "tradename" "shredded wheat" and (c) from displaying on its package a picture of a plate containing shredded wheat biscuit, or from doing any of these three acts.

The case came on for argument before Judges Buffington and Davis on March 11, 1938, Judge Thompson being absent, and the Court granted the defendant permission to present an alternative form of order and any motions or petitions desired to be presented on behalf of defendant.

(a) The jurisdiction of the Court to Entertain Plaintiff's petition.

The term of Court at which the order of this Court, dated April 12, 1937, was entered having long since expired and the mandate of this Court having gone down in December, 1937, and pursuant thereto a decree having been entered by the District Court in January, 1938, it is sub-
[fol. 2271] mitted that there is grave doubt as to the jurisdiction of this Court to entertain plaintiff's petition.

Bronson v. Schulten, 104 U. S. 410, 415;

Hart v. Wiltsee, 25 Fed. (2nd) 863, (C. C. A. 1) 1928;

Reynolds v. Manhattan Trust Company, 109 Fed. 97 (C. C. A. 8) (1901);

Foster Bros. Mfg. Co. v. National Labor Relations Board, 90 Fed. 2nd 948, (C. C. A. 4) (1937);

Arcoil Mfg. Co. v. American Ins. Co., 87 Fed. 2
206, 207 (C. C. A. 3rd) (1936);
E. G. Stande Mfg. Co. v. Labombardie, 247 Fe
879, 880 (C. C. A. 1) (1918);
Hawkins v. C. C. C. & St. L. Ry. Co., 99 Fed. 32
323 (C. C. A. 7) (1900);
Casey v. Sterling Cider Co., 15 Fed. 2nd 5
(C. C. A. 1) (1926).

In fact, the exercise by this Court of such jurisdictio
would be an exercise of original not appellate jurisdiction
The Court, in ruling upon appellant's petition, would no
be reviewing any order, judgment or decree of the Distric
Court. It would be changing the decree entered by the
District Court, pursuant to the mandate of this Court,
but not in conformity with any statute concerning appeals
or review or conferring upon it jurisdiction so to do. There
is no appeal pending in this Court from the decree of the
District Court entered pursuant to the mandate. In fact,
the Court is asked to enter an order in a case no longer
pending here where its mandate has gone down to the lower
court and has been literally executed by that court, and
to exercise jurisdiction upon an original petition filed in
this Court without a record of the proceedings had in the
court below since the filing of the mandate there.

We were first informed on March 18th, 1938 that an ex
parte order was obtained on March 5, 1938 extending the
October 1937 term of the Court in this case until the dis-
position of the plaintiff's petition. A copy of this order
is attached as Appendix B. We first procured a copy of
this order on March 19, 1938. We have not had sufficient
time to examine into the validity of this order, but that
question probably is not important. For, while in form
plaintiff seeks merely a clarification of the mandate
[fol. 2272] inasmuch as the mandate follows precisely the
opinion delivered at the March 1937 term, in substance
what plaintiff seeks is a modification of the opinion and the
order of this Court made at the March 1937 term long
since expired. In fact, we submit that plaintiff's petition
cannot be granted without a modification of the opinion
and the order of reversal and remandment, otherwise the
mandate will vary from the opinion and judgment. Under
the authorities cited above, plaintiff's petition should not
be granted.

(b) Defendant Petitions for a Rehearing

If, however, the Court decides to entertain plaintiff's petition and to determine it, the defendant requests a rehearing of this cause. In this connection, it is submitted there is the same jurisdiction in this Court to entertain a petition for rehearing now as there is to entertain and decide plaintiff's pending petition to recall the old mandate and send down a new mandate to the District Court.

Counsel are impelled further to urge a rehearing, by reason of the persuasive and highly authoritative opinion recently rendered by the Privy Council of Great Britain, Lords Atkin, Thankerton, Russell of Killowen, Wright and Maugham, in which that learned Court in passing upon the identical issues involved in this litigation and between subsidiaries of the same parties, holds that the words "Shredded Wheat" have not acquired a secondary meaning, and that the sale of defendant's biscuits under the designation "Kellogg's Shredded Whole Wheat Biscuit," either in or separate and apart from their cartons, does not constitute unfair competition with plaintiff or "passing off."

We request the Court to give attention particularly to the final paragraph of the opinion of the Privy Council, reading as follows:

"One further observation their Lordships desire to make. Litigation has taken place in the United States of America in which a company called National Biscuit Company sought to restrain a company called Kellogg Company from using the words 'Shredded Wheat'. The action was dismissed by decree of the U. S. District Court for the District of Delaware; and on appeal to the U. S. Circuit Court [fol. 2273] of Appeals for the Third Circuit, the decree was affirmed. Subsequently on reargument before the same Judges, that decision was reversed, and a decree was entered 'enjoining the defendant from the use of the name "Shredded Wheat" as its trade name, and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark. Their Lordships can only (but with the greatest respect for that Court) express the view that if the facts of that case were similar in all respects to the facts of the present case, they prefer the first judgment of the Circuit Court of Appeals to its later decision."

The issues in both cases are of law rather than fact and the facts of both cases are the same. In fact, in the American trademark registrations, plaintiff's predecessor actually disclaimed any exclusive rights in the name and form or shape of the pillow-shaped shredded wheat biscuit, as will presently appear. For the purposes of this case, the Canadian and American law should be the same, and defendant should have the same right to operate in the United States that it has in Canada under the Privy Council judgment.

As the Privy Council opinion by Lord Russell is a better petition for rehearing and a better brief for defendant than counsel could hope to write, we have attached the same hereto as Appendix A and have incorporated the same herein and we earnestly invite the attention of the Court thereto.

In any event, if the Court determines it has jurisdiction, it should either grant rehearing, or deny plaintiff's petition leaving the present mandate undisturbed.

I

The present mandate permits the defendant to make and sell the pillow shaped biscuit. If the Court decides to issue a new mandate, it also should provide that the defendant has the right to make and sell the pillow shaped biscuit.

If the defendant is to be enjoined from manufacturing and selling a small-sized pillow shaped shredded wheat bis- [fol. 2274] cuit, irrespective of the name applied thereto or the character of the carton containing the same, and irrespective of whether it ultimately goes to home or restaurant trade (an unprecedented form of injunction), such an injunction must be based solely on the principles of unfair competition on the theory that defendant was passing-off its biscuit as the biscuit of the plaintiff. Such an injunction would not be based upon any principles of trade name or trade mark.

Defendant contends that it should not be enjoined, and the mandate did not direct that it be enjoined, from manufacturing and selling a pillow shaped shredded wheat biscuit in the form, shape and size now being manufactured by it, for the following reasons:

1. As a matter of substantive law, defendant has a right to manufacture and sell a pillow shaped shredded wheat biscuit in the form, shape and size now being manufactured and sold by it because such a biscuit was formerly manufactured under the Perky patents which have expired, and the testimony in this case showed that such form is functional, and the District Court so found.

Privy Council Judgment, Appendix A;
Singer v. June, 163 U. S. 169;
Shredded Wheat Company v. Humphrey Cornell Company, 250 Fed. 960 (C. C. A. 2, 1918).

In the Humphrey Cornell case, relating to the right to sell shredded wheat biscuit in the pillow shaped form, the Court stated in part:

"It is in cases where the connotation of origin arises, not from verbal description, but only from the appearance of the article, that the trouble arises in application, because the appearance must in some way be changed, or the article must be wrapped or marked. Thus has arisen the principle often applied in this court that minor, or 'non-functional,' changes in appearance may be required, so long as the substantial elements are left in the public domain * * * Under [fol. 2275] the guise of protecting against unfair competition, we must be jealous not to create perpetual monopolies.

"We do not see any possible change in the appearance of the biscuit itself which would be of enough service to the plaintiff to justify its imposition upon the defendant. Concededly, variation could be enforced only in its form, color, or size. As to form, the plaintiff appears to us finally concluded by its own design patent. Whether or not the evidence might have allowed us to prescribe some variation in the form, had that form been only the result of the plaintiff's original adoption, we do not say. Fox v. Hathaway, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. (N. S.) 900, suggests that we might have found a way out. But the plaintiff's formal dedication of the design is conclusive reason against any injunction based upon the exclusive right to that form, however necessary the plaintiff may find it for its protection. As to color, also, we feel ourselves limited, because, while the shade of brown depends upon the baking, the plaintiff's own biscuits vary within appreciable limits, and to require the defendant to adopt a shade different

enough for commercial distinction would be to force them to bake their biscuits so that they would be repellant to most tastes. It would, so far as we can see, in effect, either terminate or hopelessly cripple any competition between the two parties.

"With size it is perhaps different, for we are not satisfied that the added cost of turning out a smaller biscuit would be substantial, per pound of shredded wheat."

The defendant complied with the Humphrey-Cornell decision by packing all biscuit for both home and restaurant trade in distinctive cartons. Defendant went even further than that decision required it to go, by making a biscuit differing in size from plaintiff's original biscuit. The testimony shows that defendant's biscuit is small than plaintiff's original biscuit. Plaintiff's original biscuit is ¾" x 2½", and defendant's 2⅝" x 2¼". Plaintiff manufactured its biscuit only in the 3¾" x 2½" size until five years after defendant's product was placed upon the market. Thereafter plaintiff manufactured a portion of its biscuit for restaurant trade of substantially the same size as defendant's, thus cancelling [fol. 2276] the difference in size between plaintiff's and defendant's biscuit. R. I, p. 204 (from the findings of the Trial Court). Of course, plaintiff cannot complain of similarity in size, when it is the imitator in that respect, and its imitation cancelled the size difference originally existing.

The unreversed findings of fact below hold clearly that the form of the biscuit as produced by the patent-expired machines is functional and is the mechanically necessary product of the patent-expired machines. The District Court held and other cases have also established as a fact (Shredded Wheat v. Humphrey-Corneli, 250 Fed. 960) that the rectangular shape of the product with shreds forming a truss-like arch between the sides is the only practical shape in which the biscuit can be made and the findings of the District Court in this respect were not reversed by this Court. The opinion in the Humphrey-Cornell case is the basis of a statement of the law by Nims on Unfair Competition and Trade Marks (3rd Edition), P. 936, as follows:

"The patents under which the Shredded Wheat Co., manufactured its biscuits had expired. While it was pos-

sible for it to compel competitors to market their biscuits in cartons which would differentiate them from its own biscuits, it was found impossible to change the appearance of the biscuits themselves so as to make them distinguishable. Defendant was ordered to mark by a wrapping, tag, or brand or by symbol impressed in the substance all of their biscuits which would reach the ultimate consumer outside the cartons. The injunction provided for relief for defendants at the end of six months, if, after a trial they showed they could not comply with this provision and continue in competition with plaintiff."

The necessary proof was supplied in this case, and plaintiff in effect conceded the fact by contending that defendant should make some other shape of biscuit because there was no other way than that which defendant had already used (difference in size), to distinguish the biscuit in issue.

Any other form of biscuit lacks the quality of strength, lightness and crispness which characterizes the regular [fol. 2277] product of the patent-expired machinery. The proof establishing this was so clear that the court below indicated its belief that if the same proof had been adduced in the Humphrey-Cornell case, the defendant there would not have been required even to mark its biscuit.*

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*R. V. I, p. 221, from the opinion of the District Court:

"By making its biscuit substantially smaller than plaintiff's, and using individual cartons, defendant has met the requirements of the decree of the Circuit Court of Appeals for the Second Circuit in the Ross case (i. e. Shredded Wheat Co. v. Humphrey-Cornell). In this case the proof fully confirms the testimony of Andrew Ross that the biscuit itself cannot be branded or marked. With each biscuit distinctively marked by carton and by size, there can be no excuse for confusion or deception. Had the proof in this case as to marking been before the Court of Appeals in the Ross case the opinion of Judge Ward would doubtless have been the opinion of the Court."

R. V. I, p. 201, the Trial Court quoting from Judge Ward in Humphrey-Cornell:

"Moreover, I think that the form and size of the biscuit as always made by the complainant are functional, and that

The testimony in support of these conclusions is at R. II, pages 1119, 1131, and 1144.

It thus appears clearly that no other form or shape of the biscuit is practicable. The defendant having established the distinctive appearance of its biscuit by reducing its size has met the requirements of the Humphrey-Cornell case. This leaves the defendant with the indisputable and conceded right (plaintiff's brief on appeal p. 34, post, p. 21) to make and sell the biscuit.

But if there should be any doubt as to whether dissimilarity in size and in packaging sufficiently differentiates defendant's product from the plaintiff's, then it is submitted that the Court instead of enjoining defendant from selling the small pillow shaped form of biscuit, should specify such further precautions, if any, as would prevent alleged unfair competition in supplying hotel and restaurant trade, without harming the defendant in its indispu-[fol. 2278] table right to compete with plaintiff for such trade, and conditioned on plaintiff ceasing to supply the restaurant trade with a small sized biscuit copied after defendant's.

Even if the form of the biscuit should be determined to be non-functional, nevertheless defendant's use of the form should not be absolutely enjoined. In Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720 (C. C. A. 6th), it was determined that the color of an imitation product resembling Coca-Cola was not functional (200 Fed. 724) and was adopted for the purpose "of making the two articles look just alike" (200 Fed. 724). Yet the Court held that as to the bottling part of the output defendant could provide reasonably efficient means of notice and probably prevent deception by stamping and labeling the bottles with the name of the product (200 Fed. 725). Upon subsequent appeal (211 Fed. 942, 944) the product was allowed to be marketed in bottles prominently marked with the name of the product.

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imitation of these features is no evidence of unfair competition. The form evidently tends to strengthen a product made out of such fragile material and the size is apparently the best fitted for use as a breakfast food on a saucer. I think the bill should be dismissed." Shredded Wheat Co. v. Humphrey-Cornell Co., 250 Fed. 960, 967.

In Coca-Cola Co. v. Koke Co., 254 U. S. 143 (another of the Coca-Cola cases), the Court held that "the product including the coloring matter is free to all who can make it if no extrinsic deceiving element is present". Note that this language was used regarding coloring matter which was not an essential ingredient of the compound.

Plaintiff's proposed form of mandate would absolutely enjoin the sale of defendant's small-sized pillow shaped biscuit even when sold to the ultimate consumer in a carton under the name of "Kellogg's Whole Wheat Biscuit" with the Kellogg name prominently displayed on the carton as the manufacturer. Such an injunction is not necessary to prevent unfair competition. It is necessary in order to give plaintiff a monopoly of the business. In the use of the pillow shape there is "no extrinsic deceiving element" under the Coca-Cola Co. v. Koke Co., 254 U. S. 143, 147; defendant therefore has the right to sell that shape of biscuit, particularly where sales are made in cartons labelled [fol. 2279] "Kellogg's Whole Wheat Biscuits" with the Kellogg name as manufacturer.

It was conceded by plaintiff at the March 11th, 1938 hearing that the carton now being used by defendant (a copy of which is submitted as Exhibit C) is non-deceptive and does not offend against plaintiff's rights. It appears, therefore, that biscuits sold for home consumption (which comprise approximately 97½% of the total biscuits sold) reach the ultimate consumer inside of non-deceptive cartons.

All of defendant's biscuit manufactured for consumption in public eating places are also packed in defendant's distinctive cartons containing two biscuits each, and in only about 2½% of the eating places are biscuits served in plates apart from the cartons.

With reference to defendant's right to sell this form of biscuit, we quote from the opinion of the Privy Council in Canadian Shredded Wheat Company, Limited, vs. The Kellogg Company of Canada Limited, decided February 4, 1938, 1938 All England Law Reports 618, and Appendix A:

"The plaintiff company however, claims as against Kelloggs a passing-off injunction based upon the allegation that Kellogg's biscuits are of such shape and size that hotel-keepers and restaurant-keepers could, if so minded, supply them in response to the request of a customer who, in asking

for shredded wheat, desired to be supplied with biscuits of the plaintiff company's manufacture. Their Lordships see no reason for granting any such relief, upon the evidence given in the present case. They are not satisfied that a person asking for shredded wheat will not have his request truly satisfied if the product shredded wheat, as manufactured by Kelloggs or any other manufacturer, is supplied. Nor are they satisfied that a customer who really desires a biscuit of the plaintiff company's manufacture will necessarily be deceived by being offered a biscuit of the same shape *but perceptibly smaller*. Such likelihood of deception requires to be proved, and it is noticeable that no witness was shown a Kellogg's biscuit and asked whether he would have taken that to be a biscuit of the plaintiff's company's manufacture. The plaintiff company has not, in [fol. 2280] their Lordships' opinion, made out a case in these proceedings which would justify the granting of a passing-off injunction based solely on the form of the biscuit." (Emphasis ours).

We also invite the Court's attention to the testimony embodied in the findings of the Trial Court, as follows:

"Howard Duane, a witness on behalf of *plaintiff* testified as follows:

(Quoting from the opinion of the Court)

"X Q. You saw right away that the biscuit handed to you in its carton was not the biscuit you had been getting?

A. Immediately.

X Q. Did you eat it?

A. Yes.

X Q. Did you notice anything about the size when you took it out of the carton?

A. Yes, the biscuit was shorter than the shredded wheat biscuit.

X Q. You did not think that was any biscuit made by the National Biscuit Company, or the Shredded Wheat Company?

A. No, I did not. I knew it was not." (Italics ours.)

All other witnesses who were asked similar questions testified to the same effect, as the District Court found.

As before explained, the exact form and shape of the biscuit is the precise product of the machine. The only way

in which distinction between the products could be made was by making the biscuit smaller. This was done by defendant and for further reference thereto, defendant now submits to the Court herewith the actual biscuits made by the plaintiff and defendant, from which the size distinction will be clear. This element of the proof was likewise embodied in the findings of the lower court, in which the Court said:

"Plaintiff also has an individual carton carrying two biscuits indistinguishable in size from defendant's small biscuit, and first put upon the market five years after *defendant* originated and popularized the same size biscuit. It should be noted that defendant distinguished its biscuit [fol. 2281] from plaintiff's by making a different size, yet *plaintiff* wiped out the size distinction by duplicating defendant's small biscuit." (Italics ours.)

2. The mandate of this Court is alleged by plaintiff to be ambiguous, but we assert that such mandate, when read in connection with the opinion of the Court, does not prohibit the defendant from selling a pillow shaped biscuit of the form and shape of plaintiff's biscuit provided such manufacture and sale is not accomplished by means of the use of the term "Shredded Wheat" and by means of the use of plaintiff's alleged trade mark consisting of two biscuits in a bowl partially submerged in milk. Plaintiff, in effect, concedes this by petitioning for a new and different mandate. In no place does the Court's opinion state that the pillow shaped form of biscuit cannot be sold by the defendant.

On the contrary, the whole opinion seems to revolve around the use of "Shredded Wheat" as a trade name and the registered bowl trade-mark of the plaintiff rather than the form of the biscuit. On page 2 of its opinion, the Court says:

"Therefore, upon the expiration of the patent the defendant was free to adopt the name of 'Shredded Wheat' to to designate its product with some adequate explanation that the product was made by it and not by the plaintiff."

In this connection the Court not only does not prohibit the manufacture of a biscuit in the form and shape of the plaintiff's but, on the contrary, by saying that the defend-

ant was free to adopt the name of "Shredded Wheat" it clearly indicates that the defendant was free to sell the product to which the Court recognized that the defendant had the right to apply that name.

On page 3 of the opinion, the Connecticut litigation is discussed. In that suit the plaintiff objected to the de- [fol. 2282] fendant's use of "Shredded Wheat". The suit was dismissed by the plaintiff without any stipulation that the defendant would cease to manufacture a biscuit in the same form and shape as that made by the plaintiff. Such a dismissal by the plaintiff constituted acquiescence, thereby recognizing that the defendant had the right to sell the pillow shaped biscuit, and as before stated this right was specifically conceded by the plaintiff on the first argument of the appeal. (Appellant's brief on Appeal, p. 34, post, 21.)

On page 4 of the opinion, the Court refers to the name and trade mark "as identifying plaintiff's biscuit," but not to the form of the biscuit as doing so.

The language used by this Court on pages 5 and 6 of its opinion on rehearing is as follows:

"For instance, the defendant called its product 'Kellogg's Whole Wheat Biscuit'. This is exactly what it is. It is a biscuit made from whole wheat by Kellogg."

This language indicates that the defendant is free to market a pillow-shaped biscuit under the name of "Kellogg's Whole Wheat Biscuit", and shows that the defendant's rights concerning the name of the biscuit are the only ones open to doubt. If the defendant can call its product "Kellogg's Whole Wheat Biscuit" it certainly must be assumed to have the right to sell the product to which it has the right to give the name. It is clear that marketing that same product under the term "whole wheat biscuit" was not prohibited by the Court.

The conclusion may definitely be drawn from the opinion that it is the name and not the form of the biscuit that appear to concern the Court. On page 6 of its opinion, the Court says:

"The case now stands in equity just as it would have stood if there had been no patent before 1912 and the plaintiff's competitors had sat by and allowed it from that time

on to build up at great expense a valuable good-will *in the name.*" (Emphasis ours.)

[fol. 2283] This sentence definitely shows that the Kellogg Company has the right to sell a biscuit in the pillow shape and form because there is no patent to prevent such action. In the last sentence of the paragraph, the Court's opinion states that the adoption by any one of the name and form of the article which a competitor has been selling, tends to show a fraudulent attempt to gain the good-will enjoyed by such competitor. It is to be noted that the form is prohibited only when it is connected with an infringing name.

The use of "name and form" conjunctively in the next paragraph leads to the same conclusion. The Court's opinion states that the expiration of the patent allows the public to use the name which has been given to the patented article provided that this right be used within a reasonable time. It argues that the right to use that name is lost after the expiration of a reasonable time but it does not refer to a loss of the right to sell the patent expired article. This language does not suggest that the defendant is prohibited from selling the pillow shaped biscuit independently of some other action which the court disapproves.

On pages 7 and 8 of this Court's opinion, referring to the Dyanshine case, it is stated:

"We held that the defendant was guilty of unfair competition and enjoined it 'from using the words 'dye and shine' in any way, form, arrangement, or manner of spelling as the name, or as resembling a name of its product, leaving it free, of course, to use these words merely and exclusively in describing the qualities and characteristics of the product.' *This the defendant in the case at bar is free to do, but may not, as it has been doing, use the words 'Shredded Wheat' as the trade name of its product.*"

The Court's language clearly concedes to the defendant the right to use the words "shredded wheat" descriptively so long as they are not used as a trade name. This language also concedes that the defendant has a right to manufacture and sell "its product"; namely, a pillow-shaped biscuit.

[fol. 2284] In the long full paragraph on page 10 of the Court's opinion, the Court mentions that the expiration of the design patent did not confer on the defendant any rights

in the trade name or trademark of the plaintiff, but in no place does the Court prohibit the manufacture of the product of the defendant and its sale, if done without designating the product as shredded wheat and using plaintiff's alleged trade mark.

In the next paragraph of the opinion and also in the opinion on pages 5 and 11, "name and form," used conjunctively, appear. The conjunctive use of those words in those paragraphs again indicates that form alone was not intended to be prohibited.

A close reading of the Court's opinion as a whole indicates that it was not intended to prohibit the sale of the pillow shaped biscuit unless connected with the other features which the Court intended to prohibit.

The opinion of this Court which recognizes in so many places defendant's right to sell the pillow shaped biscuit should not after petition for certiorari has been submitted to the Supreme Court and after the expiration of the term at which the judgment of this Court was entered, be so radically changed as now to prohibit the exercise by the defendant of the right so recognized.

In view of the decision in the Humphrey-Cornell case and of the Privy Council in the Canadian Shredded Wheat case, it is submitted that if there be any doubt as to the meaning of the mandate in this case it should be resolved against the plaintiff, and that the defendant's right to sell a pillow shaped form of biscuit of a different size than that of plaintiff's biscuit should be upheld.

II

The Effect of the Denial of Certiorari by the Supreme Court

Judge Davis, at the hearing, asked a question as to the effect on the case of the denial of certiorari by the Supreme Court.

[fol. 2285] A decree for injunction and accounting is interlocutory merely. A denial of certiorari for the review of an order of the Circuit Court of Appeals ordering such injunction and accounting does not preclude the Supreme Court after final decree upon the merits, including the accounting, and its affirmance by the Circuit Court of Appeals, to review, upon certiorari, the entire case, including

the former order of the Circuit Court of Appeals directing the injunction and accounting.

Hamilton Brown Shoe Co. v. Wolf Bros., 240 U. S. 251;
John Simmons Co. v. Grier, 258 U. S. 82.

Defendant believes that the Supreme Court may well have decided not to review this decision by certiorari at an interlocutory stage of the proceeding, but to withhold such review until completion of the accounting directed, in order that if such review were ordered, it might embrace any novel questions raised upon the accounting itself.

It may be likewise that the Supreme Court interpreted the opinion and judgment as not prohibiting the sale of the pillow shaped form of biscuit.

III

Defendant's Petition for Rehearing

Defendant hereby petitions for rehearing upon the grounds set forth below.

Since the second decision of this Court, the Judicial Committee of the Privy Council, in the case of The Canadian Shredded Wheat Company, Limited, v. The Kellogg Company of Canada Limited And Another, decided February 4, 1938 (Privy Council Appeals No. 40 of 1937) involving the same issues, facts and law and subsidiaries of the same parties as are here involved, affirmed the judgments of the [fol. 2286] Supreme Court on Ontario (1936 Ont. Rep. 281) and the Court of Appeals of Ontario (1936 Ont. Rep. 613) dismissing the Canadian suit which corresponds with and was copending with this suit. (See Appendix A.) The judgment of the Privy Council was rendered on February 4, 1938, after this Court had made its second decision herein and the Privy Council reached the same conclusion which this Court reached in its first judgment. The Privy Council expressly states its preference for the first decision of this Court over its second one.

Comity and the judicial amenities alone would indicate that this Court should rehear the cause in view of the judgment of the Privy Council.

Bourjois Sales Corporation v. Abraham Dorfman, 273 N. Y. 167.

In this Dorfman case, the judgment of the Supreme Court of the United States was not any more binding upon the New York Court of Appeals than is the Privy Council judgment here, but the New York Court bowed to the Federal Supreme Court, and in this case the Privy Council judgment is submitted as a weighty, a worthy, an important, a highly persuasive ground for rehearing.

Including the Privy Council, twenty-three judges have passed on the issue whether the formerly patented design of the biscuit is in the public domain, and twenty-one judges have passed on the issue whether, the words "shredded wheat" are in the public domain or whether they are perpetual monopolies owned by plaintiff.* Three of these judges subsequently reversed themselves.

[fol. 2287] The decisions of twenty-one judges to the effect that the words "Shredded Wheat" are in the public domain are as follows:

Natural Food Co. v. Williams, 30 App. D. C. 348 (three Judges, besides the Examiner of Interferences and the Commissioner of Patents in the same case);

Kellogg Co. v. National Biscuit Co. (the Sherman Act case), 71 Fed. (2d) 662 (C. C. A. 2) (three Judges on appeal).

The present case. (Trial judge, and three Circuit judges on the first decision on appeal who subsequently reversed themselves.)

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* In the matter of trademark No. 500,671, registered under name of Shredded Wheat Company Limited, Justice Bennett in the High Court of Justice, Chancery Division, decided on December 21, 1937, prior to the decision of the Privy Council in the Canadian Shredded Wheat Company, Limited, case, that the words "Shredded Wheat" had acquired a "secondary meaning and were properly registered as a trademark under the English trademark statute. That case is now pending on appeal in the English Court of Appeal where reversal is confidently anticipated in view of the later decision of the Privy Council ruling the words "Shredded Wheat" to be descriptive and not distinctive or possessed of a secondary meaning.

Canadian Shredded Wheat Co., Ltd. v. Kellogg Co. of Canada, Ltd. (1936, Ont. Reps. 281) and Same v. Same, 1936, Ont. Reps. 613 (the Canadian case) (One trial Judge and five Judges of the Court of Appeal of Ontario);

The Canadian Shredded Wheat Co., Ltd. v. Kellogg Company of Canada, Ltd., Privy Council Appeals, No. 40 of 1937 (Five Judges).

The decisions of twenty-three judges to the effect that the pillow shape or design is in the public domain are as follows:

Four judges in this case, three of whom subsequently reversed themselves; three in the Sherman Act case (Judge Caffey's decision in the District Court did not directly touch the issue), four Judges in the case of Shredded Wheat Co. v. Humphrey-Cornell, 250 Fed. 960 (C. C. A. 2), six Judges in the Canadian case, five Law Lords in the Privy Council, and Judge Kohlsaat, post, p. 19, all held that plaintiff did not have a monopoly of the form or shape of the biscuit.

We realize that in matters of intellectual conviction or law, questions may not be concluded by sheer weight of [fol. 2288] numbers, but certainly the grounds for further consideration are impressive.

Let us briefly consider these and other decisions which now have been followed by the Privy Council.

Plaintiff's predecessor was the owner of some forty-one patents on method and machines for shredding cooked but unleavened wheat and forming the same into rectangular biscuits of the well-known type and shape. The product was described as shredded wheat throughout the patents. One patent covered the exact shape or design of the biscuit itself; others covered machines whose sole function was to shred the wheat and form it into the identical shape of biscuit here in issue. The patents expired about 1912 and since that time, the product, machinery, design and description and patent-expired name have been in the public domain under long established law.

Singer v. June, 163 U. S. 169.

Dupont v. Waxed Products, 85 Fed. (2) 75 (C. C. A. 3) (Cert. denied, 57 Sup. Ct. 194).

Ameisite v. Interstate, 72 Fed. (2) 946, (C. C. A. 3).

Prior to defendant's entry into the field, the design, form and shape of the biscuit had been dedicated to the public as follows:

(a) In 1908, Judge Kohlsaat held that the Perky design patent No. 24,688, covering the design of biscuit here in issue, was invalid because of more than two years public use of the design before the patent application was filed. Here was a double dedication, first, by two years public use and, second, by invalidation of the design patent. Plaintiff's predecessor did not appeal from Judge Kohlsaat's judgment.

Natural Food Co. v. Henry P. Bulkley, et al., N. Dist. of Illinois, Eastern Div. No. 28,530.

(b) Plaintiff disclaimed the design or representation of the biscuit as a trademark in its trademark registrations Nos. 85,186 (V. 4, p. 197) and 216,593 (V. 4, p. 205).

(c) In 1918, the Circuit Court of Appeals for the Second Circuit held that the right of a competitor of plaintiff's to make the identical size, shape and appearance of biscuit was "indubitable."

[fol. 2289] Shredded Wheat Co. v. Humphrey Cornell, 250 Fed. 960.

(d) The expiration of the patents on the machines for making the identical shape of biscuit here in issue and on the method for making the product itself ended the patent monopoly.

Singer v. June, supra.

The public ownership of the words "shredded wheat" was just as strongly established as the public ownership of the design, prior to defendant's entry into the field, for the following reasons:

(a) The expiration of the patents in which the words were used descriptively placed such words in the public domain.

Singer v. June, supra.

(b) A few months after the enactment of the Trademark Act of February 19, 1905, which permitted registration of descriptive terms used exclusively for ten years next preceding the passage of the Act, plaintiff's predecessor sought to register the words "Shredded Whole Wheat" as its

trademark, but the Court of Appeals of the District of Columbia affirmed the decision of the Patent Office and held that the words were descriptive of the patented product; were not used as a trademark and, in fact, were incapable of exclusive appropriation. This case also held that the concurrent use of the words by Williams prevented the exclusive appropriation of such words as a trademark.

Natural Food Company v. Williams, 30 App. D. C. 348.

(c) In 1912, plaintiff registered the picture of its factory as its trademark "for shredded wheat in Class 46, foods and ingredients of foods", No. 89,071 (V. 4, p. 199). Plaintiff's present claim is that its trademark for shredded wheat is shredded wheat. Its registration No. 89,071 states that "No claim is made herein to the words 'The Home of Shredded Wheat'." which appear above the factory picture. Here is [fol. 2290] a double disclaimer of the words "Shredded Wheat," first by using them to describe the product itself and second by disclaiming the words as part of the phrase "The Home of Shredded Wheat."

Such a disclaimer is irrevocable.

Beckwith v. Commissioner of Patents, 252 U. S. 538; Holzapfels v. Rahtjens, 183 U. S. 1.

(d) The words "shredded wheat were used throughout the patents, advertisements and trademark registrations to describe and name the product and process.

(e) Even plaintiff conceded defendant's right to manufacture the patent-expired biscuit in the pillow form in its main brief on appeal in this Court, by asking, at p. 34:

"2. That the defendant be enjoined from manufacturing or selling or offering for sale Whole Wheat Biscuit in substantially the form and shape of plaintiff's biscuit *unless each biscuit be banded or marked in such a distinctive manner as to state clearly that it is a product of the defendant and not of the plaintiff.*" (Italics ours.)

Defendant thus was well protected by sound and established law and prior adjudications when it began to make this publicly owned product and design under this publicly owned name and to market it in fair and distinctive cartons.

Briefly stated, the second decision of the Court of Appeals,

particularly if it is to be amended as requested by plaintiff, would accomplish the following unusual and, we submit, erroneous results:

It would disregard the ruling of the Privy Council and of the Circuit Court of Appeals of the Second Circuit that the right of a competitor of plaintiff's to make the patent-expired pillow-shaped shredded wheat biscuit here in issue is indubitable (Shredded Wheat Co. v. Humphrey-Cornell, 250 Fed. 960); disregard the ruling that plaintiff's effort to monopolize the manufacture and sale of shredded wheat is [fol. 2291] unlawful under the Sherman Anti-Trust Act (Kellogg Company v. National Biscuit Company, 71 Fed. (2d) 662); disregard the ruling of the Court of Appeals of the District of Columbia, that shredded wheat is incapable of exclusive appropriation as a trademark (Natural Food Company v. Williams, 30 App. D. C. 348); disregard the rulings of the Supreme Court of Ontario and the Court of Appeal of Ontario that by virtue of patent expirations defendant is free to make shredded wheat and call it Kellogg's Shredded Wheat in Canada; disregard the ruling of the Privy Council on the same law and facts and its expressed preference for the first judgment of this Court over its second; disregard the ruling of the Supreme Court of the United States holding that after patents expire anyone is free to make the patent expired product and call it by the name universally applied to it during the life of the patents and in the patents themselves (Singer v. June, 163 U. S. 169); disregard the ruling of the same Court holding that perpetual monopolies may not be set up under the guise of trademarks (Delaware & Hudson Canal Co. v. Clark, 13 Wall. 311; Standard Paint v. Trinidad, 220 U. S. 446); disregard the ruling of the same Court (Mr. Justice Sutherland) holding that relief in fair trade cases cannot exceed the wrongs of the defendant and that even if the defendant practiced deception, it could not thereby be deprived of its right to combine chocolate and quinine (Warner v. Ely Lilly & Company, 265 U. S. 526); and disregard the ruling of the same Court that so-called trademarks, once disclaimed in statutory registrations, cannot thereafter be reclaimed (Beckwith v. Commissioner of Patents, 252 U. S. 538, Holzapfels v. Rahtjens, 183 U. S. 1; Saxlehner v. Wagner, 216 U. S. 375).

Finally it would disregard the Constitution and the Sherman Anti-Trust Act. The latter prohibits all monopolies

except those based on patents and copyrights and the former permits only patent and copyright monopolies and those only for a limited time and authorizes only Congress and not the Courts to grant or extend them.

Surely such wholesale disregard of long standing and well established precedents and of important principles of law in the fields of patents, trademarks, fair trade and monopoly, and in the light of a dissent so powerful as that of [fol. 2292] the Privy Council, should not be lightly undertaken and a rehearing is respectfully requested. Certainly, to broaden the mandate in the very face of the Privy Council judgment to the exact contrary and after the order for a mandate had been the subject of certiorari proceedings in the Supreme Court, would be an action so unusual as at least to be preceded by the amenity of a rehearing.

Conclusion.

Until plaintiff asked this Court to broaden the mandate so as to enjoin defendant from selling a pillow shaped biscuit at all or under any name or in any kind of a carton, the furthest any judge had gone in attempting to restrain use of the pillow shape or form by any one except plaintiff was the injunction of Judge Thomas in the District Court in the Humphrey-Cornell case. Judge Thomas restrained use of the form unless each biscuit was marked or tagged individually, irrespective of whether it was in a carton and irrespective of whether the defendant could mark each biscuit at all or whether it could remain in business if it tagged a food product with a glued on label or band—which in any event a restaurant waiter could tear off just as easily as the customer could.

But the Court of Appeals of the Second Circuit, on appeal from that ruling, held that as to biscuits reaching the consumer in cartons (either large or small) no other marking than the carton was required. It held that as to restaurant biscuit (at that time displayed in large glass globes containing biscuits without cartons) the defendant should attempt to mark or band the biscuit and if it could not do so without competitive handicap or hardship, it was given leave to apply back to the Court. The Court held that no restriction could be put on defendant, the com-

mercial effect of which would be to destroy defendant's "indubitable" right to compete.

Judge Nields held that defendant's product was incapable of being passed off as plaintiff's and that no passing off had been proved. He also held that it had been proved that no marking was possible other than what defendant worked [fol. 2293] out; namely by making a small biscuit and putting it in a distinctive carton for the restaurant trade. This Court did not reverse that finding of fact which bars the broad injunction that plaintiff now seeks.

The Privy Council after five days of argument, carefully considered both decisions of this Court and expressed its preference for the first decision and dissented in toto from the second opinion. The general principles of judicial comity suggest that the careful consideration given to both decisions of this Court by the Privy Council should be reciprocated before this Court should either enter a new mandate or adhere to the old one.

We respectfully submit that there could hardly be a stronger authority for a rehearing than the Privy Council judgment on the same principles of law, the same issues and subject matter and between subsidiaries of the same parties.

Respectfully, W. H. Crichton Clarke, Edward S. Rogers, Robert T. McCracken, E. Ennalls Berl, of Counsel for Defendant.

Certificate.

I, W. H. Crichton Clarke, certify that I am one of the counsel for Kellogg Company, the defendant in the above entitled cause, and that in my opinion the annexed Petition and Motion are well founded in law and fact and that the same are not interposed for the purpose of delay.

Crichton Clarke.

[fol. 2294] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

v.

KELLOGG COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the District of Delaware

OPINION SUR PLAINTIFF-APPELLANT'S PETITION TO RECALL AND CLARIFY MANDATE, AND DEFENDANT-APPELLEE'S PETITION FOR REHEARING—Filed May 5, 1938

Before Buffington, Davis and Thompson, Circuit Judges

DAVIS, Circuit J.:

On April 12, 1937, during the March Term of this court, a decree was entered, pursuant to an opinion filed the same day, reversing with costs a decree of the United States District Court for the District of Delaware, which dismissed the appellant's bill of complaint, and containing a direction [fol. 2295] to the District Court to enter a decree "enjoining the defendant (appellee) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade-mark; with further directions to the said District Court to order an accounting for damages and profits". Subsequently a petition for rehearing was filed by appellee and denied in due course. A petition for certiorari was then presented to the Supreme Court of the United States and denied in October, 1937, during the October Term of this court. This was followed by a petition to the Supreme Court for a rehearing and by petitions to this court and the Supreme Court that injunctive relief be withheld pending a further application for certiorari, which appellee stated that it intended to make after a final decree following an accounting had been entered in the District Court and presumably finally passed upon by this court. All of these petitions were

denied during the October Term, 1937, of this court. On December 7, 1937, this court issued its mandate in the exact language, except as to costs, of the order of April 12, 1937 above quoted. Appellant then applied to the District Court to enter a final decree. This was done, but the District Court, in the parts of the decree which dealt with the injunction and the recovery of damages and profits, except for the usual provisions in such decrees enjoining officers, agents, etc., followed the exact language of the mandate. Appellee contended before the District Court and this court that the opinion, order and mandate of this court meant that appellee could sell and offer for sale its biscuit in the usual pillow-shape form, provided it did not place on the cartons or in advertising matter what has been referred to in this case as the plaintiff's "two-biscuit-in-a-dish" trade mark, and apparently contended that it [fol. 2296] could likewise use the words "Shredded Wheat" unless in connection with that trade mark. Because the District Court was apparently in doubt as to exactly what the mandate intended to enjoin, and because the defendant had expressed a determination to advertise and sell biscuits in the pillow-shape form, appellant, before the expiration of the October, 1937, term, at which the mandate was issued, applied to this court to recall its mandate and clarify it.

We thought that, when our opinion was read as a whole, we had made it perfectly clear that what we intended to enjoin was the use of the name "Shredded Wheat" as a trade name and the advertising and selling of biscuits in the pillow-shape form, irrespective of whether the two-biscuit-in-a-dish trade mark were employed in connection with either the use of the name or the sale or advertising of the biscuit in the pillow-shape form. This was the construction which the appellee placed on the opinion and order of April 12, 1937, in its petition for rehearing to this court and appellant says that it placed the same construction upon them in its various petitions to the Supreme Court. It so admitted before this court at the hearing to recall the mandate. Appellee in those petitions doubtless placed upon the mandate what it believed to be its proper construction and its changed view adopted after the mandate of this court had issued was apparently due to the exigencies of its position rather than to any real belief that the opinion of this court left any doubt as to what was meant. The

language at the end of the opinion and in the order and mandate is poorly phrased. We intended to enjoin the use of the words "Shredded Wheat" as a trade name, the advertising and sale of biscuits in the pillow-shape form, and the use of the two-biscuit-in-a-dish trade mark, separately or together.

[fol. 2297] At the hearing to recall and clarify the mandate, counsel for appellant submitted an order which it requested the court to make. Counsel for appellee was asked if he wished to submit an alternative form of order. He said that he did and was given 10 days in which to do so. Instead of presenting such an order, he has filed a printed petition of 23 pages, in which he has asked for a rehearing of the whole case and questions the jurisdiction of this court to entertain appellant's petition.

As appellant's petition seeks only a clarification of the mandate, and as it was presented before the expiration of the term at which the mandate was issued, we have no doubt of our right to entertain it and grant the relief sought. Bronson v. Schulten, 104 U. S. 410; Marion County Court, W. Va. v. Ridge, et al., 13 Fed. (ed) 969. It is equally clear that this court is without jurisdiction to entertain appellee's petition for rehearing. It was not presented, nor was permission given to present it, within the term when the order of April 12, 1937 was made, nor within the term when the Supreme Court denied the petition for certiorari and the petition for rehearing nor within the term when the mandate was issued. Arcoil Mfg. Co. v. American Eq. Assur. Co., 87 Fed. (2d) 206 (C. C. A. 3); Foster v. N. L. R. B. 90 Fed. (2d) 948 (C. C. A. 4); Bronson v. Schulten, supra; Marion County Court, W. Va. v. Ridge, et al., supra. The petition for rehearing therefore must be denied for lack of jurisdiction.

But even if we had jurisdiction to consider it, we see no reason why it should be granted. Nothing new is presented except that in February, 1938, the British Privy Council in Canadian Shredded Wheat Co. Ltd. v. Kellogg Company of Canada, Ltd. reached, it is claimed, a different conclusion from that of this court. Even if the record in [fol. 2298] the two cases were the same, the latter decision does not persuade us that the conclusion at which we arrived was wrong. We are advised that the British High Court of Justice on a full record reached a different con-

clusion from that of the British Privy Council as to the registerability of "Shredded Wheat" as a trade name under the English statute.

The only remaining question is whether, in view of the fact that the order of April 12, 1937 did not specifically provide for an injunction against the violation of the two-biscuit-in-a-dish trade mark (although it was intended to do so) we have any jurisdiction to amend the mandate so as to include specifically such a provision. As there may be some doubt on this question, we will not amend the mandate so as to provide a specific injunction against the use of the two-biscuit-in-a-dish trade mark. Its use on a carton or in advertising matter, when the defendant is not permitted to use the word "Shredded Wheat" as a trade name or to advertise or sell biscuits in the pillow-shape form, would manifestly be so improper and so likely to mislead that we will assume that the appellee will not use it.

An order will be made recalling for clarification the mandate, as requested in appellant's petition and motion.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 2299] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

vs.

KELLOGG COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the District of Delaware

ORDER RECALLING AND CLARIFYING MANDATE—Filed May 5, 1938

This cause coming on to be heard on the petition and motion of plaintiff-appellant National Biscuit Company, filed on March 4, 1938, for an order of this Court recalling its Mandate issued in the above entitled cause on December

8, 1937, in order that the same might be clarified, and having been argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court as follows:

(1) That its said Mandate be and the same is hereby recalled for the purpose of clarification; and

(2) That the said Mandate be clarified so as to direct the United States District Court for the District of Delaware to enter a decree, in the usual form, enjoining the defendant Kellogg Company (1) from the use of the name "SHREDDED WHEAT" as its trade name, (2) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit, and (3) from doing either; and adjudging and decreeing, in the usual form, that plaintiff recover from said defendant profits and damages by reason of defendant's use of the said trade name and the use of the said pillow-shape form of biscuit, or either of them.

Philadelphia, May 5th, 1938.

J. Warren Davis, Circuit Judge.

[fol. 2300] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT CO., Plaintiff-Appellant,

vs.

KELLOGG CO., Defendant-Appellee

SUR PETITION FOR REHEARING

And now, to wit, May 5, 1938, after due consideration, the petition of defendant-appellee for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— —, ——.

J. Warren Davis, Circuit Judge.

Endorsements: Order Denying Petition for Rehearing of Defendant-Appellee. Received & Filed May 5, 1938. Wm. P. Rowland, Clerk.

[fol. 2301] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

vs.

KELLOGG COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the District of Delaware

PETITION FOR REHEARING—Filed May 13, 1938

The Court has made and filed three decisions herein and three orders or judgments based threon. The first decision and judgment affirmed the District Court, the second reversed the District Court and directed the entry of a judgment which has been heretofore understood as a three part judgment covering the words "SHREDDED WHEAT" the pillow form of biscuit and the so-called plate trade-mark.

The third judgment recalls the mandate and directs the entry of a new District Court decree enjoining only the use of the words "SHREDDED WHEAT" and the pillow form of biscuit and specifically omitting any injunction as to the so-called plate trade-mark.

The defendant-appellee respectfully hereby petitions the Court for a rehearing and reversal of the second and third [fol. 2302] decisions of the Court and of the judgments or orders entered or to be entered thereon.

As to the second decision and judgment of the Court defendant-appellee respectfully renews and re-submits its first and its second petitions for rehearing herein, hereby specifically incorporating them herein with the same force and effect as though copied at length herein.

The mandate to the District Court based on the second decision and judgment has now been recalled and is now in this Court and defendant-appellee therefore hereby resubmits its said first and second petitions for rehearing, earnestly submitting that the Court has jurisdiction to consider and grant the same.

As to the third decision and judgment of this Court based thereon, defendant-appellee assigns as a ground for rehearing:

1. The objections to jurisdiction averred in its second petition for rehearing.

2. The objection that the third decision and judgment of the Court is not a mere clarification of its second decision and judgment, but is a new and materially different judgment directing a two part injunction instead of the previous three part injunction and changing the injunction as to the pillow form of biscuit in substantial and material respects.

3. That the second decision and judgment characterized in the third decision as "poorly phrased" is not such a definite and distinct order as is necessary to serve as a lawful judgment of the Court.

4. That the Court has as much jurisdiction to grant a rehearing at this time as it has to change the second judg-
[fol. 2303] ment in the material and substantial respects directed by the third order.

W. H. Crichton Clarke, Attorney for Defendant-appellee. E. E. Berle, Robert T. McCracken, Of Counsel.

I further certify that the foregoing petition is well founded in law and is not interposed for the purpose of delay.

W. H. Crichton Clarke, Attorney for Defendant-Appellee.

[fol. 2304] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

against

KELLOGG COMPANY, Defendant-Appellee

SIR:

Please Take Notice that on the 13th day of May, 1938, at the opening of Court, at 11 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the de-

fendant-appellee will move this Court for an order staying the issuance of its mandate herein to be issued pursuant to the order of this Court made and dated the 5th day of May, 1938.

The grounds of said application are set forth in the annexed affidavit of Crichton Clarke, Esq., sworn to the 11th day of May, 1938, and the said defendant-appellee will likewise apply for such other, further or different relief as to the Court may seem just and proper.

Yours, etc., Crichton Clarke, Attorney for Defendant-Appellee, Office and P. O. Address: No. 36 West 44th Street, Borough of Manhattan, City of New York.

To Charles A. Vilas, Attorney for Plaintiff-Appellant, 36 West 44th Street, Borough of Manhattan, City of New York.

[fol. 2305] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

against

KELLOGG COMPANY, Defendant-Appellee

STATE OF NEW YORK,
County of New York, ss:

Crichton Clarke being duly sworn deposes and says:

I am an attorney and counselor at law and of counsel for the defendant-appellee in the above entitled action.

This affidavit is made in support of the annexed notice of motion for an order staying the issuance of the mandate herein to be issued pursuant to the order of this Court, dated May 5, 1938, and is made in response to the plaintiff-appellant's motion for immediate issuance of said mandate without the customary thirty days stay.

The original mandate of this Court was issued and transmitted to the District Court on the 8th day of December, 1937, and during the October Term of this Court.

On the 5th day of March, 1938, plaintiff-appellant moved this Court for an order recalling the said mandate which came on for argument on the 11th day of March, 1938, and was granted by this Court pursuant to its order dated May 5, 1938, in and by which order this Court directed the issuance of a mandate in certain other and different lan-
[fol. 2306] guage from that embodied in the mandate of December 8, 1938.

Pursuant to the directions of said order of May 5, 1938, the original mandate of December 8, 1937, having been duly recalled has now been returned by the District Court to this Court for its consideration, and no new mandate has issued out of this Court pursuant to its order of May 5, 1938.

It is the intention of the defendant-appellee to petition the Supreme Court for leave to present an application for a rehearing of its petition for certiorari on the merits of the controversy, which, as I am advised, should be presented on or before the 23rd day of May, 1938.

Such petition for rehearing is now in the process of prepa-ration, and as counsel for the defendant-appellee, I have relied upon the usual practice of this Court to grant an automatic stay of thirty days before the issuance of the mandate. The application of plaintiff-appellant for the immediate issu-ance of the mandate is not supported by any affidavits set-ting forth the grounds for such unusual relief. It would appear justifiable to assume that the plaintiff-appellant de-sires to forestall the proposed application to the Supreme Court to rehear or to deprive defendant-appellee of its right to apply to the United States Supreme Court for a writ of certiorari.

As counsel for the defendant-appellee, I desire to set before the Supreme Court the clear and indisputable con-flict between the decision of this Court of April 12, 1937, and the decision of the Judicial Committee of the House of Lords of Great Britain, and to point out the clear iden-
[fol. 2307] tity of the issues involved between this case and the case before the Privy Council.

I desire further to point out to the Supreme Court that the opinion of Mr. Justice Bennett of the High Court of Justice of Great Britain which is said to be in conformity

with the opinion of this Court relates solely to the application of the trademark statutes of Great Britain and involved no element of unfair competition, and that, further, the judgment of the High Court of Justice was rendered prior to the sweeping decision of the Privy Council, and that the decision of the Privy Council is such that there is grave doubt that the judgment of the High Court of Justice is sustainable upon appeal.

As further reason for granting the application for a stay herein, I wish to present to the Court a copy of a letter written by me on the 6th day of May, 1938, to Mr. William P. Rowland, as Clerk of this Court, which is as follows:

"May 6, 1938.

Mr. W. P. Rowland, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, Philadelphia, Pa.

Re National Biscuit Co. v. Kellogg Co., No. 5801.

DEAR MR. ROWLAND:

I have your letters of May 5th and 6th and enclose herewith my check for $5.60 to cover the cost of the opinion and order of May 5th.

I assume that the usual practice of your Court in withholding the new mandate for thirty days will be followed, as this will give the appellee an opportunity to make a new application to the Supreme Court for a writ of certiorari, [fol. 2308] and it is our intention to do this. If my assumption that the new mandate will be witheld the same as any other mandate is not correct, please let me know in order that we may take such other steps as may be necessary in attempting to preserve defendant's subject matter of this litigation, pending the intended application for certiorari.

This cause has now been involved in the appellate court for several years and there could seem to be no reason why the defendant should not have an opportunity to apply to the Supreme Court without having its business, valued at more than a million dollars, destroyed in the interim.

Very truly yours, Crichton Clarke."

On the same day, associate counsel for the defendant-appellee, Ward & Gray, wrote to Mr. Rowland as follows:

"May 6, 1938.

William P. Rowland, Esq., Clerk, U. S. Circuit Court of Appeals, 304 Custom House, Second and Chestnut Sts., Philadelphia, Pa.

DEAR SIR:

I acknowledge receipt of your letter of May 5th, inclosing copies of opinion in National Biscuit Company vs. Kellogg Company, No. 5801, and in accordance therewith I am inclosing our check for $5.00.

I assume that the mechanics which will be involved in carrying into effect the opinion of the Circuit Court of Appeals filed yesterday will be through the entry of an order providing for the recall of the mandate from the District Court, and after its actual recall, the issuance of a further order providing for a new or clarified mandate.

It is conceivable that the appellee may be advised to [fol.2309] apply for a certiorari upon the issuance of the order providing for the new mandate, and in that event we will desire an opportunity to apply to the Circuit Court of Appeals for a stay as to the new mandate, pending the disposition of the petition for certiorari.

If I am correct in my understanding of the procedure and the appellee should desire to make an application for certiorari and a stay, I should appreciate it if you would advise me when the order for the mandate is entered and before the actual issuance of the mandate, so that we may have an opportunity to follow our course in this regard.

Very truly yours, Ward & Gray."

The reason for the two letters above referred to was that counsel might be assured that the usual practice of this Court would be followed and that the usual thirty day stay on the new mandate would be automatically applied, to provide time for a rehearing or for an application to the Supreme Court for a writ of certiorari.

On May 9, 1938, in furtherance of the intention of the defendant-appellee to apply for a writ of certiorari, I wrote a letter to Mr. Rowland as follows:

"May 9, 1938.

"Mr. William P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Philadelphia, Pa.

Re National Biscuit Co. v. Kellogg Co., No. 5801

DEAR MR. ROWLAND:

[fol. 2310] With further reference to the above matter, defendant-appellee has decided to present an application for certiorari to the United States Supreme Court to review the last order of this Court, declining to entertain the petition for rehearing and recalling and modifying the mandate.

Will you please, therefore, cause to be printed and certified the requisite number of copies of the proceedings in the Circuit Court subsequent to those heretofore printed for use in the Supreme Court as Volume IIIA of the record. There need be printed only the petition of appellant to recall and clarify the mandate, dated March 5th, and our petition for rehearing filed March 21st and briefs in connection with these matters and also the judgment and order of the Circuit Court of May 5th.

Very truly yours, Crichton Clarke."

My intention in writing this letter was in order to conform to the practice of this Court, which as I understand it, is to stay the issuance of the mandate for thirty days, and then if notified that application for a writ of certiorari is pending futher to stay the mandate until such application is made and determined.

On behalf of the defendant-appellee, I now ask that the usual practice be followed and that the defendant appellee be granted the usual stay of thirty days within which to present to the Supreme Court an application for rehearing.

As above stated, the mandate has now been recalled and is before this Court, and the cause is wholly pending in this Court. The motive of plaintiff-appellant in moving that the usual practice be set aside and that the new mandate issue immediately can be only for the purpose of de-

priving defendant-appellee of its right to the usual relief [fol. 2311] and to a review of these proceedings by certiorari.

This cause has been pending for six years and there is no conceivable reason why a delay of thirty days in order to permit review of the last determination of this Court should act in any way to prejudice the plaintiff.

On behalf of the defendant-appellee, therefore, I respectfully request this Court that it stay the issuance of its new mandate herein for a period of thirty days, from the 5th day of May, 1938, for the purpose of allowing the defendant-appellee to petition the Supreme Court for a reargument of its application for a writ of certiorari.

Crichton Clarke.

Sworn to before me this 11th day of May, 1938. Nayer W. Goldberg, Notary Public. Kings. Co. No. 670, Reg. No. 00419. Comm. Expires March 30, 1940.

[fol. 2312] [Endorsed:] United States Circuit Court of Appeals for the Third Circuit. National Biscuit Company, Plaintiff-Appellant, against Kellogg Company, Defendant-Appellee. Notice of Appellees Motion for Stay of Mandate and Affidavit. Crichton Clarke, Attorney for Defendant-Appellee, 36 West 44th Street, Borough of Manhattan, New York City.

[fol. 2313] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT CO., Plaintiff-Appellant,

vs.

KELLOGG CO., Defendant-Appellee

And afterwards, to wit, on the 13th day of May, 1938, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on appellant's motion for immediate issuance of mandate and appellee's motion for stay of mandate, before the Honorable Joseph Buffington,

Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges,

Whereupon the Court ordered that a mandate in amended form issue forthwith.

[fol. 2314] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT CO., Plaintiff-Appellant,

vs.

KELLOGG CO., Defendant-Appellee

SUR PETITION FOR REHEARING

And now, to wit, May 16, 1938, after due consideration, the petition of Defendant-Appellee filed May 13, 1938, for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— — ——.

Per Curiam, Buffington, Circuit Judge.

Endorsements: Order Denying Defendant-Appellee's Petition for Rehearing. Received & Filed May 16, 1938. Wm. P. Rowland, Clerk.

[fol. 2315] UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Delaware, Greeting:

Whereas, lately in the District Court of the United States for the District of Delaware, before you or some of you, in a cause between National Biscuit Company, plaintiff below (appellant) and Kellogg Company, defendant below (appellee)—No. 980 in Equity—a decree was entered in the said District Court on January 23, 1935, which decree is of record in the office of the Clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of an appeal by plaintiff, agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

[fol. 2316] And whereas, in the term of October, in the year of our Lord one thousand nine hundred and thirty-six, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

And Whereas, On Consideration Whereof, it was, on April 12th, 1937, ordered, adjudged and decreed by the said United States Circuit Court of Appeals that the decree of the said District Court in this cause be, and the same was thereby reversed, with costs, and with direction that said District Court should enter a decree as hereinafter provided;

And Whereas, the mandate of this Court to the District Court of the United States for the District of Delaware was withheld pending consideration of a petition for rehearing and the disposition of a petition for writ of certiorari and a petition for rehearing on said petition for certiorari and certain other petitions of defendant;

And Whereas, on December 7th, 1937, upon the denials of the said various petitions, the mandate of this Court issued to the said District Court;

And Whereas, in the Term of October 1937 a motion and petition were presented by the said plaintiff to recall the said mandate for clarification, which said motion and petition were granted and an order entered recalling said mandate and directing that the same be clarified in certain respects;

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the said mandate of this Court issued on December 7th, 1937, be and the same is hereby recalled for the purpose of clarification and, in lieu of the directions therein contained, the following shall be and are the directions to the said District Court, viz.: that the said decree of the said District Court in this cause be, and the same is hereby reversed, with costs, and the said District Court is directed to enter a decree, in the

usual form, enjoining the defendant Kellogg Company (1) from the use of the name "SHREDDED WHEAT" as its trade name, (2) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit, and (3) from doing either; and adjudging and decreeing, in the usual form, that plaintiff recover from said defendant profits and damages by reason of defendant's use of the said trade name and the use of the said pillow shape form of biscuit, or either of them; and that the said plaintiff, National Biscuit Company, recover against the said defendant, Kellogg Company, in the sum of One Hundred Eight and 60/100 Dollars ($108.60) for its costs herein expended and have execution therefor.

Philadelphia, May 5, 1938.

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 16th day of May, in the year of our Lord one thousand nine hundred and thirty-eight.

Costs of Plaintiff-Appellant, National Biscuit Co.

Clerk	$88.60
Printing Record	$
Attorney	$20.00
	$108.60

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] Original File No. 5801. U. S. Circuit Court of Appeals, Third Circuit. No. 11, Oct. Term, 1936. National Biscuit Company, Plaintiff-Appellant, vs. Kellogg Company, Defendant-Appellee. Copy of Amended Mandate.

[fol. 2317] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, William P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby

certify the foregoing to be a true and faithful copy of the original additional proceedings in this Court since the certification of August 12, 1937, in the case of National Biscuit Co., Plaintiff-Appellant, vs. Kellogg Co., Defendant-Appellee, No. 5801, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 17th day of May, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundred and sixty-second.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 2318] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

No. 980. In Equity

NATIONAL BISCUIT COMPANY, Plaintiff,

v.

KELLOGG COMPANY, Defendant

And now, to wit, this—5th—day of January, A. D. 1938, the mandate of the United States Circuit Court of Appeals for the Third Circuit on the appeal of the plaintiff heretofore taken in the above entitled cause having been transmitted to the clerk of this court and filed herein on the eighth day of December, A. D. 1937 and the same having been brought to the attention of the court, in compliance therewith, it is now, on motion of Hugh M. Morris, Esq., solicitor for plaintiff,

Ordered, Adjudged and Decreed by the court as follows:

(1) That the decree of this court entered herein on the twenty-third day of January, A. D. 1935 dismissing the bill of complaint be and the same is hereby vacated and set aside and the bill of complaint reinstated.

(2) That a perpetual injunction issue out of and under the seal of this court directed to said defendant, Kellogg Company, its officers, agents, servants, employees and at-

torneys and those in active concert or participating with them, its successors and assigns, restraining and enjoining it and them, and each of them, from the use of the name "SHREDDED WHEAT" as its trade name and from advertising [fol. 2319] or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark.

(3) That the plaintiff do recover from the defendant the gains, profits and advantages which the said defendant has derived, received, earned or made or which it shall derive, receive, earn or make by reason of the use by defendant of the name "SHREDDED WHEAT" as its trade name and, advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark, as well as any and all damages which the said plaintiff has sustained by reason of such use or either of them.

(4) That this cause be and the same is hereby referred to Charles F. Richards, Esq., as special master to take, state and report to this court, with all convenient speed, an account of said profits and damages, and that upon said accounting the testimony heretofore taken by either party in this cause may be used by either party and considered by the master.

(5) That plaintiff have judgment against defendant for the costs awarded to it by the Circuit Court of Appeals for the Third Circuit in the sum of Ninety-eight Dollars and Sixty Cents ($98.60) together with its costs in this court up to and including the entry of this decree, including costs incurred by the plaintiff for printing the transcript of record on appeal, said costs to be taxed by the clerk.

[fol. 2320] (6) That this court reserves for further consideration upon the coming in of the master's report all questions pertaining to costs hereinafter accruing and damages or profits.

(Sgd.) John P. Nields, J.

A true copy. Attest: H. C. Mahaffy, Jr., Clerk. (Seal.)

[fol. 2321] [Endorsed:] U. S. District Court, District of Delaware. No. 980. In Equity. National Biscuit Company, Plaintiff, v. Kellogg Company, Defendant. Interrogatory Decree. Filed January 5, 1938. (Sgd.) H. C. Mahaffy, Jr., Clerk.

[fol. 2322] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

No. 980. In Equity

NATIONAL BISCUIT COMPANY, Plaintiff,

v.

KELLOGG COMPANY, Defendant

And now, to wit, this 19th day of January, A. D., 1938, upon reading and considering the motion of the defendant by E. Ennalls Berl, Esq., its solicitor, to amend the decree entered herein on the fifth day of January, A. D. 1938, by the deletion therefrom of the words "or either of them" at the end of paragraph (3) of said decree, it is

Ordered by the Court that said decree of January 5, A. D. 1938, be and hereby is amended by striking out paragraph (3) thereof and inserting in lieu thereof the following paragraph:

(3) That the plaintiff do recover from the defendant the gains, profits and advantages which the said defendant has derived, received, earned or made or which it shall derive, receive, earn or make by reason of the use by defendant of the name "SHREDDED WHEAT" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark; and that the plaintiff also recover from the defendant any and all damages which it may have sustained by reason of the use by defendant of the name "SHREDDED WHEAT" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark.

[fol. 2323] This order does not interpret or construe the mandate of the appellate court but seeks merely to have paragraph (3) and all other parts of the decree conform to that mandate.

(Sgd.) John P. Nields, J.

A True Copy. Attest: H. C. Mahaffy, Jr., Clerk. (Seal.)

[fol. 2324] [Endorsed:] U. S. District Court, District of Delaware. No. 980. In Equity. National Biscuit Company, Plaintiff, v. Kellogg Company, Defendant. Order

Amending Order of January 5, 1938. Filed January 19, 1938. (Sgd.) H. C. Mahaffy, Jr., Clerk.

[fol. 2325] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

No. 980. In Equity

NATIONAL BISCUIT COMPANY, Plaintiff,

v.

KELLOGG COMPANY, Defendant

UNITED STATES OF AMERICA,
District of Delaware, ss:

The President of the United States of America to Kellogg Company, a Corporation of the State of Delaware, Greeting:

Whereas, in the above entitled cause, lately pending in the District Court of the United States for the District of Delaware, it was, on the fifth day of January, A. D. 1938, Ordered, Adjudged and Decreed by the Court that a perpetual injunction issue out of and under the seal of said court directed to said defendant, Kellogg Company, its officers, agents, servants, employees and attorneys and those in active concert or participating with them, its successors and assigns, restraining and enjoining it and them, and each of them, from the use of the name "SHREDDED WHEAT" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark;

Now, Therefore, Know Ye, that you, the said Kellogg Company, your officers, agents, servants, employees and attorneys and those in active concert or participating with [fol. 2326] you, your successors and assigns, and each of you, are hereby strictly restrained and enjoined under the pains and penalties that may fall upon you in case of disobedience, from the use of the name "SHREDDED WHEAT" as your trade name and from advertising or offering for sale your product in the form and shape of plaintiff's biscuit in violation of its trade mark.

Witness the Honorable John P. Nields, Judge of said court, at Wilmington, in said district, this seventh day of

January, A. D. 1938, and the Independence of the United States of America the one hundred and sixty-second.

(Sgd.) H. C. Mahaffy, Jr., Clerk U. S. District Court, District of Delaware. (Seal.)

[fol. 2327] UNITED STATES OF AMERICA,
District of Delaware, ss:

I, Henry C. Mahaffy, Jr., Clerk of the District Court of the United States for the District of Delaware, do hereby certify that I have carefully compared the foregoing writing with the original Injunction issued in the case of National Biscuit Company, Plaintiff v. Kellogg Company, Defendant, No. 980 In Equity with Marshall's return of service thereon, and find the same to be a true and correct copy of said original injunction and Marshall's return so full and complete as the same now remains on file in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at Wilmington, in said district, this sixteenth day of May, A. D. 1938.

H. C. Mahaffy, Jr., Clerk. (Seal of the District Court in Delaware.)

[fol. 2328] [Endorsed:] U. S. District Court, District of Delaware. No. 980. In Equity. National Biscuit Company, Plaintiff, v. Kellogg Company, Defendant. Injunction. Filed January 19, 1938. (Sgd.) H. C. Mahaffy, Jr., Clerk.

DISTRICT OF DELAWARE, ss:.

I hereby certify and return that at Wilmington, in said District, on the 8th day of January, A. D. 1938, I served the within Injunction on the within named Kellogg Company, defendant, by delivering a true copy of the same to Alfred Jervis, Secretary of The Corporation Trust Company, said The Corporation Trust Company being resident agent for said defendant company in the State of Delaware, the president of said defendant company then and there residing without the State of Delaware.

So Answers.

Austin D. Smith, United States Marshal, by (Sgd.) Gove S. Lynch, Gove S. Lynch, Deputy.

[fol. 2329] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 2

ORDER ALLOWING CERTIORARI—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration or decision of this application.

[fol. 2330] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 56

ORDER ALLOWING CERTIORARI—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration or decision of this application.

CLERK'S COPY.

Vol. IV

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 2

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

No. 56

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONS FOR CERTIORARI FILED { SEPTEMBER 10, 1937. MAY 23, 1938

CERTIORARI GRANTED MAY 31, 1938.

TRANSCRIPT OF RECORD

(IN FIVE VOLUMES)

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 5801. **October Term, 1935.**

NATIONAL BISCUIT COMPANY,

Plaintiff-Appellant,

v.

KELLOGG COMPANY,

Defendant-Appellee.

Volume IV.

EXHIBITS.

(Pages 1 to 208 inclusive)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

Filed August 10, 1935.

INDEX TO EXHIBITS.

PLAINTIFF'S EXHIBITS.

No.		Admitted Vol.	Page	Printed Vol.	Page
1	Carton of Shredded Wheat, Witness Wallace	I	246	...	...
2	Book Containing Samples of Cartons, Witness DeWeese	I	574	Not printed	
3	Book Containing Samples of Cartons, Witness DeWeese	I	574	Not printed	
4	Book Containing Sample of Cartons, Witness DeWeese	I	574	Not printed	
5	Kellogg Package, Waitress 172/8/11/32, Biltmore Hotel, Providence, Witness Sweet	I	326	...	...
6	Restaurant Check, Paid September 2, 1932, Biltmore Grill Room, Providence, Witness Sweet	I	327	Not printed	
7	Kellogg Package, Delivered September 2, 1932, Biltmore Hotel, Providence, Witness Sweet	I	327	...	...
8	Menu, September 2, 1932, Providence, Biltmore Hotel, Witness Sweet	I	327	Not printed	
9	Kellogg Carton, Served, Biltmore Hotel, Providence, September 1, 1932, Witness Sweet	I	328	IV	1
10	Old Style Carton, Shredded Wheat, Witness Schapansky (Saucer With Two Biscuit)	II	720*	IV	3
11	Kellogg Package, Grocery, Hamilton, Mass., Witness Sanborn	I	359*	IV	7
12	Kellogg Carton, Hawthorne Hotel, Salem, Mass., Witness Barrett	I	361*	...	...

*Formal offer and admission of exhibit in evidence deleted in conng record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
13—Menu, Hawthorne Hotel, Salem, Mass., Witness Barrett	I	361*	Not printed	
14—Kellogg Package, Grocery, Salem, Mass., Witness Creedon	I	364*	...	...
15—Kellogg Carton, Grocery, Castle Hill, Salem, Witness McCabe	I	366*	...	...
16—Kellogg Package, Biltmore Hotel, Providence, Witness Doyle	I	388*	...	...
17—Menu, Biltmore Hotel, Providence, Witness Doyle	I	388	Not printed	
18—Large Kellogg Carton or Case, Burlington Grocery, Burlington (Photograph to Be Substituted), Witness Sharpley	I	400*	...	...
19—Individual Kellogg Carton, Vermont Lunch, Burlington, Witness Thayer	I	406*	...	...
20—Menu, Montpelier Tavern, Burlington, Vt., Witness Bradbury	I	408*	Not printed	
21—Individual Box Shredded Wheat With Kellogg's Whole Wheat Biscuit Therein, Dorn's Cafe, Burlington, Vt., Witness Bradbury	I	409*	...	...
22—Menu, Vermont Lunch, Burlington, Vt., Witness Bradbury	I	409*	Not printed	
23—Sales Slip, Duritsky's, Uniontown, Pa., Witness White	I	423	Not printed	
24—Kellogg Carton, Duritsky's, Uniontown, Pa., Witness White	I	423	...	...
25—Sales Slip, H. L. Black Grocery, Juniata, Pa., Witness Colliflower	I	427	Not printed	
26—Kellogg Carton, H. L. Black Grocery, Juniata, Pa., Witness Colliflower	I	427	...	...
27—Sales Slip, Huber's Grocery, Altoona, Pa., Witness Goodman	I	430	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
28—Kellogg Carton, Huber's Grocery, Altoona, Pa., Witness Goodman		I	430	...	...
29—Sales Slip, Witherow Store, Altoona, Pa., Witness Miller		I	433	Not printed	
30—Kellogg Carton, Witherow Store, Altoona, Pa., Witness Miller		I	433	...	...
31—Kellogg Carton, Isaly's Dairy, Steubenville, Ohio, Witness Trescher		I	445	...	...
32—Kellogg Carton, Restaurant, East Liberty, Witness Borneman		I	446	...	...
33—Kellogg Box With Paper Attached, Isaly's Dairy, Steubenville, Ohio, Witness Keeder		I	451	...	...
34—Kellogg Carton, Kresge's, Steubenville, Ohio, Witness Keenan		I	452	...	...
35—Strip Display Sign, Showing Dish Containing Two Biscuit, Witness Nubermeyer		I	454	Not printed	
36—Glass Bowl, Witness Nubermeyer		I	454	...	...
37—Kellogg Carton, Restaurant, Cleveland, Ohio, Witness Fisher		I	463	...	...
38-A—Order Slip, Hammer Grocery, Cleveland, Witness Herron		I	464	Not printed	
38-B—Kellogg Box, Hammer Grocery, Cleveland, Witness Herron		I	464	...	...
39-A—Yellow Slip, Norris Grocery, E. Cleveland, Witness Lansdowne		I	466	Not printed	
39-B—Kellogg Carton, Norris Grocery, E. Cleveland, Witness Lansdowne		I	466	...	...
40-A—White Slip, Grocery, Lakeview Road, Cleveland, Witness Lansdowne		I	467	Not printed	
40-B—Kellogg Box, Grocery, Lakeview Road, Cleveland, Witness Lansdowne		I	467	...	...
41-A—Yellow Sales Slip, Bob's Grocery, Cleveland, Witness Schneider		I	469	Not printed	

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
41-B	Kellogg Carton, Bob's Grocery, Cleveland, Witness Schneider	I	469	...	...
42-A	Sales Slip, "Y" Grocery, Cleveland, Witness Stibeling	I	470	Not printed	
42-B	Kellogg Carton, "Y" Grocery, Cleveland, Witness Stibeling	I	471	...	...
43	Carton, Kellogg's, Huff Restaurant, Cleveland, Witness Rohn	I	472	...	...
44	Kellogg Carton, Grocery Store, Detroit, Witness Bernard	I	481	...	...
45	Kellogg Carton, Cafe, Flint, Mich., Witness Harris	I	482	...	...
46	Kellogg Carton, Grocery Store, Detroit, Witness Yorke	I	483	...	...
47	Kellogg Carton, Grocery Store, Flint, Mich., Witness McClellan	I	485	...	...
48	Kellogg Carton, Grocery Store, Flint, Mich., Witness Meiloure	I	486	...	...
49	Kellogg Carton Victory Lunch, Detroit	I	490	...	...
50-A	Brown Paper Bag, Grocery Store, Detroit, Witness Cowles	I	492	...	...
50-B	Kellogg Carton, Grocery Store, Detroit, Witness Cowles	I	492	...	...
51	Kellogg Carton, Grocery Store, Detroit, Witness Westphal	I	493	...	...
52	G. & H. McMillan's Catalog, Detroit, Witness MacElroy	I	494	Not printed	
53-A	Slip, Menu Card, Restaurant, Chicago, Witness Michalak	I	499	Not printed	
53-B	Kellogg Carton, Restaurant, Chicago, Witness Michalak	I	499	...	...
54	Kellogg Carton, YMCA, Chicago, Witness Loughlin	I	502	...	...
55-A	Card, on Counter, Restaurant, Chicago, Witness Holmer	I	504	Not printed	

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
55-3	Kellogg Carton, Restaurant, Chicago, Witness Holmer	I	504	...	...
56	Menu Card, Restaurant, Chicago, Witness Holmer	I	504	Not printed	
57	Kellogg Carton, Grocery Store, Chicago, Witness Ristig	I	512	...	...
58	Kellogg Carton, Food Shop, Chicago, Witness Korsen	I	513	...	...
59	Kellogg Carton, Grocery Store, Chicago, Witness Rachlin	I	515	...	...
60	Kellogg Carton, Grocery Store, Chicago, Witness Ritter	I	516	...	...
61	Kellogg Package, Grocery Store, Chicago, Witness Golden	I	517	...	...
62	Kellogg Box, Davie's Lunch, Chicago, Witness Skewes	I	520	...	...
63	Kellogg Carton, Restaurant, Washington, D. C., Witness Kleeman	I	528	...	...
64	Kellogg Carton, Grocery Store, Hagerstown, Md., Witness Schmidt	I	533	...	...
65	Kellogg Box, Restaurant, Hagerstown, Md., Witness Schmidt	I	533	...	...
66	Bill From Restaurant, Hagerstown, Md., Witness Schmidt	I	533	Not printed	
67	Kellogg Box, Restaurant, Hagerstown, Md., Witness Schmidt	I	533	...	...
68	Bill, Marked One Box Shredded Wheat, Grocery Store, Chambersburg, Pa., Witness Ludwig	I	534	Not printed	
69	Kellogg Box, Grocery Store, Chambersburg, Pa., Witness Ludwig	I	535	...	...
70	Bill From Restaurant, Chambersburg, Pa., Witness Ludwig	I	535	Not printed	
71	Kellogg Box, Restaurant, Chambersburg, Pa., Witness Ludwig	I	535	...	...

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
72—Sales Slip From Restaurant, Baltimore, Witness Johnson	I	549*	Not printed	
73—Kellogg Carton, Restaurant, Baltimore, Witness Johnson	I	549*	...	...
74—Kellogg Package, Lull Grocery Store, Kalamazoo, Mich., Witness Doyle	I	552*	...	...
75—Kellogg Carton, Sunshine Grocery Company, Kalamazoo, Mich., Witness Doyle	I	553*	...	...
76—Kellogg Package, Grocery Store, Kalamazoo, Mich., Witness Doyle	I	553*	...	...
77—Kellogg Carton, Grocery Store, Kalamazoo, Mich., Witness Doyle	I	553*	...	...
78—Kellogg Carton, Grocery Store, Batt' Creek, Witness Doyle	I	553*	...	...
79—Kellogg Carton, Grocery Store, Battle Creek, Witness Doyle	I	554*	...	...
80—Kellogg Package, Grocery Store, South Norwalk. Conn., Witness Cavalier	I	612*	...	...
81—Purchase Slip, Grocery Store, Stamford, Witness Tuttle	I	614*	Not printed	
82—Kellogg Carton, Grocery Store, Stamford, Witness Tuttle	I	614*	...	...
83—Newspaper Schedules (Summary), Witness DeWeese	I	571*	IV	11
84—Compilation of Numerous Sheets Entitled "Advertising and Promotional Expense in the United States, Canada, and England," Witness DeWeese	I	571*	IV	41
85—Paper, Letter From Walter H. Page, Witness DeWeese	I	572*	IV	43
86—List of Publications Referring to Shredded Wheat, Witness DeWeese	I	572*	Not printed	
87 to 112—Books or Albums Containing Records of Shredded Wheat Advertising, Witness DeWeese	I	572*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
113	Kellogg Package, Grocery Store, New York, Witness Bender	I	618*	...	...
114	Sheets (Two), Figures From 1927 and 1928, Tables of Amounts Expended by Advertising Shredded Wheat, Witness Oliva	I	620*	IV	45
115	Sheets (Four), Showing Expenditures by Media From 1929 to 1932, Witness Oliva	I	620*	IV	48
116	Cut-out, Floor, Witness Oliva	I	621*	Not printed	
117	Cut-out, Witness Oliva	I	621*	Not printed	
118	Cut-out, Witness Oliva	I	621*	Not printed	
119	Four Price Cards, Witness Oliva	I	621*	Not printed	
120	Eight Carton Inserts, Witness Oliva	I	621*	Not printed	
121	Window Poster, Witness Oliva	I	621*	Not printed	
122	Three Sheet Poster, Witness Oliva	I	622*	Not printed	
123	Shopping Bag, Witness Oliva	I	622*	...	...
124	Hanger Card, Witness Oliva	I	622*	Not printed	
125	Hanger Card, Witness Oliva	I	622*	Not printed	
126	Hanger Card, Witness Oliva	I	622*	Not printed	
127	Price Card, Witness Oliva	I	622*	Not printed	
128	Price Card, Witness Oliva	I	622*	Not printed	
129	Four Broadsides, Witness Oliva	I	622*	Not printed	
130	Recipe Book, Witness Oliva	I	622*	Not printed	
131	Restaurant Hanger, Witness Oliva	I	623*	Not printed	
132	Restaurant Menu, Witness Oliva	I	623*	Not printed	
133	Three Window Posters, Witness Oliva	I	623*	Not printed	
134	Window Posters, Witness Oliva	I	623*	Not printed	
135	Price Window Poster, Witness Oliva	I	623*	Not printed	
136	Panel Poster, Witness Oliva	I	623*	Not printed	
137	Postal Card, Witness Oliva	I	623*	Not printed	
138	Letter and Circular Distributed With Free Samples of Shredded Wheat, Witness Oliva	I	623*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
139—Three Bundles of Sheets of Newspaper Schedules, Witness Oliva	I	624*	Not printed	
140—Kellogg Package, Restaurant, Newark, Witness Fagan	I	635*	...	...
141—Kellogg Package, Grocery Store, New York, Witness Mund	I	638*	...	...
142—Kellogg Package (in Part), Restaurant, Hampstead, Long Island, Witness Parnell	I	641*	...	...
143—Kellogg Package, Grocery Store, Seaford, Witness Tuthill	I	643*	...	...
144—Kellogg Package, Grocery Store, Brooklyn, Witness Evans	I	651*	...	...
145—Kellogg Box, Cafeteria, Brooklyn, Witness Evans	I	652*	...	...
146—Menu, Cafeteria, Brooklyn, Witness Evans	I	655*	Not printed	
147—Kellogg Box, Grocery Store, Witness McCrum	I	656*	...	...
148—New Carton, National Biscuit Co., Witness Oliva	I	657*	...	...
149—Transcript of Annual Sales of Shredded Wheat, Witness Dunlap	I	675*	IV	50
150—Combined Schedule of Advertising Expenditures, Witness Dunlap	I	675*	IV	51
151—Kellogg Carton, Cafeteria, New York, Witness MacKay	I	682*	...	...
152—Kellogg Package, Restaurant, Fresno, California, Witness Schapansky	II	716*	...	...
153—Kellogg Package, Black's Package Store, Fresno, California, Witness Schapansky	II	717*	...	...
154—Kellogg Carton, Grocery Store, With Sales Slip, Fresno, California, Witness Schapansky	II	718*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
154-A	Kellogg Carton, Hotel Berry, Coffee Shop, Sacramento, California, Witness Sowles	II	727*	...	...
155	Kellogg Carton, Grocery Store, Sacramento, California, Witness Sowles	II	727*	...	...
156	Menu Card, Smith's Coffee Cup, Stockton, California, Witness Burkner	II	732*	Not printed	
157	Kellogg Carton, Smith's Coffee Cup, Stockton, California, Witness Burkner	II	732*	...	...
158	Kellogg Carton, Foster's Lunch System, San Francisco, California, Witness Baird	II	736*	...	...
159	Kellogg Carton, Grocery, Berkeley, California, Witness MacCool	II	739*	...	...
160	Kellogg Carton and Purchase Slip, Miller's Store, Witness Fatjo	II	743*	...	...
161	Kellogg Package, Santa Clara, California, Witness Van Artsdale	II	767*	...	...
162	Menu, Steamship Line, Ross, California, Witness Mears	II	1196*	Not printed	
163	Menu, Ship Monterey, Ross, California, Witness Mears	II	1196*	Not printed	
164	Menu Card, Restaurant Owner, San Francisco, California, Witness Dubac	II	1235*	Not printed	
165	Kellogg Carton, Large Size, Burlingame, California, Witness West	II	1190*	...	...
166	Kellogg Carton, Burlingame, California, Witness West	II	1190*	...	...
167	Kellogg's Window Display Carton, Burlingame, California, Witness West	II	1191*	...	...
168	Kellogg's Window Display Carton, Burlingame, California, Witness West	II	1191*	...	...
169	Kellogg Carton, Restaurant Owner, Witness Lee	II	1255*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
170	Menu Card, With Paper Attached, Restaurant owner, Witness Fierstine	II	1259*	Not printed	
171	Kellogg Carton, Witness Cooper	II	776*	...	...
172	Kellogg's Wheel of Knowledge, San Diego, California, Witness Cooper	II	776*	Not printed	
173	Kellogg Carton, Purchaser, San Diego, California, Witness Cooper	II	777*	...	...
174	Kellogg Carton, Purchaser, Los Angeles, California, Witness MacFarland	II	783*	...	...
175	Kellogg Carton, Los Angeles, California, Witness MacDuffie	II	787*	...	...
176	Kellogg Carton, Purchaser, Los Angeles, California, Witness MacDuffie	II	787*	...	...
177	Kellogg Carton, Purchaser, Glendale, California, Witness Anderson	II	792*	...	...
178	Kellogg's Individual Carton, Witness Lierley	II	798*	...	...
179	Kellogg Carton and Cash Slip, Witness Ruch	II	802*	...	...
180	Clipping, Brownwood Bulletin, Kellogg Sales, Witness Wilde	II	1333*	Not printed	
181	Fort Worth Grocery Co., Price-List, Witness Wilde	II	1339*	Not printed	
182	Kellogg Carton, Witness Bullock	II	882*	...	...
183	Kellogg Package, Witness Burke	II	884*	...	...
184	Kellogg Carton, Cellophane Front, Witness Mahaffey	II	889*	...	...
185	Kellogg Carton, Witness Tutt	II	900*	...	...
186	Kellogg Carton, Witness Reynolds	II	902*	...	...
187	Sales Slip, Witness Staloup	II	904*	Not printed	
188	Kellogg Carton, Witness Staloup	II	904*	...	...
189	Slip of Paper, Witness Hunsaker	II	907*	Not printed	
190	Kellogg Carton, Witness Hunsaker	II	907*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
191—Kellogg Package, Witness Guthrie	II	936*	...	...
192—Kellogg Carton, Witness Guthrie	II	938*	...	...
193—Menu Card, Witness Guthrie	II	938*	Not printed	
194—Page of the Wichita Independent, Witness Guthrie	II	938	Not printed	
195—Kellogg Package, Witness Branson	II	943*	...	...
196—Purchase Slip, Witness Branson	II	943*	Not printed	
197—Page of the Winona Republican Herald, Dated January 20, 1933, Witness Kolvoord	III	1411*	Not printed	
198—Newspaper Advertisement of the Decatur Home Stores, Witness Kolvoord	III	1415*	Not printed	
199—Old-Style Kellogg Folder Cut, Witness Kolvoord	III	1415*	Not printed	
200—Newspaper Advertisement, Reading Eagle, April 28, 1932, Witness Kelly	III	1443*	Not printed	
201-A—Newspaper Clipping, Kalamazoo Gazette, Witness Mahan	III	1476*	Not printed	
201-B—Sheet, Containing Same, Kalamazoo Gazette, March 2, 1933; Newspaper Clipping, Witness Mahan	III	1476	Not printed	
202—Price-List Put Out by the Kellogg Company, Dated February 1, 1933, Witness Mahan	III	1476*	IV	53
203—Paper Showing Picture of Kellogg's Whole Wheat Biscuit Containing Two Biscuit in a Dish to Be Addressed to Store Managers, Witness Mahan	III	1477	IV	55
204—Tear Sheet From the Battle Creek, Michigan, Moon Journal, October 21, 1932, Witness Mahan	III	1477	Not printed	
205—Hand-Bill Used by I. G. A. Stores, Witness Mahan	III	1477	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

Ex. No.		Admitted in Vol.	Page	Printed in Vol.	Page
206	Sheet From the News Telegraph, Dated March 10, 1933, Sharon, Pa., Witness Ander	III	1638	Not printed.	
207	Page Twenty-nine of the Pittsburgh Press, Dated March 25, 1932	III	1638	Not printed.	
208	Package of Hat Cleaner, Witness Rush	III	1727		
209	Package of Camel Cigarettes, Witness Rush	III	1728		
210	Copy of the Reading Eagle, May 5, 1932, Witness Miller	III	1846*	Not printed.	
211	Page of the Reading Eagle, February 4, 1932, Witness Miller	III	1846*	Not printed.	
212	Sheet Containing Ad of the Kellogg Company of the Reading Eagle, May 12, 1932, Witness Miller	III	1846*	Not printed.	
213, 214	(Numbers Skipped, No Such Exhibits Marked.)*				
215	Package Resembling Plaintiff's Exhibit No. 166 (a Kellogg Shredded Whole Wheat Biscuit Carton), Witness Hopkins	III	1871*		
216	Package Resembling Plaintiff's Exhibit No. 165, Witness Hopkins	III	1872*		
217	Cardboard Liner, Used by Kellogg Company in Whole Wheat Biscuit Cartons, Witness Hopkins	III	1872*		
218	Easel or Study Advertising, Witness Hopkins	III	1874*	Not printed.	
219	Sheet of the Reading Eagle, March 31, 1932, Witness Hopkins	III	1875*	Not printed.	
220	Sheet of the Reading Eagle, March 5, 1932, Witness Hopkins	III	1875*	Not printed.	
221	Sheet of the Reading Eagle, March 17, 1932, Witness Hopkins	III	1875*	Not printed.	

*Formal offer and admission of exhibit in evidence inserted in condensing record.

PLAINTIFF'S EXHIBITS—Continued

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
222	Copy of Modern Merchant and Grocery World, Witness Hopkins	III	1875*	Not printed	
223	Cash-and-Carry Bulletin, Witness Hopkins	III	1875*	Not printed	
224	William Montgomery & Co., Price-List, Witness Hopkins	III	1876*	Not printed	
225	Copy of Modern Merchant and Grocery World, February 9, 1933, Witness Hopkins	III	1876*	Not printed	
226	Standard Government Form of Bid, Witness Hopkins	III	1879	Not printed	
227	Price Bulletin of Provisional Contracts, Witness Hopkins	III	1879	Not printed	
228	Copies of Requisitions, Consisting of Six Sheets, Witness Ruckman	III	1912*	Not printed	
229	Advertisement, Minneapolis Journal, April 30, 1922, Witness Ruckman	III	1940*	Not printed	
230	Breakfast Menu, Hotel Paxton Coffee Shop, Witness Dubois	III	1947*	Not printed	
231	Menu, Main Dining-Room, Hotel Paxton, Witness Dubois	III	1947*	Not printed	
232	Room-Service Menu, Hotel Paxton, Witness Dubois	III	1947*	Not printed	
233	Board of Control Specifications, Witness Sawyer	III	1965*	Not printed	
234	Consolidation Agreement, Dated May 19, 1890, Witness Malone	II	958*	Not printed	
235	Copy of Certificate of Incorporation, Dated May 7, 1900, Witness Malone	II	978	Not printed	
236	Letter, Division Passenger Agent, Atchison, Topeka & Santa Fe Railway Co., April 13, 1933, Witness Malone	II	979	Not printed	
237	Certified Copy Resettled Final Decree in Shredded Wheat Company Against Humphrey Cornell Company	III	2005	IV	57

*Formal offer and admission of exhibit in evidence deleted in consenting record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
238—Menu Card, The Fenway Inn	I	251	Not printed	
239—Photographs (24), Illustrating Plaintiff's Operations	I	271	IV	63
240—Box Diamond-Shape Biscuit	I	271	Not printed	
240-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 240	III	2019	IV	111
241—Box of Cone-Shaped Biscuit	I	272	...	...
241-A—Photograph of Four Biscuit of Plaintiff's Exhibit No. 241	III	2019	IV	113
242—Box of Doughnut-Shaped Biscuit	I	273	...	...
242-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 242	III	2019	IV	115
243—Box of 3-inch Round-Cut Biscuit	I	274	...	...
243-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 243	III	2019	IV	117
244—Box of 2-inch Round-Cut Biscuit	I	274	...	...
244-A—Photograph of Three Biscuit of Plaintiff's Exhibit No. 244	III	2019	IV	119
245—Box of 3-inch Round-Moulded Biscuit	I	275	...	...
245-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 245	III	2019	IV	121
246—Box of Biscuit Baked in Automatic Machine	I	276	...	...
247—Sheet Tampa Morning Tribune, July 9, 1932	I	303	IV	123
248—Sheet The Tampa Daily Times, July 8, 1932	I	303	IV	125
249—Sheet The Saint Paul Pioneer Press, April 26, 1933	I	304	Not printed	
250—Digest of Style for Government Printing	I	304*	...	...
251—Stipulation Re Depositions in Connecticut Case	I	306	IV	127
252—Four U. S. Trade-mark Registrations of Plaintiff	I	315	IV	129

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
	No. 85,186, January 30, 1912	I	315	IV	129
	No. 178,725, January 15, 1924	I	315	IV	133
	No. 216,593, August 17, 1926	I	315	IV	131
	No. 213,456, May 25, 1926	I	315	IV	135
253	Twenty-seven State Registrations of Trade-mark Shredded	I	315	Not printed	
254	Certificate of Incorporation, Natural Food Co.	II	1004	Not printed	
255	Certified Court Order Supreme Court, New York, Authorizing Change of Name to Shredded Wheat Company	II	1005	Not printed	
256	Certificate of Organization National Biscuit Co.	II	1005	Not printed	
257	Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
258	Second Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
259	Third Amendment of Charter of National Biscuit Co.	II	1005	Not printed	
260	Bill of Sale, 30th April, 1930, From Shredded Wheat Company to National Biscuit Co.	II	1005	Not printed	
261	Carton Purchased at Kenosha on December 24, 1932	III	2018	...	...
262	Sketches A and B Used in Cross-Examination of Witness Penty	II	1127	Not printed	
263	Report on Hot and Cold Cereals	II	1137	Not printed	
264	Report on Hot and Cold Cereals	II	1137	Not printed	
265	Slip Referred to by Witness Poole	II	1145	Not printed	
266	Package of Plaintiff's Reprocessed Biscuit	III	2018	...	...
267	Package of Plaintiff's Reprocessed Biscuit	III	2018	...	...
268	Package of Plaintiff's Biscuit, Part Reprocessed	III	2018	...	...
269	Bundle of Photographs	III	2018	Not printed	

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
270	Package Like Plaintiff's Exhibit 2, Kellogg's Shredded Whole Wheat Biscuit	III	2018	...	...
271	Defendant's Carton Put Out September, 1932	III	2018	...	...
272	Carton Kellogg's Shredded Whole Wheat	III	2018	...	...
273	Decree in Case of Natural Food Co. v. Bulkley, et al.	III	2020	Not printed	
274	Carton Champion Flake Butters	III	2024	...	...
275	Dupont Company Price-List on Cellophane	III	2036	Not printed	

PLAINTIFF'S EXHIBITS UNDER RULE 46.

A	Publication of the Cyrus Curtis Pub. Co.	III	2019	Not printed	
B	Opinion of the Court of Appeals in Williams Case	III	2020	Not printed	
C	Decree of Court of Appeals in Williams Case	III	2020	Not printed	

DEFENDANT'S EXHIBITS.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
1—Letter of Mr. Sweet	I	340	Not printed	
2—Letter of Mr. Sweet	I	340	Not printed	
3-A—Letter of Mr. Sweet	I	340	Not printed	
3-B—Letter of Mr. Sweet	I	340	Not printed	
4—Kellogg Carton, Witness Hamilton	I	357*	...	...
5—Kellogg Carton, Witness Hamilton	I	357*	...	...
6—Package Kellogg Whole Wheat Biscuit	I	495*	...	...
7—Slip of Witness' Signature Torn Off Plaintiff's Exhibit No. 54, Witness Loughlin	I	502*	Not printed	
8—Box or Carton, Kellogg's, Witness Dodge	I	531*	...	...
9—Letter and Enclosure; News Release, Re: Suit Against Kellogg, Witness DeWeese	I	604	IV	137
10—Newspaper Article, Filing of Suit by Shredded Wheat Company, Witness DeWeese	I	604	IV	138
11—Quaker Muffetts Package, Witness Weinstock	I	667*	...	...
12—Package, Codfish, Witness West	II	1194*	...	...
13—Package, Baker's Cocoanut, Witness West	II	1194	...	...
14—Package, Kellogg's Whole Wheat Flakes, Witness West	II	1194*	...	...
15—Package, Kellogg's Muffetts, Witness West	II	1194	...	...
16—Triscuit Carton, Witness Powell	II	1266	...	...
17—Wheat Krumbles Carton, Witness Thompson	II	1275*	...	...
18—Poster, Wheel of Knowledge, Witness Thompson	II	1277*	Not printed	
19—Foster, Jumbo Kellogg Carton, Witness Thompson	II	1277*	Not printed	
20—Sheets, Ads, Witness Thompson	II	1278*	Not printed	
21—Kellogg's Corn Flakes, Witness Thompson	II	1285	...	...
22—Kellogg's All-Bran, Witness Thompson	II	1285	...	...
23—Kellogg's Pep, Witness Thompson	II	1285	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
24—Kellogg's Wheat Krumbles, Witness Thompson	II	1285	...	...
25—Kellogg's Rice Krispies, Witness Thompson	II	1285	...	...
26—Kellogg's Kaffee Hag, Witness Thompson	II	1285	...	...
27—Kellogg's Wheat Krispies, Witness Thompson	II	1285	...	...
28—(Number Skipped, No Such Exhibit Marked.)				
29—Kellogg's Whole Wheat Flakes, Witness Thompson	II	1285	...	...
30—Package of Tear Sheets From San Francisco and Oakland Papers	I	775*	Not printed	
31—Package of Kellogg's All-Bran, Witness Anderson	II	1339*	...	...
32—Package of Post's Whole Bran, Witness Anderson	II	1339*	...	...
33—Package of Uneeda Graham Crackers, Witness Anderson	II	1339*	...	...
34—Package of Brown's Graham Crackers, Witness Anderson	II	1339*	...	...
35—Package of Sunshine Dutch Rush, Witness Anderson	II	1339*	...	...
36—Package of Holland Rusk, Witness Anderson	II	1339*	...	...
37—Package of Brown's Vanilla Wafers, Witness Anderson	II	1339*	...	...
38—Package of Uneeda Vanilla Wafers, Witness Anderson	II	1339*	...	...
39—Package of Van Camp's Spaghetti, Witness Anderson	II	1340*	...	...
40—Package of Thrift Spaghetti, Witness Anderson	II	1340*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
41—Package of Swans Down Biscuit Mix, Witness Anderson	II	1340*	...	...
42—Package of La France Biscuit Flour, Witness Anderson	II	1340*	...	...
43—Package of Uneeda Assorted Biscuit, Witness Anderson	II	1340*	...	...
44—Package of Sunshine Specialties Assortment, Witness Anderson	II	1340*	...	...
45—Package of Baker's Cocoanut, Witness Anderson	II	1340*	...	...
46—Package of Premier Spaghetti, Witness Anderson	II	1340*	...	...
47—Package of Van Camp's Kidney Beans, Witness Anderson	II	1340*	...	...
48—Package of Premier Beans and Pork, Witness Anderson	II	1340*	...	...
49—Package of Van Camp's Spaghetti, Witness Anderson	II	1340*	...	...
50—Package of LaChoy. Shredded Sprouts, Witness Anderson	II	1340*	...	...
51—Package of Van Camp's Hominy, Witness Anderson	II	1340*	...	...
52—Package of Beech-Nut Pork and Beans, Witness Anderson	II	1340*	...	...
53—Package of Battle Creek Fig and Bran, Witness Anderson	II	1340*	...	...
54—Package of Van Camp's Hominy, Witness Anderson	II	1340*	...	...
55—Package of Beech-Nut Spaghetti, Witness Anderson	II	1340*	...	...
56—Package of Baker's Sweet Potato Shredlets, Witness Anderson	II	1340*	...	...
57—Package of Dunham's Original Shred Cocoanut, Witness Anderson	II	1340*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
58—Package of Baker's Cocoanut Shredded, Witness Anderson	II	1340*	...	...
59—Package of National Shredded Wheat Biscuit, the Larger Individual Carton, Witness Baskett	II	1342*	...	...
60—Package of National Shredded Wheat Biscuit, the Smaller Individual Carton, Witness Baskett	II	1342*	...	...
61—Photograph of the Interior of the Wyatt Self-Service Store, Witness Baskett	II	1344	Not printed	
62—Package of Post Toasties, Corn Flakes	II	905*	...	...
63—Package of Genuine Egg Noodles	II	905*	...	...
64—Postal Card of Clover Farms Store, Reads, "Valuable Coupon," Witness Walters	III	1402*	Not printed	
65—Jumbo Carton Display, Witness Kolvoord	III	1405*	...	...
66—Display Piece With Stand, Picturing a Saucer With Two Biscuit, Witness Kolvoord	III	1406*	...	...
67—Grocers' Display Piece Which Holds Carton Kellogg's Whole Wheat Biscuit, Witness Kolvoord	III	1406*	...	...
68—Sheet of Day Advertisements, Winona Republican Herald, January 20, 1933, Witness Kolvoord	III	1416	Not printed	
69-A and 69-B—Advance Sales Notice, Consisting of Two Sheets, Witness Chapelle	III	1418*	Not printed	
70—Package, Kellogg's, Witness Hatfield	III	1444*	...	...
71—Package of Shredded Wheat, Witness Hatfield	III	1444*	...	...
72—Individual Kellogg Package, Witness Tyler	III	1446*	...	...
73—Mat, Used in Newspapers in Printing, Witness Kolvoord	III	1449*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
74—Menu, Referring to Kellogg Carton, Witness Miller	III	1454	...	...
75—Small Individual Kellogg Package, Witness Gray	III	1529*	...	...
76—Kellogg Individual Package, Witness Gray	III	1529*	...	...
77—Older Package of Muffetts, Witness Lewis	III	1534*	...	...
78—Newer Package of Muffetts, Witness Lewis	III	1534*	...	...
79—Copy of Bid, Woman's Relief Corps Home, Witness Lewis	III	1536*	IV	142
80—Kellogg Package	III	1631	...	...
81—Shredded Wheat Package	III	1631	...	...
82—Forty-inch Advertisement, Martins Ferry, Witness Ander	III	1632*	Not printed	
83—Large Set-up Window Photograph Display, Witness Ander	III	1633*	...	...
84—A Smaller Set-up Window Photograph Display, Witness Ander	III	1633*	...	...
85—Copy of Bid, Tubercular Sanitarium, Cresson, Pennsylvania (Department of Health)	III	1641*	Not printed	
86—Copy of Bid, Specifies Kellogg's Whole Wheat Biscuit, Tubercular Sanitarium, Cresson, Pa., Witness Ander	III	1642*	Not printed	
87—Copy of Bid, Pennsylvania Soldiers' and Sailors' Home, Witness Ander	III	1642*	Not printed	
88—Package, Rippled Wheat, Witness Bell	II	954	...	...
89 and 90—Kellogg Deal Price Cards, Witness Mazman	III	1750*	...	...
91—Ross Carton, Witness Witherell	III	1764*	...	...
92—Chester Lowry's Blue Book Price List, Witness Bickham	III	1801*	Not printed	
93—Camden Price List, Lowry's Blue Book, Witness Bickham	III	1801*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
94	Advertisement From Reading Eagle, February 4, 1932, Witness Miller	III	1841*	Not printed	
95	Letters From National Biscuit Company to Jobbers, December 1, 1931, Witness Miller	III	1842*	IV	143
96 and 97	Two Circulars Carrying Advertisements of Kellogg's Whole Wheat Biscuit, Witness Moyer	III	1850*	Not printed	
98	Story Book of Games, Witness Hopkins	III	1863*	Not printed	
99	Wheel of Knowledge Chart, Witness Hopkins	III	1863*	Not printed	
100-A	File Copy of Standard Government Form of Bid, for Use by Navy Department, for Supply Department, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866	Not printed	
100-B	Standard Government Form of Bid, by Navy Department, U. S. Navy Yard, Washington, D. C., Witness Hopkins	III	1866	Not printed	
101	Standard Form of Bid, Dated January 12, 1933, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866	Not printed	
102	Federal Standard Stock Catalogue, N-C-191, Witness Hopkins	III	1868	Not printed	
103	Small Kellogg Carton, Purchased on Dining Car, Northwestern Railroad	III	1944*	...	...
104	Letter to the Kellogg Co. From the F. H. Cobb Co., Inc., Cortland, N. Y., Dated March 22, 1933, an Addendum to the Testimony of Mr. A. J. Twentyman	III	1952*	Not printed	
105	Case Used for Packing National Shredded Wheat, Witness Sawyer	III	1957*	...	...
106	Sketch, Diagram of Threads, Witness Malone, Made by Mr. Clarke	II	963	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
107—Sketch Diagram of Threads, Made by Witness Malone	II	963*	Not printed	
108—Photostatic Copy of Ad in the Denver Republican, Dated March 11, 1894, Witness Hurd	II	974	IV	145
109—Certificate of Incorporation Colorado Shredded Wheat, January 25, 1895, Witness Hurd	II	977*	Not printed	
110-A and 110B—Government Bid, Fort Logan, Dated April 11, 1933, Witness Copeland	III	1989*	Not printed	
111—Package of Egypt Stick Candy	III	1990	...	...
112—Second Sheet, Page Five, Denver Times, March 17, 1894	III	1990	Not printed	
113—Second Sheet, Page Five, Denver Times, March 10, 1894	III	1990	Not printed	
114—Third Sheet, Page Eight, Daily News, Denver, Colorado, July 17, 1895	III	1990	Not printed	
115—Fourth Sheet, Page Eight, Daily News, Denver, Colorado, July 14, 1895	III	1990	Not printed	
116—Fifth Sheet, Page Eight, Daily News, Denver, Colorado, July 27, 1895	III	1990	Not printed	
117—Sixth Sheet, Page Eight, Daily News, Denver, Colorado, July 7, 1895	III	1991	Not printed	
118—Seventh Sheet, Page Eight, Daily News, Denver, Colorado, July 10, 1895	III	1991	Not printed	
119—Eighth Sheet, Page Eight, Daily News, Denver, Colorado, July 28, 1895	III	1991	Not printed	
120—Copy of Record in the Case of Shredded Wheat vs. The Humphrey Cornell Co. and Frederick H. Towne, Witness Ross	III	1992	Not printed	
121—Photostatic Certified Copy of Majority Opinion of the U. S. Circuit Court of Appeals, Witness Ross	III	1992	IV	147
122—Copy of Petition for Rehearing, Witness Ross	III	1993	IV	159

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
123—Kellogg Carton Used From About 1910 to 1912, Witness Ross	III	1999*	...	...
124—Kellogg Carton Used From 1913 to 1914 to Some Time in 1915, Front Panel of Carton Entitled Kellogg's Toasted Wheat Biscuit, Witness Ross	III	2000*	...	...
125—Kellogg Carton Used From 1915 Until 1918 (About) or 1919, Front Face Reads "Copyright 1910 by Kellogg's Toasted Corn Flakes Co.," Witness Ross	III	2000*	...	...
126—Certified Copy of Mandate, Witness Ross	III	2005	IV	163
127—Shredded Wheat Company Chart, "Educational Exhibit of Shredded Wheat Biscuit"	I	288*	Not printed	
128—Book of Labels Illustrative of Jordan Testimony	II	1002	Not printed	
129—Book of 1929 Newspaper Advertising	II	1003	Not printed	
129-A—Book of 1928 Newspaper Advertising	II	1003	Not printed	
129-B—Book of 1929 Newspaper Advertising	II	1003	Not printed	
129-C—Book of 1930 Newspaper Advertising	II	1004	Not printed	
129-D—Book of 1931 Newspaper Advertising	II	1004	Not printed	
129-E—Book of 1932 Newspaper Advertising	II	1004	Not printed	
130—Board Containing Samples of Defendant's Cartons, Marked A to R	II	1006	...	...
131—Holder Containing Kellogg Poster Advertising Before Suit Brought	II	1016	...	...
132—Packages Prepared by Witness Jordan	II	1016	...	...
133—Form Letter to Newspapers Re Kellogg Advertisements	II	1016	Not printed	
134—Five Bundles of Retailer Advertisement of Kellogg's Whole Wheat Biscuit	II	1016	Not printed	
135—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat Biscuit	II	1016	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
136—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat	II	1017	Not printed	
137—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat	II	1017	Not printed	
138—Batch of Advertisements of Plaintiff	II	1025	Not printed	
139—Odd Advertisements of Plaintiff in Woman's Home Companion	II	1035	Not printed	
140—Plaintiff's Pamphlet "Uneeda"	II	1035	Not printed	
141—Standard Government Form of Bid, Department of Interior	II	1043	Not printed	
142—Federal Specification for Cereals (Breakfast Foods)	II	1043	Not printed	
143—Defendant's Bid Naval Supply Department, Norfolk, Va., May 16, 1933	II	1044	Not printed	
144—Defendant's Bid Naval Supply Depot, Norfolk, Va., March 15, 1933	II	1045	Not printed	
145—Samples of Defendant's Early Advertisements of Kellogg's Toasted Wheat Biscuit	II	1047	Not printed	
146—Early Carton of Kellogg's Shredded Whole Wheat Biscuit	II	1048	...	...
147—Blank Carton Sanitas Toasted Corn Flakes	II	1050	...	...
148—Advertisements Kellogg's Shredded Krumbles	II	1052	Not printed	
149—Carton of Kellogg's Krumbles, Shredded Whole Wheat	II	1053	...	...
150—Carton Kellogg's Wheat Krumbles	II	1053	...	...
151—Carton Kellogg's Wheat Krumbles (U. S.)	II	1058	...	...
152—Letter May 3, 1933, N. A. Relfrich to Kellogg's Sales Co.	II	1059	Not printed	
153—Proposal April 8, 1933, to Navy Purchasing Officer, New York	II	1060	Not printed	
154—Price Bulletin of Provision Contract for May, 1933, Port of New York	II	1061	Not printed	

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
155—Bid March 2, 1933, Navy Purchasing Office, New York	II	1062	Not printed	
156—Bid June 8, 1932, Naval Air Station, Lakehurst, N. J.	II	1062	Not printed	
157—Bid February 23, 1933, Selfridge Field, Mich.	II	1063	Not printed	
158—Bid May 9, 1933, West Point, N. Y.	II	1063	Not printed	
159—Invitation for Bid August 22, 1932, Veterans Administration Home, National Military Home, California	II	1064	Not printed	
160—Invitation for Bids, October 25, 1932, Veterans Administration, Washington, D. C.	II	1064	Not printed	
161—Invitation for Bids, October 25, 1932, U. S. Marine Hospital, St. Louis, Mo.	II	1064	Not printed	
162—Bid March 21, 1932, Fort Benjamin Harrison, Ind.	II	1065	Not printed	
163—Bid September 8, 1932, Fort Hoyle, Md.	II	1065	Not printed	
164—Invitation for Bids, May 19, 1932, U. S. Property and Disbursing Officer, Trenton, N. J.	II	1065	Not printed	
165—Bids January 9, 1932, The Army War College, Washington, D. C.	II	1065	Not printed	
166—Bid August 18, 1932, Fort Moultrie, S. C.	II	1066	Not printed	
167—Bid November 11, 1932, Langley Field, Va.	II	1066	Not printed	
168—Bid January 19, 1933, Fort Crook, Neb.	II	1066	Not printed	
169—Bid March 25, 1933, Fort McClellan, Ala.	II	1066	Not printed	
170—Bid April 4, 1932, Fort Mason, San Francisco, Cal.	II	1066	Not printed	
171—Bid July 21, 1931, Fort Warden, Wash.	II	1067	Not printed	
172—Bid July 13, 1932, Quartermaster Supply Officer, Brooklyn, N. Y.	II	1067	Not printed	
173—Bid Marine Barracks, Navy Yard, Portsmouth, N. H.	II	1068	Not printed	
174—Invitation for Bids, Pennsylvania Department of Health, Sanitarium No. 2, Cresson, Pa.	II	1068	Not printed	

DEFENDANT'S EXHIBITS—Continued

Def. No.		Admitted Vol.	Page	Printed Vol.	Page
175	Specification for Cereals, Pa., December 10, 1932	II	1069	Not printed	
176	Specifications State of South Dakota	II	1069	Not printed	
177	Request for Bids, December 19, 1932, Maine	II	1070	Not printed	
178	Proposal, Rockland State Hospital, Orangeburg, N. Y.	II	1070	Not printed	
179	Invitation for Bids, March 13, 1933, Tennessee	II	1070	Not printed	
180	Order April 1, 1933, Wassaic State School, Wassaic, N. Y.	II	1071	Not printed	
181	Order January 16, 1933, Newark State School, Newark, N. J.	II	1071	Not printed	
182	Order March 23, 1933, Great Meadow Prison, Comstock, N. Y.	II	1071	Not printed	
183	Order January 14, 1933, Willard State Hospital, Willard, N. Y.	II	1071	Not printed	
184	Specifications Division of Purchases and Supplies, Springfield, Ill.	II	1072	Not printed	
185	Individual Carton Kellogg's Whole Wheat Biscuit	II	1072	...	...
186	Large Carton Kellogg's Whole Wheat Biscuit	II	1072*	...	...
187	Menu Card, Chicago, Milwaukee, St. Paul and Pacific	II	1074	Not printed	
188	Menu Card, Hotel Fort Shelby, Detroit, Mich.	II	1075	Not printed	
189	Bid March 13, 1933, Naval Supply Depot, Norfolk, Va.	II	1088	Not printed	
190	Bid February 11, 1933, U. S. Marine Corps, Navy Building, Washington, D. C.	II	1089	Not printed	
191	Bid of Price Brothers, May 16, 1933, Naval Home, Philadelphia, Pa.	II	1091	Not printed	
192	Plaintiff's Individual Carton, Large Biscuit	II	1098	...	...
193	Blueprint Diagrammatic Sketch Defendant's Mill	II	1107	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
194—Photographs (13) Illustrating Defendant's Operation	II	1111	Not printed	
195—Sample of Shreds First Time Through Rolls	II	1116	...	...
196—Sample of Shreds Second Time Through Rolls	II	1116	...	...
197—Sample of Shreds Third Time Through Rolls	II	1116	...	...
198—Carton of Fifteen Biscuit at 400 Degrees 1½ Hours	II	1117	...	...
199—Sample of Biscuit With Brown Band	II	1122	...	...
200—Sample of Biscuit With Green Band	II	1122	...	...
201—Sample of Biscuit With K Stamped Thereon	II	1123	...	...
202—Sample of Biscuit With Red Food Coloring	II	1123	...	...
203—Sample of Biscuit With Brown Food Coloring	II	1124	...	...
204—Sample of Biscuit With Green Strip on Top	II	1124	...	...
205—Sample of Biscuit With Green Strip on Bottom	II	1124	...	...
206—Sample of Biscuit With K Impressed Thereon	II	1125	...	...
207—Sample of Biscuit With Brown Stripes	II	1125	...	...
208—Sample of Biscuit With K Impressed Thereon	II	1125	...	...
209—Biscuit as Shown, Sketch A Attached to Exhibit 262	II	1130	...	...
210—Sample Diamond Shape Biscuit	II	1179	...	...
211—Sample Diamond Shape Biscuit	II	1179	...	...
212—Sample Biscuit With Band of Paper	II	1139	...	...
213—Sample Biscuit With Tag	II	1140	...	...
214—Sample Biscuit Enclosed in Envelope	II	1140	...	...
215—Large Card Carrying Samples of Plaintiff's and Defendant's Cartons	II	1151*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol.	Page	Printed Vol.	Page
216—Large Card Carrying Samples of Cartons of Defendant's Cereal Products	II	1151*	...	...
217—Defendant's Shipping Container Case No. 360	II	1152	...	...
218—Defendant's Shipping Container Case No. 324	II	1152	...	...
219—Window Display Card of Plaintiff	II	1152	...	...
220—Samples of Defendant's Cartons	II	1153	...	...
221—Photographs (2) of Store Displays	II	1153	Not printed	
222—Letter June 2, 1932, C. K. Brace, Manager, National Biscuit Co., Denver, Col., to All Jobbers	II	1154	IV	169
223—Chart of Kellogg's Shredded Wheat Biscuit Cartons	II	1155	Not printed	
224—Three Cartons Kellogg's Shredded Krumbles	II	1155	...	...
225—Advertisement Chicago Daily Tribune, June 2, 1928	II	1155	Not printed	
226—Advertisement The Battle Creek Moon Journal, May 25, 1922	II	1156	Not printed	
227—Open Letter of Plaintiff to "Dear Madam"	II	1157	Not printed	
228—Carton Complimentary Samples Shredded Whole Wheat	II	1157	...	...
229—Pamphlet Fifty Ways of Serving Shredded Whole Wheat	II	1157	Not printed	
230—Recipes for New and Delicious Energy Dishes	II	1157	Not printed	
231—Carton Kellogg's Battle Creek Shredded Wheat	II	1158	...	...
232—Registration No. 276,592, Battle Creek, Shredded Wheat	II	1158	Not printed	
233—Chamber's Journal, January 27, 1900	II	1158	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
234	File Wrapper and Contents, Trade-mark Registration No. 178,725, Shredded Wheat	II	1159	IV	171
235	File Wrapper and Contents, Trade-Mark Registration No. 213,456 Shredded Wheat	II	1159	IV	181
236	Book of Trade-Mark Registrations of Plaintiff	II	1160	IV	193
237	Collection of Correspondence	II	1161	Not printed	
238	Samples of Shredded Paper, Shredded Gelatine and Shredded Cellophane	II	1161	...	...
239	Reproduction of Kellogg Biscuit Prior to 1920	II	1162	Not printed	
240, 240-A, 240-B	Box of Split Peas, Lima Beans and Pop Corn, With Cellophane Windows	II	1163	...	...
241	Advertisements in Grocery World, Five Sheets	II	1165	Not printed	
242	Perky U. S. Patent No. 548,096, October 15, 1895	II	1166	IV	207

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
242	Book of Patents Issued to Plaintiff, Viz.:				
	Perky & Ford U. S. Patent No. 502,378, August 1, 1893	II	1166	V	1
	Perky U. S. Patent No. 520,496, May 29, 1894	II	1166	V	5
	Perky U. S. Patent No. 532,286, January 8, 1895	II	1166	V	11
	Perky U. S. Patent No. 532,480, January 15, 1895	II	1166	V	15
	Perky U. S. Patent No. 532,481, January 15, 1895	II	1166	V	21
	Perky U. S. Patent No. 532,697, January 15, 1895	II	1166	V	25
	Perky U. S. Patent No. 532,698, January 15, 1895	II	1166	V	29
	Perky U. S. Patent No. 533,551, February 5, 1895	II	1166	V	33
	Perky U. S. Patent No. 533,552, February 5, 1895	II	1166	V	37
	Perky U. S. Patent No. 533,553, February 5, 1895	II	1166	V	41
	Perky U. S. Patent No. 533,554, February 5, 1895	II	1166	V	45
	Perky U. S. Patent No. 533,555, February 5, 1895	II	1166	V	49
	Montgomery U. S. Patent No. 533,821, February 5, 1895	II	1166	V	55
	Perky U. S. Patent No. 548,086, October 15, 1895	II	1166	V	59
	Perky U. S. Design Patent No. 24,688, September 17, 1895	II	1166	V	61
	Perky U. S. Patent No. 571,284, November 10, 1896	II	1166	V	65
	Perky U. S. Patent No. 598,745, February 8, 1898	II	1166	V	77

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
	Perky U. S. Patent No. 614,338, November 15, 1898	II	1166	V	81
	Perky U. S. Patent No. 618,288, January 24, 1899	II	1166	V	87
	Perky U. S. Patent No. 667,892, February 12, 1901	II	1166	V	91
	Perky U. S. Patent No. 678,127, July 9, 1901	II	1166	V	109
	Perky U. S. Patent No. 678,625, July 16, 1901	II	1166	V	121
	Perky U. S. Patent No. 681,656, August 27, 1901	II	1166	V	135
	Burbank U. S. Patent No. 683,100, September 24, 1901	II	1166	V	143
	Burbank U. S. Patent No. 683,101, September 24, 1901	II	1166	V	149
	Burbank U. S. Patent No. 684,789, October 22, 1901	II	1166	V	155
	Burbank U. S. Patent No. 685,671, October 29, 1901	II	1166	V	165
	Perky U. S. Patent No. 713,795, November 18, 1902	II	1166	V	169
	Perky U. S. Patent No. 746,145, December 8, 1903	II	1166	V	173
	Burbank U. S. Patent No. 770,159, September 13, 1904	II	1166	V	181
	Horner U. S. Patent No. 785,554, March 21, 1905	II	1166	V	189
	Perky U. S. Patent No. 797,604, August 22, 1905	II	1166	V	201
	Smith U. S. Patent No. 1,195,114, August 15, 1916	II	1166	V	225
	Anderson U. S. Patent No. 1,334,429, March 23, 1920	II	1166	V	231
	House U. S. Patent No. 1,592,768, July 13, 1926	II	1166	V	243

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
	Webster U. S. Patent No 1,592,797, July 13, 1926	II	1166	V	301
	Anderson U. S. Patent No. 1,621,863, March 22, 1927	II	1166	V	313
243	Valentine U. S. Patent No. 831,909, September 25, 1906	II	1166	V	319
244	Book of Patents Issued to Defendant, Viz.:				
	Valentine U. S. Patent No. 1,102,614, July 7, 1914	II	1166	V	331
	Kellogg U. S. Patent No. 1,159,045, November 2, 1915	II	1166	V	355
	Kellogg U. S. Patent No. 1,189,130, June 27, 1916	II	1166	V	357
	Kellogg U. S. Patent No. 1,197,297, September 5, 1916	II	1166	V	361
	Kellogg U. S. Patent No. 1,783,434, December 2, 1930	II	1166	V	361
	Hanford U. S. Patent No. 1,091,509, March 31, 1914	II	1166	V	373
	Valentine U. S. Patent No. 1,124,363, January 12, 1915	II	1166	V	411
	Valentine U. S. Patent No. 1,143,151, June 15, 1915	II	1166	V	417
245	Book of Miscellaneous Patents Issued to Others Than Plaintiff or Defendant, Viz.:				
	Cooley U. S. Patent No. 782,109, February 7, 1905	II	1167	V	437
	Williams U. S. Patent No. 820,899, May 15, 1906	II	1167	V	441
	Williams U. S. Patent No. 878,262, February 4, 1908	II	1167	V	445
	Williams U. S. Patent No. 896,964, August 25, 1908	II	1167	V	451
	Williams U. S. Patent No. 897,182, August 25, 1908	II	1167	V	455

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
	Williams U. S. Patent No. 931,243, August 17, 1909	II	1167	V	459
	Williams U. S. Patent No. 949,013, February 15, 1910	II	1167	V	469
	Williams U. S. Patent No. 991,584, May 9, 1911	II	1167	V	489
	Williams U. S. Patent No. 1,024,168, April 23, 1912	II	1167	V	493
	Williams U. S. Patent No. 1,062,627, May 27, 1913	II	1167	V	505
	Black U. S. Patent No. 1,210,589, January 2, 1917	II	1167	V	511
	Williams U. S. Patent No. 1,263,009, April 16, 1918	II	1167	V	513
246	Bid of Plaintiff May 8, 1933, Department of Interior, Washington, D. C.	II	1170	Not printed	
247	Bid of Plaintiff December 12, 1932, U. S. Marine Corps, Washington, D. C.	II	1171	Not printed	
248	Bid of Plaintiff March 17, 1933, U. S. Marine Corps, Washington, D. C.	II	1172	Not printed	
249	Bid of Defendant February 3, 1933, Marine Barracks, Dover, N. J.	II	1172	Not printed	
250	Advertisement, The Natural Food Co. in New York Daily Tribune, May 12, 1907	II	1176	Not printed	
251	Advertisement, The Shredded Wheat Co. in Trade, Detroit, April 9, 1913	II	1176	Not printed	
252	Package of Arrowroot Biscuits	II	1177	Not printed	
253	Package of Fig Newtons Biscuits	II	1177	Not printed	
254	Package of Hydrox Biscuits	II	1177	Not printed	
255	Certificate of Incorporation of The Colorado Shredded Wheat Co.	II	1177	Not printed	
256	Carton of Kellogg's Corn Flakes	II	1178	...	...
257-A	Clarke Sketch of Cutting of Diamond-Shape Biscuit	II	1178	Not printed	

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
258	Chart Illustrating Cartons of Plaintiff's Wheat Biscuit and Triscuit	II	1179	Not printed	
259	Box Plaintiff's Butter Thin Biscuit	III	2035	...	...
260	Box Plaintiff's Uneeda Biscuit	III	2035	...	...
261	Box Plaintiff's Graham Crackers	III	2035	...	...
262	Box Plaintiff's Premium Flake Crackers	III	2035	...	...

DEFENDANT'S EXHIBIT UNDER RULE 46.

A	Proceedings in the Patent Office	III	2021	Not printed	

PLAINTIFF'S EXHIBIT NO. 9.

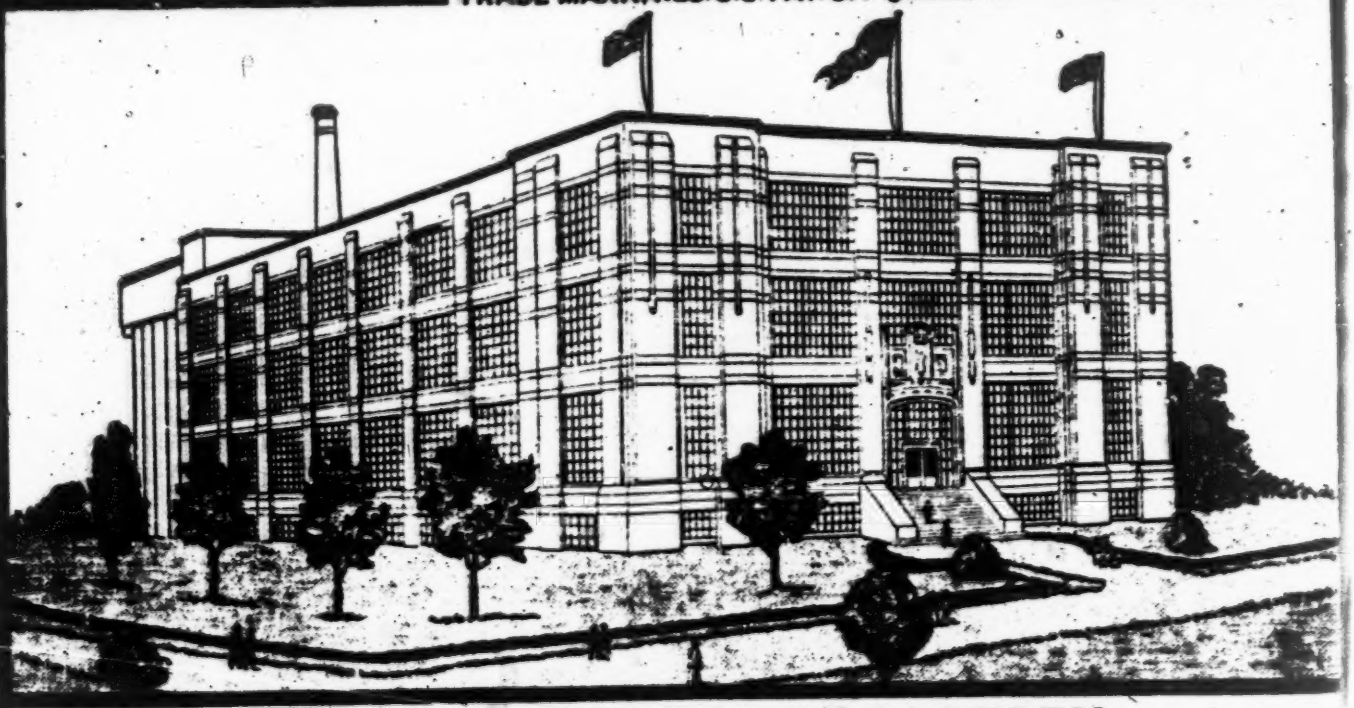
Kellogg's
WHOLE WHEAT
BISCUIT
This certified analysis made by the Medical Arts Laboratory of Philadelphia, indicates the splendid food value of Kellogg's Shredded WHOLE WHEAT Biscuit.
Carbohydrates 77.31% Minerals 2.19%
Protein 12.97% Fibre 2.49%
Fat 1.99% Moisture 2.13%
MINERALS
Calcium 2.39% Sodium 1.23%
Iron .57% Chloride 1.64%
Copper trace Phosphorus 48.17%
Magnesium 16.33% Sulphur 1.54%
Potassium 33.19% Silica .36%
Kellogg's WHOLE WHEAT Biscuits when served with milk or cream contain six vitamins, A, B, C, D, E and G.
Certified
FOR
FOOD
VALUE

WHOLE WHEAT

HANDLE WITH CARE.

SHREDDED WHEAT

TRADE MARK, REG. U.S. PAT. OFF



THE SHREDDED WHEAT FACTORY

THE CLEANEST, MOST SANITARY FOOD FACTORY IN THE WEST

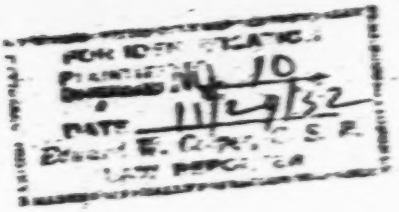
THE PACIFIC COAST SHREDDED WHEAT CO., OAKLAND, CALIFORNIA

COPYRIGHT 1926, BY THE SHREDDED WHEAT COMPANY

HANDLE WITH CARE.

WHOLE WHEAT

PLAINTIFF'S EXHIBIT NO. 10.



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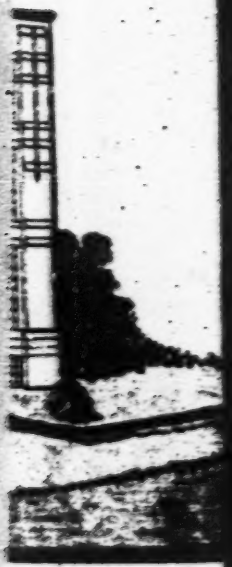

WEST
LIFORNIA

NET WEIGHT, 12 OUNCES
METRIC EQUIVALENT 340 GRAMMES

(TRADE-MARK)

SHREDDED WHEAT

REG. U.S. PAT. OFF

AS MADE FOR 30 YEARS
"IT'S ALL IN THE SHREDS"

COPYRIGHT 1924 BY THE SHREDDED WHEAT COMPANY

M

OPEN HERE **SHREDDED** OPEN HERE

HANDLE WITH CARE.

SHREDDED WHEAT

TRADE MARK REG. U.S. PAT. OFF.

Made of the whole wheat—nothing added, nothing taken away. Contains, in a digestible form, all the elements for building muscle, bone and brain. Ready-cooked ready-to-eat.

ALL THE BRAN IN THE WHEAT

SHREDDED WHEAT is an all-day food, equally nourishing for breakfast, for lunch, for dinner. Delicious with berries, sliced bananas, or other fruits.

To make a hot dish, heat the Biscuit in oven to restore crispness, then pour hot milk over them, adding a little cream. Salt or sweeten to suit the taste.

HEAT THE BISCUIT IN OVEN TO RESTORE CRISPNESS

12 Biscuits 14 Ounces

Shredded Whole Wheat

COPYRIGHT 1926, BY THE SHREDDED WHEAT COMPANY

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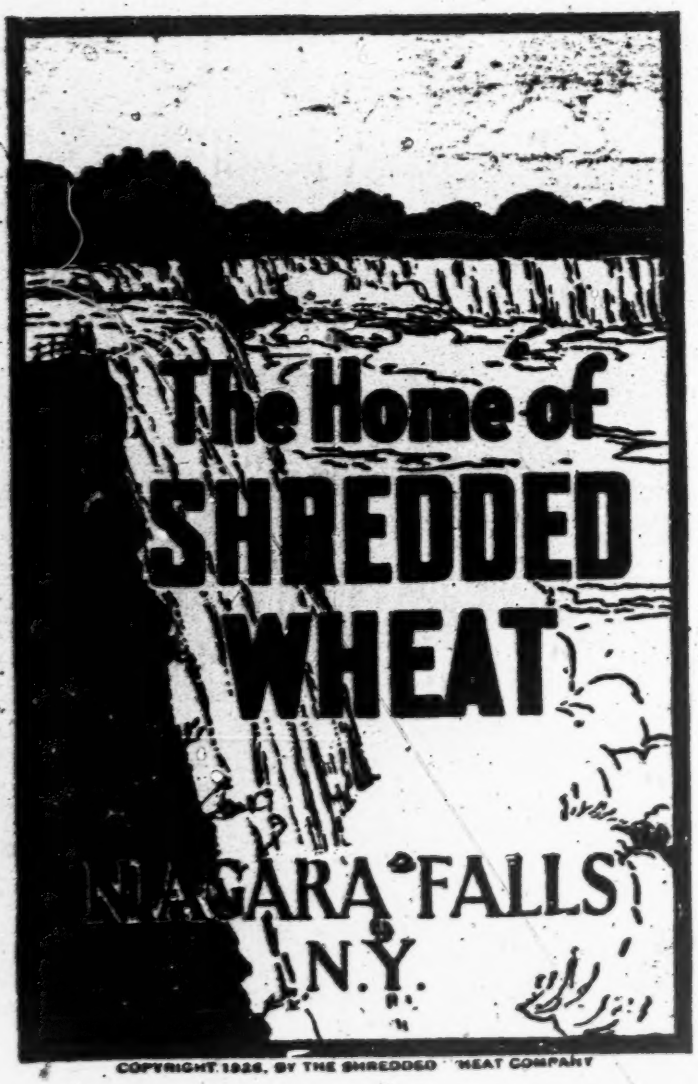
12

eat



COPYRIGHT 1926, BY THE SHREDDED WHEAT COMPANY

HANDLE WITH CARE.

SHREDDED

#10
Feb 8 1933

HOW YOU CAN OBTAIN THE KELLOGG STORY BOOKS OF GAMES

Send this package top together with 10¢ in coin to Kellogg Company, Battle Creek, Michigan, and we will mail you one of the new story books of games. The entire series of 4 Story Books of Games may be secured for 4 package tops and 30¢ in coin.

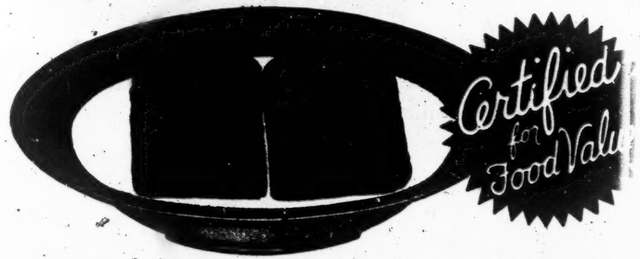
Write your name and address plainly on the opposite side of this carton top, and glue coin on this side.

This offer void in the states of Wisconsin, Washington, Nevada, Kansas and in other states having laws prohibiting this form of merchandising.

7+8
9+10

Kellogg's WHOLE WHEAT BISCUIT

11
11-29-32



MADE OF DELICIOUSLY FLAVORED WHOLE-WHEAT SHREDS, DOUBLE TOASTED

KELLOGG
ES
coin to Kellogg
mail you one of
4 Story Books
30¢ in coin.
opposite side of

EAT

ertified
Food Value

VORED
TOASTED

Certified FOR FOOD VALUE

Kellogg's WHOLE WHEAT Biscuit contains practically all the food value of entire wheat, including the natural bran. Two biscuits and a bowl of milk will supply about half the average person's daily requirements of both calcium and phosphorus and one-fourth the iron necessary, as well as many other minerals.

This certified analysis made by the Medical Arts Laboratory of Philadelphia, indicates the splendid food value of Kellogg's Shredded WHOLE WHEAT Biscuit.

Carbohydrates	77.31%	Minerals	2.10%
Protein	12.97%	Fibre	1.45%
Fat	1.90%	Moisture	3.12%

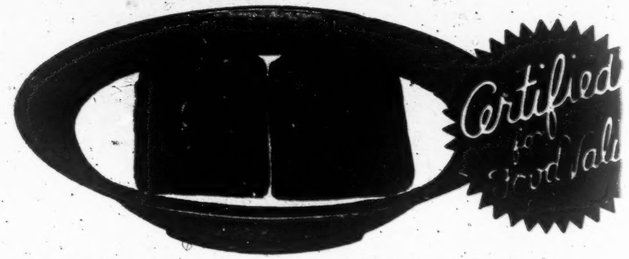
MINERALS

Calcium	3.30%	Sodium	1.23%
Iron	.82%	Chloride	1.04%
Copper	trace	Phosphorus	48.17%
Magnesium	10.52%	Sulphur	1.54%
Potassium	33.16%	Silica	.36%

Kellogg's WHOLE WHEAT Biscuits are a good source of Vitamin G. When served with milk or cream, six vitamins are present:

Vitamin A Vitamin B Vitamin C
Vitamin D Vitamin E Vitamin G

Kellogg's WHOLE WHEAT BISCUIT



15 BISCUITS 12½ OUNCES

Kellogg's WHOLE WHEAT BISCUIT

15 BISCUITS

2-32-F

Kellogg's WHOLE WHEAT BISCUIT

Are made of delicately flavored whole-wheat shreds. These shredded biscuits are a new convenient size. Two just fit the cereal bowl.

Kellogg's Whole Wheat Biscuit are delicious served with hot or cold milk or cream; and a special treat with berries, peaches, prunes, bananas or other fresh or preserved fruits. Add sugar or salt to suit taste—or sweeten with honey.

These nourishing, easy-to-digest biscuits are excellent for lunch as well as breakfast. Ideal for children's suppers or for a late bed-time snack.

KELLOGG COMPANY
BATTLE CREEK, MICHIGAN
LONDON, ENGLAND LONDON, CANADA
SYDNEY, AUSTRALIA
(CASE NO. 334)

PLAINTIFF'S EXHIBIT NO. 83.

Summary of Advertising and Promotional Work Used During Period—1895 to July 31st, 1927.

Magazine and Newspaper advertising started in the year of 1897 in a small way. However, each year the amount of Newspaper and Magazine advertising was gradually increased until as early as 1907 it was necessary to make separate appropriations for Magazines and Newspapers.

Using a 5 year period from 1922-1927 the number of Newspapers and Magazines used were as follows:—

1922	171 Regular Papers (No Magazines)	
1923	235 Regular Papers (No Magazines)	
1924	244 Regular Papers	
	40 Regular Papers (Rotogravure sections—	4 Magazines (National)
1925	291 Regular Papers	1 Magazine
1926	255 Regular Papers	
	381 Western Union List	4 Magazines
1927	325 Regular Papers	
	740 Western Union List	7 Magazines
TOTAL	2682 Newspapers.....	16 Magazines

Special Newspaper Contests—1 National Recipe Contest

1 National Teacher's and Pupil's Essay Contest.

1 International Teacher's and Pupil's Essay Contest.

Booklets	26,325,000	
Hangers	1,978,245	(S. W.)
	120,000	(Triscuit)
Leaflets & Folders	88,043,500	(S. W.)
	11,400,000	(Triscuit)
Blotters	29,360,000	(S. W.)
	1,700,000	(Triscuit)
Car Cards	826,300	
Menus	19,025,250	

Cut-outs Window Trims, Panels & Transparencies	1,318,900	
Signs, Banners, Posters & Stickers	15,000	(Triscuit)
	164,500	(S. W.)
Visitors Post Cards (given free to Visitors to "Home of S. W.")	2,050,000	

Miscellaneous Promotional Work

Advertising in College, Medical and Hotel Publications
Hotel and Restaurant Work.
Church Suppers.
Illustrated Lectures.
3 different Industrial Motion Pictures.
50,000 Triscuit Racks
23,000 School Charts
375,000 Magazine imprints
350,000 Circulars and invitations to the Public concerning exhibits of our Process.

Poster Advertising

Subway, elevateds in New York City for 3 months during 1922

Subway and elevateds in New York City for entire year of 1923

Subway, elevateds and Suburbs in New York City, Brooklyn, Chicago, Philadelphia and Boston for entire year of 1924.

1895

No magazine or newspaper advertising.

General advertising consisting of street car cards, recipe booklets and pamphlets, school charts, posters etc. Booklet used "The Vital Question"—4 editions of 100,000 each. $13,473.47

1896		
No magazine or newspaper advertising.		
General advertising consisting of the same mediums as used in 1895, but amounting to		48,518.60
Booklet used "The Vital Question"		
1897		
Newspaper and magazine advertising amounting to	$3,328.54	
General advertising consisting of street car cards, recipe booklets and pamphlets, school charts, etc.	25,618.29	
Booklet used "The Vital Question"—(Small size) 11 editions of 100,000 each.		28,946.83
1898		
Newspaper and magazine advertising amounting to	$11,667.95	
General advertising consisting of recipe booklets, hangers in colors (14 to set) and posters.	33,927.65	
Colored Store Hangers, "More Light" (picturing various ways of serving Shredded Wheat)		45,595.60
1899		
Newspaper and magazine advertising amounting to	$ 3,295.11	
General advertising consisting of two editions of car cards (both showing ways of serving S. W.) and posters.	62,277.10	
Booklet used "The Vital Question" cook book.		65,572.21

1900

No magazine or newspaper advertising.		
General advertising consisting of booklets, pamphlets, and posters.		
Booklets used—		
"More Light" Booklet in English		
"More Light" Booklet in French		90,727.24

1901

No advertising records available

1902

Newspaper and magazine advertising	$82,298.89	
General advertising consisting of booklets, pamphlets, hangers and street car cards, etc.	44,709.51	
Booklets used—		
250,000 "Vital Question" cook book		
100,000 Leaflets "S. W. as a Food for Children"		
150,000 4-page folder "S. W. Biscuit"		
3,000,000 Recipe leaflets in color —4 to set.		
800,000 Color menu inserts		
50,000 Color shelf hangers		
500,000 Cook Girl Banner Hangers (In colors)		
25,000 Window Transparencies		
2,300 Street car cards		
2,000 Chefs' Menus		$127,008.40

1903

Magazine and newspaper advertising		$185,785.59
General advertising consisting of magazine inserts and one color leaflets		42,229.72
250,000 magazine inserts (S. W. Dishes in colors)		
125,000 magazine inserts of Triscuit		
5,000 each of one color leaflets —Doctor		
Dentist		
Lawyer		
Minister		
Nurse		
Words of commendation about S. W. and Triscuit		228,015.31

1904

Magazine advertising		$51,408.45
General advertising consisting of booklets, cut-outs, menus, car cards etc.		59,614.38
Booklet "A Family Affair"	100 M.	
4-page colored Leaflet— S. W. Biscuit	1¼ million	
Street car cards	50,000	
Small colored Triscuit Hanger	50,000	
Water proof S. W. Sign —2 colors	10,000	
Peach Folder in colors	1¼ million	
Meat Strike Leaflets	100,000	
Special Menu Cover	5,000	
Leaflet	10,000	

S. W. Triscuit Booklet	500,000		
Re-edition booklet "More Light"	100 M		
18th edition cook book "The Vital Question"	250 M		
Cook Girl Cut-outs	15 M		
Colored Menus	50 M		
Cook Girl—Transparencies	12 M		
Church Suppers		4,290.00	115,290.00
	1905		
Newspaper and magazine advertising		$100,907.79	
General advertising amounting to		19,015.42	
and consisting of:			
Colored recipe Leaflets	1,100,000		
Booklet "Of Vital Interest to Mothers"	25,000		
Car Cards (S. W. & Triscuit)	65,000		
4-page Folder—S. W. Folder (colored)	1,500,000		
Colored Blotters (Ways of serving S. W.)	100,000		
Booklet "Shreds of Life"	750,000		
Menu cards	35,000		
Triscuit Easel Cards	No amount given		
Blotters	10,000		
4-page colored Folder "A Perfect Food"	1¼ million		
1 sheet S. W. Poster	1,500		
4-page colored "Health & Strength Leaflet"	1,230,000		

1906

Magazine advertising	$93,977.98	
General advertising amounting to and consisting of:	80,709.74	
150,000 Colored S. W. Blotters		
30,000 Cereal Special Slips		
245 Soda Fountain Hanger		
5,000 Waterproof S. W. Signs		
2,500 Menu Covers		
1,000 Restaurant Placards		
70,000 Car Cards		
30,000 Biscuit Girl Hanger		
25,000 Window Trims		
200,000 Colored Blotters		
1,500,000 4-page folders (colors)		
1,500,000 4-page folders (colors)		
150,000 2 color C. W. Blotter		
500,000 4-page Folders ("For Old and Young")		
200,000 Leaflets		$174,687.72

1907

Newspaper Advertising	$ 27,818.02	
Magazine Advertising	105,870.70	
General Advertising amounting to and consisting of	82,969.59	
200,000 Colored Kitchen Hangers		
100,000 Colored Menus		
650,000 Colored Recipe Slips (or leaflets)		
30,000 Car cards		
3,000 Cloth Awning Stripe		
1,000,000 Colored 4-page S. W. Folders		
100,000 2-color circulars—"Come and See" Us Make S. W.		
1,000,000 Colored S. W. Booklets		

250,000 Vital Question Cook Books (In colors)
600,000 4-page S. W. Folders "A Way to Save"
500,000 C. W. S. W. Blotters (2 colors)
No quantity given—Triangle window Trim (Girl Design) 216,658.31

1908

Newspaper Advertising	59,888.79
Magazine Advertising	70,635.69
General Advertising amounting to and consisting of:	61,716.18

2,000,000 Colored 4-page S. W. Folders
250,000 4-page S. W. Folders
2,000,000 Return Post cards (for use with Vital Question Cook Book)
40,000 Car Cards
150,000 Strawberry Post cards
525,000 Strawberry Blotters
1,0 ,000 Colored 16-page S. W. Booklet — "More Life"
15,000 Strawberry Hanger
7,500 Instruction Sheets for S. W. Window Trim
7,500 Window Trims
200,000 Mechanical Exhibit Dodgers "A 20th Century Marvel"
90,000 S. W. Blotters
100,000 Booklets—"Views in and about the 'Home of Shredded Wheat'"

37[illegible]00	Folders—"Making Both Ends Meet"	
1,000,000	C. W. S. W. colored blotters	
200,000	S. W. sampling blotters (colored)	
		192,240.66
	1909	
Newspaper Advertising		$ 62,877.08
Magazine Advertising		70,399.90
College and Hotel Paper Advertising		2,287.38
General Advertising amounting to and consisting of:		42,368.56
20,000	S. W. Blotters	
4,500	Colored S. W. Strawberry Leaflets	
100,000	S. W. Cook Girl Stickers	
85,000	Restaurant Blotters	
300,000	Strawberry Blotters	
125,000	Strawberry Post Cards	
125,000	S. W. Calendar Hangers (colored)	
4,000,000	S. W. Folders	
2,000,000	Request Card for "Vital Question Cook Book"	
60,000	Car Cards	
165,000	Menu Cards	
250,000	"Vital Question Cook Book"	
50,000	Lecture Folders	
2,500	Lecture Hangers	
150,000	Doctor Folders—"An Easy Road to Health"	
15,000	Strawberry Leaflets	
24,000	Colored Menu Sheets	
25,000	One color Menu Sheets	

7,500	Window Trims		
50,000	Colored double Menu Cards		
1,000,000	S. W. C. W. Blotters		$177,932.9
	1910		
Newspaper Advertising		$ 65,502.34	
Magazine Advertising		70,750.18	
College and Hotel paper Advertising		2,234.76	
General Advertising amounting to and consisting of:		40,802.05	
129,000	Car Cards		
390,000	Colored Calendar Hangers		
3,800,000	Colored S. W. Folders, "This Is the Way I Spell Breakfast"		
200,000	Strawberry S. W. Blotters		
175,000	Strawberry S. W. Post Cards		
2,000	Metal Restaurant Signs		
150,000	Colored S. W. Farmers' Folders, "The Man Behind the Plow"		
300,000	S. W. Colored Blotters		
400,000	S. W. Folders—"Making Both Ends Meet"		
500,000	Triscuit Blotters		
300,000	C. W. S. W. Blotters		
250,000	Cook Books—"S. W. Dishes"		
1,800,000	Return Post Cards used with recipe book—"S. W. Dishes"		
150,000	Colored S. W. Leaflets		

1,100,000	C. W. S. W. Blotters		
25,000	Window Strips for Display		
4,800	Colored S. W. Folders—"On Guard"		
285,000	Menu Cards		
341,750	Menus		179,289.33
500,000	S. W. Booklets—"Life and Health"		
	1911		
	Newspaper Advertising	$ 69,341.92	
	Magazine Advertising	72,639.49	
	College and Hotel Papers	2,365.72	
	General Advertising amounting to and consisting of:—	46,918.26	
60,000	Car Cards		
125,000	Strawberry paper hangers		
150,000	Restaurant paper hangers		
50,000	S. W. Folders—"The Bread of Health"		
15,000	S. W. Window Trims		
150,000	Menus		
6,000	Sampling Folders		
150,000	Colored S. W. Folders "On Guard"		
760,000	S. W. Hot Milk Blotters (Home)		
240,000	S. W. Hot Milk Blotters (Office)		
25,000	S. W. Telephone Boy Hangers		
75,000	Hot Milk Leaflets		
100,000	S. W. Leaflets for the Grocer		$191,265.39

1912

Newspaper Advertising		81,412.63
Magazine Advertising		79,392.47
College and Hotel Papers		2,543.63
General Advertising amounting to and consisting of:—		41,082.26
100,000	Post Cards (Visitors)	
75,000	Car Cards	
750,000	Return Post Cards used with "S. W. Dishes"	
2,500	Lecture Hangers	
100,000	Lecture Folders	
70,000	Colored S. W. Leaflets	
430,000	Colored S. W. "Special To-day" Leaflets	
200,000	Strawberry S. W. Blotters	
855,000	Menus	
6,500,000	S. W. Sampling Folders	
500,000	Menus	
1,200,000	Triscuit Blotters	
800,000	S. W. C. W. Blotters	204,430.99

1913

Newspaper Advertising		71,056.52
Magazine Advertising		87,171.28
College and Hotel Papers		2,434.02
Church Suppers		1,354.20
General Advertising amounting to and consisting of:—		54,521.25
1,000,000	Sampling Folders—"The Call of the Bell"	
700,000	Menus	
80,000	Car Cards	
500,000	Visitors' Post Cards	
25,000	Factory Window Display	
20,000	Window Transparencies	

250,000 S. W. C. W. Blotters (Small)		
175,000 S. W. C. W. Blotters (Large)		216,537.27
1914		
Newspaper Advertising	$105,367.14	
Magazine Advertising	83,770.10	
College and Hotel Papers	2,587.54	
Hotel and Restaurant Work	7,490.76	
General Advertising amounting to	47,766.89	
and consisting of:—		
1,000,000 Sampling Folders—From "Son Rise" to "Son Set"		
500,000 Booklets—"Wonders of Niagara"		
972,000 Menus		
20,000 Car Cards		$246,982.43
1915		
Newspaper Advertising	$109,909.84	
Magazine Advertising	85,389.05	
College and Hotel Papers	2,045.78	
Hotel and Restaurant Work	4,472.81	
General Advertising amounting to	42,344.61	
and consisting of—		
1,000,000 Menus		
200,000 Booklets—"Building Better Babies"		
150,000 Visitors Post Cards		
1,600,000 S. W. C. W. Blotters		
10,000 Car Cards		
15,000 Display Cards		244,162.09
1916		
Newspaper Advertising	112,044.01	
Magazine Advertising	61,776.12	
College and Hotel Papers	2,377.85	
Hotel and Restaurant Work	3,720.72	

General Advertising amounting to and consisting of:—	42,570.92	
2,850,000 Menus		
7,000,000 S. W. Sampling Folders —"Getting a Good Start"		
60,000 Car Cards		222,489.63
1917		
Newspaper Advertising	88,954.03	
Magazine Advertising	57,885.29	
College and Hotel Papers	2,139.86	
Hotel and Restaurant Work	4,486.81	
General Advertising amounting to and consisting of:—	37,835.11	
3,850,000 Menus		
6,000,000 S. W. Sampling Folders "Daddy, Mother, Brother & Me."		
500,000 Booklets "Happy Way to Health"		
25,000 Car Cards		
2,050,000 Leaflets "Make It Your 'War Bread'"		
2,000,000 S. W. C. W. Blotters		191,801.10
1918		
Newspaper Advertising	66,509.27	
No Magazine Advertising		
Hotel and Restaurant Work	379.41	
General Advertising amounting to and consisting of:—	27,535.48	
2,000,000 S. W. Blotters—"Liberty Loaf"		
250,000,000 Menu Booklet—"Meatless Menus"		
50,000 Special Hanger		

300,000 Booklets "What the War has Taught Us"		
200,000 S. W. Blotters—"Stand Behind the Flag"		94,424.16
1919		
Newspaper Advertising	$164,508.10	
Hotel and Restaurant Work	1,594.45	
General Advertising amounting to and consisting of:—	32,921.27	
300,000 Booklets—"Victory"		
200,000 S. W. Blotters—"For the Summer Days"		
500,000 S. W. Booklet—"The Happy Way"		
150,000 Visitors' Post Cards		
205,000 S. W. Blotters—"The Food that Satisfies"		
40,000 S. W. Hangers		
Motion Picture film of Production of S. W.		$199,023.82
1920		
Newspaper Advertising	175,678.98	
Hotel and Restaurant Work	1,908.56	
General Advertising amounting to and consisting of:—	38,479.10	
250,000 Booklets—"Building Better Babies"		
2,000 School Charts		
200,000 Visitors' Post Cards		
735,000 Menus		216,066.64
1921		
Newspaper Advertising	269,016.89	
Hotel and Restaurant Work	8,987.63	
General Advertising amounting to and consisting of:—	47,830.99	

50,000 Street Car Cards
21,000 School Charts
Motion Picture Film—
"It's All In The Shreds"

1922

Newspaper Advertising	340,348.69
General Advertising amounting to and consisting of Poster Advertising in Subways and elevateds in New York City for 3 month period.	105,353.17
200,000 Visitors Post Cards	
10,000,000 Sampling Folders—"Bring me Two if it's S. W."	
2,500,000 Menus	
150,000 Window Posters	
500,000 Baby Booklets	
5,000,000 C. W. Blotters—"A Hot Dish for the Cold Days"	

1923

Newspaper Advertising	$350,280.96
General Advertising amounting to and consisting of:—	51,412.28
10,000,000 Sampling Folders "Safe at the 'Home Plate'"	
5,000,000 C. W. Blotters—"Warmth and Strength for the Day"	
10,000 Window Posters	
50,000 Display Cards	
100,000 Visitors Post Cards	

1,000,000	Menus		
17,000	Window Display Panels		
10,000,000	Sampling Letters		
250,000	Booklets—"Health from the Whole Wheat"		
	Poster Advertising in New York City for 1 Year		401,693.24
	1924		
	Newspaper Advertising	222,912.21	
	Magazine Advertising	42,130.65	
	Illustrated Lectures	1,283.30	
	Hotel and Restaurant Work	1,091.24	
	General Advertising amounting to and consisting of:—	61,942.64	
150,000	Window Display Cut-outs		
50,000	Booklet "Ask the Doctor"		
464,900	Cut-outs		
2,000,000	Menus		
50,000	Triscuit Racks		
20,000	Hangers (Triscuit)		
1,000,000	Leaflet (Triscuit)		
100,000	Window Display Sign		
200,000	Visitors Post Cards		
2,000,000	Leaflet (Triscuit) (for England)		
	Industrial Film—"Shreds"		
	Poster Advertising in Subway—elevateds and suburbs of New York City, Brooklyn, N. Y., Chicago, Philadelphia and Boston for entire year of 1924 at a total cost of	64,630.62	
	National Recipe Contest		393,990.66

1925

Newspaper Advertising		415,645.45
Magazine Advertising		62,775.75
Newspaper Advertising (Triscuit)		23,282.91
General Advertising amounting to and consisting of:—		25,171.43
1,400,000	Folders (Triscuit)	
3,000,000	Booklet—"50 Ways of Serving Shredded Wheat"	
1,500,000	C. W. Blotters—"A Warm, Nourishing Meal"	
40,000	Large Cut-outs	
100,000	Visitors Post Cards	
2,000,000	Summer Fruit Blotters	
15,000	Banners (Triscuit)	
25,000	S. W. Hangers	
20,000	S. W. Banners (Special Sales Week)	
50,000	Triscuit Hangers	
500,000	Baby Booklets	
90,000	S. W. Hangers	
		526,875.54

1926

Newspaper Advertising		$343,664.42
College Publications		15,364.19
Medical Publications		11,164.94
Magazine Advertising		155,533.52
Special Newspaper Advertising		53,241.90
General Advertising amounting to and consisting of:—		44,135.57
500,000	Booklets—"50 Ways of Serving S. W."	
1,000,000	C. W. Blotters "For Warmth and Strength Eat S. W."	

10,000,000	Sampling Folders—"What Do You Eat?"	
4,000,000	Triscuit Leaflets	
50,000	Window Display "What Do You Eat?"	
25,000	S. W. Week Banners	
15,000	S. W. Week Hangers	
20,000	S. W. Side Panels	
	1st. Essay Contest (National)	623,104.54

1927 (To July 31st)

Newspaper Advertising	$269,702.19
College Publications	13,223.53
Medical Publications	6,954.20
Magazine Advertising	182,042.03
General Advertising amounting to and consisting of:—	38,000.00

2,000,000	C. W. Blotters—"For the Cold Days"
50,000	Large Displays
4,000,000	Triscuit Leaflet
2,000,000	Booklets—"Health in Every Shred"
95,000	S. W. Hangers
25,000	Side Window Panels
10,000	S. W. Store Sales Hangers
20,000	Shopping Bag Hangers
25,000	Restaurant Signs or Hangers
5,000,000	Sampling Folders ("What Do You Eat?") Revised
1,000,000	Menus
	2nd Essay Contest (International)

The Following Schedule, With Occasional Variations, Includes the Newspapers in Which We Have Advertised From Year to Year Since 1897.

CONNECTICUT

Bridgeport Post Telegram,
Hartford Times,
" Courant,
Meriden Record,
New Haven Journal Courier,
" Register,
New London Day
Waterbury Republican American

MASSACHUSETTS

Fitchburg Sentinel
Lawrence Tribune Eagle
Lowell Courier Citizen
" Sun
Lynn Item
Springfield Republican News & Union

RHODE ISLAND

Worcester Post,
" Telegram Gazette
Providence News
" Bulletin
Woonsocket Call

MASSACHUSETTS

Boston Herald Traveler
" American

ILLINOIS

Bloomington Pantagraph
Danville Commercial News
Decatur Review
" Herald

ILLINOIS

Galesburg Register Mail
Peoria Star
" Journal Transcript
Quincy Herald and Whig
Rockford Star
" Register Gazette
Springfield State Journal
" State Register
Chicago Tribune
" Herald Examiner

WISCONSIN.

Madison Capital Times
" Wisconsin News
" Journal

MICHIGAN

Battle Creek Moon Journal
" Enquirer News
Bay City Times Tribune
Flint Journal
Grand Rapids Herald
" Press
Jackson Citizen Patriot
Kalamazoo Gazette
Lansing Capital News
" State Journal
Saginaw News Courier

OHIO

Akron Times Press
" Beacon Journal
Canton News
" Repository
Cincinnati Post
" Times Star
Columbus Dispatch
" State Journal

OHIO

Dayton News
" Herald-Journal
Lima Star
" News
Mansfield News
" Journal
Marion Star
Springfield Sun
" News
Toledo News Bee
" Blade
Youngstown Telegram
" Vindicator
Zanesville Times Recorder

MICHIGAN

Detroit Free Press
" News

OHIO

Cleveland Press & News
" Plain Dealer

INDIANA

Evansville Press
" Courier Journal
Ft. Wayne News Sentinel
" Journal Gazette
Indianapolis Star
" News
Huntington Herald
Marion Chronicle
Muncie Press
Portland Republican Sun
South Bend News Times
" Tribune
Terre Haute Star
" Tribune

FLORIDA

Jacksonville Journal
" Times Union
Miami News
" Herald
Tampa Times
" Tribune

GEORGIA

Atlanta Constitution
" Journal
Macon News
" Telegraph
Savannah Press
" News

NORTH CAROLINA

Charlotte Observer
" News

SOUTH CAROLINA

Charleston News Courier
Columbia Record
" Star
Spartansburg Herald & Journal

KANSAS

Arkansas City Traveler
Emporia Gazette
Hutchinson Herald News
Salina Journal
Topeka State Journal
" Capital
Wichita Eagle
" Beacon

MISSOURI

St. Joseph Gazette
" News Press

MISSOURI

Kansas City Journal Post
" Star
Independence Free Press
Ft. Scott Tribune Monitor

ALABAMA

Anniston Star
Mobile News Item
" Register
Montgomery Advertiser
" Journal
Tuscaloosa News

KENTUCKY

Bowling Green Park City News
Lexington Leader-Herald
Paducah Sun & Democrat

MISSISSIPPI

Biloxi Gulfport Herald
Jackson Clarion Ledger
" News
Meridian Star
Vicksburg Port

TENNESSEE

Memphis Press Scimitar
" Commercial Appeal
Nashville Tennesseean
" Banner
Chattanooga Times
Knoxville Journal
Memphis Commercial Appeal

SOUTH DAKOTA

Huron Huronite

MICHIGAN

Escanaba Press
Houghton Mining Journal

MINNESOTA

Crookston Times
Detroit Record
Mankato Free Press
Minneapolis Tribune
Rochester Post Bulletin
St. Paul News
" Dispatch & Pioneer Press

NORTH DAKOTA

Bismarck Tribune
Fargo Forum
Grand Forks Herald

SOUTH DAKOTA

Aberdeen American News
Deadwood Pioneer Times
Sioux Falls Argus Leader
Rapid City Journal

WISCONSIN

Green Bay Press Gazette
La Crosse Tribune & Leader
Oshkosh Northwestern
Sheboygan Press
Superior Telegram
Wausau Record Herald

MINNESOTA

Duluth Herald

NEW YORK

Brooklyn Eagle
" Standard Union
" Times
New York Herald Tribune
" Post
" World
" Sun

NEW YORK

New York Journal
" The Day
" Jewish Journal
Yonkers Herald

NEW JERSEY

Jersey City Journal
Newark Star Eagle
" News
New Jersey Home News
New Brunswick Home News
Paterson Call
" Press Guardian
Elizabeth Journal
Asbury Park Press

IOWA

Des Moines Register Tribune
Sioux City Tribune

NEBRASKA

Hastings Tribune
Omaha World Herald
McCook Gazette

MARYLAND

Baltimore Post

PENNSYLVANIA

West Chester Local News

DELAWARE

Wilmington Journal News

DISTRICT OF COLUMBIA

Washington Star

NEW JERSEY

Camden Courier

ENNSYLVANIA

Easton Express
Hanover Sun
Harrisburg Telegraph
Lancaster Intelligencer & News Journal
Reading Times
Scranton Republican
Wilkes-Barre Record
Williamsport Sun, Gazette & Bulletin
Philadelphia Bulletin
" Record
Altoona Tribune
Erie Times
Johnstown Democrat
Pittsburg Gazette Times

EST VIRGINIA

Charleston Mail
Clarksburg Telegram
Huntington Herald Dispatch
Wheeling Register

AINE

Fort Fairfield Review
Augusta Kennebec Journal
Lewiston Sun Journal
Portland Express & Press Herald
Presque Isle Star Herald
Rumford Falls Times

W HAMPSHIRE

Concord Monitor & Patriot
Manchester Union Leader
Keene Sentinel
Nashua Telegraph

RMONT

Burlington News
Rutland Herald
St. Johnsbury Caledonian Record

ARKANSAS

Ft. Smith Times Recorder
Hot Springs Sentinel Record

MISSOURI

Columbia Tribune
Jefferson City Tribune Post
Joplin Globe & News
Springfield News

OKLAHOMA

Bartlesville Enterprise
Muskogee Phoenix & Times Democrat
Oklahoma City News
Tulsa News

MISSOURI

St. Louis Post Dispatch

TEXAS

Abilene Reporter News
Amarillo Globe & News
El Paso Herald & Times
Ft. Worth Star Telegram
Houston Chronicle
" Post Dispatch
San Antonio Light
" Express & News
Waco News-Tribune
" Times-Herald
Wichita Falls Record News
" Times
Dallas Times-Herald

LOUISIANA

New Orleans Item

NEW YORK

Albany Times Union
" Knickerbocker Press

Binghamton Sun Press & Leader
Auburn Advertiser Journal & Citizen
Buffalo News
" Courier & Express
" Everybody's Daily
Elmira Star Gazette & Advertiser
Gloversville Herald
" Leader Republican
Jamestown Journal
" Post
Middletown Herald & Times Press
Niagara Falls Gazette
Olean Herald
" Times
Rochester Times Union
" Democrat & Chronicle
Rome Sentinel
Schenectady Union Star
" Gazette
Syracuse Journal
" Post Standard
Troy Times
" Record
Utica Press
" Observer Dispatch
Watertown Times
" Standard
Corning Leader
Batavia News

ADVERTISING AND P

	1895	1896
Advertising Expense:		
1. Advertising Supplies (Home Office)	.....	.....
2. Advertising Supplies and cost of distribution through company's division offices	.....	.....
3. Magazines and Newspapers	.....	.....
4. General Advertising, consisting of street car cards, booklets, pamphlets, postage, school charts, billboards, etc.	$13,473.47	$ 48,518.60
5. Demonstration (by Home Office)	.....	.....
6. Demonstration (through Co's. div. offices)	.....	.....
7. Sampling and Cost of Distribution.	.....	.....
8. Church Suppers	.....	$ 31,891.41
9. Mechanical Exhibits	.....	.....
10. Hotel & Restaurant work—displays	.....	.....
11. Entertainments and Conventions	.....	.....
	$13,473.47	$ 80,410.01
Mixed Advertising—Promotional (Field) Expense:		
12. Division Office—Managers' Compensation & General Divisional Expenses.	.....	.....
13. Division Office Expense	.....	.....
14. Division Office—Miscl. Expense	.....	.....
15. Fieldmen's Conference (Div. Managers & Crew Managers)	.....	.....
16. Field Activity Surveys	.....	.....
17. Field Travel Expense (Home Office)	.....	.....
17A. Advertising & Promotional Expense—Eng. Acct.	.....	.....
Promotional (Field) Expense:		
18. Crew Managers' Compensation & Expenses	$ 3,989.45	$ 35,021.37
19. Miscellaneous Promotional Expense (Unclass.)	.....	.....
	$ 3,989.45	$ 35,021.37
TOTAL	$17,462.92	$115,431.38

ADVERTISING AND PROMOTIONAL EXPENSE IN UNITED STATES, CANADA AND ENGLAND

	1895	1896	1897	1898	1899	1900	1901	1902	1903	1904	1905	1906
ugh	.....	.....	.....	.....	.....	.....	.....	$ 7,321.68	$ 15,339.37	$ 13,974.66	$ 7,082.34	.....
	.....	.....	.....	.....	.....	.....	.....	39,638.38	70,580.09	65,661.72	68,464.41	$ 35,808.84
rds,	.....	.....	$ 3,328.54	$ 11,667.95	$ 3,295.11	.....	.....	82,298.89	185,785.59	51,408.45	100,907.78	113,936.04
bill-	$13,473.47	$ 48,518.60	$25,618.29	$ 33,927.65	$ 62,277.10	$ 90,727.24	$.....	44,709.51	42,229.72	59,614.38	19,015.42	80,733.94
	.....	.....	$40,489.16	$ 54,462.58	$ 54,939.37	$ 22,480.03	.....	9,575.46	10,638.77	17,706.69	40,676.23	.....
	.....	.....	.....	.....	.....	.....	.....	17,834.17	40,107.11	29,959.09	28,882.34	22,287.14
	.....	.....	.....	.....	.....	.....	.....	29,521.68	70,400.18	67,112.04	70,738.49	122,634.78
	.....	$ 31,891.41	.....	.....	.....	.....	.....	.....	.....	$ 4,290.00	.....	.....
	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	$ 1,568.16
	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
	$13,473.47	$ 80,410.01	$69,435.99	$100,058.18	$120,511.58	$113,207.27	.....	$230,899.77	$435,080.83	$309,727.03	$335,767.01	$376,968.90
ral	.....	.....	.....	.....	.....	.....	.....	125,165.20	46,215.68	41,897.83	37,054.76	49,859.36
	.....	.....	.....	.....	.....	.....	.....	7,376.44	23,522.02	21,542.08	20,277.73	22,465.24
	.....	.....	.....	.....	.....	.....	.....	.....	10,027.83	8,584.50	6,332.70	10,384.29
un-	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
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	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
	.....	.....	.....	.....	.....	.....	.....	.....	.....	59,592.73	45,532.62	45,882.81
								$132,541.64	$ 79,765.53	$131,617.14	$109,197.81	$128,591.70
	$ 3,989.45	$ 35,021.37	$21,385.60	$ 28,095.99	$ 91,214.14	$192,729.01	.....	19,810.41	54,207.67	41,905.29	40,682.68	41,543.30
	.....	.....	.....	.....	.....	.....	.....	$ 5,516.66	$ 11,813.20	12,584.71	13,941.10	12,082.35
	$ 3,989.45	$ 35,021.37	$21,385.60	$ 28,095.99	$ 91,214.14	$192,729.01	.....	$157,868.71	$145,786.40	$186,107.14	$163,821.59	$182,217.35
	$17,462.92	$115,431.38	$90,821.59	$128,154.17	$211,725.72	$305,936.28	.....	$388,768.48	$580,867.23	$495,834.17	$499,588.60	$559,186.25

04	1905	1906	1907	1908	1909	1910	1911	1912	1913	1914	1915	1916	1917
										$ 22,887.04	$ 24,819.92	$ 23,340.54	$ 19,028.99
74.66	$ 7,082.34	.....	.....	.....	.....	.....	.....	.....	.....				
									$.....	$.....	.....	6,444.42	3,612.85
61.72	68,464.41	$ 35,808.84	$ 50,485.04	$ 54,176.89	.....	.....	.....	.....	.....	230,001.23	236,337.92	251,608.86	244,148.58
08.45	100,907.78	113,936.04	156,424.76	150,506.35	$155,503.91	$166,744.67	$179,039.28	$196,741.75	198,335.42				
14.38	19,015.42	80,733.94	84,646.85	63,641.37	44,047.12	40,902.64	49,246.65	43,598.60	56,771.32	54,272.47	48,834.61	49,759.31	48,108.98
06.69	40,676.23	.....	.....	.....	7,682.00	7,276.47	10,151.01	10,326.87	11,188.82	11,836.95	11,731.58	12,535.46	13,826.04
59.09	28,882.34	22,287.14	20,542.01	15,231.24	15,480.80	12,557.88	10,490.99	9,609.96	6,770.87	3,421.63	128.08	50.92	.....
12.04	70,738.49	122,634.78	145,303.17	125,830.78	157,914.12	209,148.58	248,422.35	260,310.54	283,105.75	332,952.66	360,438.39	390,472.10	459,074.95
90.00	.....	.....	.....	.....	.....	7,054.18	3,655.15	4,846.40	8,253.70	8,286.74	1,324.02	519.09	.....
.....	.....	$ 1,568.16	$ 864.63	$ 30,009.66	$ 21,992.83	20,968.91	12,156.59	7,998.90	8,637.94	5,427.89	4,733.50	1,714.38	130.00
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	7,490.76	4,472.81	3,720.72	4,486.81
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	952.19
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
27.03	$335,767.01	$376,968.90	$458,266.46	$439,396.29	$402,620.78	$464,653.33	$513,162.92	$533,433.02	$573,063.82	$676,577.37	$692,820.83	$ 740,165.80	$ 793,369.39

97.83	37,054.76	49,859.36	51,769.71	51,268.86	63,523.50	70,071.60	67,355.16	66,680.34	73,209.65	76,478.88	74,335.58	104,457.67	97,706.63
42.08	20,277.73	22,465.24	23,389.02	24,215.39	24,858.63	25,719.14	28,722.80	30,353.62	33,844.06	36,703.15	36,180.84	38,647.07	41,610.99
84.50	6,332.70	10,384.29	15,220.05	17,979.23	59,473.85	64,172.86	49,788.09	54,591.05	52,960.75	40,618.74	39,755.36	25,616.74	20,925.89
.....	.....	.....	.....	.....	.....	.....	.....	.....	191.15	.....	2,346.25	2,212.54	2,699.31
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
92.73	45,532.62	45,882.81	40,292.52	41,781.95	41,083.21	42,912.03	45,528.35	24,304.78	58,470.52	68,416.42	73,421.88	79,744.74	120,252.27
17.14	$109,197.81	$128,591.70	$130,671.30	$135,245.43	$188,939.19	$202,875.63	$191,394.40	$175,929.79	$218,616.13	$222,217.19	$226,039.91	$ 250,678.76	$ 283,195.09
05.29	40,682.68	41,543.30	34,015.40	23,421.56	20,172.02	14,224.88	17,003.55	25,282.52	24,871.35	22,657.96	24,769.87	12,984.51	11,506.33
84.71	13,941.10	12,082.35	13,768.09	13,710.30	15,621.03	7,562.27	6,349.18	6,368.60	6,086.10	5,809.66	6,238.66	6,009.69	6,156.66
07.14	$163,821.59	$182,217.35	$178,454.79	$172,477.29	$224,732.24	$224,662.78	$214,747.13	$207,580.91	$249,573.58	$250,684.81	$257,048.44	$ 269,672.96	$ 300,858.09
34.17	$499,588.60	$559,186.25	$636,721.25	$611,873.58	$627,353.02	$689,316.11	$727,909.15	$741,013.93	$822,637.40	$927,262.18	$949,869.27	$1,009,838.76	$1,094,227.48

PLAINTIFF'S EXHIBIT NO. 84

THE SHREDDED WHEAT COMPANY AND SUBSIDIARY COMPANIES

1917	1918	1919	1920	1921	1922	1923	1924	1925	1926	Total
$ 19,028.99	$ 21,959.30	$ 27,362.17	$ 27,616.25	$ 25,943.35	$ 45,304.72	$ 60,236.66	$ 125,347.99	$ 68,316.74	$ 71,252.06	$ 607,133.78
					11,871.86	8,033.20	14,983.77	35,191.39	20,904.81	503,517.43
3,612.85	2,151.68	7,491.20	5,624.75	2,392.13	484,982.57	583,262.31	481,701.07	778,455.00	873,001.28	6,895,253.73
244,148.58	91,497.97	214,359.67	248,986.82	420,985.96						
					115,799.40	76,600.46	98,865.48	85,305.90	111,229.11	1,775,619.70
48,108.98	42,076.30	39,189.84	46,181.47	56,696.50	11,962.54	14,228.35	19,181.37	21,667.14	20,184.04	497,139.66
13,826.04	11,504.35	13,426.14	17,565.42	19,896.82	48.00	7,437.07	19,135.90	484.01	.600.00	261,059.21
.....	.....	.....	.....	.....	486,454.02	526,453.40	552,267.39	476,312.12	474,543.25	6,001,617.61
459,074.95	73,817.70	293,115.30	132,342.78	342,931.09	.....	.....	.....	.....	.....	38,229.28
.....	.....	.....	.....	.....	1,350.86	15,006.41	28,149.65	30,148.81	48,984.23	272,880.45
130.00	343.50	.....	407.06	395.13	9,207.57	9,177.86	3 126.41	345.03	4,831.82	59,729.84
4,486.81	379.41	1,594.45	1,908.56	8,987.63	.....	.....	6,535.36	1,669.66	7,914.72	17,071.93
952.19	.....	.....	.....	.....	.....	.....	.....	.....	.....	
$ 793,369.39	$243,730.21	$ 596,538.77	$480,633.11	$ 877,228.61	$1,166,981.54	$1,300,435.72	$1,349,294.39	$1,497,895.80	$1,633,445.32	$17,619,252.62
					137,501.62	131,941.10	163,836.41	177,437.78	159,292.90	2,349,567.40
97,706.65	93,278.65	139,203.00	127,931.77	122,093.74	66,513.01	71,994.18	88,146.54	87,264.70	88,520.08	1,043,644.61
41,610.99	43,327.16	45,138.47	52,451.36	60,860.89	6,566.47	21,264.40	51,930.45	33,655.43	38,825.84	695,974.25
20,925.89	12,486.98	21,691.89	16,105.63	17,015.23						
					1,237.18	1,308.19	5,106.00	3,667.21	903.21	23,259.10
2,699.31	152.50	1,186.80	.....	2,308.76	6,535.78	12,232.08	3,234.50	.....	.....	22,002.36
.....	.....	.....	.....	.....	.....	4,157.74	4,141.75	4,937.84	4,940.43	18,177.76
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	958,648.13
.....	.....	.....	.....	.....	(Distributed among the various classifications 1919-26)					
120,252.25	23,104.06	148,327.26	.....	.....						$ 5,111,273.61
$ 283,195.09	$172,349.35	355,547.42	$196,488.76	$ 202,278.62	$ 218,354.06	$ 242,897.69	$ 316,395.65	$ 306,962.96	$ 292,482.46	
					26,462.90	30,131.50	62,109.44	162,768.36	211,524.75	1,478,753.85
11,506.39	67,617.68	43,307.96	40,416.94	32,919.40	21,089.74	10,634.82	15,173.66	15,262.81	24,766.62	264,753.09
6,156.60	7,195.43	6,767.52	6,566.55	7,627.74						
					$ 265,856.70	$ 283,664.01	$ 393,678.75	$ 484,994.13	$ 528,773.83	$ 6,854,780.55
$ 300,858.08	$247,162.46	$ 405,622.90	$243,472.25	$ 242,825.76	$1,432,838.24	$1,584,099.73	$1,742,973.14	$1,982,889.93	$2,162,219.15	$24,474,033.17 GRAND TOTAL
$1,094,227.47	$490,892.67	$1,002,161.67	$724,105.36	$1,120,054.37						

PLAINTIFF'S EXHIBIT NO. 85.

To Arthur W. Page
American Embassy,

London, April 7, 1918.

Dear Arthur:

I daresay you remember this epic:

Old Morgan's wife made butter and cheese;
Old Morgan drank the whey.
There came a wind from West to East
And blew Old Morgan away.

I'm Old Morgan and your mother got ashamed of my wheyness and made the doctor prescribe cream for me. There's never been such a luxury, and anybody who supposes that I am now going to get fat and have my cream stopped simply doesn't know me. So, you see why I'm intent on shredded wheat biscuits. That's about the best form of real wheat that will keep. And there's no getting real wheat-stuff pure and simple, in any other form.

There's no use in talking about starving people—except perhaps in India and China. White men can live on anything. The English could fight a century on cabbage and Brussels sprouts. I've given up hope of starving the Germans. A gut of dogmeat or horse flesh and a potato will keep them in fighting trim forever. I've read daily for two years of impending starvation across the Rhine; but I never even now hear of any dead ones from hunger. Cold steel or lead is the only fatal dose for them.

Therefore I know that shredded wheat will carry me through.

You'll see, I hope, from the clippings that I enclose that I'm not done for yet anyhow. Two speeches a day is no small stunt; and I did it again yesterday—hand running; and I went out to dinner afterward.

It was a notable occasion—this celebration of the anniversary of our coming into the war.[1]

Nobody here knows definitely just what to fear from the big battle; but everybody fears more or less. It's a critical time—very. I am told that that long-range gunning of Paris is the worst form of frightfulness yet tried. The shells do not kill a great many people. But their falling every fifteen minutes gets on people's nerves and they can't sleep. I hear they are leaving Paris in great numbers. Since the big battle began and the Germans have needed all their planes and more in France, they've let London alone. But nobody knows when they will begin again.

Nobody knows any future thing about the war, and everybody faces a fear.

Secretary Baker stayed with me the two days and three nights he was here. He made a good impression but he received a better one. He now knows something about the war. I had at dinner to meet him:

Lloyd George, Prime Minister.
Balfour, Foreign Secretary.
The Chief of Staff.
Lord Derby, War Secretary.
General Biddle, U. S. A., in command at London.
Admiral Sims, U. S. N.

The talk was to the point—good and earnest. Baker went straight back to France and our whole cooperation began. With the first group of four we had conferences besides for two days. His coming was an admirable move.

Yours affectionately,
W. H. P.

[1] This meeting, on April 6, 1918, was held at the Mansion House. Page and Mr. Balfour were the chief speakers.

From the "Life and Letters of Walter H. Page" by Hendrick, Volume II, page 369.

PLAINTIFF'S EXHIBIT NO. 114.

Advertising Expense—Shredded Wheat

Year 1928

East of Rocky Mountains

General Advertising		
Newspapers "A"	$288,951.35	
Newspapers "B"	170,751.15	
West Newspapers—Union B	4,724.21	
Country Weeklies—B	85,673.24	
Billboards	615.00	
Gratuitous Biscuit	4,860.24	
R. F. D. Special "B" Advertising	15,355.83	
National Magazines	54,819.27	
Juvenile Magazines	3,705.29	
Miscellaneous Magazines	295.50	
Collegiate Publications	10,288.03	
Miscellaneous Publications	2,234.80	
Advertising Salaries	14,828.16	
School Charts	1,086.17	
Teachers Essay Contest	5,370.19	
Booklets	7,089.36	
Roadmaps	2,041.06	
Foyer Demonstrations	20,431.89	
Special Advertising Allowance	9,896.25	
Insert Contest	12,607.48	
Unclassified	8,591.17	
		724,215.64
Field Advertising		
Miniature Shredder Repairs	258.40	
Trade Papers	8,806.69	
Booklets	19,237.14	
Leaflets	3,692.57	

Prizes and Competition	1,800.00	
Menus	3,293.90	
Cutouts and Hangers	31,161.92	
Window Strips	576.17	
Blotters	561.24	
Advertising with Samples	5,720.96	
Decalcomanias	2,192.00	
Cartons—Dummy	281.05	
Cartons—Jumbo	1,207.26	
Field Work—F. Presbrey Co.	5,055.05	
Restaurant Signs	710.57	
Refund Store Sales	11,102.85	
School and Institutional	298.70	
		95,896.47
Sampling		
Newspaper Sampling Advertising	21,986.51	
Sampling	68,627.51	
Miniature Shredders	36.69	
Food Shows	1,406.65	
House to House	330,655.75	
Store Sales	29,318.21	
Auto Expense	53,713.91	
		505,745.23
Total		1,325,857.34
PACIFIC COAST SHREDDED WHEAT		
Selling & Advertising Expense—1928		245,098.00
GRAND TOTAL		1,570,955.34

Year 1927

EAST OF ROCKY MOUNTAINS

General Advertising		
Newspapers "A" and "B"	$354,159.37	
Gratuitous Biscuit	3,612.98	
National Magazines	252,372.20	
Juvenile Magazines	21,081.68	
Miscellaneous Magazines	3,040.65	
Collegiate Publications	13,246.02	
Miscellaneous Publications	10,207.63	
Advertising Salaries	14,390.45	
School Charts	275.55	
Teachers Essay Contest	5,011.01	
Booklets	7,016.38	
Foyer Demonstrations	21,016.76	
Unclassified	9,182.09	
		714,612.77
Field Advertising		
Trade Papers	7,653.30	
School and Institution Work	600.00	
Glass Jars and Globe Bases	361.23	
Menus	2,442.41	
Special Field Work—F. Presbrey	6,923.28	
Store Advertising — Cutouts, Hangers	32,142.85	
Store Advertising — Window Strips	4,018.47	
Blotters	2,324.16	
Advertising with Samples	6,501.94	
Dummy Cartons	620.10	
Jumbo Cartons	1,198.57	
Store Advertising with Field	26,843.48	
Prizes and Competition	2,550.00	
Miniature Shredder Repairs	1,576.16	
		95,755.95

Sampling		
Newspaper Sampling Advertising	28,393.93	
Sampling	90,857.34	
Miniature Shredders	12,229.53	
Food Shows	3,750.74	
House to House	214,986.41	
Store Sales	37,244.03	
Auto Expense	57,061.13	
		444,523.11
Total		1,254,891.83
PACIFIC COAST SHREDDED WHEAT		
Selling & Advertising Expense—1927		204,610.97
GRAND TOTAL		1,459,502.80

PLAINTIFF'S EXHIBIT NO. 115.

Expenditures—Shredded Wheat
T. M. Advertising

Year 1929

Newspapers	496,403.52	71.32
College Papers	4,516.07	.65
Trade Papers	2,093.26	.30
Magazines	73,481.11	10.56
Insert Contest	34,643.86	4.98
Sundries	10,646.45	1.53
Grocery Store Advertising	49,179.40	7.07
Donations	682.29	.10
Radio	7,538.78	1.08
Walls & Bulletins	123.60	.02
Agency Walls & Bulletins	375.64	.05
Foyer and Visitors	13,246.08	1.90
Carton Slips	3,085.80	.44
	696,015.86	100.00

Year 1930		
Newspapers	545,181.68	67.842
College Papers	11,027.26	1.372
Trade Papers	4,566.77	.568
Magazines	213,557.57	26.575
Insert Contest	2,728.55	.340
Sundries	2,732.64	.340
Grocery Store Advertising	8,990.92	1.119
Walls and Bulletins	25.00	.003
Agency Walls & Bulletins	349.70	.044
Foyer and Visitors	8,643.28	1.075
Carton Slips	5,804.31	.722
	803,607.68	100.00
Year 1931		
Newspapers	545,121.67	64.18
College Papers	3,027.84	.36
Trade Papers	3,802.12	.45
Magazines	239,036.28	28.14
Sundries	1,377.93	.16
Grocery Store Advertising	30,956.75	3.65
Agency Walls & Bulletins	380.96	.04
Foyer and Visitors	7,184.78	.85
Carton Slips	183.58	.02
Radio	18,286.13	2.15
	849,358.04	100.00
Year 1932		
Newspapers	440,542.09	65.41
Magazine and Farm Papers	163,353.72	24.25
Grocery Store Advertising	34,983.91	5.20
Trade Papers	4,456.46	.66
Foyer and Visitors	6,647.40	.99
L Posting and Vehicle	3,778.69	.56
Sundries	5,721.36	.85
Agency Walls & Bulletins	476.76	.07
Carton Inserts	6,016.77	.89
College Papers	7,604.60	1.12
	673,581.76	100.00

PLAINTIFF'S EXHIBIT NO. 149.

The Natural Food Company
The Shredded Wheat Company
National Biscuit Company
Sales in the United States of Cases
Containing 36 Packages

Year	Cases	Year	Cases
1896	37,172	1915	1,040,368
1897	88,512	1916	1,275,973
1898	142,916	1917	1,390,797
1899	230,173	1918	1,293,510
1900	291,780	1919	1,790,830
1901	364,909	1920	1,912,019
1902	465,118	1921	1,949,310
1903	472,742	1922	2,035,922
1904	468,588	1923	1,947,957
1905	518,125	1924	2,107,197
1906	578,638	1925	2,324,815
1907	596,307	1926	2,411,022
1908	587,915	1927	2,477,262
1909	674,770	1928	2,521,751
1910	767,985	1929	2,496,501
1911	846,784	1930	2,321,076
1912	889,623	1931	2,176,291
1913	936,362	1932	1,817,650
1914	1,004,110		

PLAINTIFF'S EXHIBIT NO. 150.

The Natural Food Company
The Shredded Wheat Company
National Biscuit Company
Sales in the United States of Cases
Containing 36 Packages

Year	Cases	Advertising Expenditures
1896	37,172	$ 115,431.38
1897	88,512	90,821.59
1898	142,916	128,154.17
1899	230,173	211,725.72
1900	291,780	305,936.28
1901	364,909	.....
1902	465,118	388,768.48
1903	472,742	580,867.23
1904	468,588	436,241.44
1905	518,125	454,055.98
1906	578,638	482,132.82
1907	596,307	551,951.75
1908	587,915	527,191.63
1909	674,770	534,946.75
1910	767,985	591,676.02
1911	846,784	622,264.80
1912	889,623	655,934.69
1913	936,362	699,620.02
1914	1,004,110	786,348.52
1915	1,040,368	801,810.70
1916	1,275,973	810,500.34
1917	1,390,797	854,018.42
1918	1,293,510	423,645.17
1919	1,790,830	759,126.85
1920	1,912,019	618,996.04
1921	1,949,310	957,154.54

Year	Cases	Advertising Expenditures
1922	2,035,922	1,242,159.45
1923	1,947,957	1,295,951.06
1924	2,107,197	1,437,199.57
1925	2,324,815	1,601,276.07
1926	2,411,022	1,783,791.98
1927	2,477,262	1,459,502.80
1928	2,521,751	1,570,955.34
1929	2,496,501	696,015.86 *
1930	2,321,076	803,607.68 *
1931	2,176,291	849,358.04 *
1932	1,917,650	973,581.76 #

* does not include sampling and field expenses
# includes $300,000.00 for sampling

PLAINTIFF'S EXHIBIT NO. 202.

Kellogg's

PRICES TO JOBBERS

Except in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming, Counties of Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, Loving, Pecos, Presidio, Reeves, Ward, Winkler, in Texas.

KELLOGG'S CORN FLAKES

				Per Case
No. 136	36	8 oz. Pkgs., Standard size		$2.80
No. 124	24	13 oz. Pkgs., Large size		2.80
No. 102	100	1 oz. Pkgs., Individual size		1.70
No. 105	50	1 oz. Pkgs., Individual size		.85

KELLOGG'S PEP

No. 224	24	10 oz. Pkgs., Standard size	$1.75
No. 250	50	1¼ oz. Pkgs., Individual size	.85

KELLOGG'S WHOLE WHEAT BISCUITS

No. 324	24	12½ oz. Pkgs., Standard size	$2.05
No. 360	60	1½ oz. Pkgs., Individual size	.90

KELLOGG'S WHEAT KRUMBLES

No. 412	12	8 oz. Pkgs., Standard size	$1.18

KELLOGG'S RICE KRISPIES

No. 524	24	6 oz. Pkgs., Standard size	$1.90
No. 550	50	1 oz. Pkgs., Individual size	.85

KELLOGG'S BRAN FLAKES

No. 624	24	10 oz. Pkgs., Standard size	$1.57½
No. 650	50	1¼ oz. Pkgs., Individual size	.65

KELLOGG'S KAFFEE HAG—Steel Cut

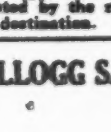
No. 712	12	1 lb. cans, Standard size	$4.80
No. 708	6	1 lb. cans, Standard size	2.40
No. 702	24	2 oz. cans, Hotel size	2.20

KELLOGG'S WHOLE WHEAT FLAKES

No. 914	24	10 oz. Pkgs., Standard size	$1.80
No. 950	50	1 oz. Pkgs., Individual size	.55

KELLOGG'S ALL-BRAN

No. 1412	12	16 oz. Pkgs., Large size	$1.90
No. 1424	24	10 oz. Pkgs., Small size	2.30
No. 1450	50	⅞ oz. Pkgs., Individual size	.85



PRICES SUBJECT TO CHANGE WITHOUT NOTICE

TERMS: 30 days net, less 2% ten days from date of invoice. Freight prepaid on all shipments to jobbers.

Straight car discount 1½%
Pool car quantity discount 1%

Straight car to take the 1½% quantity price must be of at least sufficient weight to be accepted by the railroad carriers as minimum car, and must be billed to one consignee, at one destination.

KELLOGG SALES COMPANY — Battle Creek, Michigan

1A — Feb. 1, 1933

202
3/17/33

PLAINTIFF'S EXHIBIT NO. 203,

203
3/12/33

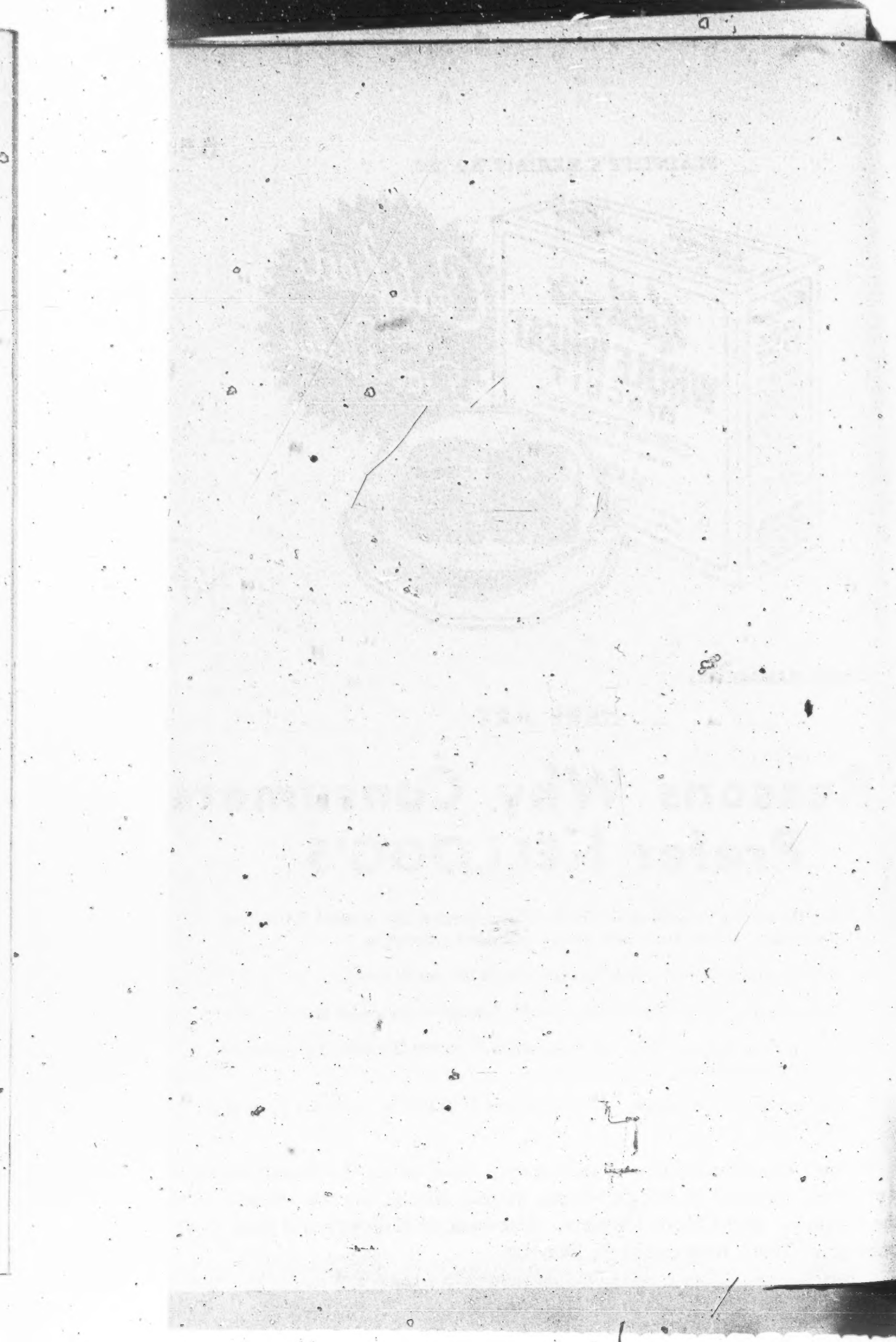
STORE MANAGERS:

HERE ARE

5 Reasons Why Consumers Prefer KELLOGG'S

1. Doublé toasted! Kellogg's Whole Wheat Biscuit are toasted brown on both sides! They are much crisper and more appetizing.
2. More convenient size. Two biscuits just fit the cereal bowl.
3. Economical. 15 biscuits to the package instead of the usual dozen.
4. Rich in food value. Every package certified by the Medical Arts Laboratory of Philadelphia.
5. Kellogg flavor and quality. Delicious taste baked in by a special Kellogg process.

Feature these points to our customers. Cash in on the fine qualities of this product. Display Kellogg's Whole Wheat Biscuit on the counter and in the window. Build Floor Displays. Get back of Kellogg's and push them aggressively. Have your clerks do likewise.



PLAINTIFF'S EXHIBIT NO. 237.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE SHREDDED WHEAT COMPANY,
Complainant,
—against—
THE HUMPHREY CORNELL COMPANY and FREDERICK H. TOWNE,
Defendants.

IN EQUITY
No. 1436.

The order entered herein on June 12, 1918 on mandate of the United States Circuit Court of Appeals for the Second Judicial Circuit is hereby re-settled to read as follows:

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE SHREDDED WHEAT COMPANY,
Complainant,
—against—
THE HUMPHREY CORNELL COMPANY and FREDERICK H. TOWNE,
Defendants.

IN EQUITY
No. 1436.

Order on Mandate

A final decree having been entered in the above entitled cause in favor of complainant on the 25th day of May, 1917, and an appeal from said decree having been duly allowed and prosecuted in the United States Circuit Court of Appeals for the Second Judicial Circuit, from which a mandate has been duly issued to this Court ordering that the said decree be modified and that

as thus modified the decree be affirmed without costs, and said mandate having been duly entered in this Court:

AND IT APPEARING from the opinion of the said Court of Appeals that the defendants' cartons are so different from the complainant's that no confusion is possible in the sale of defendants' biscuits in the cartons; and that only commercial experience can finally determine the possibility of marking, wrapping or tagging the individual biscuits, which may be sold outside of the cartons, without operating to give the complainant such advantage in the market as would substantially handicap the defendants in business of selling biscuits outside of the cartons;

NOW, THEREFORE, UPON CONSIDERATION THEREOF, and in obedience to said mandate and in cognizance with the opinion of the said Court of Appeals herein,

IT IS ORDERED that the said decree heretofore entered in this cause be and the same is hereby modified to read as follows:

"I. That complainant or its predecessors have for upwards of twenty-three years past been engaged in the manufacture and sale of a wholewheat biscuit of a particular form, shape, size and color; and during all said period, until the acts of these defendants, have been the sole manufacturers of a wholewheat biscuit of such form, shape, size, color and character.

II. That the said biscuit as manufactured and sold by complainant in such form, shape, size and color, has become widely and universally known as the product of complainant, and known to the public under the name of 'Shredded Wheat' or 'Shredded Wheat Biscuit', which said words were originally applied to said product by complainant.

III. That the said form, shape, size and color of said biscuit have come, through long and exclusive use and advertisement, to have the meaning and significance only of the product and biscuit of the complainant.

IV. That the defendants' cartons are so different from the complainant's that no confusion is possible in the sale of defendants' biscuits in the cartons.

V. That the defendants' biscuits are of the same form, shape, size and color as the said biscuit manufactured and sold by the complainant, and, therefore, all said defendants' biscuits that shall reach the last purchaser outside of their cartons must either bear a letter, cross or other plain symbol, impressed in their substance, or have fastened upon them a wrapping, tag or band, stating that they are made by the Ross Food Company.

VI. That an injunction issue out of and under the seal of this Court restraining and enjoining defendants, The Humphrey Cornell Company and Frederick H. Towne, their privies, agents, servants, employees, attorneys and representatives, from the sale of all wholewheat biscuits reaching the last purchaser outside of their cartons, to wit, wholewheat biscuits of the same form, shape, size, color and appearance as the biscuit manufactured by the complainant, or in imitation thereof, unless the said biscuits reaching the last purchaser either bear a letter, cross or other plain symbol impressed in their substance, or have fastened upon them a wrapping, tag, or band stating that they are made by the Ross Food Company or other manufacturer.

VII. That the Ross Food Company, the manufacturer of said biscuit, has assumed the expense of defending this action; and that the said corporation, and Andrew Ross, president thereof, and Ralph Valentine, superintendent thereof, were present and participated in the trial of the issues herein, in behalf of defendants, and are privies to the judgment of this Court;

VIII. That the evidence shows that the sales of the defendants The Humphrey Cornell Company and Frederick H. Towne are so small in amount as not to justify the expense of a reference to a master for an accounting.

IX. That the complainant is entitled to recover against the defendants the costs and disbursements of this action, taxed by the clerk of this Court in the sum of $623.90 and execution issue therefor.

AND IT IS FURTHER ORDERED that the injunction heretofore granted in the above entitled cause be and the same hereby is modified so that the said injunction shall read:

"NOW, THEREFORE, we do strictly and perpetually enjoin you, the said Humphrey Cornell Company, and the said Frederick H. Towne, your privies, agents, servants, employees, attorneys and representatives, under the pains and penalties which may fall upon you and each of you, that you forthwith and forever desist and refrain from selling all wholewheat biscuits reaching the last purchaser outside of the cartons, to wit, wholewheat biscuits of the same form, shape, size, color and appearance as the biscuit manufactured by the plaintiff, or in imitation thereof, unless each of the said biscuits reaching the last purchaser, either bears a letter, cross or other plain symbol impressed in their substance, or have fastened upon them a wrapping, tag or band stating that they are made by the Ross Food Company, or other manufacturer;"

AND IT IS FURTHER ORDERED, that the said injunction, as modified hereby continue in force until the further order of the Court:

AND IT IS FURTHER ORDERED, that the defendants at the end of six months from the date hereof may apply to this court to be relieved of the requirement and

injunction herein to mark, wrap, tag or band the said biscuits reaching the last purchaser outside of the cartons, upon showing that after a bona fide trial of all possible expedients, the manufacturer of defendants' biscuits cannot comply with the said requirement and injunction except at an expense which would make impossible any continued competition in the business of selling biscuits outside the cartons with any assurance of reasonable profit.

EDWIN L. GARVIN
U. S. D. J.

August 21, 1919.

The re-entry of the foregoing order in the above form is hereby assented to.

WILLIAM C. BREED
Of Counsel for Complainant.
GEARY DAVIS & KEEFE
Solicitors for Defendants.

New York, August 19 1919.

A true copy,

(Seal) Attest: C. E. PICKETT Clerk.

Endorsement:

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE SHREDDED WHEAT COMPANY,
Complainant,

—against—

THE HUMPHREY CORNELL COMPANY
and FREDERICK H. TOWNE,
Defendants.

Copy

ORDER

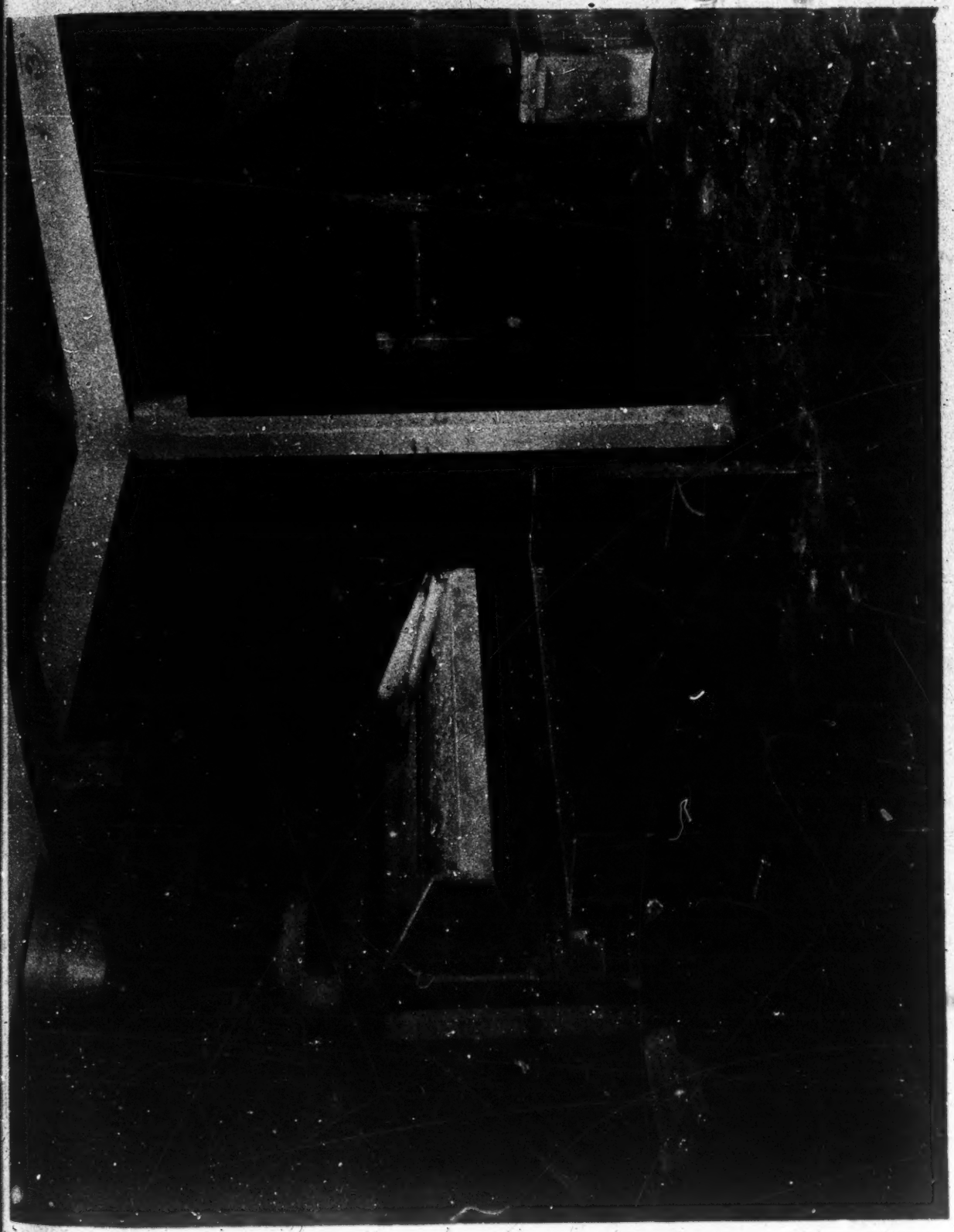
BREED, ABBOTT & MORGAN
32 Liberty Street, New York
Of Counsel for Complainant.

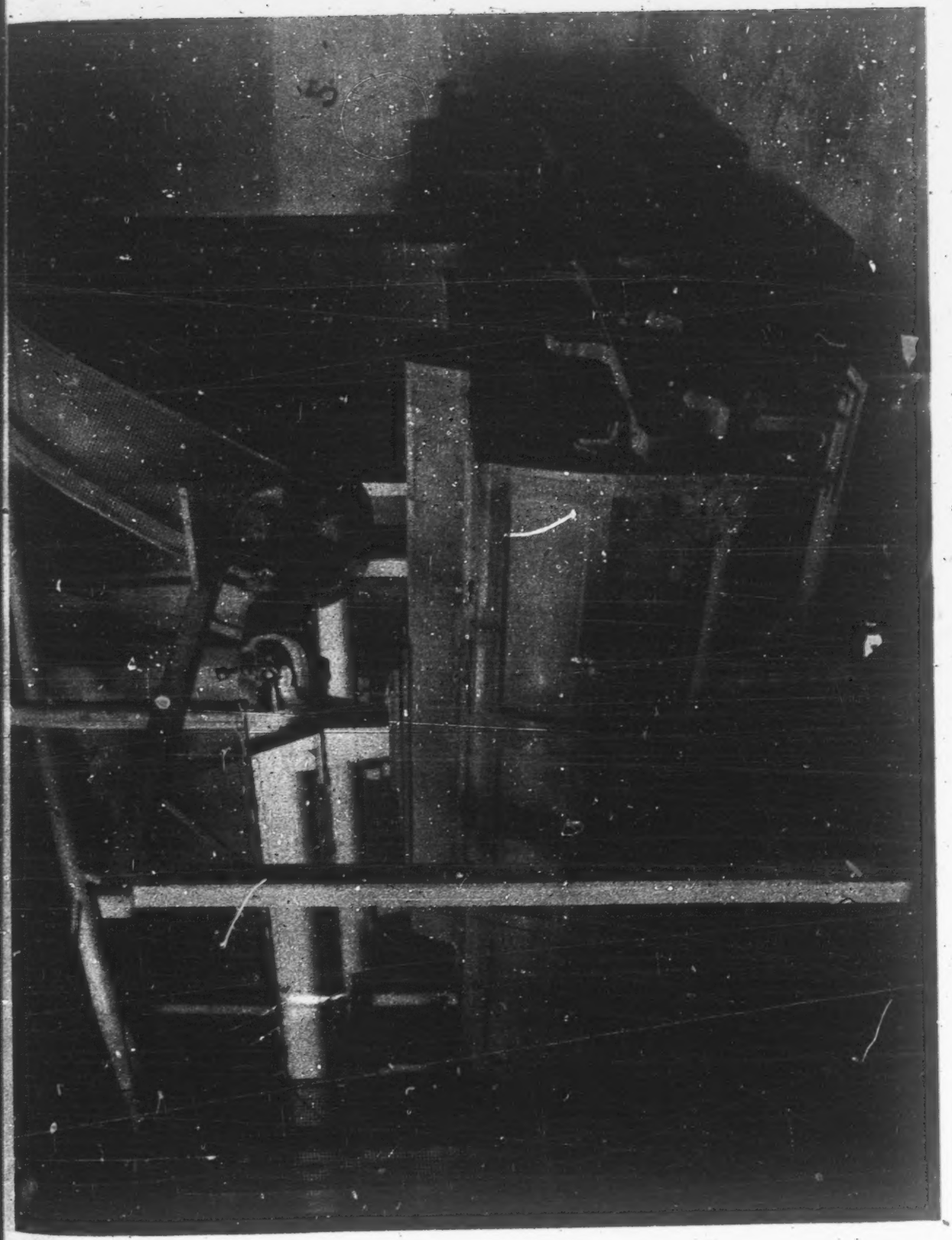
To

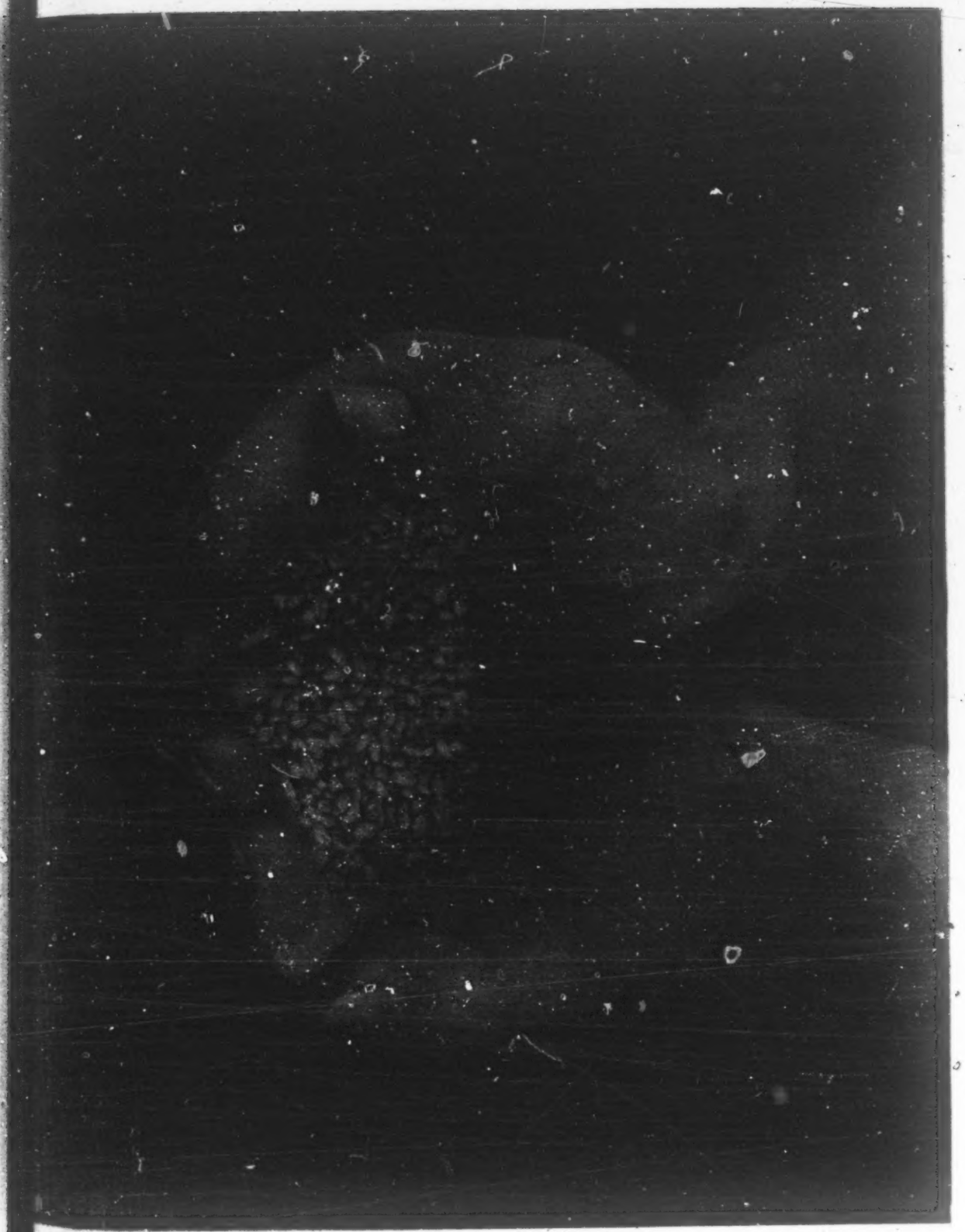
Filed 21 August 1919.

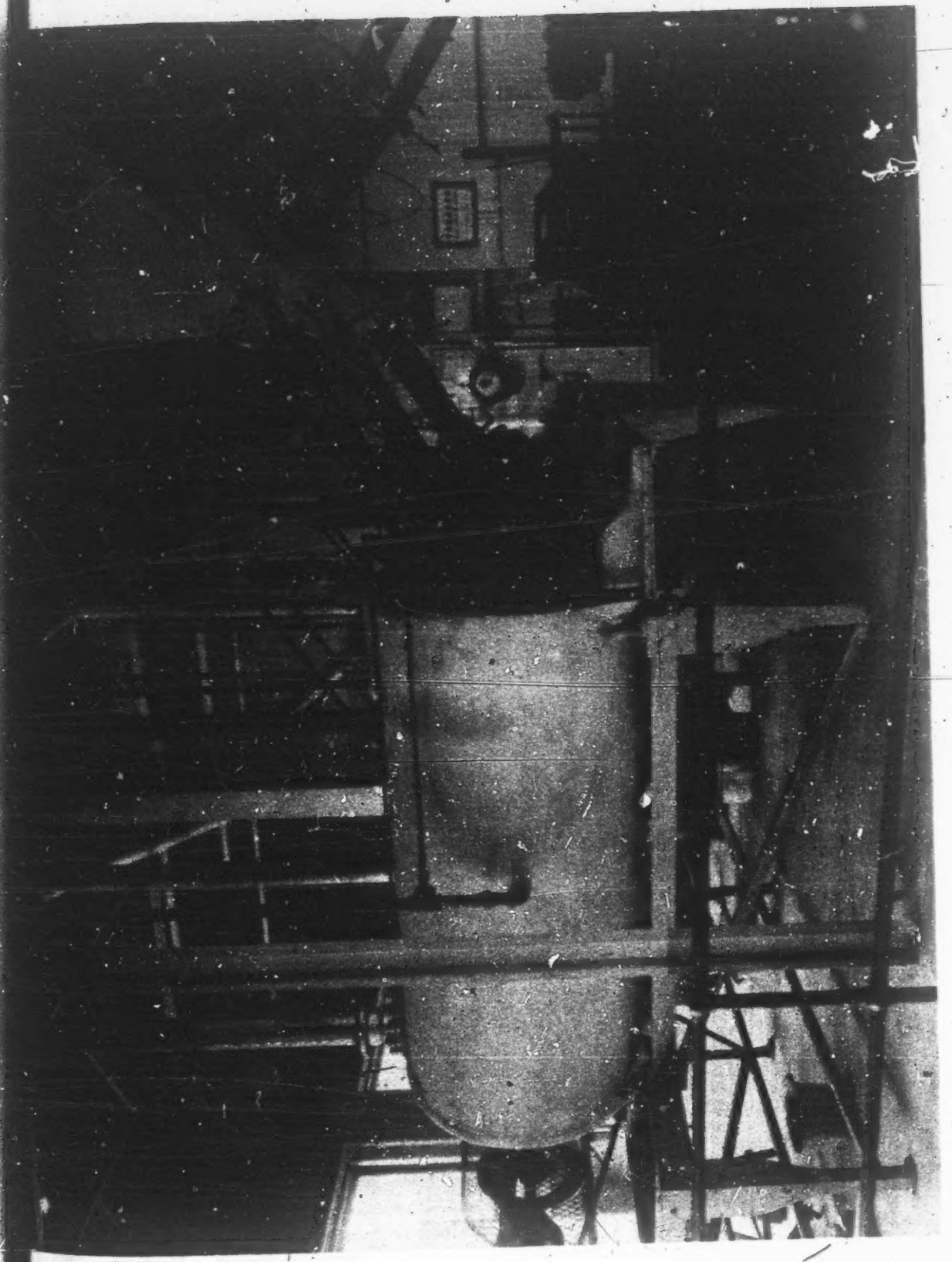
C. E. PICKETT
Clerk.

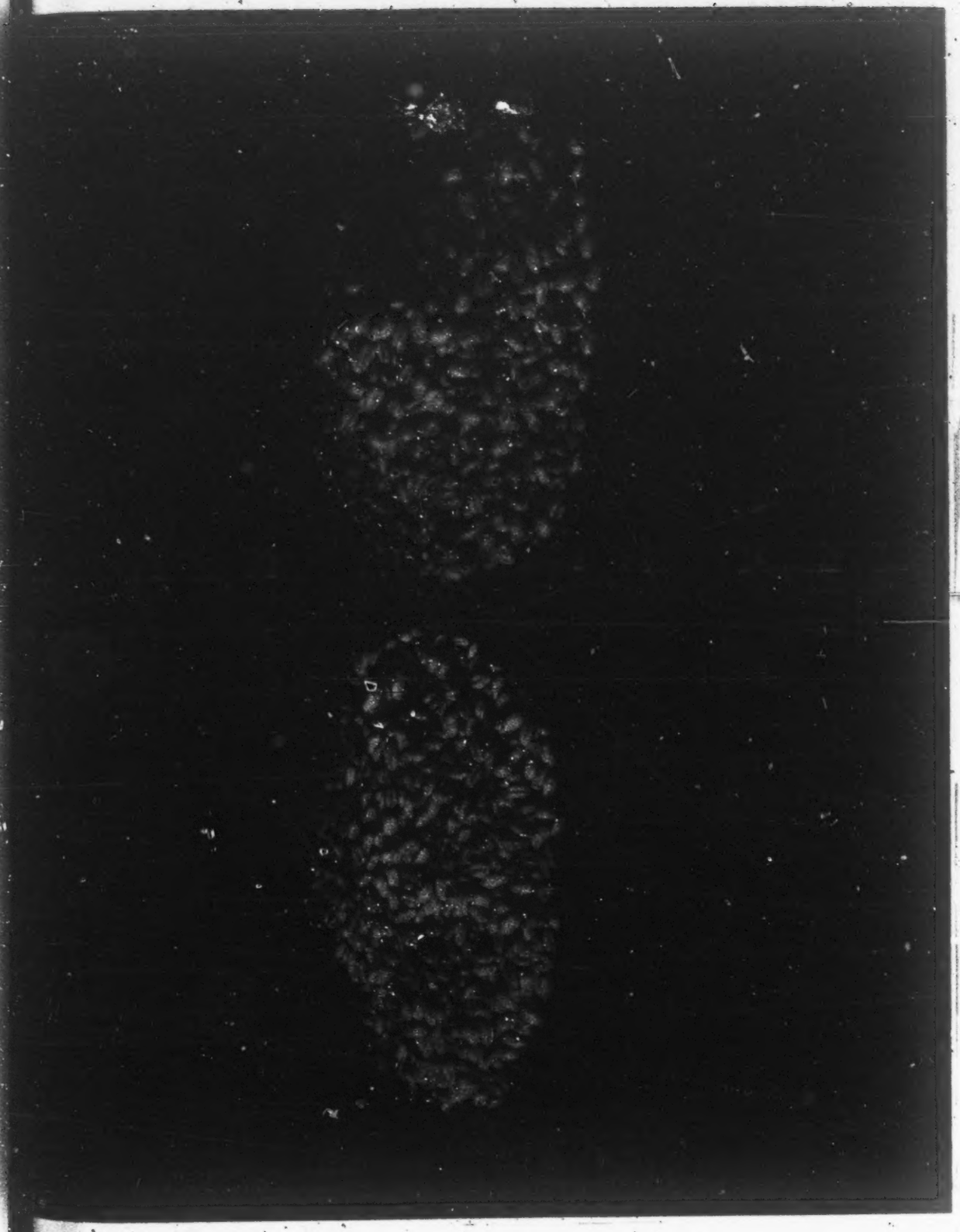
PLAINTIFF'S EXHIBIT NO. 239.

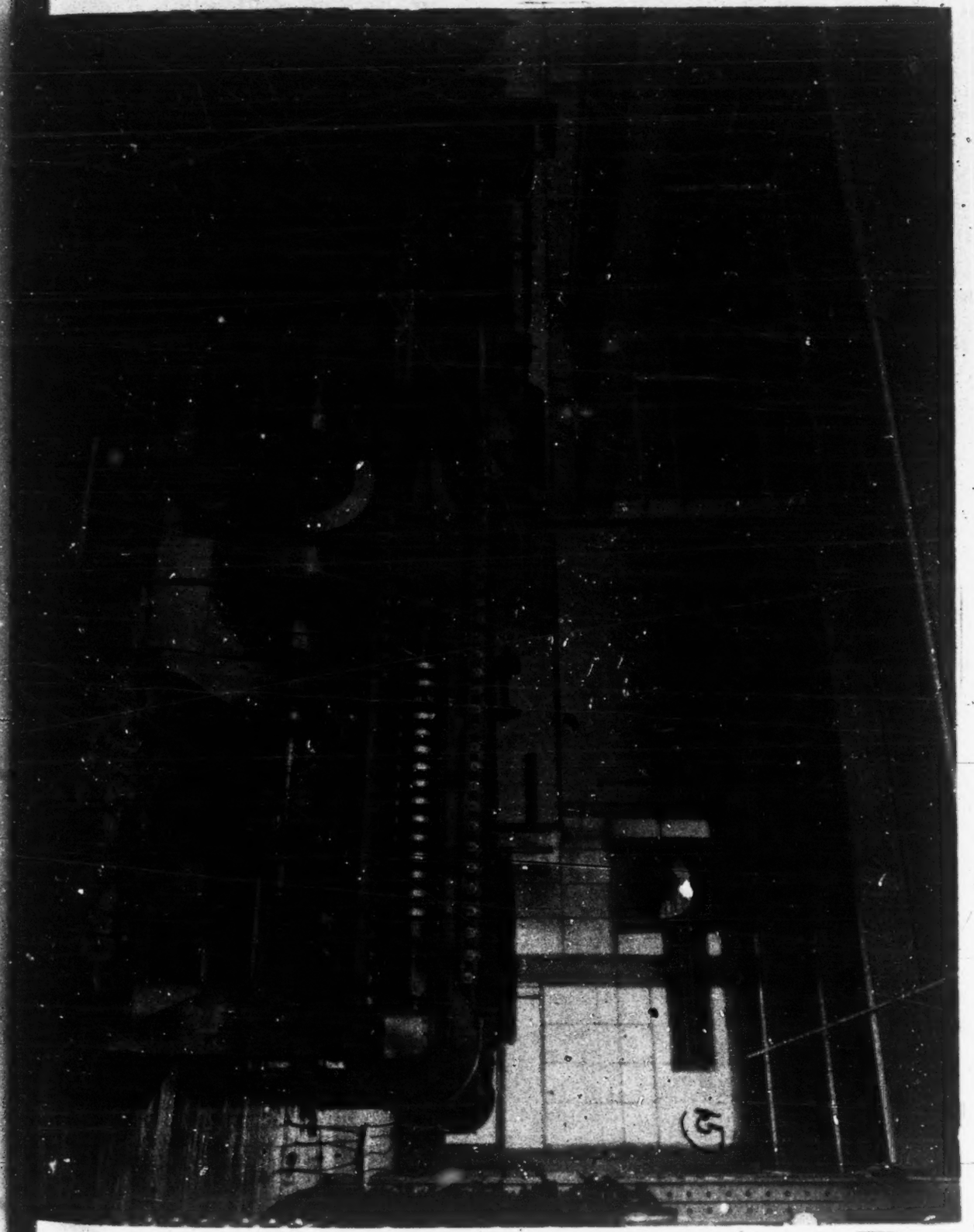


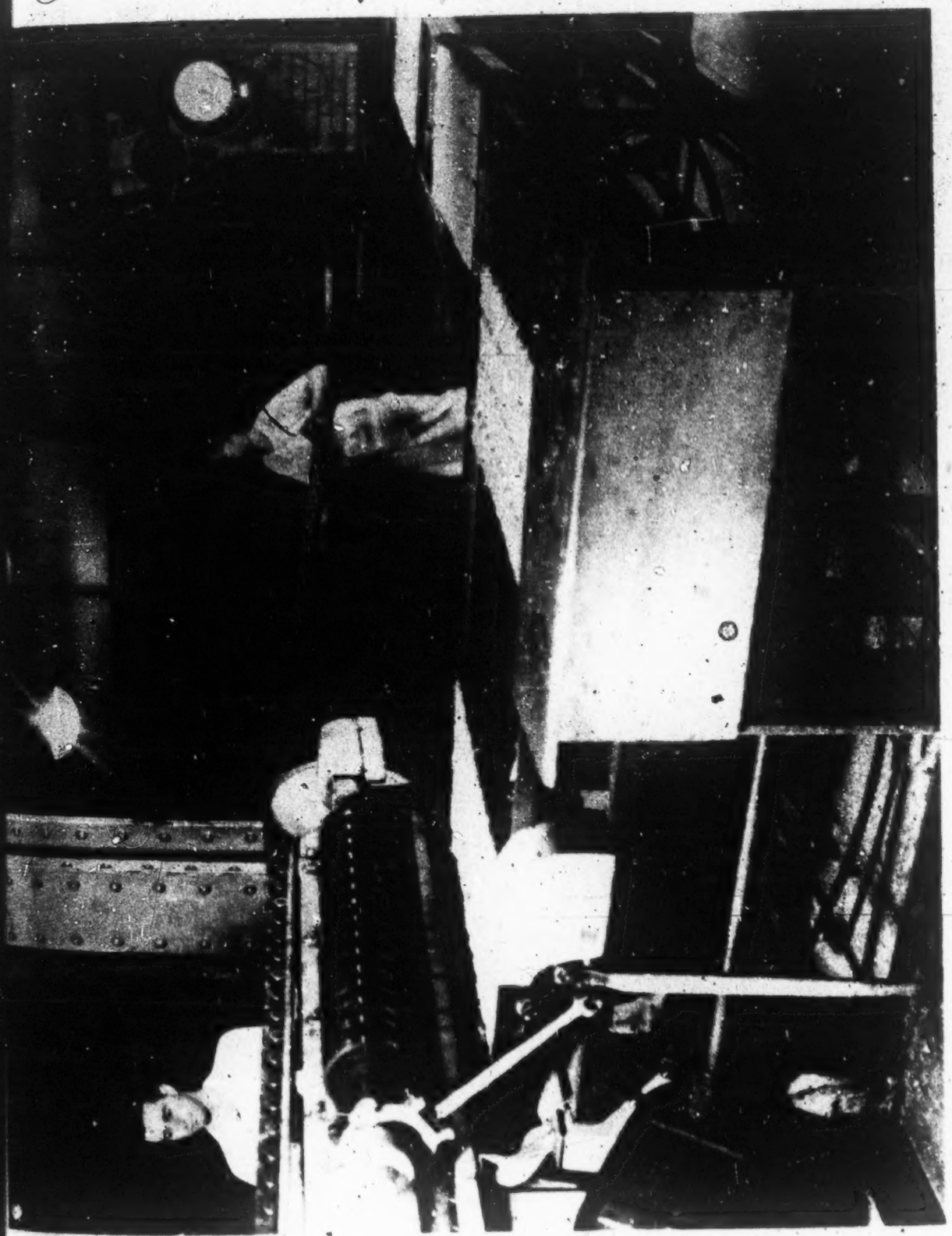


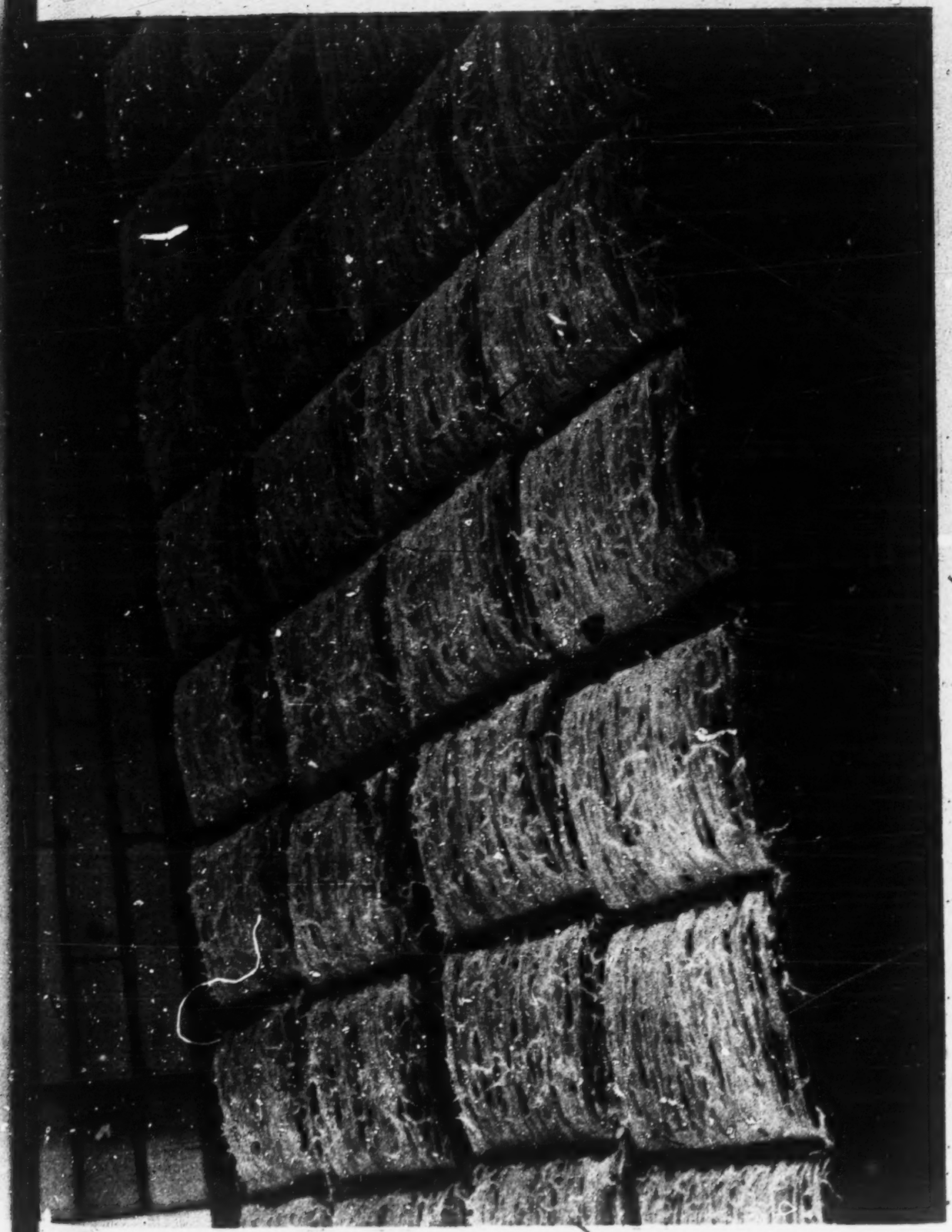


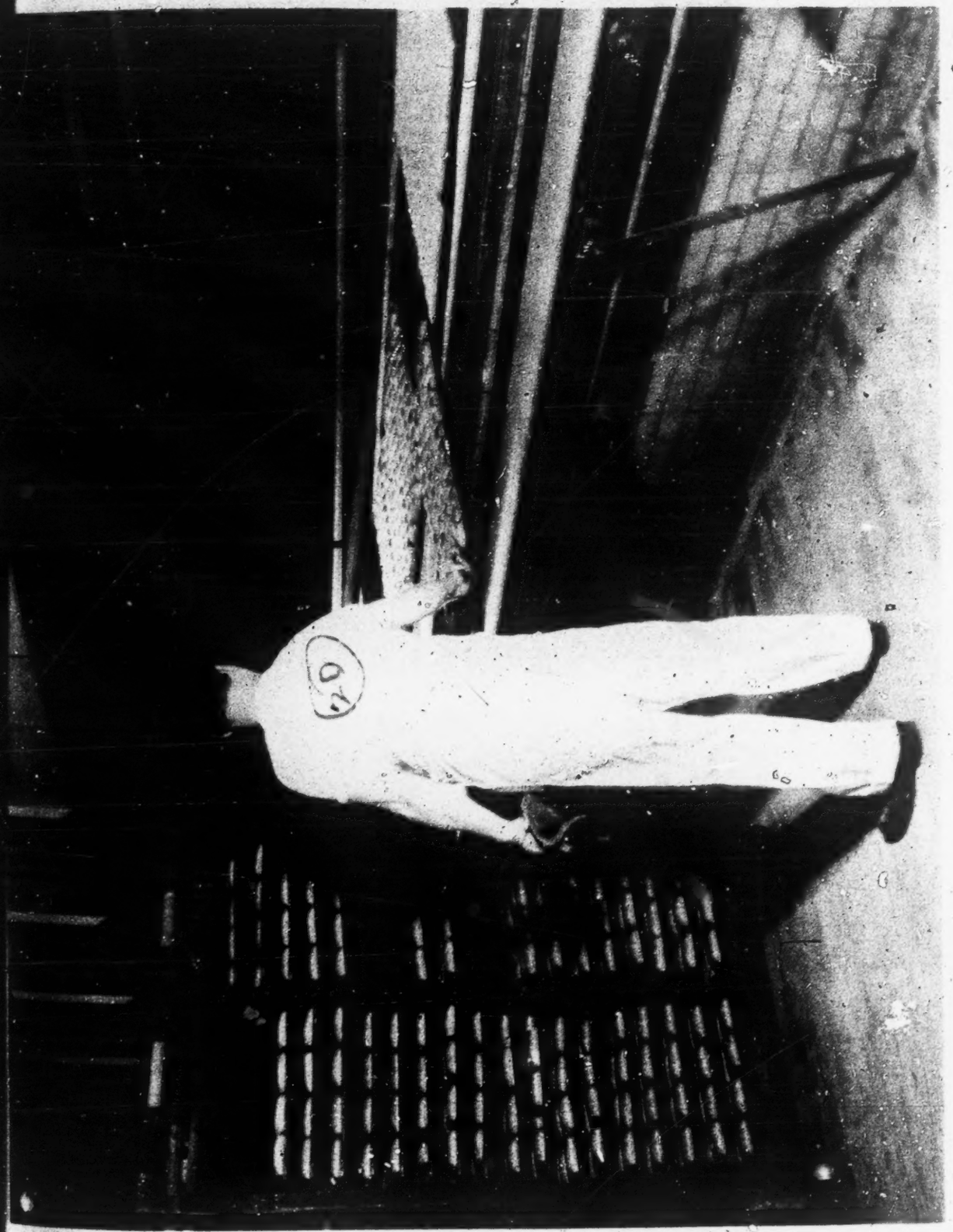


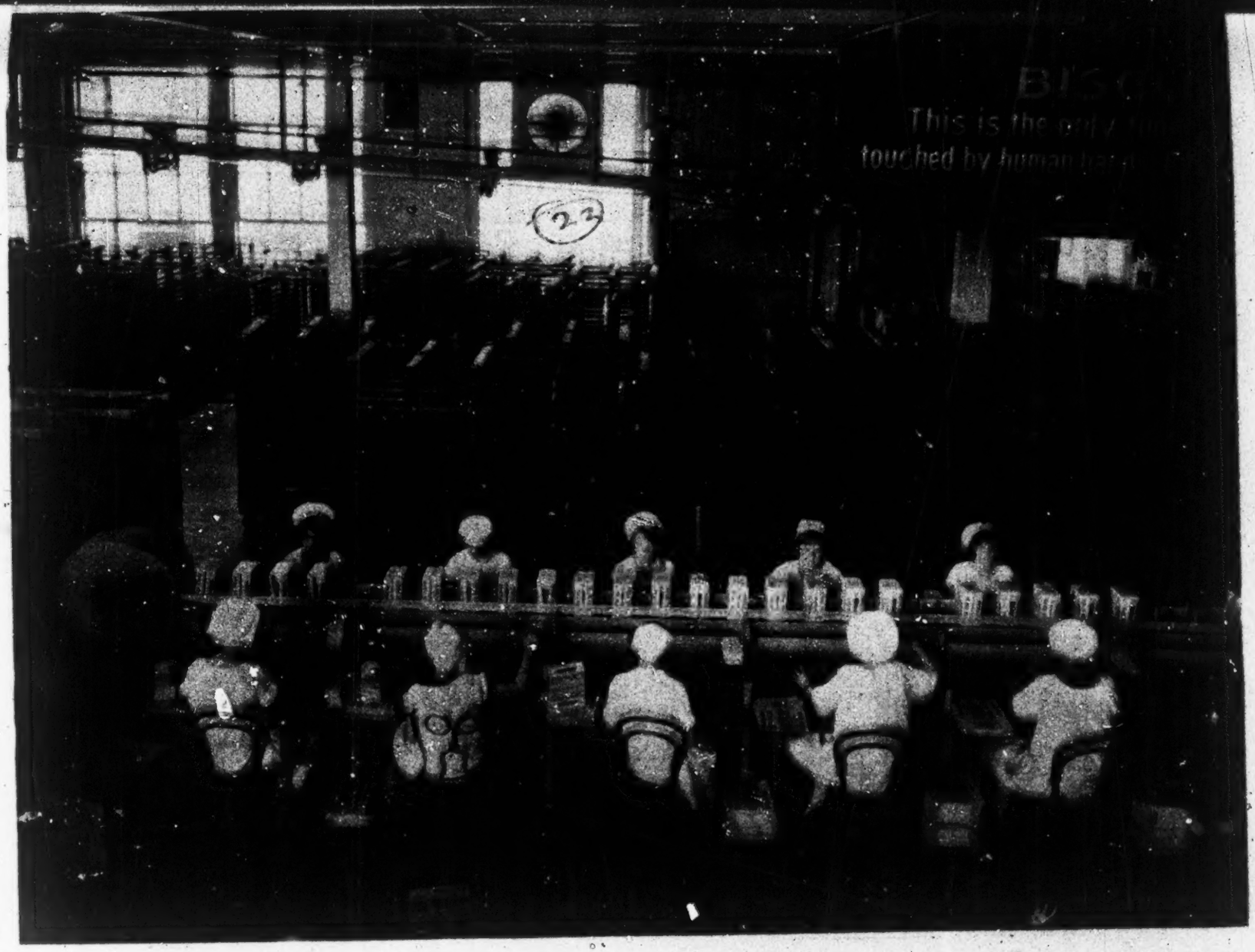








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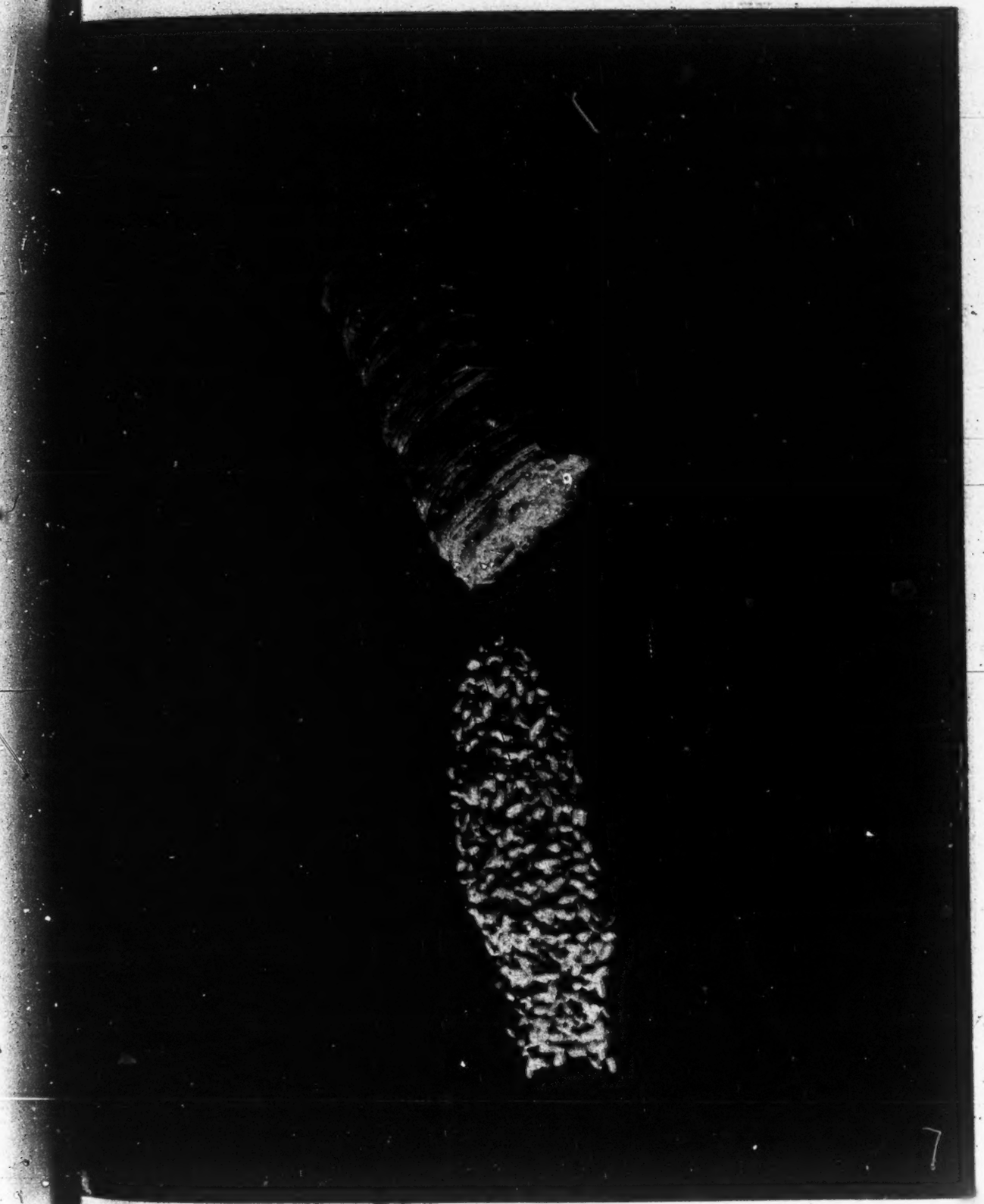
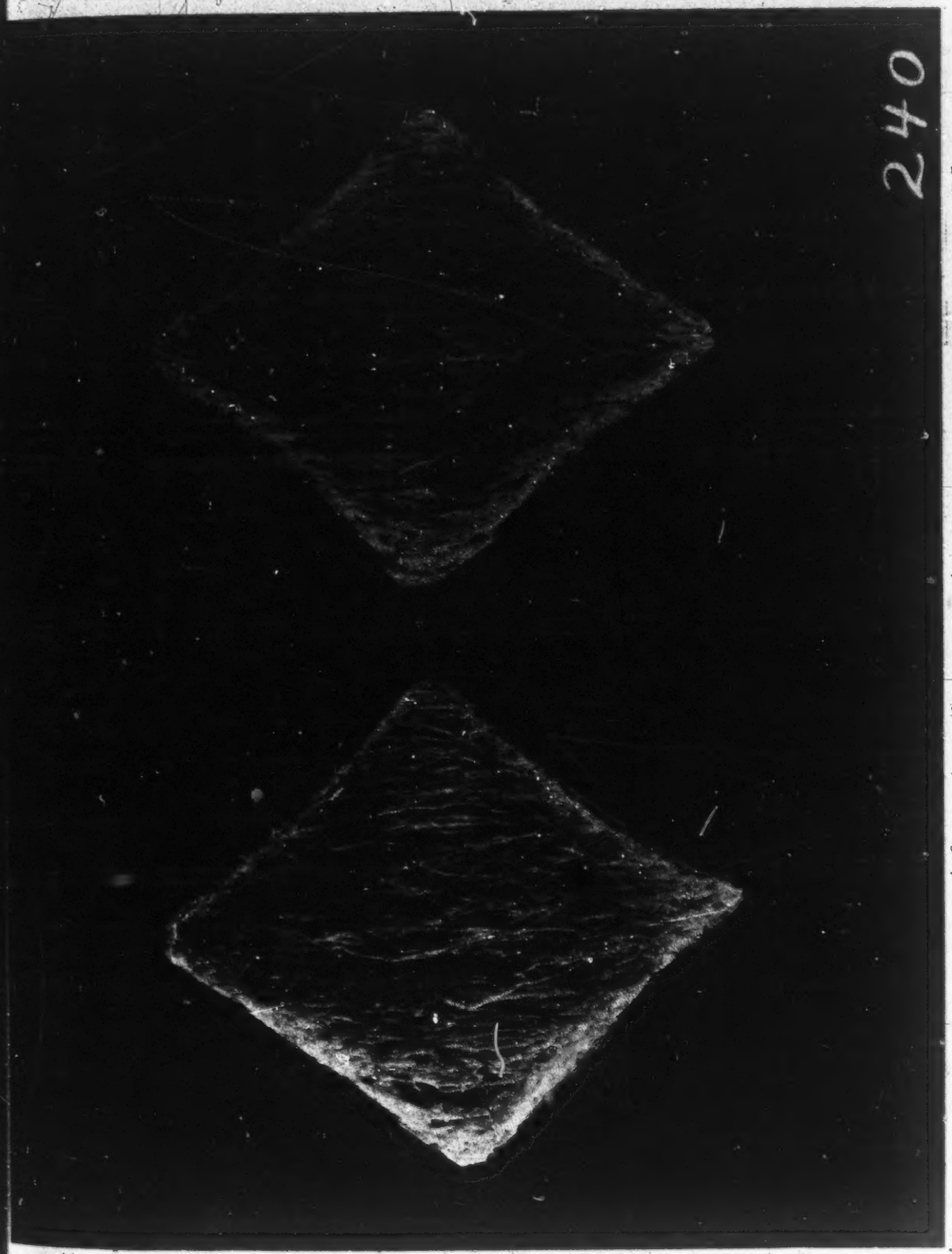
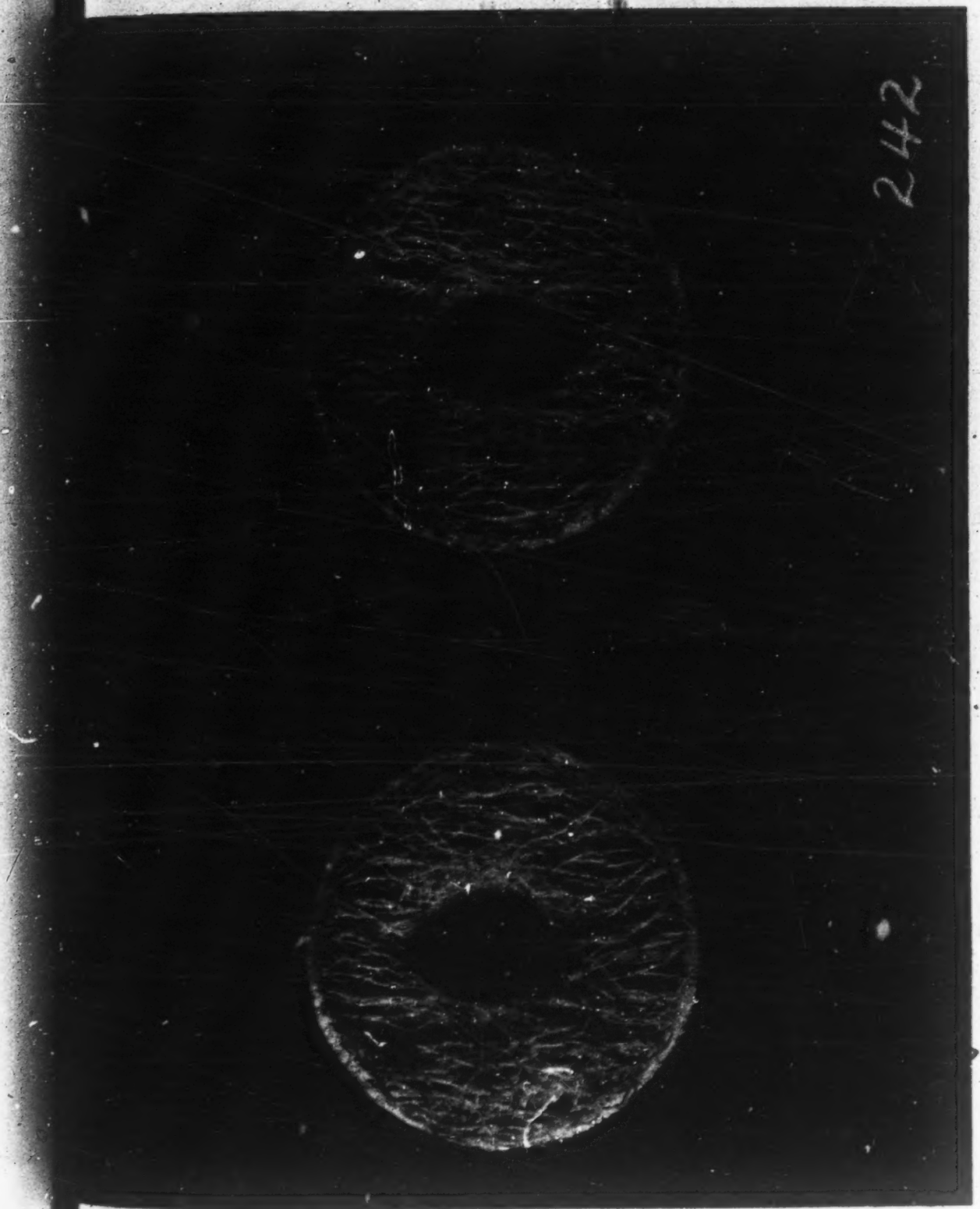


PLAINTIFF'S EXHIBIT NO. 240-A.

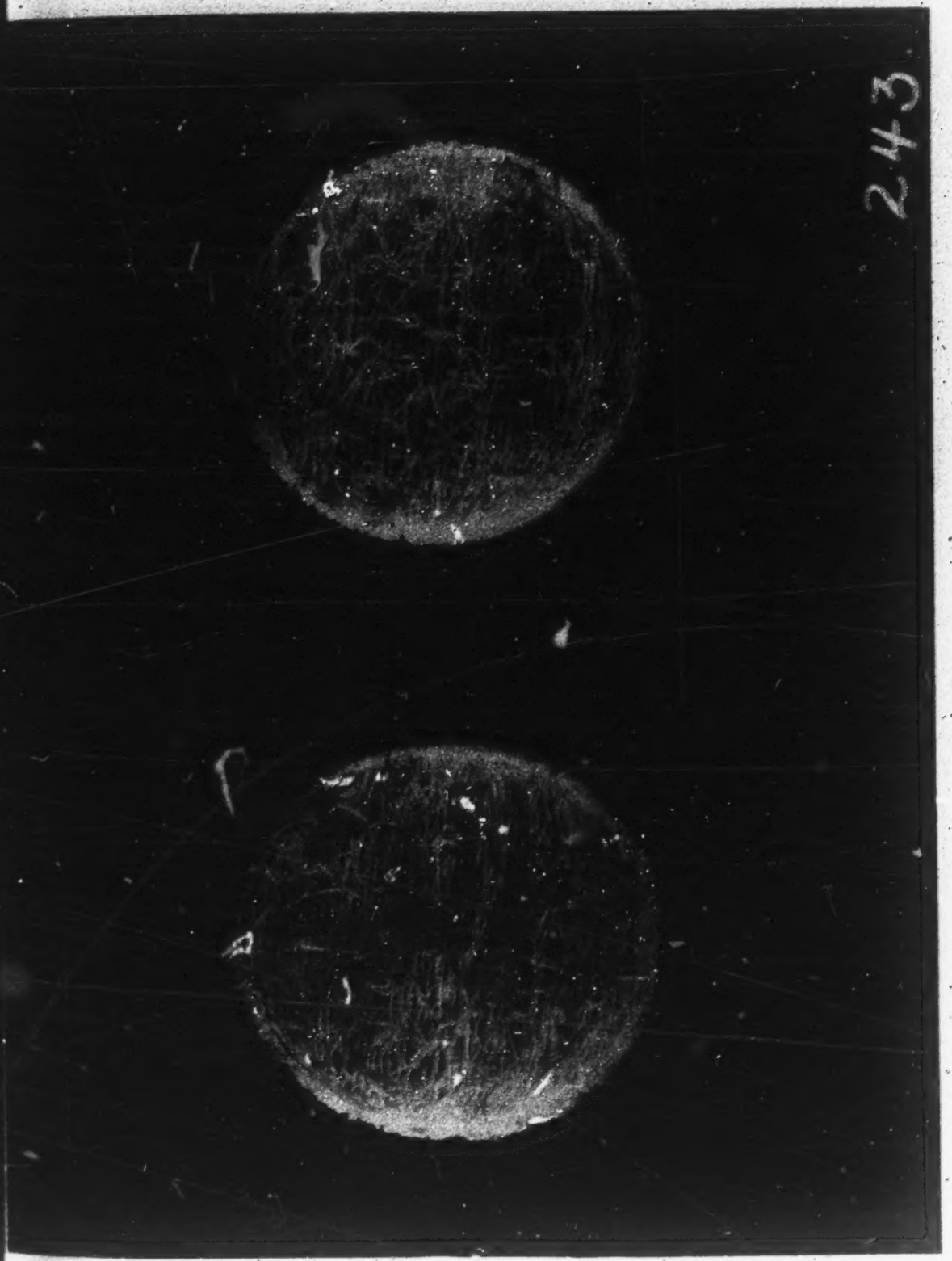


PLAINTIFF'S EXHIBIT NO. 241-A.

PLAINTIFF'S EXHIBIT NO. 242-A.



PLAINTIFF'S EXHIBIT NO. 243-A.



PLAINTIFF'S EXHIBIT NO. 244-A.

PLAINTIFF'S EXHIBIT NO. 245-A.

PLAINTIFF'S EXHIBIT NO. 247.

TAMPA MORNING TRIBUNE.

(Saturday, July 9, 1932.)

PIGGLY WIGGLY

SUGAR 5-lb. Cloth Bag **21c**

COFFEE Del Monte, lb. **27c**

COFFEE 7 A. M., lb. **19c**

Senate Coffee Lb. **29c**

MILK Federal Brand, 5 Tall Cans **23c**

MILK Libby's, 5 Tall Cans **27c**

WESSON OIL Pint **19c** Quart **37c**

CRISCO, 3-Lb. Can 49c

PEANUT BUTTER, two 1-lb. jars, 19c

BUDWEISER MALT, per can 45c

BOTTLE CAPS, 1 gross pkg. 19c

SUNSWEET PRUNES 17c
Large Size, 2 1-lb. Pkgs.

Del Monte—2 Large Cans
SLICED PINEAPPLE 29c

2 Large Cans
ROSEDALE PEACHES 29c

Fairy—3 Bars
TOILET SOAP 12c

Kellogg's Shredded Wheat, pkg. . 9c

Miller's Corn Flakes, 2 pkgs. . . . 13c

Comet Brown Rice Flakes, 3 pkgs. 22c

Specials Friday P. M. and Saturday

PIGGLY WIGGLY

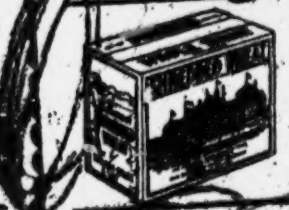
There's a Piggly Wiggly Near Your Home

SUNSWEET
PRUNES Large Size
2 1-lb. Packages for ..... **17¢**

P&G
SOAP
5 for 14

OCTAGON SOAP
Powder 5 Small Pkgs. **13c**

FAIRY TOILET
SOAP 3 Bars **12¢**



Pineapple Del Monte 2 Large cans **29¢**

PEACHES ROSEDALE 2 Large Cans **29¢**

KELLOGG'S
SHREDDED WHEAT pkg. **9¢**

Corn Flakes Mittens, 2 Pkgs. **13¢**

CORN SCOTT COUNTY 3 Medium Cans **25¢**

JELLY GRAPE ..... QUINCE ..... GOLDEN SUN ..... CRABAPPLE ..... } 16-OZ. JAR **25¢**

WELSH'S GRAPE JUICE 2 Pints for . . **35¢**

PLAINTIFF'S EXHIBIT NO. 248.
THE TAMPA DAILY TIMES.
(Friday, July 8, 1932.)

PLAINTIFF'S EXHIBIT NO. 251.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

The Shredded Wheat Company, Complainant v. Kellogg Company, Kellogg Sales Company, Will K. Kellogg, The Merchants Provision Company, William R. Bailey, The Dietter & Crowe Incorporated, Frederick W. Dietter and John A. Crowe	In Equity No. 922

Stipulation and Order of Dismissal

The Court consenting thereto, it is hereby agreed and stipulated among the several parties hereto that this suit may be and hereby is ORDERED DISMISSED without prejudice, and with the condition that should Plaintiff, or its successors, sue again upon the same cause of action, or bring any other litigation involving the same, or related subject matter against these defendants, or any of them, or their successors, representatives, agents, or privies, in this or in any other Court or before the Patent Office, then any party to such litigation may avail himself or itself of any part of or all of the proceedings, orders, testimony, and depositions heretofore had, entered, or taken in this case, or for use herein, to the same extent and for the same purposes as though the same had been taken, had or done in such litigation.

The Shredded Wheat Company
By E. Y. Crossmore
Vice-President.

Kellogg Company,
By Lewis Brown
President.

Kellogg Sales Company,

(Signed) By Will K. Kellogg
President.

" Will K. Kellogg
Will K. Kellogg

The Merchants Provision Company,

" By John W. Scobie
President

" Wm. R. Bailey, Secy
William R. Bailey

The Dietter & Crowe Incorporated

" By John A. Crowe
President

" Frederick W. Dietter
Frederick W. Dietter

" John A. Crowe
John A. Crowe

Approved as to form:

Breed Abbott & Morgan
C. A. Vilas
Bristol & White
Counsel for Plaintiff
Crichton Clarke
Lewis L. Field
Counsel for Defendant

Approved and so ordered this 22 day of September, 1930.

Edwin S. Thomas
United States District Judge

PLAINTIFF'S EXHIBIT NO. 252.

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

TRADE-MARK FOR CEREAL BISCUIT.

85,186. Registered Jan. 30, 1912.

Application filed May 8, 1911. Serial No. 56,292.

STATEMENT.

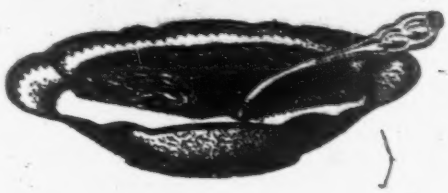
To all whom it may concern:

Be it known that THE SHREDDED WHEAT COMPANY, a corporation duly organized under the laws of the State of New York, and located in the city of Niagara Falls, county of Niagara, in said State, and doing business at the corner of Buffalo avenue and Fourth street, in the city of Niagara Falls, in said State, has adopted for its use the trade-mark shown in the accompanying drawing, no claim being made to the representation of a shedded-wheat biscuit, for cereal biscuit, in Class No. 46, Foods and ingredients of foods.

The trade-mark has been continuously used in the business of said corporation since September 15, 1909.

The trade-mark is applied or affixed to the packages containing the goods by printing the same on said packages or by placing thereon a printed label on which the trade-mark is shown.

THE SHREDDED WHEAT COMPANY,
By A. J. PORTER,
President.



DECLARATION.

State of New York Niagara county ss:

ALEXANDER J. PORTER, being duly sworn, deposes and says that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States; that the drawing presented truly represents the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

ALEXANDER J. PORTER.

Subscribed and sworn to before me, a notary public, this first day of November in the year 1910.

[L. S.] JAS. TRAVERSE,
Notary Public.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

Registered Aug. 17, 1926. **Trade-Mark 216,593**

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

ACT OF FEBRUARY 20, 1905.

Application filed February 18, 1926. Serial No. 227,680.

STATEMENT.

To the Commissioner of Patents:

The Shredded Wheat Company, a corporation duly organized under the laws of the State of New York, and located and doing business at Niagara Falls, New York, has adopted and used the trade-mark shown in the accompanying drawing, for BISCUITS, CRACKERS, AND CEREAL FOODS COOKED OR PREPARED FOR CONSUMPTION, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods and requests that the same be registered in the United States Patent Office in accordance with the act of February 20, 1905, as amended. The trade-mark has been continuously used and applied to said goods in applicant's business since September 15, 1909. The trade-mark is applied or affixed to the packages containing the goods by printing the same on said packages or by placing thereon a printed label on which the trade-mark is shown. Applicant is the owner of trade-mark registration No. 85,186, granted January 30, 1912.

Applicant disclaims any exclusive right to the representation of two biscuits apart from the mark shown on the drawing.

The undersigned hereby appoints William H. Davis, Arba B. Marvin, Dean S. Edmonds, Frank E. Barrows, W. Brown Morton, Merton W. Sage, and Willis H. Taylor, Jr., (constituting the firm of Pennie, Davis, Marvin & Edmonds, 165 Broadway, New York city, registration No. 10,839), and each of them, its attorneys, to prosecute this application for registration, with full powers of substitution and revocation, to make alterations and amendments therein, to receive the certificate of registration, and to transact all business in the Patent Office connected therewith.

THE SHREDDED WHEAT COMPANY,
By CHAS. H. BROWN, Jr.,
Treasurer.

Registered Jan. 15, 1924.

Trade-Mark 178,725

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

ACT OF MARCH 19, 1920.

Application filed November 14, 1922. Serial No. 199,210.

SHREDDED WHEAT

STATEMENT.

To the Commissioner of Patents:

The Shredded Wheat Company, a corporation duly organized under the laws of the State of New York, and located and doing business at Niagara Falls, New York, has adopted and used the trade-mark shown in the accompanying drawing, for BISCUIT OR CRACKERS, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the act of March 19, 1920. The trade-mark has been continuously used and applied to said goods in applicant's business since January 1st, 1894. The trade-mark is applied or affixed to the goods, or to the packages containing the same, by placing thereon a printed label on which the trade-mark is shown, or by printing the trade-mark directly on the package. The mark has been in bona fide use for not less than one year in interstate commerce by the applicant. E. W. Anderson & Son (George Manne Anderson) of Washington, D. C., are appointed attorneys for the prosecution of this application.

THE SHREDDED WHEAT COMPANY,
By F. L. HOMM,
Secretary.

Registered May 25, 1926.

Trade-Mark 213,456

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

ACT OF MARCH 19, 1920.

Application filed February 18, 1926. Serial No. 227,479.

SHREDDED WHEAT

STATEMENT.

To the Commissioner of Patents:

The Shredded Wheat Company, a corporation duly organized under the laws of the State of New York, and located and doing business at Niagara Falls, New York, has adopted and used the trade-mark shown in the accompanying drawing, for BISCUITS, CRACKERS, AND CEREAL FOODS COOKED OR PREPARED FOR CONSUMPTION, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods and requests that the same be registered in the United States Patent Office in accordance with the act of March 19, 1920. The trade-mark has been continuously used and applied to said goods in applicant's business since January 1, 1894. The trade-mark is applied or affixed to the goods or to the packages containing the same by placing thereon a printed label on which the trade-mark is shown or by printing the trade-mark directly on the package. The mark has been in bona fide use for not less than one year in interstate commerce by the applicant. Applicant is the owner of trade-mark registration No. 178,725, granted January 15, 1924.

The undersigned hereby appoints William H. Davis, Arba B. Marvin, Dean S. Edmonds, Frank E. Barrows, W. Brown Morton, Merton W. Sage, and Willis H. Taylor, Jr., (constituting the firm of Pennie, Davis, Marvin & Edmonds, 165 Broadway, New York city, registration No. 10,839), and each of them, its attorneys, to prosecute this application for registration, with full powers of substitution and revocation, to make alterations and amendments therein, to receive the certificate of registration, and to transact all business in the Patent Office connected therewith.

THE SHREDDED WHEAT COMPANY,
By CHAS. H. BROWN, Jr.,
Treasurer.

DEFENDANT'S EXHIBIT NO. 9.

THE SHREDDED WHEAT COMPANY
NIAGARA FALLS, N. Y.

August 16, 1927

TRUMAN A. DEWEESE
Vice-President in Charge of Publicity

The News Editor,
"State Journal,"
Springfield, Ill.

Dear Friend:

I am sure you will agree that the enclosed item, referring to our suit against the Kellogg Company, has enough news interest to justify its publication in your paper. The item will no doubt come to you through the regular news channels, but as it vitally concerns the interests of this Company that has been a consistent advertiser in the newspapers for thirty years I am sure you will appreciate our efforts to give you the exact facts.

I know you will not want to show any prejudice in the matter, and yet I am sure you will want to be fair to this Company. For this reason I have confined the news article to the claims made in the complaint which was filed in the United States District Court. The matter of editorial comment is left entirely to your good judgment.

We would like to have it printed just as it is written, but of course you are at liberty to make any condensations that will better adapt it to your columns and your policies. We are sure we can depend on you not to print it before the date on which it is to be released. Needless to tell you any courtesies you may

show us in this matter will be greatly appreciated by our Company as well as by the writer.

Very truly yours,

T. A. DeWeese
Vice-President in Charge of Publicity.

TAD-M.

DEFENDANT'S EXHIBIT NO. 10.

Please do not Publish before August 22nd.

THE SHREDDED WHEAT COMPANY SUES KELLOGG

The Company Asks the Court to Restrain Kellogg from Manufacturing an Imitation of Its Product and from Appropriating its Trade Name and Good-Will.

A lawsuit involving issues of far-reaching importance to manufacturers of food products was started when The Shredded Wheat Company filed a complaint against the Kellogg Company of Battle Creek, Michigan, and certain grocers, alleging unfair competition and unlawful appropriation of its trade name and its good-will. The suit was filed in the United States District Court at New Haven, Connecticut, on Monday, August 22nd.

The occasion for the complaint is the attempt of the Kellogg Company and some grocery jobbers and retailers to market a biscuit which is an imitation of the product of The Shredded Wheat Company under the name "Shredded Whole Wheat Biscuit." The filing of this complaint by The Shredded Wheat Company is notice of its intention to enforce its rights and claims for damages against any manufacturer, wholesaler or retailer manufacturing or distributing any product that is an imitation of its product.

The complaint covers in detail the growth and development of the business of The Shredded Wheat Company, the various methods employed to educate the public regarding the food value of the product and the money expended in creating consumer demand and building good-will all over the world. It places the value of this good-will and trade name at millions of dollars and asks for an injunction against the Kellogg Company.

The complaint alleges that for 34 years The Shredded Wheat Company has given its biscuit a distinctive form, size and shape, and by extensive advertising has so fixed this form, size and shape in the public mind that even when the biscuits are displayed separate and apart from the carton they are recognized by consumers as a product only of The Shredded Wheat Company. They have employed the words "Shredded Whole Wheat Biscuit" and "Shredded Wheat" not as descriptive of the process of manufacture, but as fanciful and distinctive designations identifying their particular product and indicating the source of manufacture.

The complaint avers that The Shredded Wheat Company has expended over $24,000,000, in all kinds of educational work until these terms or words have grown to be trade names of their product with only one meaning in the public mind in the United States and foreign countries, and that these names have not been used in respect to any other article of food for human consumption.

Among the educational methods mentioned in the complaint are advertisements in newspapers and magazines; booklets, leaflets, lectures, store cards, and the distribution of millions of samples from house to house. It is also stated that an average of 100,000 persons have passed through the home plant in Niagara Falls every year for twenty years, to the end

that consumers now invariably associate the names "Shredded Wheat Biscuit" and "Shredded Wheat" with the one product made by The Shredded Wheat Company.

While much of the complaint stresses the unfairness of this sort of competition and the damage done to The Shredded Wheat Company through the appropriation of their trade name and good-will, a large portion of the complaint is devoted to calling the attention of the Court to the deception and fraud that will be practiced upon consumers who purchase the Kellogg Biscuit under the impression that they are getting the original Shredded Wheat Biscuit made by The Shredded Wheat Company, the only product associated with the words "Shredded Wheat."

Attention is also called to the fact that the consumer seldom sees the carton or container, hence he is easily led to believe that The Shredded Wheat Company is manufacturing a biscuit reduced in size and containing less wheat. The complaint alleges in fact that in many instances the Kellogg biscuit has been passed off as the Shredded Wheat Company's product.

The complaint recites the fact that in 1915 The Shredded Wheat Company brought a suit in equity against the Ross Food Company and certain grocers to restrain them from manufacturing and marketing an imitation Shredded Wheat. An injunction was issued restraining the defendants from making Shredded Wheat Biscuit, and this injunction afterwards was affirmed with some modification by the Court of Appeals.

It is further alleged in the complaint that the Kellogg package contains nine ounces of food as against the twelve ounces in the Shredded Wheat Company's package and is sold at less price as an additional means of deceiving the consumer who asks for Shredded

Wheat and is given less weight under the impression that he is getting the real Shredded Wheat made by The Shredded Wheat Company. It is further claimed that if Kellogg is not restrained he will proceed to flood the market with imitation biscuit, relying upon the market for Shredded Wheat Biscuit created through years of advertising.

The complaint asks that Kellogg be restrained from infringing upon the rights of The Shredded Wheat Company, from manufacturing an imitation of their product, and from putting on their carton improper and misleading terms, thereby confusing the product of the Kellogg Company with the real Shredded Wheat Biscuit. The Shredded Wheat Company asks for damages to be assessed and an injunction issued.

DEFENDANT'S EXHIBIT NO. 79.

N-933

NEW YORK STATE

WOMAN'S RELIEF CORPS HOME

L. J. HUTCHISON, *Superintendent*

Oxford, N. Y., March 17 1933

Kellogg Sales Company
317 Union Bldg., Syracuse, N. Y.

REQUEST FOR QUOTATIONS

Dear Sir:

Please *quote promptly on this sheet* by March 30 net prices upon any or all of the following items. Prices to stand good for the month of APRIL-JUNE. Prices should be in conformity with *unit of measure*. This is *not* to be considered as an order. Retain one copy. Vouchers submitted in payment of any items purchased will require execution before a Notary Public.

Very truly,
L. J. HUTCHISON,
Superintendent

Bids cannot be accepted unless size, kind, brand, and (if possible) manufacturer of each article is specified.

Check Mark	Article	Brand	Substitute Brand	Quantity	Unit of Measure	Price f.o.b. Oxford, N. Y. Per Unit of Measure
	Cornflakes	Kellogg's		80	Lbs	$ .07 Lb
	Shredded Wheat Whole Wheat Biscuit 24—12½ Oz Pkgs to the Case 15 Biscuit in Pkg	Kellogg's		10—	Doz	1.01 Do

Signed .....

..... 193

Purchases of the State are exempt from Federal Excise Taxes thereon such charges are not applicable and will be disallowed if charged.

DEFENDANT'S EXHIBIT NO. 95.

NATIONAL BISCUIT COMPANY

"UNEEDA BAKERS"

Eighty-Five Ninth Avenue, New York

December 1, 1930.

TO JOBBERS:

Effective January 1, 1931, National Biscuit Company will inaugurate direct sale and distribution of SHREDDED WHEAT to retail merchants and other distributors through its agencies located throughout the United States.

The following prices will apply:

SHREDDED WHEAT, 36's (9 bundles of 4 cartons)	$4.05 per case
SHREDDED WHEAT (bundles of 4 cartons)	.45¢ " bundle
INDIVIDUAL SHREDDED WHEAT (72 cartons)	1.60 " case
TRISCUIT (bundles of 6 cartons)	.50¢ " bundle

Inasmuch as SHREDDED WHEAT will be considered as an added line to our present merchandise sold through agencies, it will be subject to our usual terms and discounts, as follows:

Less than $100 per month,	10%
$100 to $999.99 per month,	15%
More than $1,000 per month,	17½%

Jobbers of SHREDDED WHEAT will be allowed an additional 2½%, based on quantities noted above, with maximum of 17½% trade discount. Cash discount of 1% will be allowed if paid within 10 days from date of invoice. It is requested that, in the sale of SHREDDED WHEAT, Jobbers do not allow in excess of our published discounts.

National Biscuit Company desires to retain, and will co-operate to encourage the sale of SHREDDED WHEAT through jobbers who are in a position to handle same profitably. Any inquiry in regard to this revised policy will have our prompt attention. If jobbers now handling SHREDDED WHEAT desire to discontinue the item entirely, they will be relieved of their stock, at cost price, as early as practicable after January 1, 1931.

If, during the month of December, present jobbers permit their supply of SHREDDED WHEAT to become exhausted and they do not desire to restock, National Biscuit Company reserves the right to fulfill customers' requirements by delivery through its agencies.

Very truly yours,

NATIONAL BISCUIT COMPANY,
SALES DEPARTMENT,
F. K. Montgomery, Vice President.

DEFENDANT'S EXHIBIT NO. 108.

THE DENVER REPUBLICAN:
SUNDAY MORNING, MARCH 11, 1894.

108
4/21/33

Ceres Greets You With Words of Good Cheer.

Ceres, the Goddess of Agriculture, says there is wealth of muscle and blood and brain, and the material for the reconstruction of your physical form and the enjoyment of perfect health to be found ONLY in pure, unadulterated, plain, nutritious food, and this Nature has lavishly provided.

If you would have bright eyes, rosy cheeks, good form, elasticity in step, avoid adulterated and mixed up messes. Improper food, and, therefore, improper nourishment, has caused the death of more than one-half the entire population of the world under the age of five years, and the other half to suffer the torments of the damned. Drunkards, lunatics, felons and other unfortunates fill the asylums, poor houses, hospitals and penitentiaries of the land because of improper food. The races are sick.

Absolutely pure food is manufactured only by THE CEREAL FOOD CO., 1632 Arapahoe street.

Shredded Whole Wheat Bread and Shredded Cereal Coffee fill every requirement of the human system. Come to the CEREAL RESTAURANT AND SALESROOM and try, and take home with you some of these perfect foods.

DEFENDANT'S EXHIBIT NO. 121.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

THE SHREDDED WHEAT COMPANY,
Complainant-Appellee,

—against—

THE HUMPHREY CORNELL COMPANY and FREDERICK H. TOWNE,
Defendants-Appellants.

Before:

WARD and HOUGH, Circuit Judges

and

LEARNED HAND, District Judge.

Appeal by the defendants from a decree of the District Court for Connecticut enjoining them from selling any shredded wheat biscuit without distinctly marking upon each biscuit that it was made by the defendant and was not the product of the plaintiff and from using any cartons having a picture of such biscuit without similar marking. The jurisdiction of the District Court depended upon diverse citizenship.

The plaintiff is a large corporation situated in Niagara Falls, New York, and engaged in the manufacture of the familiar article of food, known as "Shredded Wheat Biscuit", under a series of patents of which the original and basic is for a product and process. This patent was granted to one, Perky, the original promoter of the enterprise, in October, 1895, Number 548,086, and disclosed a process of boiling the original whole wheat berry, partially drying it, and

then forcing it between compression rollers, one or both of which had peripheral grooves which mashed the several parts of the berry into a heterogeneous soft paste. This paste was then forced out through combs or scrapers so as to emerge in thin filaments or shreds. The patent states that the wheat in this form is ready for food, though it may be baked in various ways.

In the actual manufacture of the biscuit, the pulpous shreds or filaments which proceed from the combs, as described in the product patent, are carried off upon a web or endless belt and are built up by a succession of layers until a strand of the desired thickness is secured. This strand is cut at given intervals by knives, thus making the longer edges of the biscuit, which through the pressure of the knives are matted and pressed together. The biscuits are then cooked in an oven which raises the top except at the longer edges which have been matted together, separating the shreds and making more obvious the interstitial texture of the whole. The baking also browns the top, and hardens the biscuit by drying; the color depends upon the manipulation of the heat and somewhat varies with the operator.

In September of the same year Perky took out a design patent for fourteen years upon a biscuit, shown in accompanying drawings and rectangular in plan view, the longer axis being about twice the shorter. The end view or section on the shorter axis was ovoid, the bottom or base of the biscuit being flatter than the top. The design also displayed the rough or filamented texture of the biscuit. It described as the leading feature of the design "a fibrous interstitial appearance, showing superimposed layers or irregular interlacing threads or filaments" in such wise that the threads are visible from the surface through the outer

layers. This design resulted necessarily from the actual process of manufacture above described.

The plaintiff's predecessor, the Cereal Machine Company, of Colorado, began the manufacture of this product in 1895, and in six years, 1901, it had already attained a wide sale, and has increased enormously until at the present time the sales amount to hundreds of millions of biscuits each year distributed in all states of the Union, in Europe, and elsewhere. Accompanying the increase of its business has been an outlay for advertising of many millions of dollars and in all sorts of forms, among which one of the most common has been pictures of the biscuit, either in black and white or in color.

The plaintiff packs the biscuit in cardboard cartons twelve to the box, and sells to the retailer or jobber in cases of thirty-six cartons for Three dollars and sixty cents each. The cartons have the words "Shredded Wheat Biscuit" upon them and the name of the plaintiff as manufacturer. In cases where the retailer sells to the consumer for family use the cartons go along with the biscuits, but a large part of the plaintiff's business consists in sales to hotels, restaurants, lunch-rooms and boarding houses, and the biscuits in such cases necessarily reach the ultimate consumer upon plates or saucers without any identifying mark. As a method of advertising, moreover, the biscuits are displayed in restaurants and lunch-rooms in large glass globes, without any mark or sign of their source.

The plaintiff, to show the unfair competition upon which the bill was based, was obliged to prove that the mere appearance of the biscuits when out of the cartons was so associated with the plaintiff that it had acquired a "secondary" meaning. To do this it called many witnesses, who swore either that they knew the biscuit as the plaintiff's or that they knew it as

coming from a single source to which they had become accustomed. These witnesses were jobbers, retailers and consumers. The testimony was uncontradicted, and the defendants do not dispute that the biscuit is so associated with the plaintiff or at least with some single source in the public mind.

The defendant company is only a jobber selling the biscuits of the real party in interest, the Ross Food Company, a corporation organized in 1914, by Ross, Valentine and Towne, formerly employees of the plaintiff for many years. The design patent having expired in 1909, and the product patent in 1912, these gentlemen conceived the project of manufacturing a biscuit identical in substance and appearance with the plaintiff's, and this they began to do in August, 1915. Their efforts had not as yet achieved much success when in October of that year, three years after the product patent had expired, this bill was filed.

The Ross Food Company markets its biscuits in cartons of ten each, of which it sells thirty-six to a case for two dollars and eighty cents. The carton is so totally dissimilar to that of the plaintiff that nothing need be said of it except that it contains a picture of two of the wheat biscuits, accurate not only as to its own contents, but necessarily identical with the plaintiff's biscuit. This picture has been used by retailers in the sale of the goods as an assurance that the contents of the carton was shredded wheat biscuit and the general appearance of the carton in one instance anyway was not sufficient to prevent confusion. The plaintiff also produced several witnesses who said either that they had innocently served the Ross Food Company's biscuit as shredded wheat or that they had received them as such.

The question litigated upon the trial was whether, assuming that the general appearance of the plaintiff's biscuit had acquired a "secondary" meaning, that

justified any relief in view of the design patent, and the defendant's undoubted right to make and sell the biscuits as it chose. Proof was taken as to the feasibility of wrapping each biscuit or tagging it with a distinctive mark, and as to the commercial possibility of making the biscuit in another form or of impressing some mark upon its top in the process of baking. So far as necessary this proof is considered in the opinion.

CHARLES K. OFFIELD and WILLIAM C. BREED
for the plaintiff
JAMES H. GRIFFIN and JOHN R. NOLAN
for the defendant.

LEARNED HAND, D. J.: Originally the plaintiff was able to sell its biscuits because the public came to like them; they liked their taste, they liked their appearance, they were converted by their supposititious dietetic value. The art of advertising spuriously reinforced a genuine demand by the power of reiterated suggestion. So far, however, the public was buying because it wanted, or had been made to think it wanted, the biscuit which the plaintiff produced and so far there was no ground for any kind of protection. We have recently considered this question in Crescent Tool Co. v. Kilborn & Bishop Co., decided Nov. 13, 1917, and there we held that the right to appeal to the public even in the minutest details of the plaintiff's design was open to all so long as the details had acquired no "secondary" meaning. The evidence shows without contradiction, however, that the long monopoly of the plaintiff has created, as indeed it was bound to create, a state of mind more complex than this, for when one has for a long time bought from a single source some article that one likes, either through conscious reflection or through mere conservative habit,

one is apt to impute to its source a part of its putati value. The plaintiff has at least shown that the pub has become accustomed to regard its familiar wh biscuit as emanating if not from it by name, at l from a single, though anonymous maker, and the se ond is as good for these purposes as the first, Saalfi Co. vs. G. & C. Merriam Co., 238 Fed. R. 1, 8. Tho the public may, therefore, buy the biscuit becaus has come to like it, the plaintiff still has a stake that other motive for buying, i. e., that it comes fr the accustomed maker. It is true that it has at tim been said that where the association of the make name with the article has arisen during the monopol of a patent, it is of slight value, Kellogg Toasted Co Flake Co. vs. Quaker Oats Co., 235 Fed. R. 657, 6 But while the public cannot of course exercise an preference between makers during the monopoly, th may come, and as we have said, it is almost inevitabl that they should come, to associate some of the sup posed merit of a successful article not only with th advantages due to the patented characteristics, bu with the supposed uniformity and reliability of it manufacture. If the public has come so to associat the machine with a single maker, he is, we think, e titled to some protection, as much when the associa tion be through mere appearances as when it b wrapped up in a name as in Singer Manufacturing Co. vs. June Mfg. Co., 163 U. S. 169. It is not neces sary that there should be a period after the expiration of the monopoly during which the field was open and the secondary meaning was acquired or preserved among actual or possible competitors, though the con trary is indeed suggested in G. & C. Merriam v. Saal field, 198 Fed. R. 369, 374.

We think, therefore, that prima facie the plaintiff stands with a genuine grievance, an "injuria" of ex

ctly the same kind as the owner of a trade-mark or a ell-established "make-up". The difficulty in the case t bar, as it generally does in such cases, lies in giving ny remedy which shall not take away the defendant's ndubitable rights. The original "secondary meaning" ases like Reddaway vs. Banham, (1896), App. C. 199, ll turned upon some meaning acquired by words of ommon speech, to which it cost the defendant little or othing to add some affix, so that his complaint that he as being deprived of rights in the public domain was hin, yet in strict principle he was correct, because rima facie he might use the common speech in any ontext. The courts were necessarily in fact compromising between two conflicting rights, of which one ad no substantial value.

It is in cases where the connotation of origin arises ot from verbal description, but only from the appearance of the article, that the trouble arises in application, because the appearance must in some way be changed, or the article must be wrapped or marked. Thus has arisen the principle often applies in this court that minor, or "non-functional", changes in appearance may be required, so long as the substantial elements are left in the public domain, Enterprise Mfg. Co. vs. Landers, 131 Fed. R. 240, Yale & Towne Mfg. Co. v. Alder, 154 Fed. R. 37. In the same class stand cases like Fox vs. Hathaway, 199 Mass. 99, and Fox vs. Glynn, 199 Mass. 344, Coca Cola Co. vs. Gay-Ola Co., 200 Fed. R. 720, Walker vs. Grubman, 222 Fed. R. 478. Indeed, this principle has been pressed very far in this court, Rushmore vs. Manhattan Screw & Stamping Co., 163 Fed. R. 999, Lovell, McConnell Mfg. Co. v. American Ever Ready Co., 195 Fed. R. 931, Rushmore vs. Badger Brass Mfg. 198 Fed. R. 379. The first Rushmore case was recognized at the time as trenching hard upon the other limit in application, which is that where the "second-

ary meaning'' is bound up in elements of the appear-
ance which cannot be changed without cutting off th
defendant's substantial right to make and sell that kin
of goods in question, the plaintiff must suffer the resul
ing confusion. These are the converse of the "no
functional'' cases, Daniel vs. Electric Hose & Rubb
Co., 231 Fed. R. 827, Marvel Co. vs. Pearl, 133 Fed. R
160, Diamond Expansion Bolt Co. vs. U. S. Expansi
Bolt Co., 177 App. Div. 554, Fairbanks vs. Jacobus, 1
Blatchf. 337, Heide vs. Wallace, 135 Fed. R. 346, Globe
Wernicke Co. vs. Fred Macey Co., 119 Fed. R. 69
Flagg Mfg. Co. v. Holway, 178 Mass. 83. Under the
guise of protecting against unfair competition we must
be jealous not to create perpetual monopolies.

We do not see any possible change in the appear-
ance of the biscuit itself which would be of enough
service to the plaintiff to justify its imposition upon
the defendant. Concededly, variation could be enforced
only in its form, color or size. As to form, the plain-
tiff appears to us finally concluded by its own design
patent. Whether or not the evidence might have
allowed us to prescribe some variation in the form had
that form been only the result of the plaintiff's original
adoption, we do not say; Fox vs. Hathaway, supra, sug-
gests that we might have found a way out. But the
plaintiff's formal dedication of the design is conclu-
sive reason against any injunction based upon the ex-
clusive right to that form, however necessary the plain-
tiff may find it for its protection. As to color also we
feel ourselves limited, because, while the shade of brown
depends upon the baking, the plaintiff's own biscuits
vary within appreciable limits and to require the de-
fendant to adopt a shade different enough for commer-
cial distinction would be to force them to bake their
biscuits so that they would be repellant to most tastes.
It would, in so far as we can see, in effect, either ter-

inate or hopelessly cripple any competition between e two parties.

With size it is perhaps different, for we are not tisfied that the added cost of turning out a smaller iscuit would be substantial, per pound of shredded heat. That might indeed have to await experiment, it appeared that a mere change in size would give y effective relief to the plaintiff. There is no reason suppose that it would, and there is every reason to elieve that it would greatly embarrass the defendants. o increase the size of the biscuit would make it impos- ible to put two in the ordinary saucer; to decrease it o that three could be sold for the present price of two ould obviously increase the cost of that part of the anufacture, after the wheat is shredded, by one-half gain, or nearly. We think that such a requirement fanciful as relief and too onerous upon the defendant.

There remains, therefore, as the only practicable elief, some mark impressed upon the surface of the iscuit in the baking, or some proper wrapping or tag, ith an adequate legend. In the imposition of such a equirement, we should observe the same limitation as ourts have by general agreement observed in the "non- nctional" cases. That is, we should be equally jeal- us to assure the defendant's right freely to compete the market with the first comer. The question is lways commercial; we ought not to impose any bur- ens which either by changing the appearance of the rticle itself, or by imposing expense upon its produc- ion, will operate to give the plaintiff such advantage the market as will substantially handicap his com- etitors. On the other hand Judge Hough believes hat once the right is assured to the defendant of mak- g the article in all its substantial elements, that is all e can demand. If the similarity between the goods ust remain such as to create confusion, it is irrelevant

that the cost of wrapping, marking or tagging them may impose too great a burden upon the defendant to allow his continuing in the market. His manufacture, as it exists, is a fraud and all elements of deception must be removed before it can be permitted to continue.

In the case at bar it remains ambiguous upon this record just what are the commercial possibilities of marking, wrapping or tagging the defendant's individual biscuits. The evidence is meagre as to impressing a mark upon the top of the biscuits during the baking; all we can find is that of Valentine. At one place he says that it would be practicable to impress a cross upon the biscuit while soft that would endure and the cost would be slight; later he says that when the biscuit rose in the baking the mark would disappear or the biscuit would be "deformed". We think that the "deformity" is just what the plaintiff is entitled to require, not a deformity, it is true, which would affect the design dedicated by the design patent, but enough to mark distinctively the biscuit itself. After a careful scrutiny of this record as it stands we see no reason to suppose that such a requirement is not possible.

The evidence as to wrapping or tagging each biscuit is if possible still more meagre. Ross swears that the paper alone for wrapping would cost twenty-five cents per case, raising the cost from two dollars and eighty cents to three dollars and five cents. How far the cost of labor and breakage would increase this, he does not know. A paper tag or band if put on before baking would be destroyed, and if put on afterwards must be pasted. What the cost of pasting would be, does not appear, nor whether a paste could be obtained which would be unobjectionable upon an article of food. It would certainly appear as though each of these would be a reasonable possibility.

The record appears neutral in respect of these matters, and in the view I take personally all depends upon

whose is the burden to show that there is or is not a commercially practicable means to discriminate. I think that since the plaintiff has shown that the appearance of its biscuit has acquired a "secondary" meaning and that it is physically possible to attach or impress upon the defendant's biscuit a distinguishing mark, the defendant has the burden of showing that such a mark will impose upon him a commercial handicap which will practically take from him his free right to compete. I therefore agree with Judge Hough that the defendant should be compelled to put some distinguishing mark upon each biscuit sold to any final purchaser out of the carton. This mark need not be what the District Court required, that is, a statement that the biscuit was made by the defendant, and not by the plaintiff, but something sufficiently obvious to distinguish the two, as a cross, a line, or a letter, if the mark be impressed, or a suitable legend, if paper be fastened to the biscuit.

Such a requirement does not, however, apply to those biscuits which reach the final purchaser in cartons, that is, to those which are not sold to hotels, restaurants, lunch-rooms and boarding houses. The defendant's cartons are so different from the plaintiff's that no confusion is possible. ~~Yet as the point has been so much pressed that the picture of the biscuits on the cartons has been the means of confusion or of deception, we agree that out of abundant caution the defendant should add below that picture in large type the legend, "Made by the Ross Food Company."~~

I think that as respects the marking, wrapping or tagging of individual biscuits the case is such that only commercial experience can finally tell what are the possibilities. I would therefore add to the requirements imposed above a probationary period within which the defendant must try in good faith to accommodate itself to this necessity. This portion of its trade is less than ten per cent. and it cannot prove a for-

midable obstacle for six months to require it to comp
provided that at the end of that time it have leave
demonstrate that compliance is equivalent to destru
tion of its right of free competition. The burden
be upon it to show that it has exhausted all the pos
bilities of effective distinction between the biscuits,
that each involves an expense which will not permit
to maintain that part of its trade without a handi
that forbids any assurance of a reasonable profit
a continued competition in that line. While Jud
Hough does not think that such a probationary peri
is necessary, since the result would be irrelevant,
agrees to a disposal of the case upon those terms.

The decree will, therefore, be modified as follow
first, by relieving the defendants of any injunction
the sale of such biscuits as shall reach the last pu
chaser in cartons, ~~except that at the base of the pict~~
H. G. W. ~~of biscuits on the carton shall appear the legen~~
~~"Made by Ross Food Co."~~ Second, all biscuits reach
ing the last purchaser outside of their cartons mu
either bear a letter, cross or other plain symbol, im
pressed in their substance, or have fastened upon them
a wrapping, tag or band, stating that they are made by
the Ross Food Company. Third, the defendant at the
end of six months may apply to the District Court to be
relieved of the second requirement upon showing that
after a bona fide trial of all possible expedients it can
not comply with the second provision except at an
expense which would make impossible any continued
competition in the business of selling biscuits outside
the cartons with any assurance of reasonable profit.

As so modified the decree is affirmed without costs.

A true copy,

WM. PARKIN,
(Seal) Clerk

DEFENDANT'S EXHIBIT NO. 122.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

No. 145, October Term 1917.

THE SHREDDED WHEAT COMPANY,
Complainant-Appellee,
against
THE HUMPHREY CORNELL COMPANY and FREDERICK H. TOWNE,
Defendants-Appellants.

Appeal from the District Court of the United States for the District of Connecticut.

PETITION OF DEFENDANTS-APPELLANTS FOR RE-HEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioners, The Humphrey Cornell Company and Frederick H. Towne, defendants-appellants, in the above-entitled cause, respectfully show:

(1) That as appears from the majority opinion (per Judges Hough and Hand) filed February 20, 1918, the fact was apparently overlooked by the Court that defendants' cartons bear thereon, in large distinct type, below each picture of the biscuit, the legend:

Manufactured by
THE ROSS FOOD CO., INC.,
Batavia, N. Y., U. S. A.; and

(2) That, therefore, there was inadvertently included in the order of modification of the decree of the District Court, respecting the sale of defendants' biscuits in cartons, the requirement:

. . . that at the base of the picture of biscuits on the carton shall appear the legend: "Made by Ross Food Co."

The express language of the Court is:

"The decree will, therefore, be modified as follows: first, by relieving the defendants of any injunction in the sale of such biscuits as shall reach the last purchaser in cartons, except that at the base of the picture of biscuits on the carton shall appear the legend: 'Made by Ross Food Co.'"

. . .

The portion of the opinion forming the basis of the foregoing requirement as to the addition of the legend "Made by the Ross Food Co." is found at page 12 of the typewritten opinion, and reads:

"The defendant's cartons are so different from the plaintiff's that no confusion is possible. Yet as the point has been so much pressed that the picture of the biscuits on the cartons has been the means of confusion or of deception, we agree that out of abundant caution the defendant should add below that picture in large type the legend, 'Made by the Ross Food Company.'"

The effect of leaving in the opinion and order of the Court, the requirement that the defendants' cartons shall bear the legend "Made by the Ross Food Co.," is to convey the erroneous impression that defendants' cartons did not heretofore have upon them words designating the biscuits illustrated thereon and contained therein as a product manufactured by The Ross Food Co.; and it leaves the meaning of the Mandate in doubt before the District Court, and may thus occasion difficulty in the settlement of the decree in that Court, with attendant delay and expense. Moreover should the District Court insist upon defendants altering the language on their cartons, i. e., changing

"Manufactured" to Made, the defendants will be greatly embarrassed thereby, in that there are many thousands of the cartons on hand.

WHEREFORE your petitioners pray that a rehearing of this cause may be granted on the matters hereinbefore referred to at such time as the Court may appoint, that the Court may then consider and determine the propriety of modifying the said opinion and the directions therein relative to the marking of defendants' cartons, and that such other and further relief may be had as to this Court may seem just and meet and the circumstances of the case may require.

The Humphrey Cornell Company
Frederick H. Towne
Defendants-Appellants
and Petitioners.
By John R. Nolan
James H. Griffin
Their Attorneys and
Counsel.

Dated March 5, 1918.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

I, John R. Nolan, of counsel for The Humphrey Cornell Company and Frederick H. Towne, the petitioners above named, do hereby certify on oath, that in my opinion the grounds stated in the foregoing petition for rehearing are meritorious and sufficient, and that said petition is well founded in point of law; and further that the said petition is made in good faith and not for the purpose of delay.

John R. Nolan

Sworn to and subscribed before me this fifth day of March, 1918.

B. Chandler Snead.
(Notary's seal) Notary Public, Kings County.
Certificate Filed New York County.

Endorsed.—

UNITED STATES CIRCUIT COURT OF APPEALS
SECOND CIRCUIT.

Filed March 7, 1918.

WILLIAM PARKIN, Clerk.

A true copy,

(Sgd.) WM. PARKIN,
(Seal) Clerk.

DEFENDANT'S EXHIBIT NO. 126.

UNITED STATES OF AMERICA, SS:

The President of the United States of America,

To the Honorable the Judges of the District Court of the United States for the District of Connecticut.

GREETING:

WHEREAS, lately in the District Court of the United States for the District of Connecticut, before you, or some of you, in a cause between Shredded Wheat Company and Humphrey Cornell Company and another, a decree was entered in the office of the clerk of said court on the 25th day of May, 1917, in the words and figures following, to-wit:—

"This cause having duly come on to be heard upon the issues raised by the pleadings herein and Charles K. Offield, Esq., William C. Breed, Esq., and Frederick I. Allen, Esq., having been heard in behalf of complainant; and John R. Nolan, Esq., James H. Griffin, Esq., David Tice, Esq., and Arthur Keefe, Esq., having been heard in behalf of defendants and due consideration having been had, it is now upon motion of George D. Seymour, solicitor for complainant,

Ordered, adjudged and decreed

I. That complainant or its predecessors have for upwards of twenty three years past been engaged in the manufacture and sale of a whole wheat biscuit of a particular form shape size and color; and during all said period until the acts of these defendants have been the sole manufacturer of a whole wheat biscuit of such form shape size color and character,

II. That the said biscuit as manufactured and sold by complainant in such form shape size and color has become widely and universally known as the product of complainant and known to the public under the name of Shredded Wheat or Shredded Wheat Biscuit, which said words were originally applied to said product by complainant.

III. That the said form shape size color of said biscuit have come through long and exclusive use and advertisement to have the meaning and significance only of the product and biscuit of the complainant and are not functional or essential to the manufacture of a whole wheat biscuit.

IV. That the defendants have infringed upon and violated the rights of complainant in selling a whole wheat biscuit manufactured by The Ross Food Company simulating, copying and imitating the form shape size and color of the complainant's biscuit, and have unfairly traded therein by the marketing and sale of the said biscuit to the injury of the complainant and the deception of the public.

V. That the defendants have futher infringed upon and violated the rights of the complainant by placing upon their cartons a pictorial representation of complainant's biscuit to the injury of complainant and the deception of the public.

VI. That the Ross Food Company the manufacturer of said biscuit has assumed the expense of defending this action; and that the said corporation and Andrew Ross president thereof, and Ralph Valentine Superintendent thereof were present and participated in the trial of the issues herein in behalf of defendants and are privies to the judgment of this court.

VII. That an injunction issue in accordance with the opinion of this court filed herein, and under the seal of this court restraining and enjoining the defendants The Humphrey Cornell Company and Frederick H. Towne, their privies agents

servants employees attorneys and representatives from manufacturing selling or marketing a whole wheat biscuit of the same form shape size color and appearance as that of complainant's biscuit or in imitation thereof unless there is clearly and unmistakably marked on each biscuit words stating that such biscuit is made by the defendants or other manufacturer and is not the product of the Shredded Wheat Company, the complainant herein; and that defendants their privies, agents, servants, employees, attorneys and representatives are further enjoined and restrained from selling or marketing or using cartons or containers for a wheat biscuit bearing thereon a pictorial representation of the shredded wheat biscuit manufactured by the complainant or in imitation thereof, unless there is clearly and unmistakeably on each representation of such biscuit words stating that said biscuit is made by the defendants or other manufacturer and is not the product of the Shredded Wheat Company, the complainant herein.

VIII. That the evidence shows that the sales of the defendants The Humphrey Cornell Company and Frederick H. Towne are so small in amount as not to justify the expense of a reference to a master for an accounting, and this decree is therefore made final.

IX. That the complainant is entitled to recover against the defendants the costs and disbursements of this action the same to be taxed by the clerk of this court and execution issue therefor.

Dated New Haven, Connecticut, May 25, 1917.

EDWIN S. THOMAS, U. S. J."

as by the inspection of the transcript of the record of the said Court, which was brought into the United States Circuit Court of Appeals for the Second Circuit, by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And, Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and seventeen the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record and was argued by counsel:

On consideration whereof, IT IS HEREBY

ORDERED, ADJUDGED AND DECREED, That the decree of said District Court be and it hereby is modified in accordance with the opinion of this court and as so modified is affirmed without costs.

You therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the decision of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 4th day of March, in the year of our Lord one thousand nine hundred and eighteen.

WILLIAM PARKIN

(Seal) Clerk of the United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA
DISTRICT OF CONNECTICUT } *ss:*

I, C. E. Pickett, Clerk of the United States District Court in and for the District of , do hereby certify that the annexed and foregoing is a true and full copy of the original Mandate filed March 5, 1918 in the case of Shredded Wheat Co. vs Humphrey Cornell Co. and another, No. 1436 Equity now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at New Haven this 9th day of July, A. D. 1935.

(Seal)

(Sgd.) C. E. PICKETT,
Clerk.

DEFENDANT'S EXHIBIT NO. 222.

Defendant's Exhibit No. 222

Clerk

NATIONAL BISCUIT COMPANY
"Uneeda Bakers"

Denver, Colo.,
June 2nd, 1932.

TO ALL JOBBERS:

We have put out a smaller size Shredded Wheat biscuit in Individual Cartons, for restaurant use, and these are listed at $1.35 per case of 72, your regular discount applies.

We will continue to carry our regular size biscuit in Individual Cartons at $1.60 per case of 72.

Our reason for this change has been the fact that there has been a smaller biscuit put out by one of our competitors and some of the restaurant trade have been confused with the thought that our price was out of line.

In ordering out this merchandise please designate "Small Size" for the new carton and "Large Size" for the standard carton. We know, there are a great many restaurants who do not care to change because the consumer in general is used to the larger size biscuits but we want your salesmen to be in line with competition on price, and if this new package is used only when needed it will serve its purpose.

We will see that our salesman shows you samples.

Yours very truly,

NATIONAL BISCUIT COMPANY.

C. L. Race

Manager.

CKB:R

P.S, SUMMER HEAT - COOLING DRINKS - SLIM JIM BUTTER PRETZELS.

A-110

DEFENDANT'S EXHIBIT NO. 234.

see Defendant's Exhibit No. 234

DEPARTMENT OF COMMERCE H. C. Mahaffey Jr.
UNITED STATES PATENT OFFICE Clerk

To all persons to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the File Wrapper and Contents, in the matter of the

Trade-Mark Registered by

The Shredded Wheat Company,

January 15, 1924, Number 178,725.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twentieth day of May, in the year of our Lord one thousand nine hundred and thirty-three and of the Independence of the United States of America the one hundred and fifty-seventh.

ATTEST:

C. W. Shutter
Acting Chief of Division.

Thomas E. Robertson
Commissioner of Patents.

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188326 [redacted]

SERIAL NO. (Series of 1923) 1923 (RECORD BOOK)

188329

TRADE-MARK No.

TRADE-MARK. (Class 46, Foods and Ingredients)

ACT OF MARCH 19, 1920.

Name The Shredded Wheat Company

of Niagara Falls

County of

State of New York

For Biscuit or Crackers

Petition	Oct 31, 1923.
Declaration	Nov 14, 1923.
Statement	Oct 31, 1923.
Specimens	" " 1923.
Drawing	" " 1923.
Fee $10.	Oct 31, 1923.
Appl. filed complete	Nov 14, 1923.

Examined for Publication REGISTER B, 19

Examined for Registration [illegible] Dec 4, 1923

Notice of Allowance DEC 11 1923, 19

Registered JAN 15 1924, 19

Representative

Attorney E. W. Anderson & Son, 1100 9th St. N.W., City

Associate Attorney

Merchandise Biscuits or crackers.

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Serial No. 188,329 Paper No.

Application

PETITION.

To the Commissioner of Patents:

The Shredded Wheat Company, a corporation duly organized under the laws of the State of New York, and located and doing business at Niagara Falls, New York, has adopted and used the trade-mark shown in the accompanying drawing for biscuit or crackers, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the act of March 19, 1920. The trade-mark has been continuously used and applied to said goods in applicant's business since January 1st, 1894. The trade-mark is applied or affixed to the goods, or to the packages containing the same, by placing thereon a printed label on which the trade-mark is shown, or by printing the trade-mark directly on the package. The mark has been in bona fide use for not less than one year in interstate commerce by the applicant. E.W.Anderson (George Manne Anderson) of Washington, D.C., are appointed attorneys for the prosecution of this application.

The Shredded Wheat Company,

[by

88329-1

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Trade-Mark
1 5 1923
U. S. Patent Office

868

DECLARATION.

State of New York)
(SS:
County of Niagara)

Frank J. Morin, being duly sworn, deposes and says: that he is the Secretary of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade mark is used by said corporation in commerce among the several states of the United States and between the United States and foreign nations or indian tribes; that the description and drawing presented truly represent the trade mark sought to be registered; and that the specimens show the trade mark as actually used upon the goods.

Frank J. Morin

Subscribed and sworn to before me, a notary public, this 12th day of January, 1923.

Notary Seal:

Notary Public

188329-2

Not entered

DECLARATION.

State of New York }
County of Niagara } SS:

Frank L. Wollin, being duly sworn, deposes and says that he is the President of the corporation, the applicant named in the foregoing Statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade mark sought to be registered; that no other person, form, corporation or association, to the best of his knowledge and belief, has the right to use said trade mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade mark is used by said corporation in commerce among the several States of the United States and between the United States and foreign nations or indian tribes; that the description and drawing presented truly represent the trade mark sought to be registered; and that the specimens show the trade mark as actually used upon the goods.

Frank L. Wollin

Subscribed and sworn to before me, a notary public, this 12th day of January 1923.

[illegible]

188329-3

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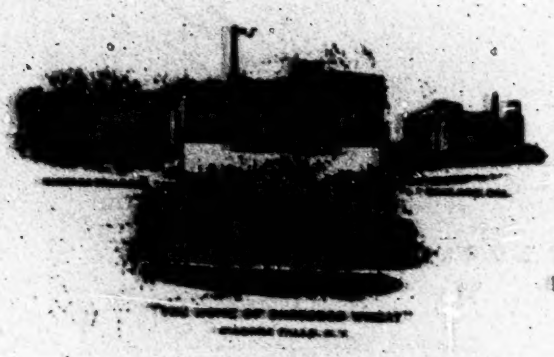
#1
Letter to file



THE
SHREDDED WHEAT COMPANY
NIAGARA FALLS, N.Y.

F. L. Mowat,
TREASURER

October 18th, 1923.

Make special

Examiner of Trade Marks,
United States Patent Office,
Washington, D. C.

Dear Sir:

It is requested that this application be made special for the reason that it is to form the basis of foreign registration in the following countries:

Cuba	Sweden
Brazil	Denmark
Poland	Switzerland
Germany	Portugal
Norway	Spain

Yours very truly,

THE SHREDDED WHEAT COMPANY

Secretary & Treasurer.

188929-4

23-34. Form IX

DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE
WASHINGTON

Sir:-

Receipt is acknowledged of your incomplete application for registration of a trade-mark, the title of which is

filed [illegible], accompanied by

Petition and Statement
Declaration
Drawing
Fee of $10.00
Specimens

This application is incomplete because the officer before whom the declaration was made did not affix his official seal thereto. A new declaration is required.

This application should be completed within one year from the above date.

Very respectfully,
Thomas E. Robertson
Commissioner of Patents.

188329-5

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OFFICIAL USE ONLY
THE COMMISSIONER OF PATENTS
WASHINGTON, D. C.

S-186

Kr No. 188,329

DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE
WASHINGTON

The Shredded Wheat Company

Sir:

Your APPLICATION for REGISTRATION OF TRADE-MARK

For

Biscuits or crackers

has been examined and allowed.

The CERTIFICATE OF REGISTRATION will be issued and forwarded to you as soon as practicable in due order of business.

Very respectfully,

Thomas E. Robertson
Commissioner of Patents

E. W. Anderson & Son,
700 9th St., N. W.,
Washington, D. C.

188329-6

Registered Jan. 15, 1924. Trade-Mark 178,725.

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

ACT OF MARCH 19, 1920.

Application filed November 14, 1922. Serial No. 186,290.

SHREDDED WHEAT

STATEMENT.

To the Commissioner of Patents:

The Shredded Wheat Company, a corporation duly organized under the laws of the State of New York, and located and doing business at Niagara Falls, New York, has adopted and used the trade-mark shown in the accompanying drawing, for BISCUIT OR CRACKERS, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the act of March 19, 1920. The trade-mark has been continuously used and applied to said goods in applicant's business since January 1st, 1894. The trade-mark is applied or affixed to the goods, or to the packages containing the same, by placing thereon a printed label on which the trade-mark is shown, or by printing the trade-mark directly on the package. The mark has been in bona fide use for not less than one year in interstate commerce by the applicant. E. W. Anderson & Son (George Manne Anderson) of Washington, D. C., are appointed attorneys for the prosecution of this application.

THE SHREDDED WHEAT COMPANY,
By F. L. MONIN,
Secretary.

9-493 CLASSIFICATION

1923

CONTENTS:

TRADE-MARKS.
Class 46. Foods and ingredients of foods

Application for ~~paper~~ Registered.

1. Letter to Pinkus Abrams - Oct 31 1923
2. .....
3. .....
4. .....
5. .....
6. .....
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11. .....
12. .....
13. .....
14. .....

TRADE-MARK: Claim, Used since Jan 1, 1894.

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188329-1

DEFENDANT'S EXHIBIT NO. 235.

Defendant's Exhibit No. 235

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE

To all persons to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the File Wrapper and Contents, in the matter of th

Trade-Mark Registered by

The Shredded Wheat Company,

May 25, 1926, Number 213,456.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twentieth day of May, in the year of our Lord one thousand nine hundred and thirty-three and of the Independence of the United States of America the one hundred and fifty-seventh.

ATTEST:

Acting Chief of Division.

Thomas E. Robertson
Commissioner of Patents.

wk

227479

TRADE-MARK No. 227479

TRADE MARKS:
AND &c. FOODS AND INGREDIENTS OF FOODS

1926 REGISTERED MAY 25 1926

ACT OF MARCH 19, 1920.

Name THE SHREDDED WHEAT COMPANY

of NIAGARA FALLS

State of NEW YORK

For BISCUIT, CRACKERS, AND CEREAL FOODS, TO BE

Parts of Application filed

Petition	, 1926
Declaration	, 1926
Statement	, 1926
Specimens	, 1926
Drawing	, 1926
Fee	, 1926

Application filed complete F.B. 5, 1926

Examined and Passed for Publication REGISTER-B

Published in The Official Gazette

Examined for Registration

Notice of Allowance April 30 1926

Application for Renewal Filed

Examined for Renewal

Renewal

Representative

Attorney

Associate Attorney

Merchandise Biscuits, crackers and cereal foods cooked or prepared for consumption.

PENNIE, DAVIS, MARVIN AND EDMONDS
COUNSELLORS AT LAW
165 BROADWAY
NEW YORK

WASHINGTON OFFICES
WASHINGTON LOAN & TRUST BLDG
CABLES PENANGOLD New York
WESTERN UNION CODES
CORTLANDT 0057

February 16, 1926.

10-P
B2718

Honorable Commissioner of Patents,
Washington, D. C.

S i r:

We are enclosing herewith, for filing, an application by The Shredded Wheat Company for registration of the trade mark "Shredded Wheat" for biscuit, crackers, and cereal foods cooked or prepared for consumption, including one sheet of drawings, five specimens of the mark as actually used upon the goods, and our check for $10.00 to cover the filing fee.

Very respectfully,

Pennie, Davis, Marvin & Edmonds

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10-P
32718

"Shredded Wheat"

227477

TM
456

PETITION AND STATEMENT

TO THE COMMISSIONER OF PATENTS:

THE SHREDDED WHEAT COMPANY, a corporation duly organized under the laws of the State of New York, and located and doing business at Niagara Falls, New York, has adopted and used the trade-mark shown in the accompanying drawing, for biscuit, crackers, and cereal foods cooked or prepared for consumption, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the Act of March 19, 1920. The trade-mark has been continuously used and applied to said goods in applicant's business since January 1, 1894. The trade-mark is applied or affixed to the goods, or to the packages containing the same, by placing thereon a printed label on which the trade-mark is shown, or by printing the trade-mark directly on the package. The mark has been in bona fide use for not less than one year in interstate commerce by the applicant. Applicant is the owner of trade-mark registration No. 178,725, granted January 16, 1934.

The undersigned hereby appoints William H. Davis, Arba B. Marvin, Dean S. Edmonds, Frank E. Barrows, A. Brown Morton, Merton W. Sage, and Willis H. Taylor, Jr., (constituting the firm of Pennie, Davis, Marvin & Edmonds, 165 Broadway, New York City, Registration No. 10,839), and each of them, its attorneys, to prosecute this application for registration, with full powers of substitution and revocation to make alterations and amendments therein, to receive the Certificate of Registration, and to transact all business in the Patent Office connected therewith.

THE SHREDDED WHEAT COMPANY,

By [signature]
Treasurer.

227479-2

10-2
92218

AFFIDAVIT

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

CHARLES H. BROWN, JR., being duly sworn, deposes and says that he is the Treasurer of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other firm, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States; that the description and drawing presented truly represent the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

SUBSCRIBED AND SWORN TO before me, a notary public, this 12th day of [illegible], 1926.

Notary Public.

227479-3

Trade-mark Division, Room 164
Address only
"The Commissioner of Patents,
Washington, D.C."
and not any official by name

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

Paper No. 1

All communications relating to this application should give the serial number, name of client, and name of the applicant

Please find below a communication from the EXAMINER in charge of this application

Thomas E. Robertson
Commissioner of Patents

Pennie, Davis, Marvin & Edmonds,
185 Broadway,
New York, N.Y.

Applicant: The Shredded Wheat Company,
Ser. No. 227,479
Filed Feb. 18, 1926
For Trade Mark

March 18, 1926

The term "and cereal foods cooked or prepared for consumption" is indefinite. The particular character of the goods covered by this term should be disclosed.

Complete specimens as actually used on each variety of applicant's goods should be furnished. Those on file are for "Biscuits" only.

O.K.

As presented, registration is refused.

W. T. McCracken

(Shredded Wheat)

4-AA
P-1716

IN THE UNITED STATES PATENT OFFICE

Application of THE SHREDDED WHEAT COMPANY
Serial No. 227,479
Filed February 18, 1926
For Trade Mark SHREDDED WHEAT.

New York, N.Y., April 20, 1926.

Honorable Commissioner of Patents,
Washington, D. C.

S i r:

We beg to submit the following in reply to the comment in the Examiner's letter dated March 18, 1926.

We respectfully request that the objection to the characterization of the goods on which the mark is used be withdrawn. This characterization was adopted after careful consideration of a somewhat unusual situation and seems to us to be needed to insure adequate protection of applicant's Trade Mark rights. The article on which the mark is used is the well known shredded wheat biscuit, known everywhere and commonly referred to as a biscuit. This product is in some respects like a cracker, and in fact this applicant makes a product of the same general nature as the shredded wheat biscuit, but much thinner and more compact and in those respects much more like a cracker. However, in the actual conduct of the applicant's business its shredded wheat biscuit competes with prepared cereal foods, such as are commonly referred to as breakfast foods. It does not compete to any substantial extent with products of the kind commonly sold as biscuits and crackers. In other words, though the product is called a biscuit it competes to an inconsiderable extent with

227479-4

the products of bakers as that term is commonly used, and to almost the whole extent with prepared cereal or breakfast foods.

This seems to us to require that the Certificate of Registration name biscuits as the goods on which the mark is used because applicant's goods are commonly referred to as biscuits, and also crackers because applicant's product is similar to crackers and may readily be made up in a form even more closely similar to crackers, and also cereal foods because applicant's product, even though otherwise referred to, is in fact a prepared cereal food and competes with such food in the trade.

These considerations seem to us to fully justify the use of the characterization of applicant's goods as it appears in the statement, and we ask, therefore, that the objections presented in the first two paragraphs in the Examiner's letter be withdrawn.

The matters referred to in the foregoing were discussed at some length with the Examiner in charge of Trade Marks, and we wish to express our appreciation of the courtesy extended to us at that interview.

Respectfully submitted,

Attorneys for Applicant.

227479-5

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ADDRESS ONLY THE COMMISSIONER OF PATENTS WASHINGTON, D. C.

Jat 1906 No. 227479

DEPARTMENT OF COMMERCE

UNITED STATES PATENT OFFICE

WASHINGTON

The Shredded Wheat Company,

MAILED

MAY 1906

Sir:

Your APPLICATION for REGISTRATION OF TRADE-MARK for

Biscuits, crackers and cereal foods cooked or prepared for consumption,

REGISTERED

has been examined and allowed.

The CERTIFICATE OF REGISTRATION will be issued and forwarded to you as soon as practicable in due order of business.

Very respectfully,

Thomas E. Robertson
Commissioner of Patents.

Pennie, Davis, Marvin & Edmonds,
185 Broadway,
New York, N.Y.

227479-6

Registered May 25, 1926. Trade-Mark 213,455

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

ACT OF MARCH 19, 1920.

Application filed February 18, 1926. Serial No. 227,473.

SHREDDED WHEAT

STATEMENT.

To the Commissioner of Patents:

The Shredded Wheat Company, a corporation duly organized under the laws of the State of New York, and located and doing business at Niagara Falls, New York, has adopted and used the trade-mark shown in the accompanying drawing, for BISCUITS, CRACKERS, AND CEREAL FOODS COOKED OR PREPARED FOR CONSUMPTION, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods and requests that the same be registered in the United States Patent Office in accordance with the act of March 19, 1920. The trade-mark has been continuously used and applied to said goods in applicant's business since January 1, 1892. The trade-mark is applied or affixed to the goods or to the packages containing the same by placing thereon a printed label on which the trade-mark is shown or by printing the trade-mark directly on the package. The mark has been in bona fide use for not less than one year in interstate commerce by the applicant. Applicant is the owner of trade-mark registration No. 178,725, granted January 15, 1924.

The undersigned hereby appoints William H. Davis, Arba B. Marvin, Dean S. Edmonds, Frank E. Barrows, W. Brown Morton, Merton W. Sage, and Willis H. Taylor, Jr., (constituting the firm of Pennie, Davis, Marvin & Edmonds, 165 Broadway, New York city, registration No. 10,839), and each of them, its attorneys, to prosecute this application for registration, with full powers of substitution and revocation, to make alterations and amendments therein, to receive the certificate of registration, and to transact all business in the Patent Office connected therewith.

THE SHREDDED WHEAT COMPANY.
By CHAS. H. BROWN, Jr.,
Treasurer.

CLASSIFICATION

1926

CONTENTS:

[illegible] papers.

1. [illegible]
2. Letter - Upon 21.1926
3.
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TRADE-MARK:-

Claims use since

Jan. 4 1894

DEFENDANT'S EXHIBIT NO. 236.

TRADEMARK REGISTRATIONS OF PLAINTIFF.

Renewed.

The Shredded Wheat Co., a corporation of New York, assignee.

TRADE-MARK

No. 52,858. REGISTERED MAY 22, 1906.

THE NATURAL FOOD COMPANY.

BISCUIT OR CRACKERS.

APPLICATION FILED JUNE 8, 1906.

WITNESSES
George H. Anderson.

PROPRIETOR
The Natural Food Company
by E. W. Anderson
its Attorney

Renewed.

The Shredded Wheat Co., a corporation of New York, assignee.

UNITED STATES PATENT OFFICE.

THE NATURAL FOOD COMPANY, OF NIAGARA FALLS, NEW YORK

TRADE-MARK FOR BISCUIT OR CRACKERS.

No. 52,880. Statement and Declaration. Registered May 22, 1906.

Application filed June 8, 1905. Serial No. 7,888.

STATEMENT.

To all whom it may concern:

Be it known that THE NATURAL FOOD COMPANY, a corporation duly organized under the laws of the State of New York, and located in the city of Niagara Falls, in the county of Niagara, in said State, and doing business at the corner of Buffalo avenue and Fourth street, in said city of Niagara Falls, has adopted for its use a trade-mark, of which the following is a description.

The trade-mark consists of the conventional representation of the mythological character "Ceres," represented as holding a lighted torch in one hand and a sheaf of wheat in the other.

This trade-mark has been continuously used in the business of said corporation since January 1, 1894.

The class of merchandise to which the trade-mark is appropriated is bakers' ware or bread, and the particular description of goods comprised in said class upon which said trade-mark is used is biscuit or crackers.

The trade-mark is usually displayed on the packages containing the goods by printing the same on the package.

[L. S.] THE NATURAL FOOD COMPANY,
By BIRNEY L. HERRICK,
Secretary.

DECLARATION.

State of New York, county of Niagara, ss:

BIRNEY L. HERRICK, being duly sworn, deposes and says that he is secretary of the corporation, THE NATURAL FOOD COMPANY, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person or firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form, or in any such near resemblance thereto as might be calculated to deceive; that the said trade-mark is used by the said corporation in commerce among the several States of the United States and particularly between the State of New York, and the State of Illinois, and between the United States and foreign nations, and particularly with Great Britain, and that the description, drawing, and facsimiles presented truly represent the trade-mark sought to be registered.

BIRNEY L. HERRICK.

Subscribed and sworn to before me, a notary public in and for the State of New York, this 19th day of April, 1905.

[L. S.] HECTOR W. MACBEAN,
Notary Public, Niagara County, N. Y.

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

TRADE-MARK FOR CEREAL BISCUIT.

85,186. Registered Jan. 30, 1912.

Application filed May 6, 1911. Serial No. 94,226.

STATEMENT.

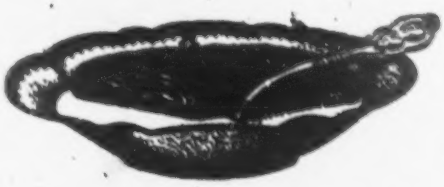
To all whom it may concern:

Be it known that THE SHREDDED WHEAT COMPANY, a corporation duly organized under the laws of the State of New York, and located in the city of Niagara Falls, county of Niagara, in said State, and doing business at the corner of Buffalo avenue and Fourth street, in the city of Niagara Falls, in said State, has adopted for its use the trade-mark shown in the accompanying drawing, no claim being made to the representation of a shredded wheat biscuit, for cereal biscuit, in Class No. 46, Foods and ingredients of foods.

The trade-mark has been continuously used in the business of said corporation since September 15, 1909.

The trade-mark is applied or affixed to the packages containing the goods by printing the same on said packages or by placing thereon a printed label on which the trade-mark is shown.

THE SHREDDED WHEAT COMPANY,
By A. J. PORTER,
President.



DECLARATION.

State of New York Niagara county ss:

ALEXANDER J. PORTER, being duly sworn, deposes and says that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States; that the drawing presented truly represents the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

ALEXANDER J. PORTER.

Subscribed and sworn to before me, a notary public, this first day of November in the year 1910.

[L. S.] JAS. TRAVERSE,
Notary Public.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

TRADE-MARK FOR SHREDDED WHEAT.

69,071. Registered Nov. 5, 1912.

Application filed December 7, 1911. Serial No. 69,112.

STATEMENT.

To all whom it may concern:

Be it known that THE SHREDDED WHEAT COMPANY, a corporation duly organized under the laws of the State of New York, and located in the city of Niagara Falls, county of Niagara, and State of New York, and doing business at the corner of Buffalo avenue and Fourth street, in the city of Niagara Falls, in said State, has adopted and used the trade-mark shown in the accompanying drawing, for shredded wheat, in Class No. 46, Foods and ingredients of foods.

The trade mark has been continuously used in the business of said corporation since March 1, 1910.

The trade mark is applied or affixed to the packages containing the goods by printing the same on such packages or by placing thereon a printed label on which the trade mark is shown.

No claim is made herein to the words "The Home of Shredded Wheat."

THE SHREDDED WHEAT COMPANY,
By ALEXANDER J. PORTER,
President.

THE HOME OF SHREDDED WHEAT

DECLARATION.

State of New York county of Niagara ss:

ALEXANDER J. PORTER, being duly sworn deposes and says that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade mark is used by said corporation in commerce among the several States of the United States; that the drawing truly represents the trade mark sought to be registered and that the specimens show the trade mark as actually used upon the goods.

ALEXANDER J. PORTER.

Subscribed and sworn to before me, a notary public, this 6th day of November, 1911.

[L. S.] JAMES TRAVERSE.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

Registered Jan. 15, 1924. Trade-Mark 178,725

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

ACT OF MARCH 19, 1920.

Application filed November 14, 1923. Serial No. 186,220.

SHREDDED WHEAT

STATEMENT.

To the Commissioner of Patents:

The Shredded Wheat Company, a corporation duly organized under the laws of the State of New York, and located and doing business at Niagara Falls, New York, has adopted and used the trade-mark shown in the accompanying drawing, for BISCUIT OR CRACKERS, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the act of March 19, 1920. The trade-mark has been continuously used and applied to said goods in applicant's business since January 1st, 1894. The trade-mark is applied or affixed to the goods, or to the packages containing the same, by placing thereon a printed label on which the trade-mark is shown, or by printing the trade-mark directly on the package. The mark has been in bona fide use for not less than one year in interstate commerce by the applicant. E. W. Anderson & Son (George Manne Anderson) of Washington, D. C., are appointed attorneys for the prosecution of this application.

THE SHREDDED WHEAT COMPANY,
By F. L. HOSIN,
Secretary.

Registered May 25, 1926. Trade-Mark 213,456

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

ACT OF MARCH 19, 1920.

Application filed February 18, 1926. Serial No. 227,479.

SHREDDED WHEAT

STATEMENT.

To the Commissioner of Patents:

The Shredded Wheat Company, a corporation duly organized under the laws of the State of New York, and located and doing business at Niagara Falls, New York, has adopted and used the trade-mark shown in the accompanying drawing, for BISCUITS, CRACKERS, AND CEREAL FOODS COOKED OR PREPARED FOR CONSUMPTION, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods and requests that the same be registered in the United States Patent Office in accordance with the act of March 19, 1920. The trade-mark has been continuously used and applied to said goods in applicant's business since January 1, 1894. The trade-mark is applied or affixed to the goods or to the packages containing the same by placing thereon a printed label on which the trade-mark is shown or by printing the trade-mark directly on the package. The mark has been in bona fide use for not less than one year in interstate commerce by the applicant. Applicant is the owner of trade-mark registration No. 178,725, granted January 15, 1924.

The undersigned hereby appoints William H. Davis, Arba B. Marvin, Dean S. Edmonds, Frank E. Barrows, W. Brown Morton, Merton W. Sage, and Willis H. Taylor, Jr., (constituting the firm of Pennie, Davis, Marvin & Edmonds, 165 Broadway, New York city, registration No. 10,839), and each of them, its attorneys, to prosecute this application for registration, with full powers of substitution and revocation, to make alterations and amendments therein, to receive the certificate of registration, and to transact all business in the Patent Office connected therewith.

THE SHREDDED WHEAT COMPANY,
By CHAS. H. BROWN, Jr.,
Treasurer.

Registered Aug. 17, 1926. Trade-Mark 216,593

UNITED STATES PATENT OFFICE.

THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

ACT OF FEBRUARY 20, 1905.

Application filed February 18, 1926. Serial No. 287,480.

STATEMENT.

To the Commissioner of Patents:

The Shredded Wheat Company, a corporation duly organized under the laws of the State of New York, and located and doing business at Niagara Falls, New York, has adopted and used the trade-mark shown in the accompanying drawing, for BISCUITS, CRACKERS, AND CEREAL FOODS COOKED OR PREPARED FOR CONSUMPTION, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods and requests that the same be registered in the United States Patent Office in accordance with the act of February 20, 1905, as amended. The trade-mark has been continuously used and applied to said goods in applicant's business since September 15, 1909. The trade-mark is applied or affixed to the packages containing the goods by printing the same on said packages or by placing thereon a printed label on which the trade-mark is shown. Applicant is the owner of trade-mark registration No. 85,186, granted January 30, 1912.

Applicant disclaims any exclusive right to the representation of two biscuits apart from the mark shown on the drawing.

The undersigned hereby appoints William H. Davis, Arba B. Marvin, Dean S. Edmonds, Frank E. Barrows, W. Brown Morton, Merton W. Sage, and Willis H. Taylor, Jr., (constituting the firm of Pennie, Davis, Marvin & Edmonds, 165 Broadway, New York city, registration No. 10,839), and each of them, its attorneys, to prosecute this application for registration, with full powers of substitution and revocation, to make alterations and amendments therein, to receive the certificate of registration, and to transact all business in the Patent Office connected therewith.

THE SHREDDED WHEAT COMPANY,
By CHAS. H. BROWN, Jr.,
Treasurer.

DEFENDANT'S EXHIBIT NO. 242.

[NOTE: This patent only reproduced. Balance of patents in this exhibit found in Volume V.]

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO.

BREAD AND METHOD OF PREPARING SAME.

SPECIFICATION forming part of Letters Patent No. 548,086, dated October 15, 1895.

Application filed March 16, 1894. Serial No. 503,777. (No specimens.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented a certain new and useful Article of Food or Bread and the Preparation of the Same; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

An object of the invention is the production of an article of food or bread, consisting of externally-rough porous threads or filaments of wheat or similar grain, having the outer nutrition bran and gluten of the entire berry visibly mingled with the interior starchy portion thereof and adapted by their composition of entire grain-berries and their rough and porous thread-like or shred-like form to constitute, without other shortening or aeration, bread of especially light and wholesome character.

A further object of the invention consists in the novel art or method of preparing the grain or berry and reducing it to form without taking from the grain any of the beneficial qualities provided by nature and presenting the same in convenient form for service as a superior article of food without the aid of experts or skilled labor now required to produce palatable bread.

The usual methods practiced in the manufacture of flour and the resultant bread therefrom are such as to detract from the natural and healthful properties possessed by the grain in its original state. The addition of shortening, yeast, baking-powder, alum, or other foreign ingredients to render the bread light is also detrimental, and the entire method consumes a large amount of time and labor.

According to the improved method which I am now about to describe, the wheat is taken in the whole or berry form, and after being cleaned and thoroughly washed is boiled until cooked, without destroying the whole or individual form of the berry. The time of boiling is usually about one hour. This operation, in addition to cooking the grains, removes from them the outer siliceous coating and adherent extraneous matter. It also destroys all insect life and removes the traces thereof. Before removal from the boiler the grain is seasoned with salt. The wheat, still in berry form, is, nevertheless, just after the boiling quite soft and its interior or starchy portion especially is watery. It can be easily mashed between the finger and thumb and is not in condition for proper compression until its inner and outer portions are brought more upon an equality in point of consistence. To this end the grain, being removed from the boiler, is allowed to dry for some hours—from twelve to twenty hours being usually sufficient—until the interior of the berry has, from the loss of some of its water, become more consistent. The grain should be constantly stirred or agitated during this part of the process to hasten the drying-out action and to prevent incipient fermentation. I prefer, therefore, to dry out the grain in rotating wire-cloth barrels or cage-tumblers. The berries should now have sufficient interior consistence to enable their outer and interior portions to be effectively incorporated with each other, such incorporation being accomplished by passing the grain between compression-rollers, one or both of which is provided with a series of fine circumferential grooves whereby the berries are mashed and their outer bran-coats, gluten layers, and starchy interior portion thoroughly incorporated together and forced into the grooves of the roller or rollers, whence the resultant food is discharged, by means of a comb or scraper, in the form of long fine filaments or threads of porous character and having a rough exterior admirably adapted to cause them to adhere together when being massed to form loaves or biscuit. The sinuous form and rough or jagged exterior shape of the filaments is designed also to provide small interstices throughout the mass, whereby the bread is thoroughly aerated and made very light.

The food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways. The food presented is pure wheat and all the parts of the berry are given to the consumer in attractive form. No chemical change is set up therein by the use of ferments or other

foreign ingredients, and the percentage of water in the food is much less than in ordinary bread.

The article so produced is a food or bread composed of superposed or massed layers or deposits of dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch, and gluten of the entire berry, and which is absolutely free from leavening or raising material or their products.

The fine thread-like character of the component filaments of the bread and their disposition therein renders it tender, so that shortening is not required. All the nutritious and beneficial qualities of the berry are preserved in this admirable article of food, while its form gives it tenderness and lightness without the admixture of foreign ingredients.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. A food or bread composed of superposed or massed layers or deposits of dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch, and gluten of the entire berry, and which is absolutely free from leavening or raising material, or their products.

2. The process of reducing cereals for food, consisting, first, in cooking the grain with salt, after it has been thoroughly cleaned, without destroying the whole berry form, second, partially drying the grain with constant agitation until its interior and exterior portions are of substantially the same consistency, and finally, compressing the grain to intimately commingle the outer or bran coats, gluten layers, and starchy, interior portions in the form of porous, rough filaments or threads, substantially as described.

In testimony whereof I affix my signature in the presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

Correction in Letters Patent No. 548,086.

It is hereby certified that in Letters Patent No. 548,086, granted October 15, 1895, upon the application of Henry D. Perky, of Denver, Colorado, for an improvement in "Bread and Methods of Preparing Same," an error appears in the printed specification requiring correction, viz: In line 47, page 1, the word "corked" should read *cooked;* and that the said Letters Patent should be read with this correction therein that the same may conform to the record of the case in the Patent Office.

Signed, countersigned, and sealed this 29th day of October, A. D. 1895.

[SEAL.]

JNO. M. REYNOLDS,
Assistant Secretary of the Interior.

Countersigned:
S. T. FISHER,
Acting Commissioner of Patents.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Set.:*
THIRD JUDICIAL CIRCUIT,

I, WM. P. ROWLAND, clerk of the United States Circuit Court of Appeals for the Third Circuit, Do HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of record (Volume IV, Exhibits) in the case of National Biscuit Co., Plaintiff-Appellant, v. Kellogg Company, Defendant-Appellee, No. 5801, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this eleventh day of August, in the year of
(Seal) our Lord one thousand nine hundred and thirty-seven and of the Independence of the United States the one hundred and sixty-second.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

CLERK'S COPY.

Vol. V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 2

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

No. 56

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONS FOR CERTIORARI FILED { SEPTEMBER 10, 1937. MAY 23, 1938.

CERTIORARI GRANTED MAY 31, 1938.

TRANSCRIPT OF RECORD

(IN FIVE VOLUMES)

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 5801. October Term, 1935.

NATIONAL BISCUIT COMPANY,

Plaintiff-Appellant,

v.

KELLOGG COMPANY,

Defendant-Appellee.

Volume V.

EXHIBITS.

(Pages 1 to 516 inclusive)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

Filed August 10, 1935.

DEFENDANT'S EXHIBITS.

		Admitted		Printed	
		Vol.	Page	Vol.	Page
10	Book of Patents Issued to Plaintiff, Viz.:				
	Perky & Ford U. S. Patent No. 502,378, August 1, 1893	II	1166	V	1
	Perky U. S. Patent No. 520,496, May 29, 1894	II	1166	V	5
	Perky U. S. Patent No. 532,286, January 8, 1895	II	1166	V	11
	Perky U. S. Patent No. 532,480, January 15, 1895	II	1166	V	15
	Perky U. S. Patent No. 532,481, January 15, 1895	II	1166	V	21
	Perky U. S. Patent No. 532,697, January 15, 1895	II	1166	V	25
	Perky U. S. Patent No. 532,698, January 15, 1895	II	1166	V	29
	Perky U. S. Patent No. 533,551, February 5, 1895	II	1166	V	33
	Perky U. S. Patent No. 533,552, February 5, 1895	II	1166	V	37
	Perky U. S. Patent No. 533,553, February 5, 1895	II	1166	V	41
	Perky U. S. Patent No. 533,554, February 5, 1895	II	1166	V	45
	Perky U. S. Patent No. 533,555, February 5, 1895	II	1166	V	49
	Montgomery U. S. Patent No. 533,821, February 5, 1895	II	1166	V	55
	Perky U. S. Patent No. 548,086, October 15, 1895	II	1166	V	59
	Perky U. S. Design Patent No. 24,688, September 17, 1895	II	1166	V	61
	Perky U. S. Patent No. 571,284, November 10, 1896	II	1166	V	65
	Perky U. S. Patent No. 598,745, February, 8, 1898	II	1166	V	77

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Page	Printed Vol.	Page
	Perky U. S. Patent No. 614,338, November 15, 1898	II	1166	V	81
	Perky U. S. Patent No. 618,288, January 24, 1899	II	1166	V	87
	Perky U. S. Patent No. 667,892, February 12, 1901	II	1166	V	91
	Perky U. S. Patent No. 678,127, July 9, 1901	II	1166	V	109
	Perky U. S. Patent No. 678,625, July 16, 1901	II	1166	V	121
	Perky U. S. Patent No. 681,656, August 27, 1901	II	1166	V	135
	Burkank U. S. Patent No. 683,100, September 24, 1901	II	1166	V	143
	Burbank U. S. Patent No. 683,101, September 24, 1901	II	1166	V	149
	Burbank U. S. Patent No. 684,789, October 22, 1901	II	1166	V	155
	Burbank U. S. Patent No. 685,671, October 29, 1901	II	1166	V	165
	Perky U. S. Patent No. 713,795, November 18, 1902	II	1166	V	169
	Perky U. S. Patent No. 746,145, December 8, 1903	II	1166	V	173
	Burbank U. S. Patent No. 770,159, September 13, 1904	II	1166	V	181
	Horner U. S. Patent No. 785,554, March 21, 1905	II	1166	V	189
	Perky U. S. Patent No. 797,604, August 22, 190[illegible]	II	1166	V	201
	Smith U. S. Patent No. 1,195,114, August 15, 1916	II	1166	V	225
	Anderson U. S. Patent No. 1,334,429, March 23, 1920	II	1166	V	231
	House U. S. Patent No. 1,592,768, July 13, 1926	II	1166	V	243

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
	Webster U. S. Patent No. 1,592,797, July 13, 1926	II	1166	V	301
	Anderson U. S. Patent No. 1,621,863, March 22, 1927	II	1166	V	313
243	Valentine U. S. Patent No. 831,909, September 25, 1906	II	1166	V	319
244	Book of Patents Issued to Defendant, Viz.:				
	Valentine U. S. Patent No. 1,102,614, July 7, 1914	II	1166	V	331
	Kellogg U. S. Patent No. 1,159,045, November 2, 1915	II	1166	V	355
	Kellogg U. S. Patent No. 1,189,130, June 27, 1916	II	1166	V	357
	Kellogg U. S. Patent No. 1,197,297, September 5, 1916	II	1166	V	361
	Kellogg U. S. Patent No. 1,783,434, December 2, 1930	II	1166	V	361
	Hanford U. S. Patent No. 1,091,509, March 31, 1914	II	1166	V	373
	Valentine U. S. Patent No. 1,124,363, January 12, 1915	II	1166	V	411
	Valentine U. S. Patent No. 1,143,151, June 15, 1915	II	1166	V	417
245	Book of Miscellaneous Patents Issued to Others Than Plaintiff or Defendant, Viz.:				
	Cooley U. S. Patent No. 782,109, February 7, 1905	II	1167	V	437
	Williams U. S. Patent No. 820,899, May 15, 1906	II	1167	V	441
	Williams U. S. Patent No. 878,262, February 4, 1908	II	1167	V	445
	Williams U. S. Patent No. 896,964, August 25, 1908	II	1167	V	451
	Williams U. S. Patent No. 897,182, August 25, 1908	II	1167	V	455

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Admitted Page	Printed Vol.	Printed Page
	Williams U. S. Patent No. 931,243, August 17, 1909	II	1167	V	459
	Williams U. S. Patent No. 949,013, February 15, 1910	II	1167	V	469
	Williams U. S. Patent No. 991,384, May 9, 1911	II	1167	V	489
	Williams U. S. Patent No. 1,024,168, April 23, 1912	II	1167	V	493
	Williams U. S. Patent No. 1,062,627, May 27, 1913	II	1167	V	505
	Black U. S. Patent No. 1,210,589, January 2, 1917	II	1167	V	511
	Williams U. S. Patent No. 1,263,009, April 16, 1918	II	1167	V	513
246	Bid of Plaintiff May 8, 1933, Department of Interior, Washington, D. C.	II	1170	Not printed	
247	Bid of Plaintiff December 12, 1932, U. S. Marine Corps, Washington, D. C.	II	1171	Not printed	
248	Bid of Plaintiff March 17, 1933, U. S. Marine Corps, Washington, D. C.	II	1172	Not printed	
249	Bid of Defendant February 3, 1933, Marine Barracks, Dover, N. J.	II	1172	Not printed	
250	Advertisement, The Natural Food Co. in New York Daily Tribune, May 12, 1907	II	1176	Not printed	
251	Advertisement, The Shredded Wheat Co. in Trade, Detroit, April 9, 1913	II	1176	Not printed	
252	Package of Arrowroot Biscuits	II	1177	Not printed	
253	Package of Fig Newtons Biscuits	II	1177	Not printed	
254	Package of Hydrox Biscuits	II	1177	Not printed	
255	Certificate of Incorporation of The Colorado Shredded Wheat Co.	II	1177	Not printed	
256	Carton of Kellogg's Corn Flakes	II	1178		
257-A	Clarke Sketch of Cutting of Diamond-Shape Biscuit	II	1178	Not printed	

DEFENDANT'S EXHIBITS—Continued.

No.		Admitted Vol.	Page	Printed Vol.	Page
258—Chart Illustrating Cartons of Plaintiff's Wheat Biscuit and Triscuit		II	1179	Not printed	
259—Box Plaintiff's Butter Thin Biscuit		III	2035	...	...
260—Box Plaintiff's Uneeda Biscuit		III	2035	...	...
261—Box Plaintiff's Graham Crackers		III	2035	...	...
262—Box Plaintiff's Premium Flake Crackers		III	2035	...	...

DEFENDANT'S EXHIBIT UNDER RULE 46.

A—Proceedings in the Patent Office	III	2021	Not printed		

DEFENDANT'S EXHIBIT NO. 242.

Book of Patents Issued to Plaintiff.

(United States Patents.)

No.		Page
502,378,	to Perky and Ford, Dated August 1, 1893	1
520,496,	to H. D. Perky, Dated May 29, 1894	5
532,286,	to H. D. Perky, Dated January 8, 1895	11
532,480,	to H. D. Perky, Dated January 15, 1895	15
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2

(No Model.)

H. D. PERRY & W. H. FORD.

MACHINE FOR THE PREPARATION OF CEREALS FOR FOOD.

No. 502,378. Patented Aug. 1, 1893.

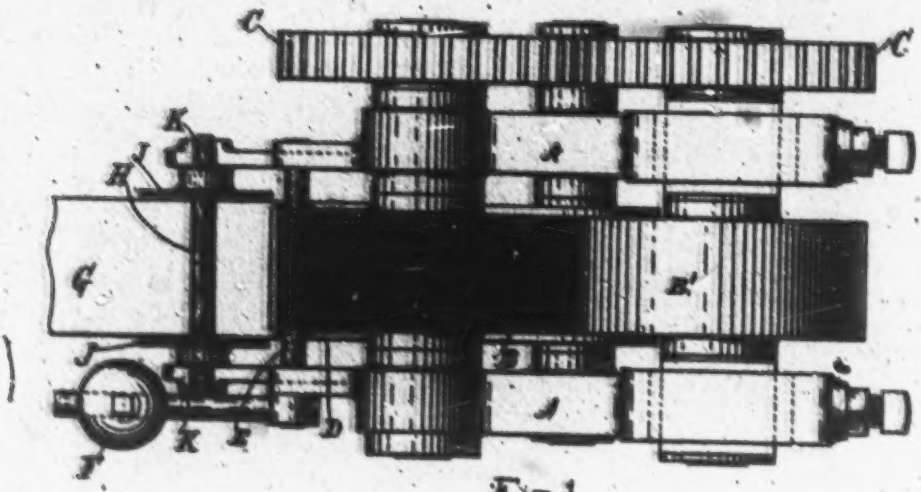


Fig. 1.

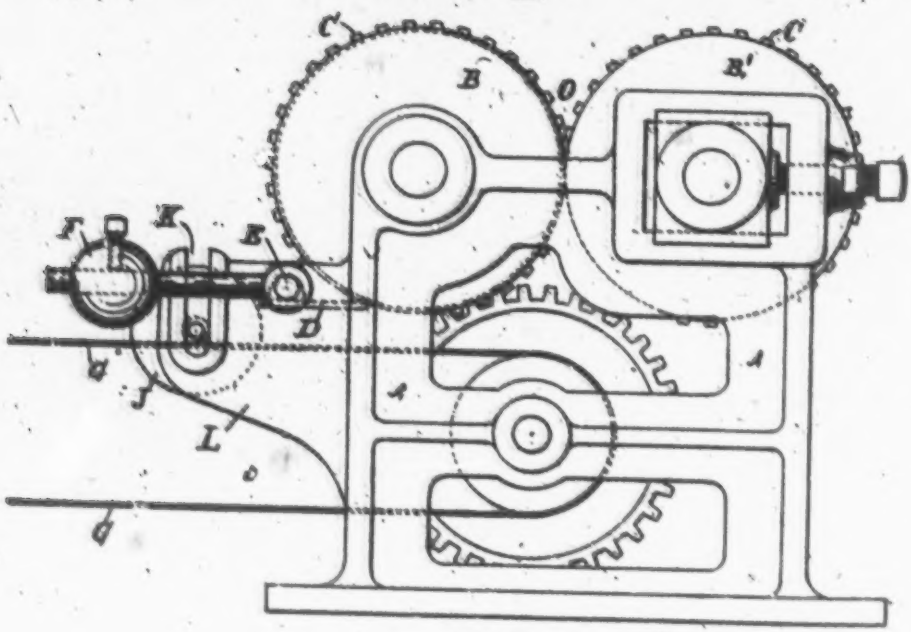


Fig. 2.

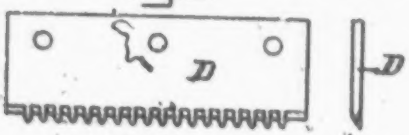


Fig. 3. Fig. 4.

WITNESSES:
A. S. Neadles
Belle Stewart

INVENTORS
William H. Ford.
Henry D. Perry.

UNITED STATES PATENT OFFICE.

HENRY D. PERKY AND WILLIAM H. FORD, OF WATERTOWN, NEW YORK, ASSIGNORS, BY DIRECT AND MESNE ASSIGNMENTS, TO THE CEREAL MACHINE COMPANY, OF COLORADO.

MACHINE FOR THE PREPARATION OF CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 502,378, dated August 1, 1893.

Application filed October 29, 1892. Serial No. 450,305. (No model.)

To all whom it may concern:

Be it known that we, HENRY D. PERKY and WILLIAM H. FORD, citizens of the United States, residing at Watertown, in the county of Jefferson, State of New York, have invented certain new and useful Improvements in Machines for the Preparation of Cereals for Food, of which machine the following description, in connection with the accompanying drawings, is a specification, like letters on the drawings representing like parts.

The object of our invention is the economic reduction of cereals in the grain state to desirable forms of food without detracting from their natural nutritious qualities and virtue and for the better preparation of the same for more convenient and general use. These objects are attained by the mechanism illustrated in the accompanying drawings, in which—

Figure 1 is a plan view; Fig. 2 an elevation. Figs. 3 and 4 are details of a scraper.

A is a frame supporting the moving parts.

B and B′ are two rolls one or both of which are to be grooved circumferentially. Only one marked B is so shown in the drawings. The said rolls are geared together by gears C. C. and may be driven by any convenient power. Roll B is shown with rigid journal bearings while B′ is shown with adjustable bearings so that the desired proximity or contact may be maintained between the faces of the two rolls.

D is a scraper having teeth so formed as to fit in the grooves in roll B and between the teeth the said scraper is to fit the cylindrical faces of the divisions separating said grooves. This scraper D is fixed upon a spindle E and is held in contact with roll B by the weight F upon an arm attached to the spindle E. The said scraper may be held in contact with said roll by other convenient means.

G is a conveyer belt.

H is a spindle having loose collars J. J. This spindle plays in vertical slots K. K. of the brackets L. L.

The operation of this machine is as follows: The grain being properly prepared by boiling, steaming, steeping or soaking and the outer shell being removed when desired, is fed in any convenient manner between the rolls B and B′ at O by which it is compressed into the grooves on roll B from which the product in the form of threads, lace or ribbons or sheets, &c., (the form of which depending on the contact or proximity of rolls B and B′) is removed by scraper D where it is received by the belt G and carried forward to the spindle H around which the product is wound by the frictional action of the belt against the product; the spindle rising in the slots as the size of the roll increases. If desired the product may be conveyed without winding upon the spindle to any convenient receptacle.

What we claim, and desire to secure by Letters Patent, is—

1. In a machine for the preparation of cereals for food, the combination with a pair of compressing rolls, one of which is provided with circumferential grooves, of a comb-like scraper the teeth of which are arranged to fit said grooves, the spaces between said teeth being arranged to fit the cylindrical faces of the divisions separating said grooves, substantially as specified.

2. In a machine for the preparation of cereals for food, the combination of a pair of circumferentially grooved rolls, the comb-like scraper therefor, the conveyer belt, and the spindle H hung in slotted bearings, over said belt, substantially as specified.

3. In a machine for the preparation of cereals for food, the combination with a pair of compressing rolls, one of which is formed with circumferential grooves, the comb-like scraper therefor, and the weight for holding said scraper in contact with said roll, of the conveyer belt, traveling underneath said grooved roll, and the spindle H journaled in bearing slots over said belt and designed to have frictional contact therewith, substantially as specified.

In testimony whereof we have signed our names to this specification in presence of two subscribing witnesses.

HENRY D. PERKY.
WILLIAM H. FORD.

Witnesses:
D. S. MILLER,
BELLE STEWART.

6

(No Model.) 2 Sheets—Sheet 1.

H. D. PERKY.

MACHINE FOR THE MANUFACTURE OF FOOD PRODUCTS FROM CEREALS.

No. 520,496. Patented May 29, 1894.

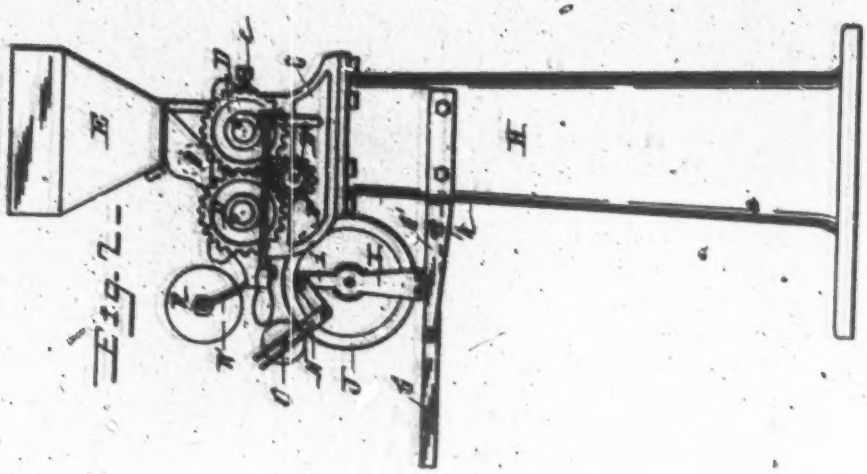


Fig. 2.

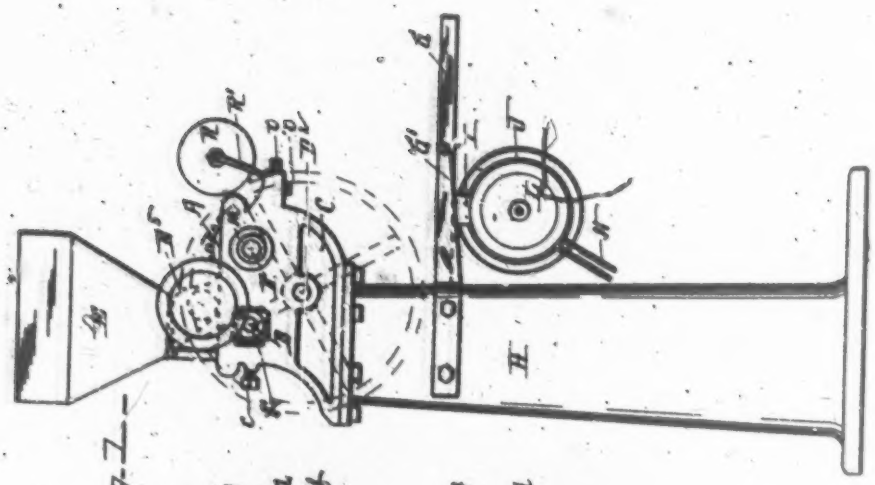


Fig. 1.

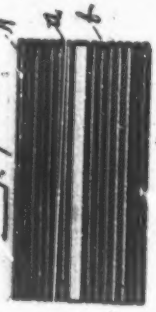


Fig. 7.

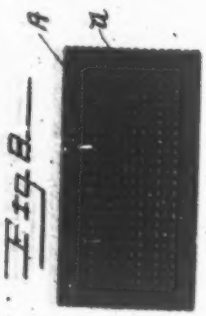


Fig. 8.

WITNESSES

Geo. M. Tuckerman

Philip A. Masi.

INVENTOR

Henry D. Perky

by W. W. Anderson,

his Attorney

8

(No Model.) 2 Sheets—Sheet 2.

H. D. PERKY.

MACHINE FOR THE MANUFACTURE OF FOOD PRODUCTS FROM CEREALS.

No. 520,496. Patented May 29, 1894.

Fig. 3.

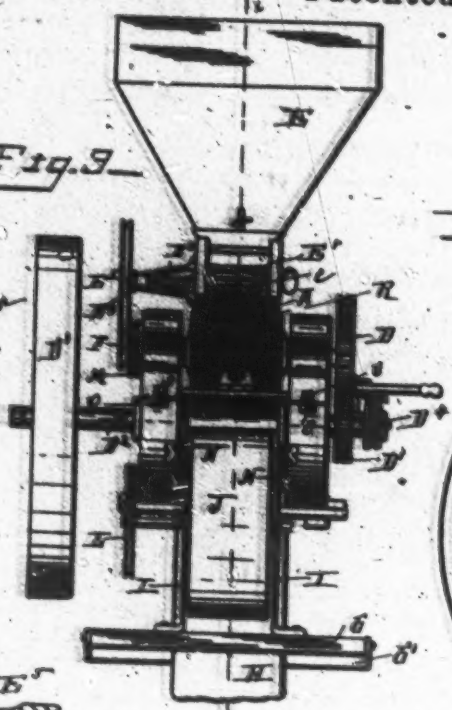


Fig. 8.

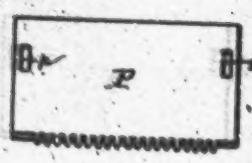
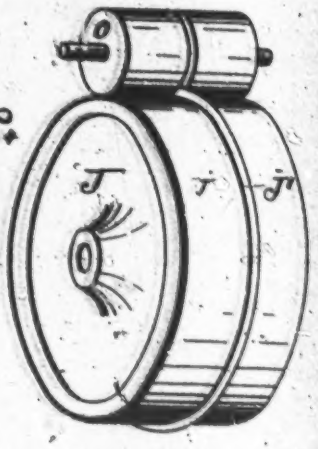


Fig. 6.



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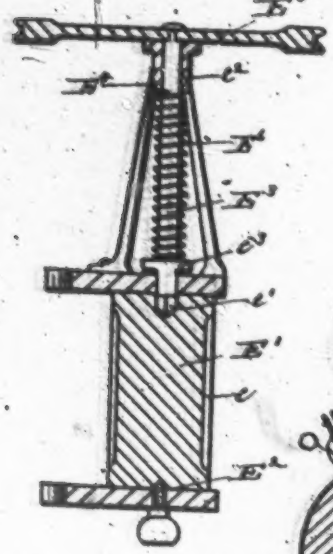


Fig. 4.

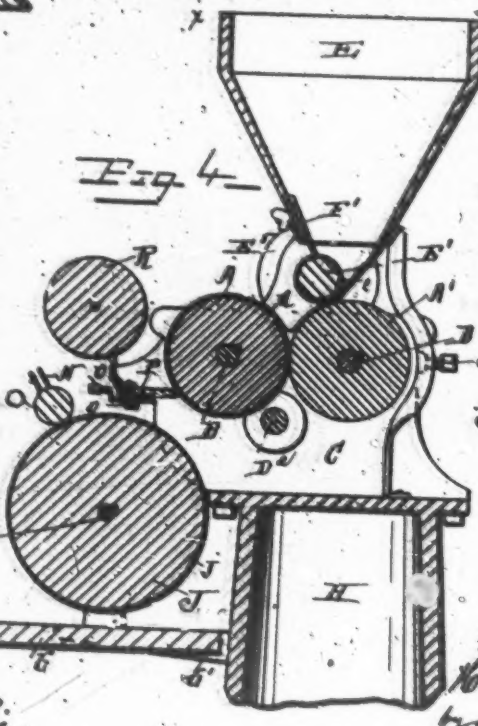
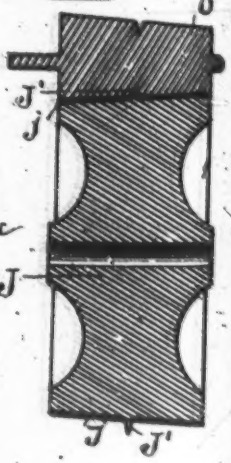


Fig. 10.



WITNESSES

G. M. Austin

Phillemain.

INVENTOR

Henry D. Perky

by E. W. Anderson

his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO, ASSIGNOR TO THE CEREAL MACHINE COMPANY, OF COLORADO.

MACHINE FOR THE MANUFACTURE OF FOOD PRODUCTS FROM CEREALS.

SPECIFICATION forming part of Letters Patent No. 520,496, dated May 29, 1894.

Application filed July 7, 1893. Serial No. 479,849. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented certain new and useful Improvements in Machines for the Manufacture of Food Products from Cereals; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 is a side elevation of the machine. Fig. 2 is a side elevation of the other side of the machine. Fig. 3 is a front elevation of the machine, with the pedestal broken away. Fig. 4 is a vertical section on the line *x*—*x*, Fig. 3. Fig. 5 is a detail, partly in section, showing the feed roll and its bearings. Figs. 6, 7 and 8 are detail views of modified forms of parts of the invention, and Fig. 9 is a detail view of the comb or scraper. Fig. 10 is a longitudinal vertical section through the rolls O and J.

This invention has relation to certain new and useful improvements in machines for the manufacture of food products from cereals, and it consists in the novel construction and combination of parts, all as hereinafter described and pointed out in the appended claims.

The object of the invention is to provide a practical and efficient machine for the treatment of cereals whereby they may be economically converted into a wholesome food product in desirable and convenient form, as more fully described in my pending application, Serial No. 475,540, filed May 25, 1893.

Referring to the accompanying drawings illustrating the invention, the letters A, A′ designate a pair of parallel rolls or cylinders having their shafts B journaled in suitable bearings in a frame C, side by side in close relation to each other, and acting by compression. One or both of said rolls have their surfaces provided with a series of fine circumferential grooves *a*, separated from each other by plain circumferential spaces *b*. In the drawings I have shown only one of the rolls A as having such grooves, the other having a plain cylindrical surface. The shaft of the roll A′ is provided with movable bearings *b*′, acted upon by screws *c*, for purposes of adjustment to regulate the compression of the rolls one against the other.

D D are intermeshing gear wheels on the shafts B B, and driven by a pinion D′ on a shaft D^2, journaled below the shafts B B, and driven by a pulley D^3, or by other suitable gear. The shaft D^2 is journaled a little to one side of a central line of the shafts B, D, and meshes with one of the gear wheels D.

D^4 is a clutch for throwing the pinion D′ into and out of driving engagement with its shaft.

E designates a hopper supported over the rolls A, A′, and E′ is a feed cylinder journaled in the throat or discharge of said hopper. This feed cylinder is formed with longitudinal corrugations *e*, and is made removable from its bearings for purposes of cleaning when necessary. To permit such removal one end of the cylinder has a bearing on a screw point E^2, while at the other end is a shaft E^3 having a squared portion *e*′ which removably engages a correspondingly shaped socket in the end of the cylinder. Said shaft E^3 has a bearing at e^3 in a bracket E^4, and carries a grooved pulley E^5 by means of which it, together with the cylinder is rotated. On said shaft is a collar e^3 between which, and the bearing e^2, around the shaft, is a spring E^6 which normally holds said shaft against endwise movement out of engagement with the cylinder. The shaft may however be withdrawn when it is desired to remove the cylinder, which by this arrangement may be readily accomplished. The pulley E^5 may be driven by a belt from a pulley F on one of the shafts B, as shown, or by friction or other gear connection with such shaft. The corrugations *e* in the feed cylinder E′ assist the feed in that they carry the grain from the hopper and cause it to be deposited centrally between the rolls A, A′.

F′ is a slide situated in the throat of the hopper E, and arranged to control the feed.

G is a table situated below and in front of the roll A′, and supported by a bracket G′.

carried by the rest or support H of the machine. This table is pivotally swung between the arms of said bracket, being reversible, and is normally held in its horizontal position by means of a thumb screw *h*, or pin engaging the table through the arm of the bracket. Depending from the under side of said table when the latter is in the position shown in Fig. 1, is a bracket I in which is journaled a roll J, which is usually provided with a covering *j* of canvas, or other suitable material. On the shaft K of said roll is a pulley L, which when the table is in its reversed position, as shown in Fig. 2 is in position to be driven by a belt or other connection with a pulley M on one of the shafts B. Extending from the arms *i* of the bracket I are slotted or forked arms N, N, the slots of which are designed to form bearings for a removable spindle or former roll O.

P designates a comb or scraper supported on the frame in front, and so situated that its teeth are adapted to engage the fine grooves *a* of the roll A while the intervening spaces between the teeth travel upon the plain spaces *b* between said grooves. The bolts which secure the comb to the frame extend through slots *p* in the comb frame, thereby permitting the comb to be adjusted toward or away from roll A, by means of adjusting screws *o*.

The operation of the machine as thus far described is as follows:—The grain being first boiled, steamed, soaked, or steeped, and the outer hull or shell being first removed, when desired, it is fed into the hopper E and is delivered by the rolls A, A', which are geared to rotate toward each other. By the compression of these rolls the grains or cereals are reduced and forced into the grooves *a* of the roll A, from which the resulting product is removed by the comb P in the form of films, strings, or shreds, of light, tender, and porous character, as more fully described in my application before referred to. In the position of the table as shown in Fig. 1, these films, strings, or shreds, are deposited thereon, or into a suitable receptacle supported thereon for the purpose. When, however, it is desired to turn out the finished product in rolls, cups, or other similar forms, the table is reversed and swung into the position shown in Fig. 2 and the roll J is connected with its driving pulley or gear. The shreds, strings, or films, fall upon this roll from the comb, the rotation of the said roll also causing, by friction, the rotation of the spindle or former roll O, which catches such shreds, strings or films and winds them thereon into a cylindrical mass. In order to facilitate the removal of this mass from the former roll or spindle, the latter is preferably made slightly tapering or conical, the roll J being of similar form.

In some cases it may be desired to divide the mass transversely of its length into two parts, and this may be accomplished by means of a cutter R carried by an arm R' pivoted to the front portion of the frame, and adapted to be turned down into cutting contact with the mass as it forms on the roll or spindle O. The same effect may be accomplished by forming the roll J with a central, circumferential cutter projection J', as shown in Fig. 6, or by omitting a few of the grooves *a* at the central portion of the roll A, as in Fig. 7, so that the product is naturally delivered in two parts.

When both rolls A and A' are provided with the grooves each roll is designed to have a comb and delivery and forming devices, the arrangement being a duplication of that shown.

In some instances in addition to the circumferential grooves *a*, I may provide the rolls with grooves at right angles to the grooves *a*, or obliquely thereto, as shown in Fig. 8. This aids the feed and adds to the capacity of the rolls.

Having thus described my invention, what I believe to be new, and desire to secure by Letters Patent, is—

1. In a machine for treating cereals, the combination with the hopper and the compression rolls, of the removable rotary feed cylinder in the throat of said hopper, and above said rolls, a screw forming a bearing for one end of said cylinder, the shaft detachably engaging an angular socket in the opposite end portion of the cylinder, the bearing for said shaft, the spring, and means for driving said shaft and thereby said cylinder, substantially as specified.

2. In a machine for treating cereals, the combination with the compression rolls, and the comb or scraper, of the reversible table, the bracket secured thereto, the roll journaled in said bracket, the former roll or spindle also carried by said bracket, and means for rotating said roll, substantially as specified.

3. In a machine for treating cereals, the combination of the compression rolls, the comb or scraper, the reversible table, the bracket carried thereby and having the forked or slotted arms, the receiving roll journaled in said bracket, the former roll or spindle removably journaled in said forked or slotted arms, and designed to be rotated by frictional contact with said receiving roll, and means for rotating said feeding roll, substantially as specified.

4. In a machine for treating cereals, the combination of the compression rolls, the comb, the receiving roll, the former roll or spindle, and means for dividing the product taken by said former roll into two parts, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
JOHN S. PERKY,
THOS. H. HARDCASTLE.

(No Model.) 2 Sheets—Sheet 1.

H. D. PERKY.

ROLL MACHINE FOR REDUCING CEREALS FOR FOOD.

No. 532,480. Patented Jan. 15, 1895.

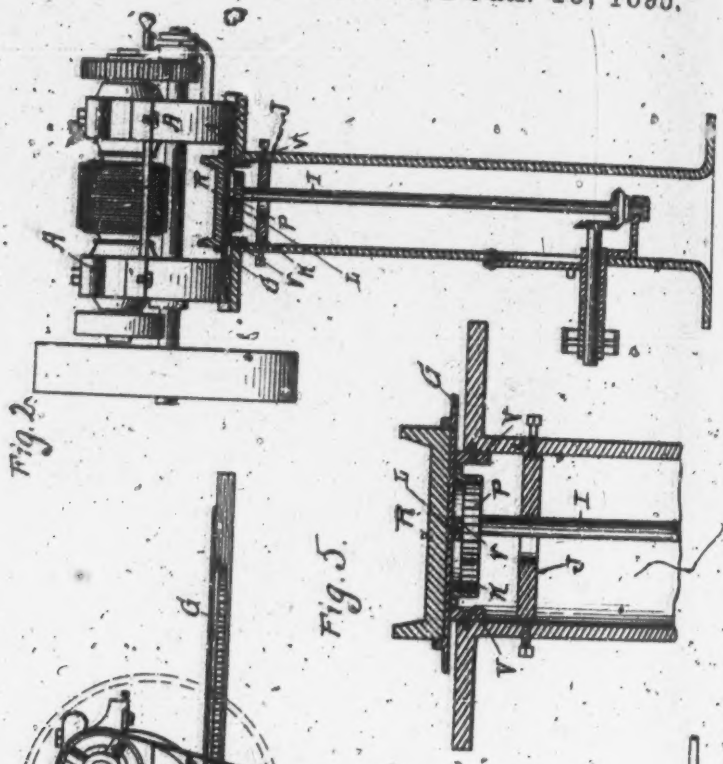


Fig. 2.

Fig. 5.

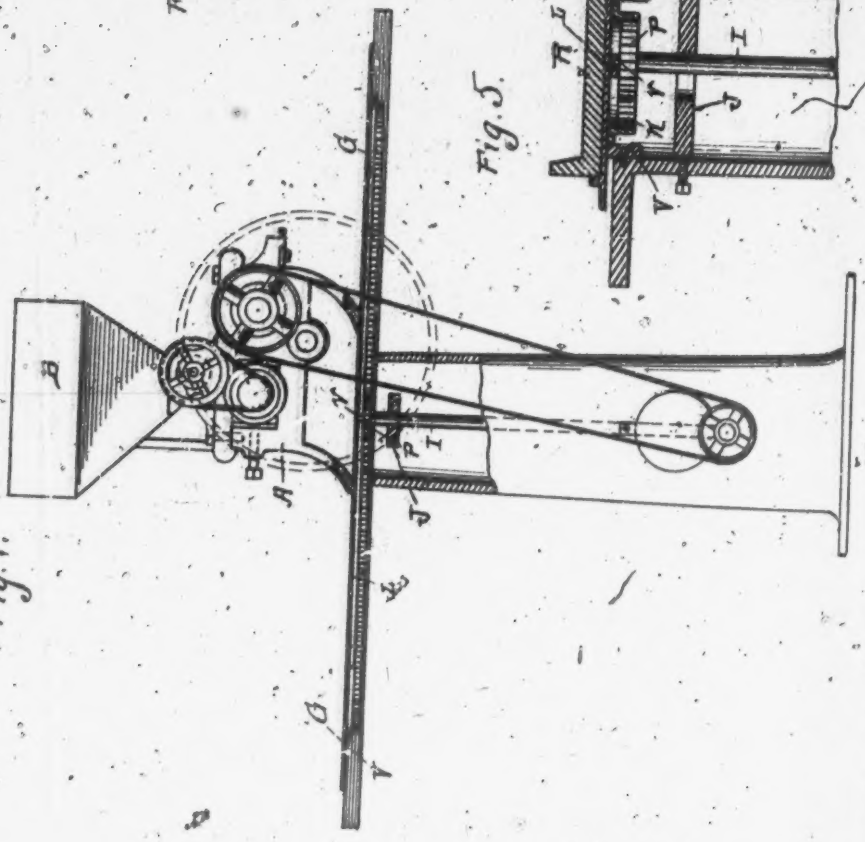


Fig. 1.

WITNESSES

Geo. M. Anderson

Phillellaxi.

INVENTOR

Henry D. Perky

by E. W. Anderson

his Attorney

18

(No Model.) 2 Sheets—Sheet 2.

H. D. PERKY.

ROLL MACHINE FOR REDUCING CEREALS FOR FOOD.

No. 532,480. Patented Jan. 15, 1895.

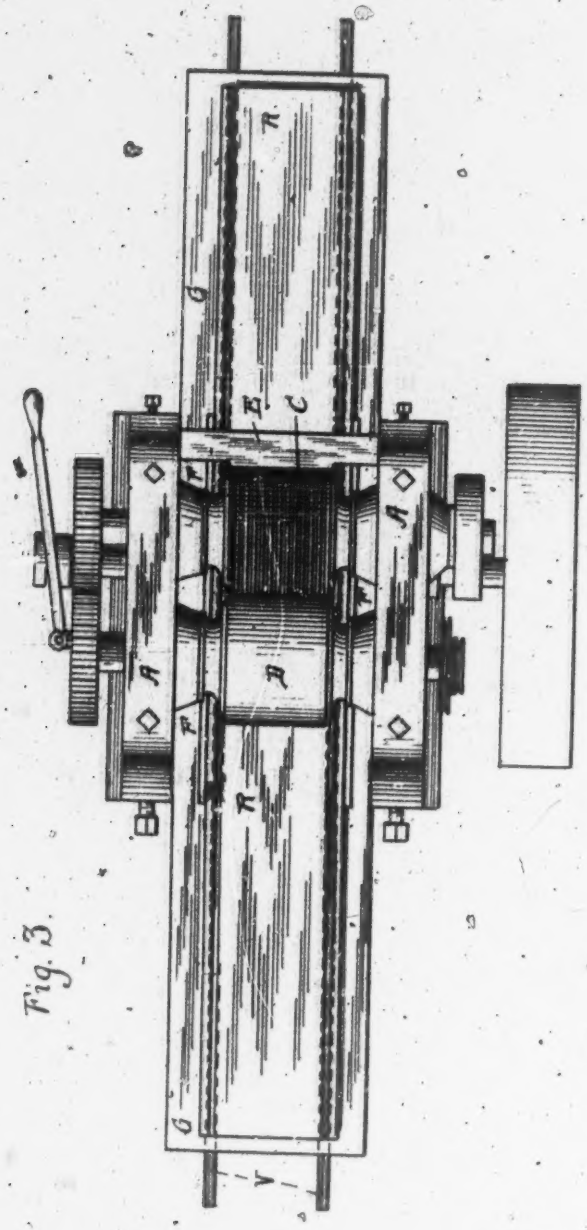


Fig. 3.

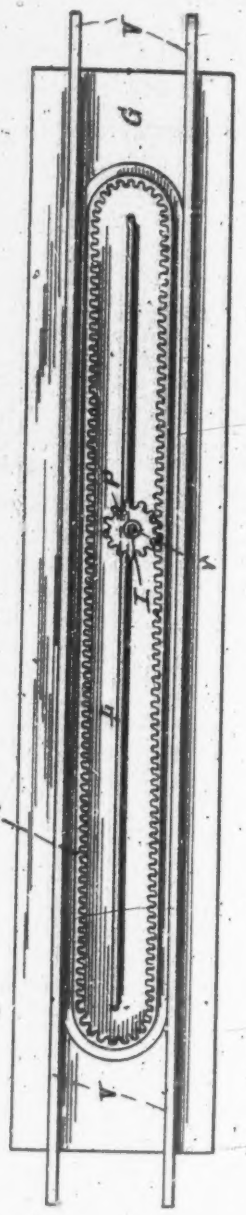


Fig. 4.

WITNESSES

Geo. M. Anderson

Phil. Masi.

INVENTOR

Henry D. Perky

by E. W. Anderson

his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO, ASSIGNOR TO THE CEREAL MACHINE COMPANY, OF SAME PLACE.

ROLL-MACHINE FOR REDUCING CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 532,480, dated January 15, 1895.

Application filed March 31, 1894. Serial No. 505,950. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented certain new and useful Improvements in Roll-Machines for Reducing Cereals for Food; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 of the drawings is a side view, partly in section, of a machine embodying the invention. Fig. 2 is a front elevation, of the machine, with parts in section; the hopper being removed. Fig. 3 is a plan view of the machine with the hopper removed. Fig. 4 is a bottom plan view of the endless rack, its support, and the pinion; and Fig. 5 is a detail, sectional view of part of the frame, showing the engagement of the rack and pinion.

The object of this invention is to provide a reducing machine for grain and other articles of food, whereby the material, being reduced continuously by the machine to the form of long threads or shreds, falls upon a long reciprocating receiver, which disposes said threads or shreds lengthwise of the receiver in layers to any desired thickness.

In the accompanying drawings the letter A designates the frame of a reducing machine, supporting a hopper B, and a pair of reducing rolls C and D, whereof the roll C is formed with circumferential grooves, into which the material fed into the hooper is compressed, and from which it is discharged in thread or shred-like form by means of the comb or scraper E, having its toothed edge complementary in contour to the sectional form of the grooved roll. These shreds or threads, especially those formed by passing cooked wheat grains between the rolls, are very tender and delicate, and cannot be independently manipulated or disposed after discharge by the comb. The form, therefore, in which they are laid or disposed by the machine upon such discharge is of great importance.

Under the rolls and comb of the machine is provided a through-way or passage F, for a reciprocating receiver, which consists usually of a reciprocating holder or plate G, a detachable receiving board or trough R, and suitable reciprocating mechanism.

In order to provide a compact machine of this character with a long throw of the receiver, various mechanisms may be employed, such as a vibrating lever, or reversing cams with pulley and reversing cord, or the device indicated in the drawings which is preferred, being compact, reliable, and capable of arrangement within the framing. In this movement, the letter K, represents an endless internal-tooth rack, cast or otherwise attached to the under side of the plate G, such rack being of elongated form, with parallel sides and semicircular ends. Between the sides midway is also attached to the under side of said plate a guide rib L, the ends of which are separated from the semicircular toothed ends of the rack sufficiently to allow for the passage of the pinion P, from one side of the rack to the other. This pinion is secured to the upper end of the vertical shaft I, the lower end of which may be turned by means of bevel gearing, or otherwise. It is provided with a central stud *v*, engaging the rib L.

Below the pinion the shaft engages the transverse slotted bearing J, whereby sufficient lateral vibratory movement is allowed to the shaft I, when its pinion engages the semicircular ends of the rack in passing from one side thereof to the other. As the pinion rotates in engagement with one side of the rack the plate or holder or carriage G, is moved longitudinally in the passage F, until the semicircular end of said rack comes into engagement with said pinion, causing the latter to transfer its engagement from one side of the rack to the other, and thereby reversing the endwise motion of said plate or carriage.

A detachable or removable receiver, board or trough R, is usually provided, to be placed on the plate G, to receive the shreds or threads as they fall from the reducing rolls. The reciprocating movement disposes these continuous shreds longitudinally on the receiver, and in layers, these layers increasing in number, in accordance with the number of reciprocations of said receiver, until the desired thick-

ness is produced. The receiver board with its contents can then be removed from the plate or carrier, and another substituted. The contents of the trough can be subdivided into biscuits or loaves for baking.

The carrier or plate G moves upon elongated guide arms V, extending from the frame, which is usually constructed in hollow pedestal form inclosing and concealing the reciprocating gear mechanism of the receiver.

The receiver is designed to be geared up to run at about the same speed as the reducing rolls, or a little more slowly when it is desired to effect a wavy or sinuous disposition of the shreds or threads along the receiver.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. In a food-reducing machine, the combination with the rolls and discharging comb, of a reciprocating receiver, adapted to dispose the shreds or threads, as they fall from the reducing rolls, in longitudinal manner and in layers, substantially as specified.

2. In a food-reducing machine, the combination with the frame, the reducing rolls, the discharging comb, and the passage in said frame below said rolls and comb, of the reciprocating plate or carrier, and the removable receiver board or trough substantially as specified.

3. In a food-reducing machine, the combination with reducing mechanism, of a receiver plate its endless bottom rack and guide, the vertical vibratory shaft its pinion, and the driving gear, substantially as specified.

4. In a food-reducing machine, the combination with reducing rolls of a reciprocating receiver moving in a way or passage of the frame, below said reducing rolls, and having its reciprocating mechanism inclosed in said frame, substantially as specified.

In testimony whereof I affix my signature in the presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

(No Model.)

H. D. PERKY.

PERFORATED ROLL MACHINE FOR REDUCING CEREALS FOR FOOD.

No. 532,481. Patented Jan. 15, 1895.

Fig. 1.

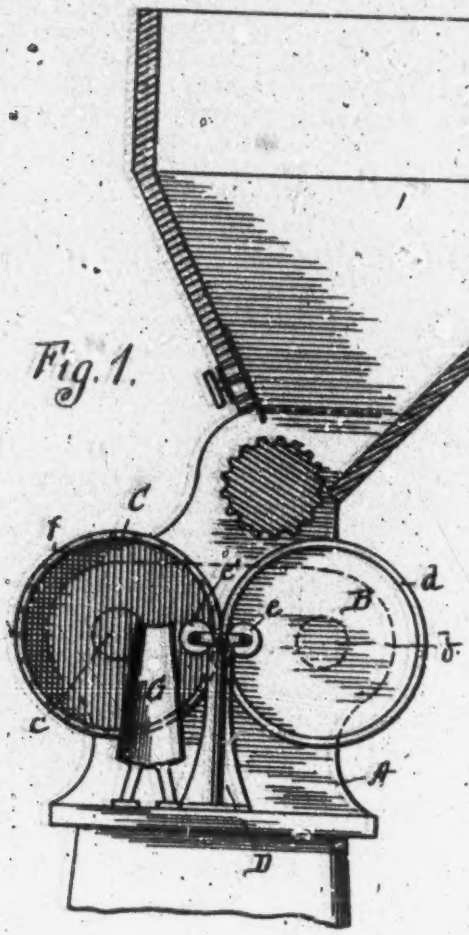


Fig. 2.

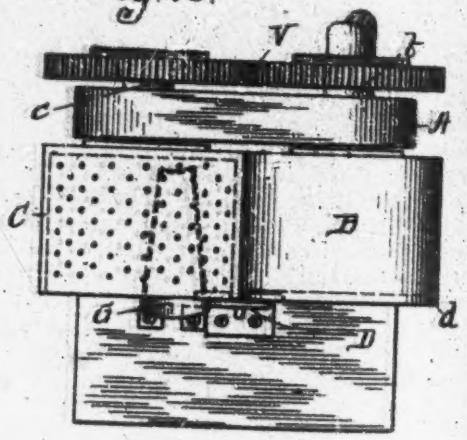
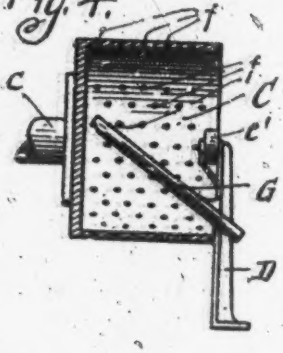


Fig. 3.

Fig. 4.



WITNESSES

Geo. M. Anderson

Phil. E. Mason.

INVENTOR

Henry D. Perky

by C. W. Anderson

his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO, ASSIGNOR TO THE CEREAL MACHINE COMPANY, OF SAME PLACE.

PERFORATED-ROLL MACHINE FOR REDUCING CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 532,481, dated January 15, 1895.

Application filed March 31, 1894. Serial No. 505,951. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, residing at Denver, in the county of Arapahoe and State of Colorado, have invented new and useful Improvements in Perforated-Roll Machines for Reducing Cereals for Food; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, forming a part of this specification, and to the letters of reference marked thereon.

Figure 1 of the drawings is an end view, partly in section, of a machine embodying the invention. Fig. 2 is a plan view of the same with the hopper removed. Figs. 3 and 4, are detail views showing the discharging scoop in slightly modified form.

The invention has relation to rolling machines for reducing grain to thread like or shred like form, while thoroughly incorporating together the interior and exterior particles of the berry.

In the accompanying drawings, the letter A designates the frame or support, having bearings for the journals of the reducing rolls B, and C, which are designed to work in neat contact with each other.

The roll B is formed preferably of steel, and has a cylindrical surface. Its journal shaft *b*, is strong and is seated in a long bearing in order to brace the roll to its work. The body of this roll is solid, but it may have a circular end flange *d*, this being an extension of the marginal portion of said roll at its free end to engage a small roller *e*, of a tie brace D, which is also provided with a second small roller *e'*, to engage the circular end flange *f*, of the other roll, C.

The roll C is of cylindrical form and hollow, and its cylindrical wall is provided with perforations throughout its extent. This hollow roll is open at one end, and at its other end is formed with a strong back portion to which is connected its journal shaft *c*, which is of comparatively large diameter, and is seated in a long bracing bearing.

The rolls are turned by means of gearing, as indicated at V.

E represents a hopper seated on the frame and designed to feed the grain, previously prepared by boiling and drying, to the rolls B, and C, which compress the berries, mashing them, and intimately incorporating the particles composing the outer portions of the berries with the starchy interior part thereof. The action of the rolls forces the grain during this process into and through the perforations of the roll C, the material being protruded within the perforated wall in the form of threads or shreds, growing in length at each revolution of the roll until removed from the cylinder by the operation of a suitable scoop or discharging device G.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. In a machine for reducing grain for food, the combination with a hollow roll having a perforated cylindrical wall, of a cylindrical compressing and crushing roll working in metallic contact therewith, a feeding hopper, and rotating mechanism for said rolls, substantially as specified.

2. In a machine for reducing grain, for food, the combination with a hollow perforated roll, of a cylindrical compressing roll working in contact therewith, the operating gear therefor, and a rolling tie-brace, substantially as specified.

3. In a machine for reducing grain for food, the combination with the hollow perforated roll and the compressing roll working in contact therewith, of the operating gear, the feed hopper, and a discharging device, substantially as specified.

In testimony whereof I affix my signature in the presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

(No Model.)

H. D. PERKY.

ROLL MACHINE FOR REDUCING CEREALS FOR FOOD.

No. 532,897. Patented Jan. 15, 1895.

Fig. 4.

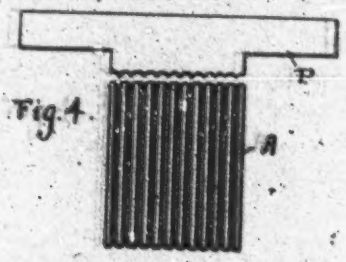


Fig. 3.

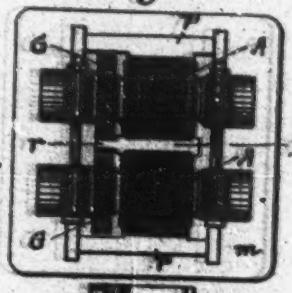


Fig. 1.

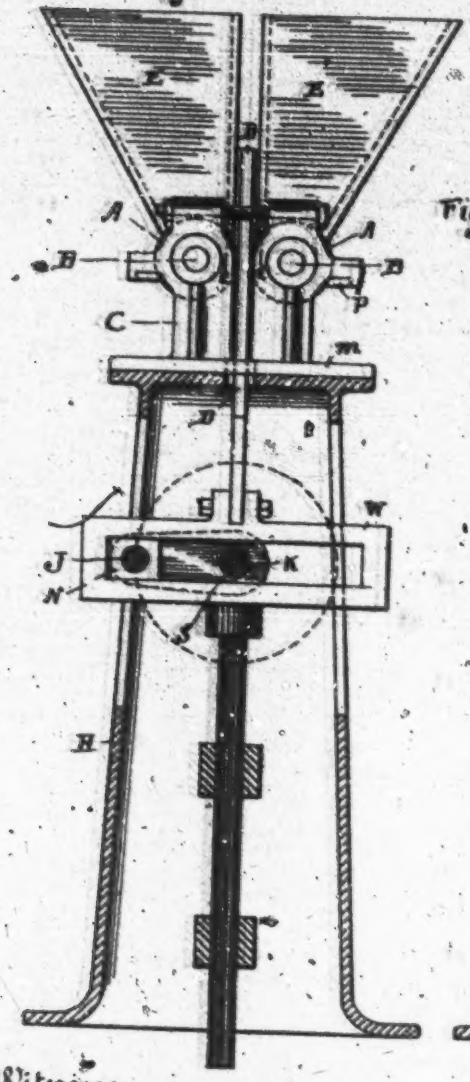
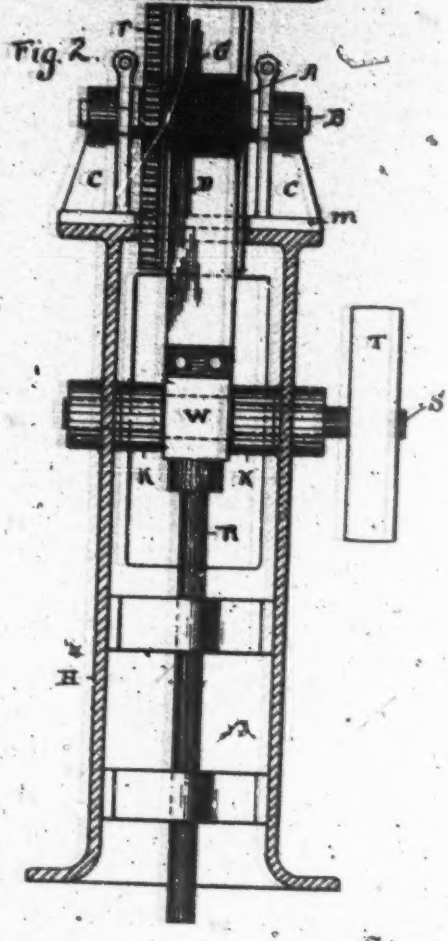


Fig. 2.



Witnesses
Geo. M. Anderson
Phil. E. Masi

Inventor
Henry D. Perky
By his Attorney
E. W. Anderson

27

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO, ASSIGNOR TO THE CEREAL MACHINE COMPANY, OF SAME PLACE.

ROLL-MACHINE FOR REDUCING CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 532,697, dated January 15, 1895.

Application filed March 31, 1894. Serial No. 505,948. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented certain new and useful Improvements in Roll-Machines for Reducing Cereals for Food; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 of the drawings is an end view, partly in section, of a machine embodying my invention. Fig. 2 is a front view of the same, also partly in section, with the hoppers removed. Fig. 3 is a plan view of the machine with the hoppers removed; and Fig. 4 is a detail view of one of the groove-rolls and comb.

The object of this invention is to provide a reciprocating or slide machine for the reduction of food, and especially for the reduction of grain to shredded or thread-like form, without detracting from the nutritious qualities and virtues thereof.

The machine consists mainly of the frame or pedestal H, the slide plate D, its gearing, the circumferentially grooved rolls or cylinders A, their gears, the hoppers E, and the discharging combs P. The pedestal or frame is provided at its upper end with standards C, for the grooved rolls, and below, with strong bearings for the crank shaft S, and for the guide rod R of the slotted cross head W.

This machine is usually made in double form, having two grooved rolls between which the slide plate reciprocates each roll being provided with its independent hopper E which rests upon the roll and is provided with an opening or way *e*, between its rear wall and the cylinder surface for the passage of the contents of the hopper, which is fed down between said roll or cylinder and the slide plate.

The grooved rolls are provided with gears G, and the slide-plate has a lateral rack connected therewith, which extends upward between and engages the roll-gears G.

The rolls A are provided with fine grooves extending circumferentially around them, said grooves being preferably of V-form; and the combs P, having teeth of similar contour to enter the grooves and discharge therefrom the threads or shreds of the food product.

The slide plate D is connected to the slotted cross-head W, which is given a vertically reciprocating motion by the revolution of the cranks K, crank pin J, and the sliding box N. Motion is given to the cranks and crank pin by the shaft S, and its pulley T, which is belted to any convenient power shaft.

The grain or other material to be shredded, having been suitably prepared by boiling and drying to proper consistence, is placed in the hoppers and fed through the ways *e*, *e*, between the faces of the rolls and the reciprocating plate, whose rack *r*, engaging the gears of the rolls causes them to revolve first in one direction, and then in the opposite direction. On the downward movement of the rack, the material to be shredded is drawn between the inward turning rolls and the plate and forced into the grooves of said rolls from which it is discharged by the combs P, which are attached to the standards C, and extend transversely of the rolls in front engaging the same.

Suitable pans or receivers may be placed upon the flat top *m* of the pedestal to receive the shredded or filamentous discharge.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. The combination with a grooved reducing roll and its discharging comb of the reciprocating plate engaging said roll, and mechanism for operating the same substantially as specified.

2. The combination with a grooved reducing roll, its gear and discharging comb, of the reciprocating plate and rack, and mechanism for operating the same, substantially as specified.

3. The combination with a pair of grooved reducing rolls, their gear, and discharging combs, of the reciprocating plates between said rolls and its rack engaging the gear of said rolls, substantially as specified.

4. The combination with a pair of grooved reducing rolls, their hoppers, gear, and discharging combs, of the reciprocating plate between said rolls, its rack engaging the gear of said rolls, the slotted cross-head slide-bar and crank shaft, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

30

(No Model.)

H. D. PERRY.

GROOVE ROLL MACHINE FOR REDUCING CEREALS FOR FOOD.

No. 532,638. Patented Jan. 15, 1895.

Fig. 1.

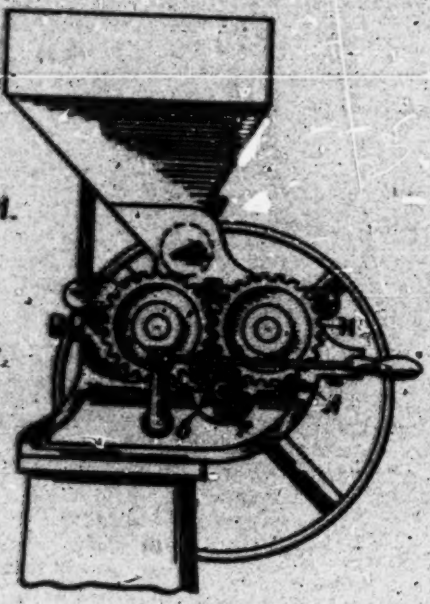


Fig. 3.

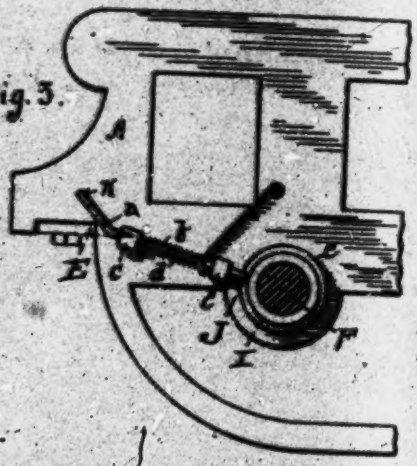


Fig. 2.

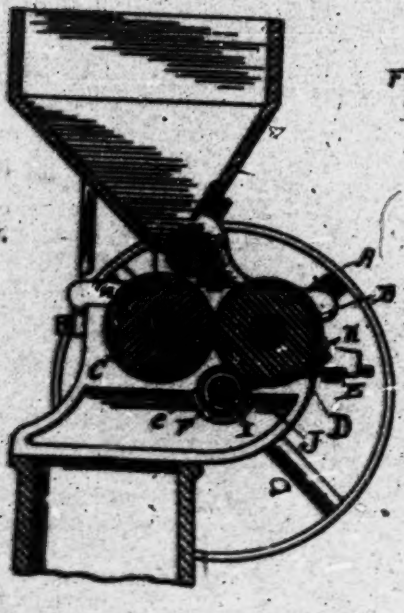


Fig. 4.

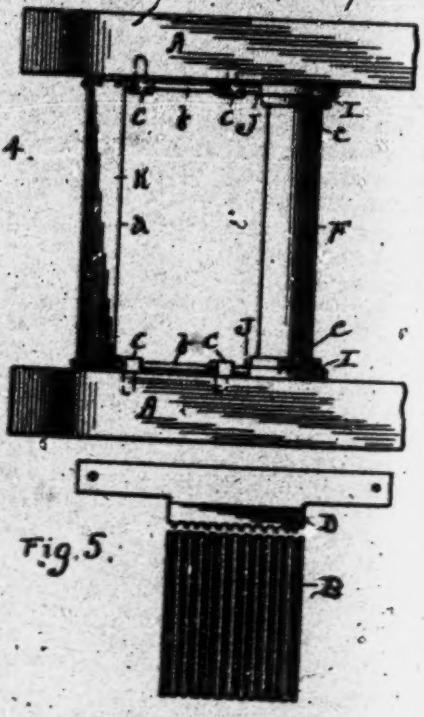


Fig. 5.

WITNESSES

Geo. M. Anderson

Phil. C. Masi

INVENTOR

Henry D. Perry

by T. W. Anderson

his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO, ASSIGNOR TO THE CEREAL MACHINE COMPANY, OF SAME PLACE.

GROOVE-ROLL MACHINE FOR REDUCING CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 532,698, dated January 15, 1895.

Application filed March 31, 1894. Serial No. 505,949. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, residing at Denver, in the county of Arapahoe and State of Colorado, have invented a certain new and useful Improvement in Groove-Roll Machines for Reducing Cereals for Food; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1, of the drawings is an end view of a machine embodying my invention, part of the supporting frame being broken away. Fig. 2 is a vertical section of the same. Fig. 3 is a detail view of a portion of the frame, showing the comb cleaner. Fig. 4 is a plan view of the comb-cleaner and a portion of the frame; and Fig. 5 is a detail view of one of the groove-rolls and comb.

The invention relates to groove roll machines for reducing grain or other articles of food to shredded or thread-like form, and consists mainly in the novel construction, and combination with the grooved roll and its discharging comb, of a cleaner for said comb, as hereinafter set forth. In these machines, although the grooved roll and the discharging comb, are of fine construction, the teeth and lands of the comb fitting neatly the grooves and surface intervals of the roll, it is found that particles of the food material will, to some extent, pass the discharging comb and accumulate on its upper marginal surface near the roll; and the object of this invention is to provide means for clearing away, and saving this accumulation.

In the accompanying drawings, the letter A designates a portion of the frame of the machine, carrying a pair of reducing rolls, whereof the front roll B is formed with a series of fine circumferential grooves, the back roll C having a simple cylindrical surface. The material fed between these rolls is compressed into the fine grooves of the roll B, and is discharged from these grooves in shred or thread-like form by the comb D, the teeth of which fit neatly into said grooves. This comb is secured to bearings of the frame, as indicated at E.

F represents a small shaft, located below the reducing rolls, and having a pinion G, engaging the gear-wheel H of the grooved reducing roll. At each end this shaft is provided with a cam I, having a circular contour broken by the notch J.

K indicates the comb cleaner, which is usually a plate of steel extending along the top of the comb, but having an oblique position with reference to the top plane of the comb, its lower or working edge *a*, when said cleaner is moved inward being just clear of the top of said comb and free of the surface of the grooved roll. This cleaner is designed to have an intermittent quick movement in the direction of this roll, and to give it such motion, the lateral slides *b*, are employed, these being attached to the ends of the cleaner plate, and working in side bearings *c*, of the frame in a reciprocating manner, intermittently, their motion being governed by the notch cams I. Springs *d*, serve to hold the ends of the slides *b*, in engagement with said cams. At each revolution of the cams I, the cleaner is moved, as the slides enter and leave the notches J, suddenly toward the roll surface, and away therefrom a short distance, this distance being maintained by the engagement of the circular portion *e*, of the cams with the ends of said slides, until the rotation of the cams brings their notches again to bear on the slides. This intermittent reciprocating cleaner, at each revolution of the cams, quickly pushes whatever particles of material may have accumulated on the inner edge of the comb toward and into the grooves of the reducing roll, so that they are taken up thereby and carried around in said grooves to be mixed with the new material fed from the hopper and utilized.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. The combination with the reducing rolls and the discharging comb, of a comb cleaner, substantially as specified.

2. The combination with the reducing rolls

and the discharging comb, of an intermittently reciprocating comb cleaner, substantially as specified.

3. The combination with the grooved reducing rolls and the discharging comb engaging one of said rolls, of the intermittently reciprocating cleaner plate extending along the top of the comb and having oblique position with reference to its top plane, its lateral slides and springs, and the circular cams, moving in contact with said slides substantially as specified.

In testimony whereof I affix my signature in the presence of two witnesses.

HENRY D. PERK

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

34

(No Model.)

H. D. PERKY.

ROLL MACHINE FOR REDUCING CEREALS FOR FOOD.

No. 533,551. Patented Feb. 5, 1895.

Fig. 1.

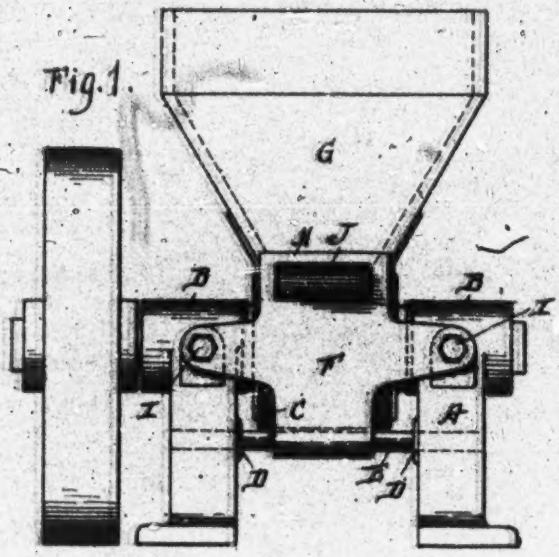


Fig. 2.

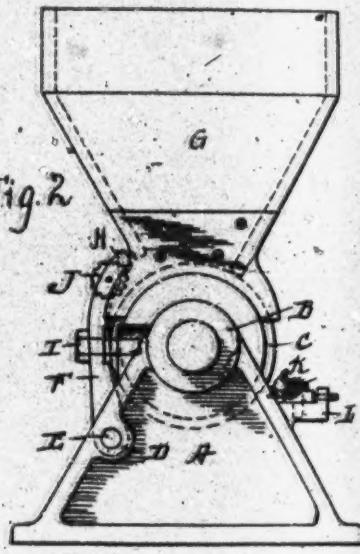


Fig. 3.

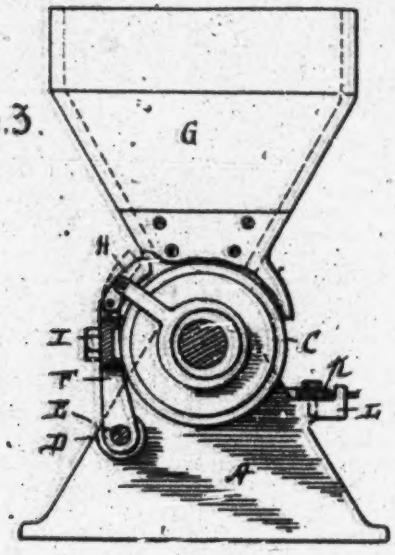
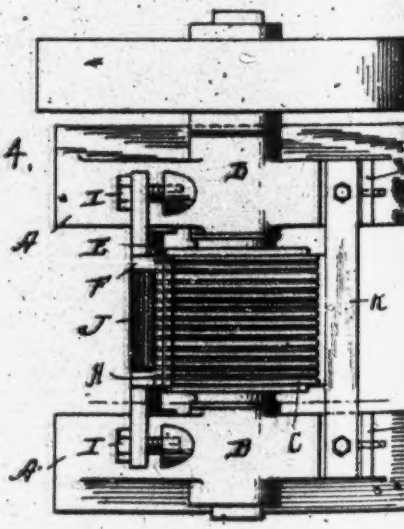


Fig. 4.



WITNESSES:

Geo. M. Anderson

Philip Allasi

INVENTOR

Henry D. Perky

BY

E. W. Anderson

his ATTORNEY

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO, ASSIGNOR TO THE CEREAL MACHINE COMPANY, OF SAME PLACE.

ROLL-MACHINE FOR REDUCING CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 533,551, dated February 5, 1895.

Application filed April 28, 1894. Serial No. 509,104. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented certain new and useful Improvements in Roll-Machines for Reducing Cereals for Food; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 of the drawings is a back view of the machine. Fig. 2 is a side view. Fig. 3 is a sectional view. Fig. 4 is a top view with the hopper removed.

This invention has for its object to provide a machine for the reduction of cereals and other articles of food, wherein a single grooved roll is employed in conjunction with a stationary or non-reciprocating adjustable back plate.

In the accompanying drawings, the letter A designates a frame having bearings B, for the reducing roll C, which is designed to rotate upon a horizontal axis, and is circumferentially grooved as indicated. The frame is also provided with bearings D for the pivots E of the back plate F, which is designed to engage the face of the roll C in order to cooperate therewith in reducing the grain which is fed from the hopper G between said roll and the upper extension of flange H, of said plate, and causing the mashed product to enter the grooves of said roll. The back plate is adjustable, its position being governed by the screws I, which extend through lateral bearings of said back plate into the frame. The adjustment required is very slight, whether it be designed to hold the back-plate in contact with the surface of the roll in order to reduce the material to shred-like or filamentous form, or to allow a slight interval between the roll surface and the back-plate in order to reduce the material to the form of a ribbon or film having a corrugated surface.

In some cases, it is designed to provide the flange of the back plate with a corrugated feed roll as indicated at J; or the flange may be made to have an oscillating feed motion.

K represents the discharging comb, which is supported upon bearings L of the frame, and extends transversely of the cylinder or roll in front. The contour of its edge is complementary to that of the roll surface which it engages to clear the material from the grooves thereof, discharging the same in thread like or shred form.

In preparing grain for this machine, it should be boiled until sufficiently cooked without destroying the whole form of the grains, and then dried sufficiently to restore somewhat the interior consistence thereof, and equalize the amount of moisture in the several parts of the berry.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. In a reducing machine for grain and other articles of food, the combination with a circumferentially grooved roll, and its discharging comb, of a stationary back-plate engaging said roll, substantially as specified.

2. In a reducing machine for grain and other articles of food, the combination with a circumferentially grooved roll and its discharging comb, of an adjustable pivoted back plate and the adjusting screws, substantially as specified.

3. A reducing machine for grain and other articles of food having the circumferentially grooved feed roll, the back-plate provided with an upper extension or feed flange, the hopper, and the discharging comb, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

38

(No Model.)

H. D. PERKY.

ROLL MACHINE FOR REDUCING CEREALS FOR FOOD.

No. 533,552. Patented Feb. 5, 1895.

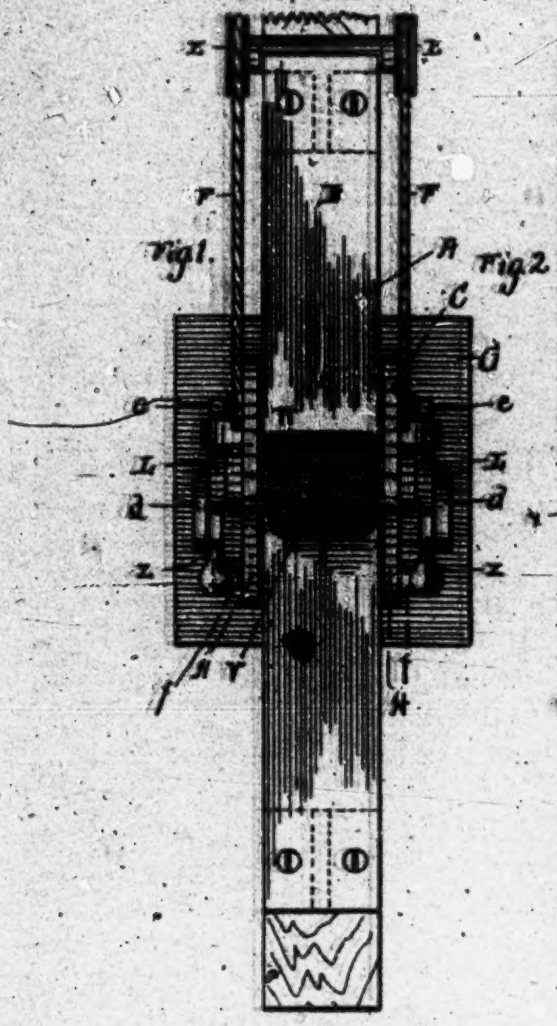


Fig. 1.

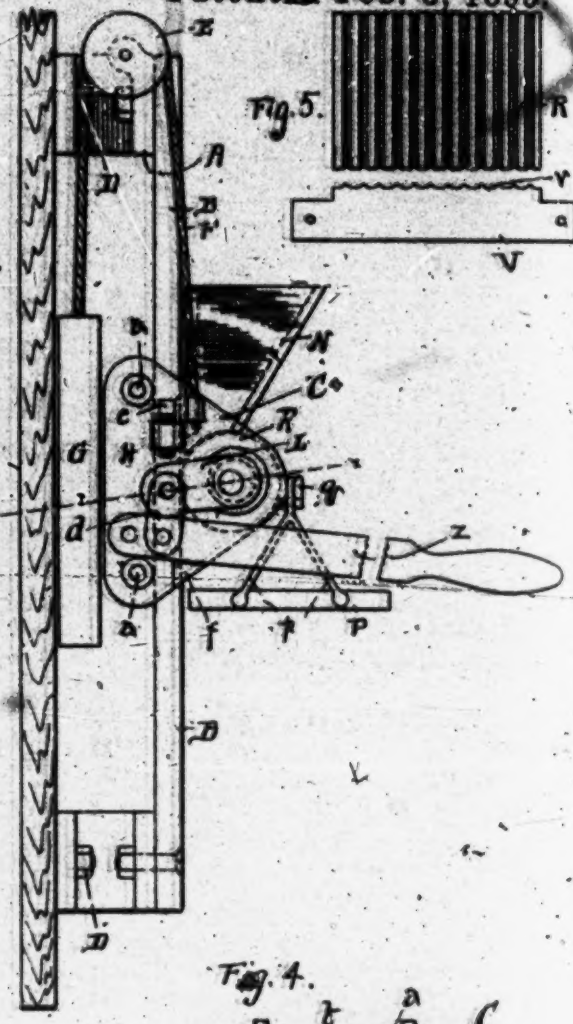


Fig. 2.

Fig. 5.

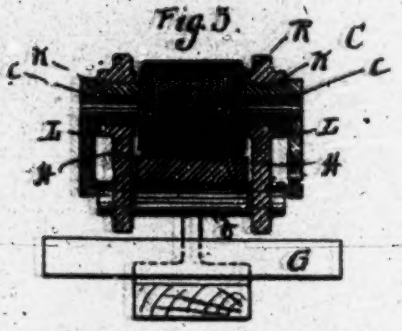


Fig. 3.

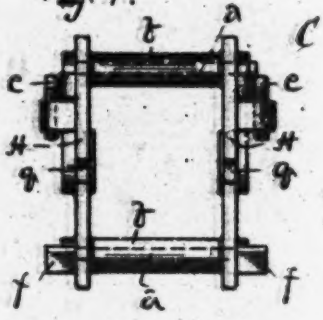


Fig. 4.

Witnesses
Geo. M. Anderson
Philip Allaai.

Inventor
Henry D. Perky
By his Attorney
E. W. Anderson

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO, ASSIGNOR TO THE CEREAL MACHINE COMPANY, OF SAME PLACE.

ROLL-MACHINE FOR REDUCING CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 533,552, dated February 5, 1895.

Application filed April 28, 1894. Serial No. 509,406. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented certain new and useful Improvements in Roll-Machines for Reducing Cereals for Food; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 of the drawings is a front elevation of a machine embodying my invention. Fig. 2 is a side view of same. Fig. 3 is a sectional view on the line *x*—*x* Fig. 2. Fig. 4 is a detail view of the reciprocating frame, and Fig. 5 is a detail view of one of the grooved rolls and scraper or comb.

The object of this invention is to provide an upright reciprocating or wall machine for the reduction of food, and especially for the reduction of grain to shredded or thread-like form without detracting from the nutritive qualities and virtues thereof.

The machine consists of a frame A of elongated form, having a back plate B, and in connection therewith a reciprocating shredder slide C, having a grooved roll and hopper and devices for operating the same.

The frame A with its elongated back plate is designed to be secured to a wall or upright in vertical position by means of suitable bolts or fastenings indicated at D. At the upper end of the frame are provided the pulleys E each carrying a rope F, one end of which is attached to the slide C, while to its other end is connected the weight G. This weight is sufficiently heavy to balance the slide and to assist the working movement of the latter in the upward direction.

The slide C, is provided with a frame consisting of side plates H, connected by transverse bolts indicated at *a*, which form bearings for the anti-friction rollers *b*, which engage the rear surface of the back plate B. The side plates extend forward at the sides of the back plate, projecting sufficiently to provide bearings for the journals K of the eccentric levers L, said journals forming bearings for the shaft of the grooved roll or cylinder R, as indicated at *c*. These bearings are eccentrically placed in the lever journals K, so that when said levers are turned downward by depressing the operating levers Z, which are connected thereto by links *d*, the grooved roll or cylinder R is moved away from the back-plate B.

The cylinder R is formed with circumferential grooves preferably of V-form, as indicated in the drawings. Upon it is supported the hopper N, the rear wall of which is made short at its lower end between the side walls to provide a feed way for the contents of the hopper allowing it to pass down along the rear upper surface of the grooved cylinder between the same and the back-plate B.

When the cylinder slide is drawn upward by means of its levers Z, or a treadle connected thereto, the eccentric levers L bring the cylinder R into engagement with the back-plate, so that by its rotation thereon, the grain or other contents of the hopper is reduced to shredded or thread-like form. In the reverse or downward movement of the slide the feeding ceases, and the cylinder is moved away from the back-plate by the action of the eccentric levers. The amount of upward movement of the levers Z, is adjusted and controlled by means of the set screws *e*, on the side plates H, said side plates also carrying stop lugs *f*, which limit the downward movement of the main operating levers Z.

P indicates a removable pan or receiver which is connected to the side plates of the slide by means of its lateral arms *p*, which engage lugs *q*, of said slide or carrier.

V indicates the discharging comb the operating edge *v* of which is shaped to conform to the contour of the cylinder surface across which it extends in front, its small teeth entering the grooves of the cylinder and causing the threads of material brought around in said grooves to fall upon the receiver in shredded or thread-like form.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. The combination of the circumferentially grooved cylinder and a sliding carrier

therefor, of the vertical back-plate behind said cylinder, the discharging comb engaging said cylinder, the hopper arranged to discharge between said cylinder and back plate, and devices for operating said carrier and cylinder, substantially as specified.

2. The combination with the vertical back plate, of the reciprocating, adjustable grooved cylinder arranged to move in contact with said back plate, the carrier slide, in which said cylinder is journaled, a discharging comb engaging said cylinder, levers for actuating said slide, and stops for controlling the movements of said levers, substantially as specified.

3. The combination with the carrier walls and the grooved cylinder of the eccentric levers bearing in said walls, and the cylinder shaft having eccentric bearings in the journals of said levers, substantially as specified.

4. The combination with the back-plate, and the carrier, of the balance device, the grooved cylinder, the eccentric levers, their eccentric bearings for the cylinder shaft, the operating levers and connections, and the lever stops, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

42

(No Model.)

H. D. PERKY.

ROLL MACHINE FOR REDUCING CEREALS FOR FOOD.

No. 533,556. Patented Feb. 5, 1895.

Fig. 3

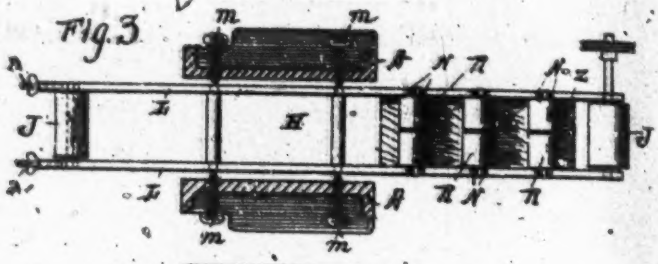


Fig. 1.

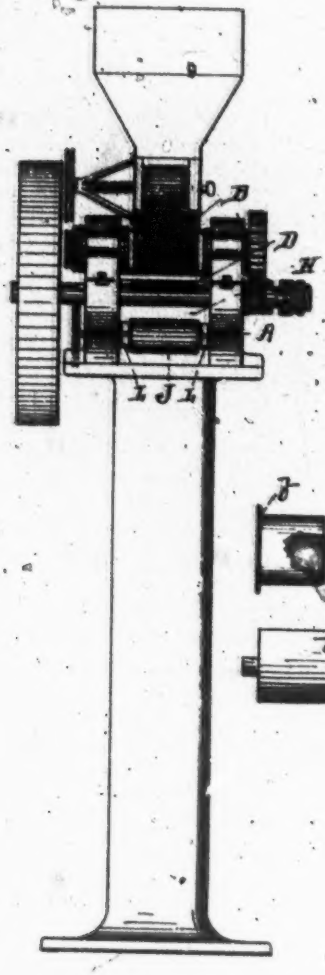


Fig. 2

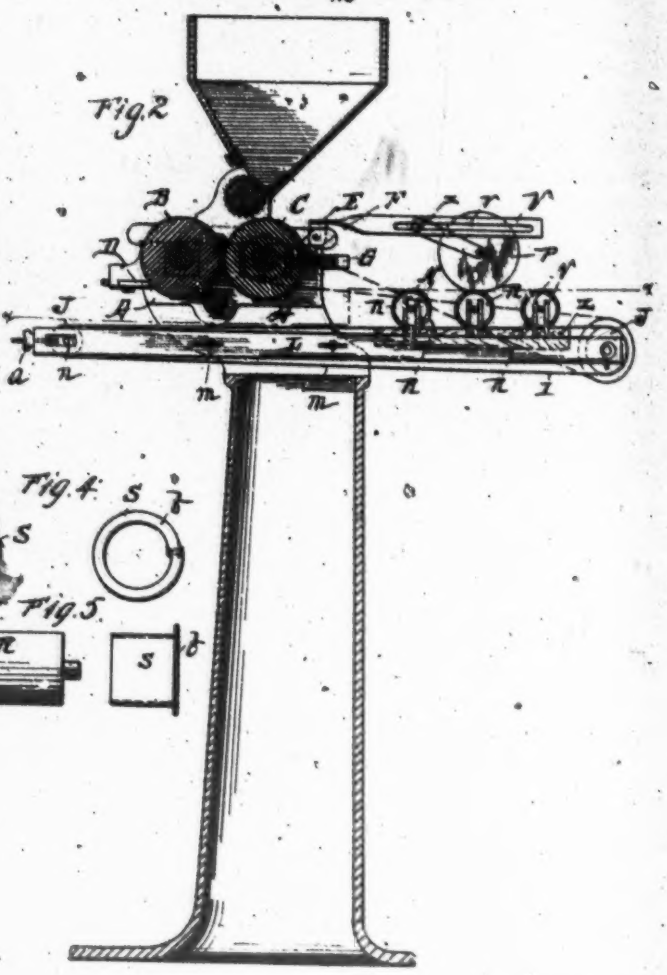


Fig. 4

Fig. 5.

Witnesses
Philip Allaire.
George H. Parmelee.

Inventor
Henry D. Perky
By his Attorney
E. W. Anderson

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO, ASSIGNOR TO THE CEREAL MACHINE COMPANY, OF SAME PLACE.

ROLL-MACHINE FOR REDUCING CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 533,553, dated February 5, 1895.

Application filed April 28, 1894. Serial No. 509,406. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented certain new and useful Improvements in Roll-Machines for Reducing Cereals for Food; and I do declare the following to be a full, clear and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 of the drawings is a front elevation of my invention. Fig. 2 is a partial vertical section thereof. Fig. 3 is a horizontal section on line *x*—*x*, Fig. 2. Fig. 4 shows details of the shell. Fig. 5 is an elevation of roll with a shell removed therefrom.

The invention is designed to facilitate the formation of the films or threads of material, as discharged from a grain reducing machine, into hollow cylindrical or cup shape.

In the accompanying drawings the letter A designates the frame of a grain reducing machine, having a circumferentially grooved shredding roller B, and a compressing roll C engaging the same, designed to reduce the grain previously softened by boiling and drying to proper consistency, to threadlike or shredded form, the threads or shreds being discharged therefrom by the comb or scraper D having edge teeth conformed to and engaging the grooves of the roll B.

E represents a slide box for one of the rolls, engaging a slide-way F of the frame on each side, whereby said roll is allowed to be separated slightly from its fellow in order to form a ribbon or film of the material, having a ribbed or corrugated surface. The adjustment is controlled by the set screws G.

Below the rolls and above the frame support, is provided in said frame, a passage or through way H, for the reception of a traveling receiver, such receiver being usually removable from the frame.

In the drawings the form of receiver represented is a traveling band or belt I, moving around pulleys J, J, which bear in the ends of an elongated frame L, which is held in the passage H of the frame by means of the set screws *m*, which pass through side bearings of the frame. These screws also facilitate the adjustment of the receiver to true position.

At one end of the frame a slide bearing *n*, is provided for the band pulley said bearing having a tension screw and nut as at *a*.

The traveler frame carries the vertical slot-bearings N, arranged opposite to each other on the sides of said frame, and being designed to receive the journals of the receiving rollers R.

The threads or films of material discharged from the reducing rolls upon the traveling band are carried thereby in extended form to the nearest receiving roller R, which takes up the same and winds it in circular form, and in layers until the desired thickness of wall is reached. Then this roller with its contents being removed, the material on the band is taken up by the next roller in series and formed thereon to be removed in turn. It will be observed that the feed from the machine on the band to the rollers is continuous, and the formation of the food rings or "cups" expeditious, no time being lost in stopping the machine to remove or replace a roller, a matter of great importance in the production of these articles of food in large numbers and at a low price.

In order to further facilitate the production and preparation of these rings or "cups," each roller is provided with the detachable metallic shells S, which are slipped on said roller from its ends toward its middle portion, the adjacent ends of said shells being separated from each other a little, to provide a way for the cutter P, by means of which the material wound upon the shells is divided, allotting to each shell its proper portion. The shells are usually formed with a divided wall to allow them to be compressed in discharging the rings or cups of food; and this construction also gives them a spring-like hold upon the roller. The shell is also usually provided with a base flange *b* at one end.

Each shell S is not alone a former or shaper of the food material, but also it constitutes a pan or cooking utensil, as it is designed to be

placed upon its flanged end, in upright position, with its contents, for cooking, in a suitable oven. The perfect form of the rings or "cups" is thereby preserved, and the danger of their injury before cooking reduced to a minimum. When these shells are employed in suitable numbers, two or three winding rollers R, will be found sufficient for the machine.

The dividing knife or cutter P, preferably a disk, is carried on an arm V, pivoted or otherwise connected to the frame. The cutter is adjustable in order that it may be readily applied to any roller of the series, for this purpose the arm V is provided with a slot or slideway v, and a connecting pin or clamp-screw z.

Z is a board underneath that portion of the traveling band which is under the rollers R. The purpose of this board is to support the traveling band where it passes under the receiving rollers and hold it in contact with said rollers.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. In a food-reducing machine, the combination with the reducing rolls and discharging comb; of the adjustable and removable receiver frame, its traveling band, pulleys and tension device, substantially as specified.

2. In a food-reducing machine, the combination with the reducing rolls and discharging comb; of the receiver frame, its pulleys and traveling band, the vertical slot-bearings of said receiver frame, the removable receiver rollers, and a dividing cutter, arranged to be brought into successive engagement with said receiving rollers, substantially as specified.

3. In a food reducing machine, the combination with the reducing rolls, and discharging comb; of the receiver frame, its pulleys and traveling band, the vertical slot-bearings of said receiver frame, the removable receiver rollers, and metallic receiver shells adapted to engage said rollers and removable therefrom, substantially as specified.

4. A divided removable metallic receiver shell provided with a base-flange and adapted to fit on the receiver roller of a traveling receiver, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

(No Model.)

H. D. PERKY.

ROLL MACHINE FOR PREPARATION OF CEREALS FOR FOOD.

No. 533,564. Patented Feb. 5, 1895.

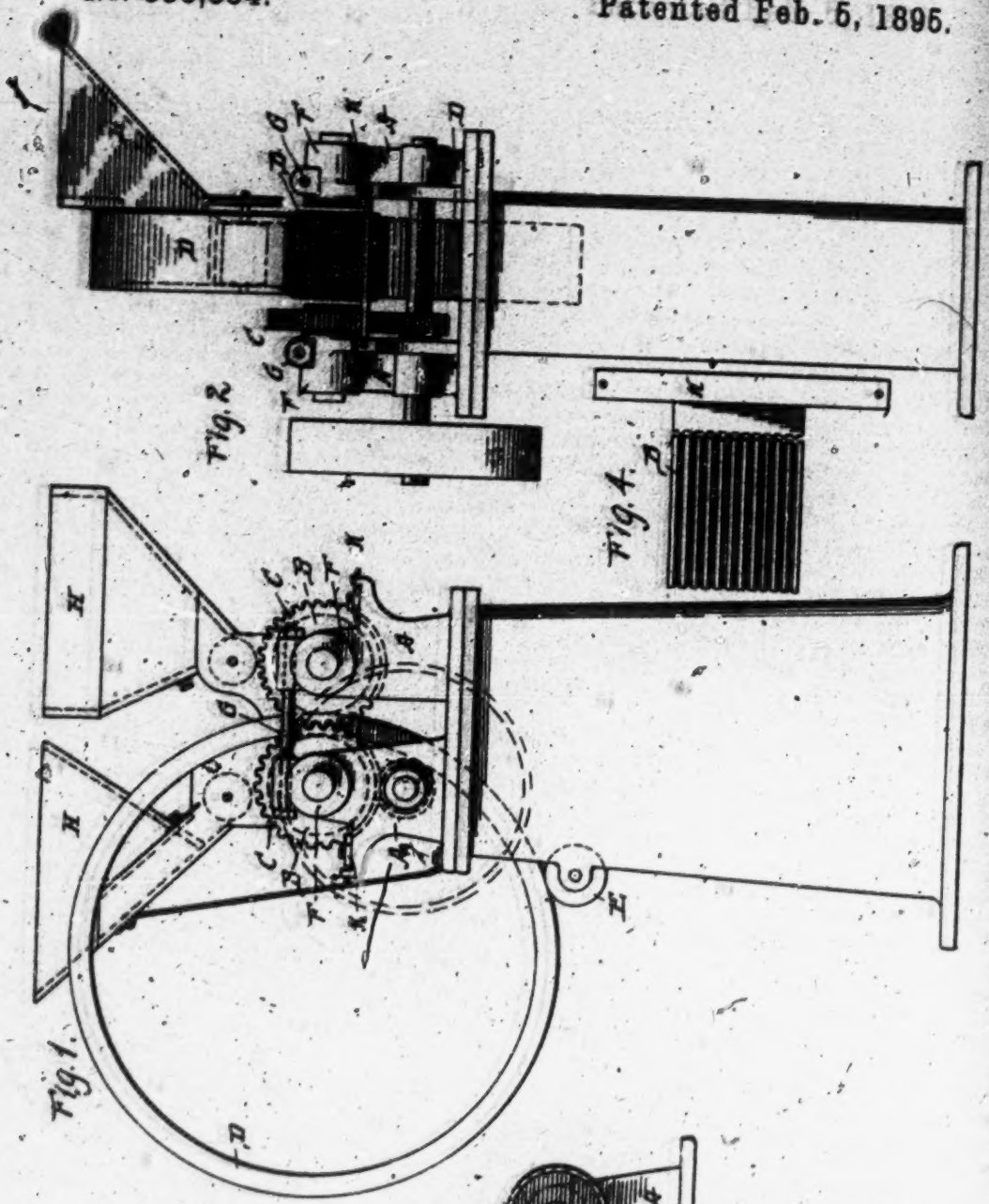


Fig. 1.

Fig. 2.

Fig. 4.

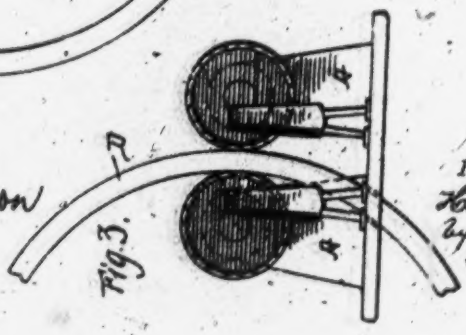


Fig. 3.

WITNESSES

Geo. M. Anderson

Philip C. Masi

INVENTOR

Henry D. Perky

by E. W. Anderson

his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO, ASSIGNOR TO THE CEREAL MACHINE COMPANY, OF SAME PLACE.

ROLL-MACHINE FOR PREPARATION OF CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 533,554, dated February 5, 1895.

Application filed April 28, 1894. Serial No. 509,407. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, residing at Denver, in the county of Arapahoe and State of Colorado, have invented new and useful Improvements in Roll-Machines for the Preparation of Cereals for Food; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings and to the letters of reference marked thereon.

Figure 1 of the drawings represents a side view of the machine. Fig. 2 is a front view. Fig. 3 is a detail showing perforated rolls. Fig. 4 is a detached view of one of the grooved rolls and its discharging comb.

The object of this invention is to provide a machine for the economic reduction of cereals in the grain form to a desirable article of food, without detracting from their natural nutritious qualities, and for the better preparation of the same for general use.

In the accompanying drawings, the letter A designates the frame of the machine.

B, B represent two reducing rolls having engaging gear wheels C, C, and operating mechanism therefor. Between the cylindrical surfaces of the reducing rolls extends a compressing ring or annular traveling band plate D, of comparatively large diameter, said ring having a roller bearing at E.

F, F represent the bearings for the reducing rolls, which may be braced in position by means of tie-bolts G, whereby also, the rolls may be adjusted to proper contact with the traveling ring plate.

H H indicate the hoppers in which the grain, suitably prepared by boiling and drying to proper condition for the action of the rolls, is placed, and whereby the grains in whole form are fed between the reducing rolls and the intermediate ring plate. As the rolls are rotated, the ring plate revolves and compresses and mashes the grain into the fine circumferential grooves of the rolls, which carry the material until discharged in the shape of continuous fine threads or shreds by scrapers K. In this action the outer bran layers, the glutin layer and the interior starchy portions of the grain are intimately commingled, and an article of food is presented having all the nutritive qualities and virtues of the various parts of the grain berry, in convenient form for immediate consumption, or for shaping and preparation in various ways for baking.

The circumferential grooves of the reducing rolls are fine, or small in cross-section, and preferably of V-form, and the discharging combs or scrapers have fine teeth of similar contour adapted to enter said grooves, and discharge the threads or shreds of food as they are brought around by the rotation of the rolls. The grooved rolls are especially adapted for the reduction of small grain such as wheat and barley.

In reducing Indian corn, I design sometimes to employ in place of the grooved rolls, hollow rolls having their cylindrical walls provided with a number of perforations, through which, by the action of the traveling ring plate the material is forced in the shape of small threads, which can be discharged from the hollow rolls by means of inclined scoops or other suitable device.

Having described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. In a reducing machine, the combination with the reducing rolls and their hoppers of the intermediate traveling ring plate, and its bearing roller, substantially as specified.

2. In a reducing machine, the combination with circumferentially grooved reducing rolls, their hoppers, and discharging combs or scrapers, of the traveling ring-plate extending between the reducing rolls, substantially as specified.

In testimony whereof I affix my signature in the presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

50

(No Model.) 2 Sheets—Sheet 1.

H. D. PERKY.

MACHINE FOR REDUCTION AND PREPARATION OF CEREALS FOR FOOD.

No. 533,555. Patented Feb. 5, 1895.

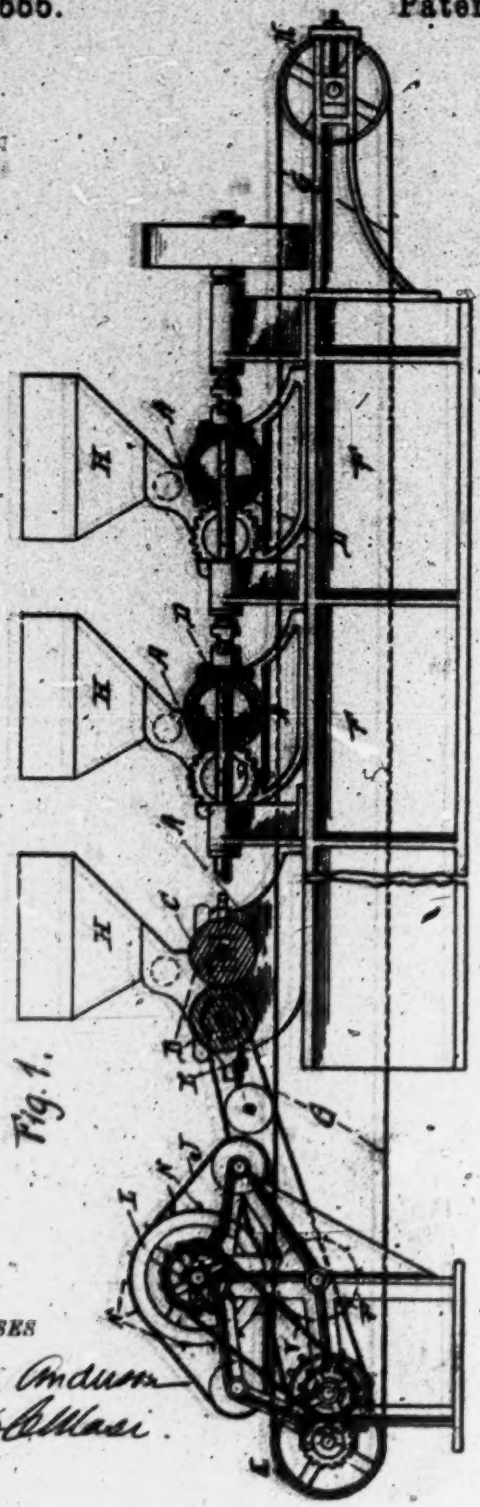


Fig. 1.

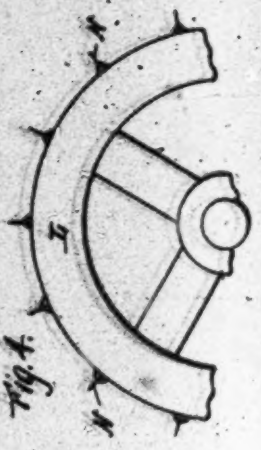


Fig. 4.

Fig. 3.

WITNESSES

Geo. W. Anderson

Philip C. Wasey

INVENTOR

H. D. Perky

by E. W. Anderson

his Attorney

(No Model.) 2 Sheets—Sheet 2.

H. D. PERKY.

MACHINE FOR REDUCTION AND PREPARATION OF CEREALS FOR FOOD.

No. 533,555. Patented Feb. 5, 1895.

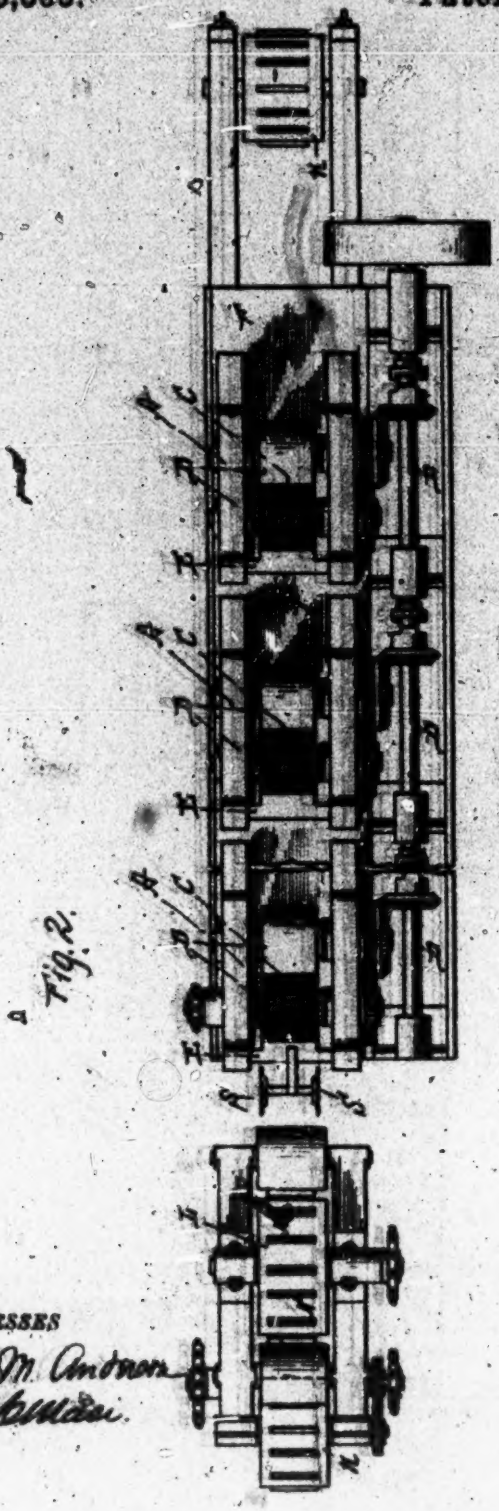


Fig. 2.

Fig. 6.

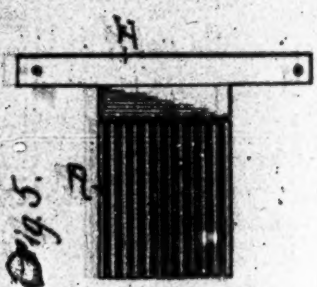


Fig. 5.

WITNESSES

Geo. M. Anderson

Philip Bellas.

INVENTOR

H. D. Perky.

by C. W. Anderson.

his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO, ASSIGNOR TO THE CEREAL MACHINE COMPANY, OF SAME PLACE.

MACHINE FOR REDUCTION AND PREPARATION OF CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 533,565, dated February 5, 1895.

Application filed May 4, 1894. Serial No. 510,075. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, residing at Denver, in the county of Arapahoe and State of Colorado, have invented new and useful Improvements in Machines for the Reduction and Preparation of Cereals for Food; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, forming a part of this specification, and to the letters of reference marked thereon.

Figure 1 of the drawings is a side elevation of the machine with part of the line shaft and gear broken away and one of the shredders in section. Fig. 2 is a plan view of the machine. Fig. 3 shows a fragment of slotted belt J. Fig. 4 shows a fragment of the continuous cutter. Fig. 5 is a plan view of grooved roll and comb. Fig. 6 shows a fragment of the slotted belt G.

The invention relates to the economic reduction of cereals in the grain state, to a desirable form of food, and it has for its object to provide means for the production of such form of food, rapidly, and in large quantities, commensurate with the ordinary use of such an article as bread.

In carrying out this invention, I provide in bearings upon a suitable frame F, a series of reducers or shredders A, which are arranged in succession.

Each reducer or shredding device, consists preferably of a pair of rolls B, B, whereof one is grooved. The grooves of the roll extend circumferentially around it, and are of small or fine character, and usually V-shaped in sectional form, the bottom of the groove having however some breadth. A groove having a width of one fiftieth of an inch, and a depth of one fiftieth of an inch serves an excellent purpose, especially in the reduction of wheat. The grooves are arranged in series around the cylindrical surface of the roll, and the intervals of the cylindrical surface between the grooves may be about one thirtieth of an inch.

The back roll of the pair or set is smooth and its cylindrical surface is in exact and neat contact with that of the grooved roll. The rolls are geared together to run in contact as indicated at C, and all the sets of the series are rotated at a uniform rate of speed. For this purpose a line shaft D may be provided with suitable gearing engaging the roll gear. Each set of reducing rolls is provided with a discharging scraper or comb E, which is secured to the frame. This scraper or comb has teeth which are complementary in their contour to the grooves of the roll, and engage said grooves to discharge the contents thereof, as brought around in said grooves. Over each set of rolls is a hopper H, into which the grain, having been boiled and sufficiently dried for the proper action of the reducing rolls, is placed.

When the machine is in operation, each set of rolls discharges the grain in the form of continuous threads or shreds of fine or small cross-section. In order to take up these different discharges of the reducers, a continuous receiver belt or carrier G is provided having suitable pulleys or rollers K, at its ends, and proper guides of the framing to keep its upper or receiving portion level. This belt, being run at a suitable rate of speed takes the discharged threads or shreds of the reducers along with it, disposing the layers successively upon each other to a thickness suitable for baking, this thickness being governed by the number of reducers employed. In order to form and subdivide the material thus built upon the belt and carried along thereby into sections for biscuit or loaves, a continuous cutter L is provided. This cutter is preferably one which moves at the same rate of speed as the belt, and may be a wheel having radially projecting blades N, which extend transversely. The distance between the blades determines the breadth of the biscuit-sections. A continuous band J, extends at the height of the proposed biscuit above the carrier belt, and parallel therewith. This band J is run at the same rate of speed as the belt G, and is provided with transverse slots I, which are engaged by the blades of the cutter as the latter revolves, said blades projecting through said slots into the material on the belt G, and subdividing the same into sections. This band J serves

as a clearer for the cutter blades, keeping them free from adherence of the shredded or threaded product.

The cutter should be run by means of a sprocket chain from the belt pulley of the carrier or from some shaft in gear therewith, at the same rate of speed as the carrier belt. By means of this cutter the biscuits or loaves can be nearly cut through or separated so as to leave a thin or web-like attachment between them at their lower portions, such attachment causing them to hold together sufficiently for leading in delivering them to an oven-belt on which they may be baked.

If it is desired to separate the biscuits or loaves entirely the pressure wheel P, which runs under the belt G immediately below the cutter wheel may be provided in order to form an under cutter with short blades V, adapted to protrude in turn through transverse slots Z, which may be formed in the belt G for this purpose.

The threads or shreds of material are very delicate and tender, and, owing to their nature and their roughened or somewhat jagged exterior, adhere to each other readily so as to give considerable stability to the biscuit formation, but in order to prevent them from adhering to the cutter blades or cutter, the clearing belt or band J is provided as hereinbefore described.

S, S designate a pair of cutter disks situated back of the last comb E. The purpose of these disks is to trim the lateral edges of the layers of product on the belt G before it passes to the cutter L.

Any suitable form of gearing may be employed for giving the cutter L and clearer J the proper movements, a suitable arrangement for the purpose being indicated at the right of Figs. 1 and 2.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. The combination of a series of sets of reducing rolls, their discharging combs, a continuous receiver belt underneath said rolls, a rotary cutter journaled over said belt beyond the last set of said rolls, and gear for rotating said cutter at the same rate of speed as said belt, substantially as specified.

2. The combination of a series of sets of reducing rolls, their discharging combs, a continuous receiver belt underneath said rolls, a rotary cutter journaled over said belt beyond the last set of said rolls, a slotted endless clearer belt for said cutter, and gear for rotating said cutter and clearer belt at the same rate of speed as the receiving belt, substantially as specified.

3. The combination with the reducing rolls, and a continuous receiver belt, of a moving cutter, and an endless, traveling, slotted clearer belt operating in connection with said cutter, substantially as specified.

4. The combination with reducing rolls and a continuous receiver band, of an endless moving cutter having a series of blades and a slotted endless clearer belt, substantially as specified.

5. The combination with reducing rolls, and a slotted continuous receiver band, of an endless moving cutter, a slotted clearer belt, and a moving under cutter, having its blades working through the slots of the receiver band, substantially as specified.

In testimony whereof I affix my signature in the presence of two witnesses.

HENRY D. PERKY.

Witnesses:
JOHN S. PERKY,
J. M. STANLEY.

(No Model.)

J. H. MONTGOMERY.

PULSATING WATER SEPARATOR FOR REMOVING ROCK, GRIT, OR FOREIGN MATTER FROM GRAIN.

No. 533,821. Patented Feb. 5, 1895.

Fig. 1.

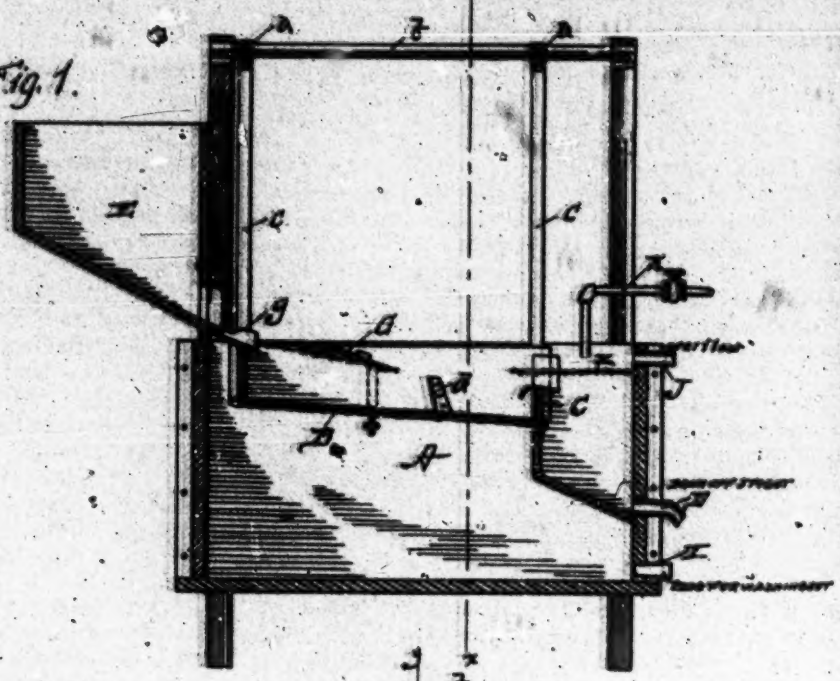
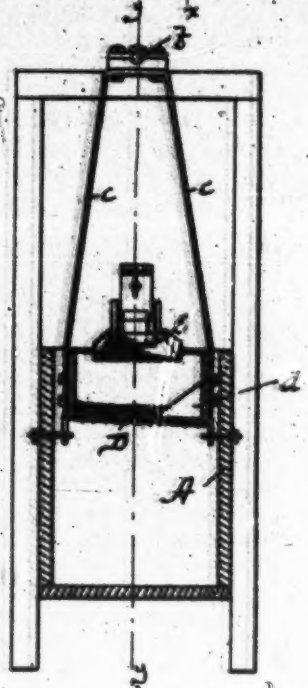


Fig. 2.



WITNESSES

Geo. M. Anderson

Philip Williams

INVENTOR

Jas. H. Montgomery,

by E. W. Anderson.

his Attorney

UNITED STATES PATENT OFFICE.

JAMES H. MONTGOMERY, OF DENVER, COLORADO.

PULSATING WATER-SEPARATOR FOR REMOVING ROCK, GRIT, OR FOREIGN MATTER FROM GRAIN.

SPECIFICATION forming part of Letters Patent No. 533,891, dated February 5, 1895.

Application filed May 4, 1894. Serial No. 510,066. (No model.)

To all whom it may concern:

Be it known that I, JAMES H. MONTGOMERY, a citizen of the United States, residing at Denver, in the county of Arapahoe and State of Colorado, have invented a certain new and useful Pulsating Water-Separator for Removing Rock, Grit, or Foreign Matter from Grain; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, forming part of this specification, and to the letters of reference marked thereon.

Figure 1, of the drawings represents a vertical longitudinal section on the line *y*—*y*, Fig. 2. Fig. 2 represents a cross-section on line *x*—*x*, Fig. 1.

The object of this invention is to provide means for separating from grain, and especially from wheat, by water pulsations, such particles of rock, chaff, and other foreign matter, as may be left intermingled therewith, after the grain has been acted upon by thrashing or cleaning machines of ordinary character. It is designed to thoroughly separate all grit from the grain so that it may be fed to reducing machines of exact and fine construction without danger of injuring the same.

In the accompanying drawings the letter A, designates a water-tight box or tank, and B, an inclined screen or sieve extending longitudinally in the upper portion of said tank, and suspended or supported therein, so that it is just submerged below the surface of the water with which the tank is designed to be nearly filled. The screen has a small mesh to retain the grains of wheat while allowing the smaller particles of grit to pass through into the lower portion of the tank. The tail C of the screen is sufficiently raised above the wire cloth bottom to dam up the grain to the depth of an inch or more, said grain being designed as the screen fills, to flow over the tail board into the chute in the end of the tank, whence it is discharged through a valve spout D.

An up and down reciprocating motion is given to the screen by means of small rotating cams *a*, on a shaft *b*, said cams being connected to the screen by suitable arms, *c*. This reciprocation produces upon the wheat grains in the screen a pulsating action causing them to rise, loosen from each other and fall back at each pulsation. The particles of rock and grit being specifically heavier than the grains of wheat, are by these pulsating motions, gradually washed down through the grain to the bottom of the screen, which allows the finer grit to pass through its mesh but retains the larger particles. These larger pieces of rock and grit accumulate at the lower end of the screen being gradually shaken into a receptacle or pocket *d*, preferably at the side from which they may be taken, when there is a sufficient quantity. In order to cause a lateral movement of these larger particles of grit a slight lateral inclination may be given to the bottom of the screen.

The grain is fed into the hopper E, whence it passes by the hopper spout *g*, to the screen. While good thrashed grain will sink in water, some of the berries may require a little soaking, and in order to prevent these from floating along the surface of the water past the screen with the chaff, a canvas or other drag G is provided across the head portion of the screen to exert a submerging action on the berries, holding them until they are soaked sufficiently to sink. This drag extends transversely of the tank, its ends being connected to the sides thereof.

In order to let the water and sediment out of the tank, a discharge spout I is provided at its bottom portion.

The level of water is preserved by the surface spout J. If running water is employed, being supplied to the tank by a pipe K, the chaff and light stuff will float along the surface of the water, and be discharged through the spout J. A screen Z, just below the water surface, extends to the discharge end of the tank to prevent chaff covered grain from soaking and falling into the chute with the good grain.

I am aware that there are several ways of producing a pulsating effect of the water on the grain therein, and I do not therefore desire to be confined to the mechanism hereinbefore described for this purpose.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. In a separator for taking out grit and

foreign matter from grain, the combination of a tank, a pulsating screen therein, a hopper arranged to discharge onto said screen, an inclined discharge chute, and a chaff screen over said chute, substantially as specified.

2. In a pulsating water separator for taking out grit and foreign matter from grain, the combination of a tank, a screen therein, and a soaking drag over said screen, substantially as specified.

3. In a pulsating water separator for grain the combination of a vertically reciprocating screen submerged in a tank, an inclined discharge chute in the tank extending from the tail of the screen and a soaking drag across the head portion of said screen, substantially as specified.

4. In a pulsating water separator for grain, a tank, a vertically reciprocating grit screen therein, a discharging chute or receptacle, a chaff screen thereover, and a soaking drag over the grit screen, substantially as specified.

In testimony whereof I affix my signature in the presence of two witnesses.

JAMES H. MONTGOMERY.

Witnesses:

JOHN S. PERRY,

J. M. STANLEY.

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO.

BREAD AND METHOD OF PREPARING SAME.

SPECIFICATION forming part of Letters Patent No. 548,088, dated October 15, 1895.

Application filed March 15, 1894. Serial No. 503,777. (No specimens.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented a certain new and useful Article of Food or Bread and the Preparation of the Same; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

An object of the invention is the production of an article of food or bread, consisting of externally-rough porous threads or filaments of wheat or similar grain, having the outer nutrition bran and gluten of the entire berry visibly mingled with the interior starchy portion thereof and adapted by their composition of entire grain-berries and their rough and porous thread-like or shred-like form to constitute, without other shortening or aeration, bread of especially light and wholesome character.

A further object of the invention consists in the novel art or method of preparing the grain or berry and reducing it to form without taking from the grain any of the beneficial qualities provided by nature and presenting the same in convenient form for service as a superior article of food without the aid of experts or skilled labor now required to produce palatable bread.

The usual methods practiced in the manufacture of flour and the resultant bread therefrom are such as to detract from the natural and healthful properties possessed by the grain in its original state. The addition of shortening, yeast, baking-powder, alum, or other foreign ingredients to render the bread light is also detrimental, and the entire method consumes a large amount of time and labor.

According to the improved method which I am now about to describe, the wheat is taken in the whole or berry form, and after being cleaned and thoroughly washed is boiled until corked, without destroying the whole or individual form of the berry. The time of boiling is usually abont one hour. This operation, in addition to cooking the grains, removes from them the outer silicious coating and adherent extraneous matter. It also destroys all insect life and removes the traces thereof. Before removal from the boiler the grain is seasoned with salt. The wheat, still in berry form, is, nevertheless, just after the boiling quite soft and its interior or starchy portion especially is watery. It can be easily mashed between the finger and thumb and is not in condition for proper compression until its inner and outer portions are brought more upon an equality in point of consistence. To this end the grain, being removed from the boiler, is allowed to dry for some hours—from twelve to twenty hours being usually sufficient—until the interior of the berry has, from the loss of some of its water, become more consistent. The grain should be constantly stirred or agitated during this part of the process to hasten the drying-out action and to prevent incipient fermentation. I prefer, therefore, to dry out the grain in rotating wire-cloth barrels or cage-tumblers. The berries should now have sufficient interior consistence to enable their outer and interior portions to be effectively incorporated with each other, such incorporation being accomplished by passing the grain between compression-rollers, one or both of which is provided with a series of fine circumferential grooves whereby the berries are mashed and their outer bran-coats, gluten layers, and starchy interior portion thoroughly incorporated together and forced into the grooves of the roller or rollers, whence the resultant food is discharged, by means of a comb or scraper, in the form of long fine filaments or threads of porous character and having a rough exterior admirably adapted to cause them to adhere together when being massed to form loaves or biscuit. The sinuous form and rough or jagged exterior shape of the filaments is designed also to provide small interstices throughout the mass, whereby the bread is thoroughly aerated and made very light.

The food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways. The food presented is pure wheat and all the parts of the berry are given to the consumer in attractive form. No chemical change is set up therein by the use of ferments or other

foreign ingredients, and the percentage of water in the food is much less than in ordinary bread.

The article as produced is a food or bread composed of superposed or massed layers or deposits of dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch, and gluten of the entire berry, and which is absolutely free from leavening or raising material or their products.

The fine thread-like character of the component filaments of the bread and their disposition therein renders it tender, so that shortening is not required. All the nutrition and beneficial qualities of the berry are preserved in this admirable article of food, while its form gives it tenderness and lightness without the admixture of foreign ingredients.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. A food or bread composed of superposed or massed layers or deposits of dry, externally rough, porous, sinuous threads or fi ments of cooked whole wheat containing i termixed the bran, starch, and gluten of t entire berry, and which is absolutely fr from leavening or raising material, or the products.

2. The process of reducing cereals for fo consisting, first, in cooking the grain wi salt, after it has been thoroughly cleans without destroying the whole berry form, se ond, partially drying the grain with constan agitation until its interior and exterior po tions are of substantially the same consis ency, and finally, compressing the grain t intimately commingle the outer or bran coat gluten layers, and starchy, interior portio in the form of porous, rough filaments threads, substantially as described.

In testimony whereof I affix my signatu in the presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. M. STANLEY,
HARRY C. JAMES.

Correction in Letters Patent No. 548,086.

It is hereby certified that in Letters Patent No. 548,086, granted October 15, 1895, upon the application of Henry D. Perky, of Denver, Colorado, for an improvement in "Bread and Methods of Preparing Same," an error appears in the printed specification requiring correction, viz: In line 47, page 1, the word "corked" should read *cooked;* and that the said Letters Patent should be read with this correction therein that the same may conform to the record of the case in the Patent Office.

Signed, countersigned, and sealed this 29th day of October, A. D. 1895.

[SEAL.]

JNO. M. REYNOLDS,
Assistant Secretary of the Interior.

Countersigned:
S. T. FISHER,
Acting Commissioner of Patents.

62

DESIGN.

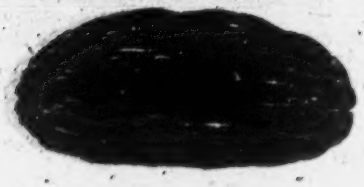
H. D. PERKY.

BISCUIT.

No. 24,668. Patented Sept. 17, 1895.

Fig. 1.

Fig. 2.



WITNESSES

Geo. M. Anderson

Philip Cunaeus

INVENTOR

H. D. Perky

by E. W. Anderson

his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERRY, OF BOSTON, MASSACHUSETTS.

DESIGN FOR A BISCUIT.

SPECIFICATION forming part of Design No. 24,033, dated September 17, 1895.

Application filed August 2, 1895. Serial No. 558,026. Term of patent 14 years.

To all whom it may concern:

Be it known that I, HENRY D. PERRY, a citizen of the United States, and a resident of Boston, in the county of Suffolk and State of Massachusetts, have invented a certain new and useful Design for Biscuits; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, which form a part of this specification.

Figure 1 of the drawings is a perspective view of the invention, and Fig. 2 is an end view of same.

This invention has relation to a certain new and original design for biscuits; and it consists in the novel form and configuration thereof, as hereinafter described, and shown in the accompanying drawings.

The leading feature of the design consists in a biscuit, which presents a fibrous interstitial appearance, showing superimposed layers or irregular interlacing threads or filaments, which are wound or disposed in such loose relation to each other that the threads or filaments of the inner layers are visible from the surface to a greater or less degree through the interstices of the outer layers.

The general form of the biscuit shown in the drawings, when viewed in plan, is that of a parallelogram, and when viewed in end elevation or cross-section is a flattened oval with slight creases along the longitudinal edges, its distinguishing characteristic being mainly, as above stated, its fibrous interstitial appearance.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

The design for a biscuit, substantially as herein shown and described.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERRY.

Witnesses:
S. A. TERRY,
A. W. TERRY.

66

(No Model.) 4 Sheets—Sheet 1.

H. D. PERKY.

MACHINE FOR REDUCING AND PREPARING CEREALS FOR FOOD.

No. 571,284. Patented Nov. 10, 1896.

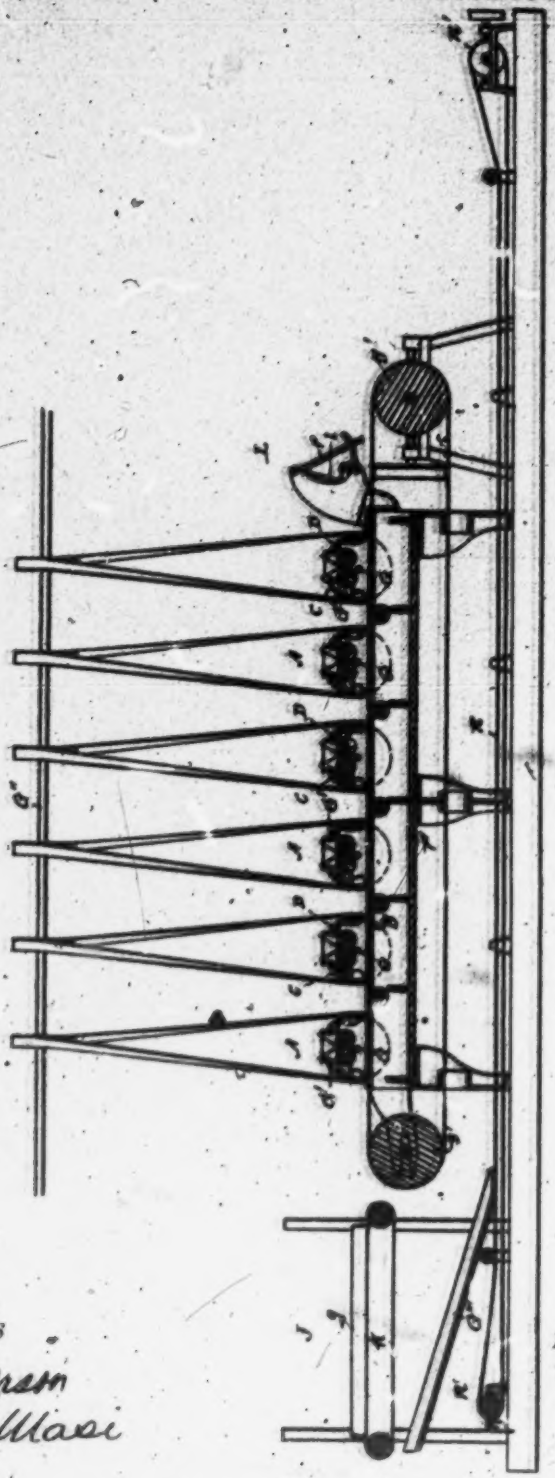


Fig. 1.

WITNESSES

Geo. Ambrose

Phil. C. Masi

INVENTOR

Henry D. Perky

by E. W. Anderson

his Attorney

68

(No Model.) 4 Sheets—Sheet 2.

H. D. PERKY.

MACHINE FOR REDUCING AND PREPARING CEREALS FOR FOOD.

No. 571,284. Patented Nov. 10, 1896.

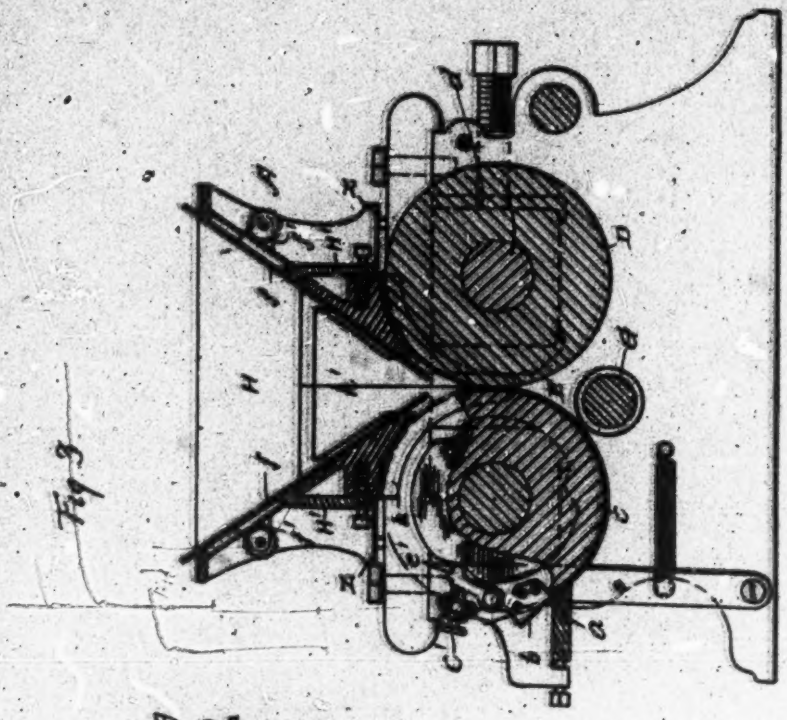


Fig. 3.

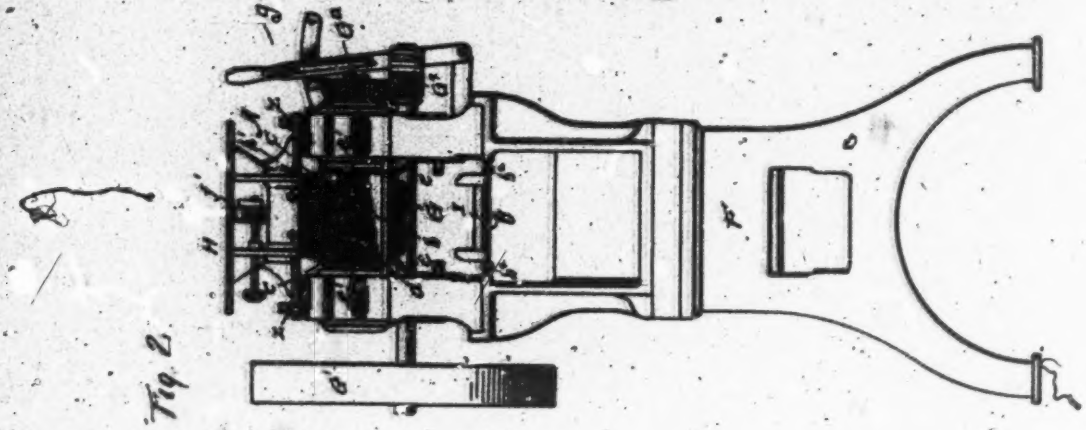


Fig. 2.

WITNESSES

G. Magnuson

Phil. Masi

INVENTOR

Henry D. Perky

by E. W. Anderson

his Attorney

70

(No Model.) 4 Sheets—Sheet 1.

H. D. PERKY.

MACHINE FOR REDUCING AND PREPARING CEREALS FOR FOOD.

No. 571,284. Patented Nov. 10, 1896.

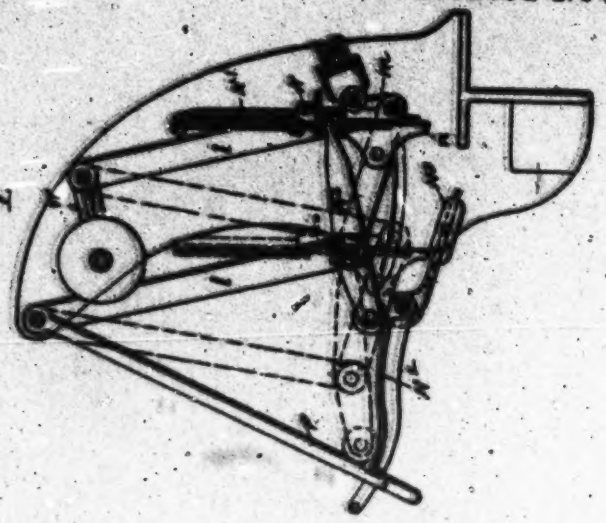


Fig. 4.

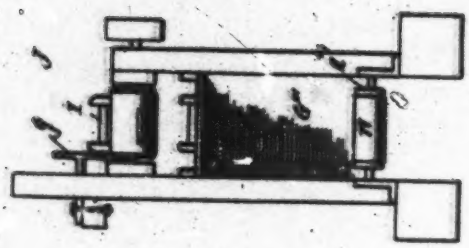


Fig. 5.

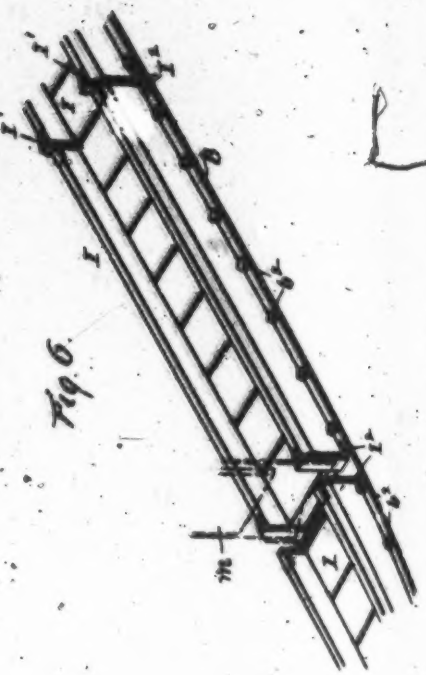


Fig. 6.

WITNESSES

Geo. Anderson

Phill. Masi

INVENTOR

Henry D. Perky

By W. W. Anderson

his Attorney

72

(No Model.) 4 Sheets—Sheet 4.

H. D. PERKY.

MACHINE FOR REDUCING AND PREPARING CEREALS FOR FOOD.

No. 571,284. Patented Nov. 10, 1896.

Fig. 8

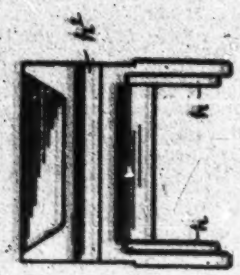


Fig. 9.

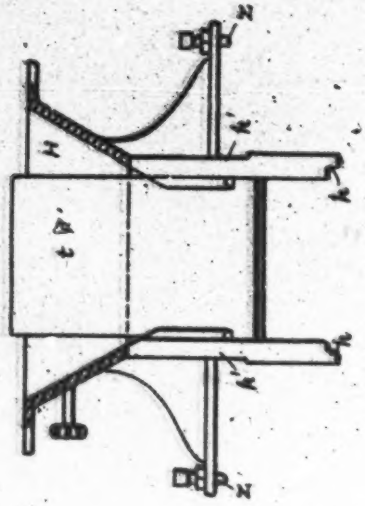


Fig. 7.

WITNESSES

G. M. Anroon

Phil. C. Wasi

INVENTOR

H. D. Perky

by E. W. Anderson

Sub Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF WORCESTER, MASSACHUSETTS.

MACHINE FOR REDUCING AND PREPARING CEREALS FOR FOOD.

SPECIFICATION forming part of Letters Patent No. 571,284, dated November 10, 1896.

Application filed February 7, 1896. Serial No. 578,394. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Machines for the Reduction and Preparation of Cereals for Food; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 of the drawings is a representation of a central vertical section through the machine. Fig. 2 is an end view of the cutter-head and supporting-frame receiving-belt in section. Fig. 3 is a central vertical section through the cutter-head with roller C broken to show cam at back. Fig. 4 is a sectional view of the section-cutter. Fig. 5 is an end view of the trough-feeder. Fig. 6 is a perspective view showing the troughs and the action of the section-cutter, the knife of the same being in dotted lines. Fig. 7 is a sectional view of one of the hoppers of the reducing-machines detached, the plane of section being at right angles to that of the section shown in Fig. 2. Fig. 8 is a detail view, partly in section, of the sectional hopper-walls h' detached. Fig. 9 is a side view of the same.

The object of this invention is to provide a competent and efficient machine for the reduction of grain in large quantities to thread-like or shredded form wherein the exterior and interior portions of the grain-berry are properly commingled, and suitable rapid disposition of the reduced product in layers sectionally divided and arranged for convenience in the manufacture of biscuits or forms of bread is effected.

In carrying out this invention I provide upon a suitable frame F a series of reducers or shredding-heads A, which are arranged in line with each other, as indicated in the drawings, Fig. 1. Each reducing-head is provided with a pair of reducing-rolls C and D, preferably, whereof one roll, C, is grooved. The grooves of the roll extend circumferentially and are of small or fine character and usually V-shaped in cross-section. The number of grooves may be about twenty to the inch. A groove being a width of one-fiftieth of an inch by about the same depth and a bottom surface of about one-sixth of the depth will serve an excellent purpose. The back roll D of the pair or set is smooth and its cylindrical surface is designed to be in exact and neat contact with that of the grooved roll. The rolls are geared together to run in contact, as indicated at E. The bearings for one of the rolls, preferably the back roll, are adjustable, as indicated at d. The rolls are provided with annular rabbets at their ends, as indicated at c, to form bearings for the inside faces of the concaves h of the lateral walls h' of the hopper H, which is removable. The grooved roll is provided with a circular notched cam C' at each end. Corresponding notches in the two cams should, as is obvious, be exactly opposite each other.

G indicates the driving-shaft, carrying a clutch-pinion $G^{\times}$, adapted to engage the gear-wheel $G^{\times}$ of the front roll. The shifting-lever engages the clutch and enables the operator to disengage the driving mechanism from the rolls of the head in an instant, causing said rolls to cease working. Each drive-shaft is provided with a pulley G', which is belted to a line-shaft G'', whereby all the rollers of the reducing-heads are run at the same speed.

Each reducing-head is provided with a comb or scraper a, which is provided with teeth to engage the grooves of the roller C. A spring-actuated cleaner b, located in inclined position above the comb, is carried by the lever-arms e, which are provided with adjustable lugs e' to engage the notched cams of the grooved roller. This cleaner thereby has an intermittent motion toward the surface of the grooved roller and serves to push back to this roller such accumulations of the product material as may occur upon the comb or scraper a.

It may sometimes happen that the rabbeted bearings upon the end portions of the two rolls may not be exactly in alinement with each other. It is therefore advisable to provide the hopper with means whereby it can be adjusted to suit such a condition. To this end the lower portion of the hopper is made in two

sections h', which are separate from the main frame H', each section having a sliding engagement with said frame, as indicated at h^2. The concaves h are formed on these sections, as shown in Figs. 7 and 9. By this construction it will be apparent that each section h' can be adjusted to suit its bearings on its subjacent roll independently of the other section.

Inclined cut-off slides f are seated in ways of the hopper-walls and are provided with rack-and-pinion devices f'' in order to adjust the feed of the grain to the rolls or to cut it off. The inclination of the slides enables the operator to cut the flow off close to the rolls. The hopper is supported upon adjustable set-screws, as at Z.

Underneath the series of reducing-heads the frame F is provided with a series of idle-rollers for the feed branch of the endless receiver-belt B and below this with a return-way. The traveling belt B is provided with lateral studs or guides b^2. B' indicates the driving and take-up pulleys for this belt.

At one end of the machine is provided a trough-feeding ledge or table J, having an adjustable guide or flange g (see Fig. 5) to insure feeding the troughs or sectional receivers I (see Fig. 6) in line with the receiver-belt B. This table is provided with a short feeding-belt K, which is designed to be driven at a speed somewhat faster than that of the main belt B, in order to insure closing the troughs or sectional receivers in abutted end-to-end position on the main belt. These sectional receivers have lateral flanges or walls and are open at their ends, which are shod with metal, as indicated at I^2, to avoid undue wear. At one end each trough is provided with catch lugs or projections I' for the automatic operation of the cutter m. This cutter (see Fig. 4) is secured upon the frame beyond the last reducing-head. Its frame is provided with bearings for the parallel-motion hanger l, to which is secured the knife-frame N, carrying the knife m, which is connected to said frame by a retracting-spring N'. This frame or carriage is provided with lugs at its lower corners, as indicated at n, which are designed to be engaged by the catch projections I' of the sectional receivers I. A lever K^2 is pivoted to the hanger and engages a bearing of the knife by one of its arms. Its other arm, usually provided with an antifriction-roller, engages a cam-arm N^2, which is pivoted to the fixed frame of the cutter and is counterbalanced, as at N^3, to give it an upward motion to engage the trip-arm p. The hanger l is returned to normal position by means of the weighted arm W.

The grain, having been boiled, salted, and dried to proper consistency, as explained in Letters Patent No. 548,086, dated October 15, 1895, is fed into the hoppers of the reducing-machines and is reduced by their grooved rollers to shred or thread like form, each head depositing a layer of the shred-like pro upon the traveling sectional receiver these layers are deposited in succes thickness of the product upon the rece gradually increased to the extent desir accordance with the number of redu heads composing the machine or such portion of them as may be in gear. In to form biscuit of fair size, I design to some thirty-odd heads in the gang. As trough or section of the receiver engage manger of the cutter the knife-frame is forward and the knife is automatically eciprocated vertically in such a manner transversely divide the product into sec at the junction of the trough with the ceding one. The cam-arm of the cutter ing the trip-arm becomes disengaged, trough passes forward, and the hanger turns to original position. The cam-arm and is set in engagement with the trip, w for the next receiver section or trough. low the receiver-belt is the trough return R, which runs upon a roller-way and is vided with driving and adjusting pulleys dicated at R'.) An upwardly-inclined ch G''' is provided under the trough-feeding ble J and serves to raise the troughs a matically to suitable position to be taken an attendant and fed onto the belt K.

Having thus described my invention, w I claim as new, and desire to secure by Let Patent, is—

1. The combination of a series of reduc or shredding heads, the endless carrier-b arranged to travel below the said heads series of open-ended receivers designed to carried on said belt, a cutting device loca over the rear portion of said belt and adap to be operated by the engagement there of the receivers as they pass thereunder, means whereby said receivers may be ea returned to feeding position, substantially specified.

2. The combination of the series of reduc or shredding heads arranged in line, a roller-way below said heads, the endless b arranged to run over said way, the feed-t at the front end of said belt, its feed-bel line with the first-named belt and desig to be driven at a slightly greater speed, sectional receivers, the automatic cutter, the return belt and chute, substantially specified.

3. The combination with the series of ducing-heads, the endless belt thereun and the sectional receivers having the t lugs or projections, of the section-cutter, h ing the parallel-motion hanger, the kn frame secured to said hanger, and hav trip-lugs for engagement with the lugs of receivers, the knife, its retracting-spring the cam-and-lever devices for forcing t knife to its work, substantially as specifi

4. The combination with the receivers h ing trip or catch lugs, of the parallel-mot

...hanger the knife-frame secured to said hanger ...ed to be engaged by the said trip of ...ch lugs, means whereby said engagement ...the movement of the hanger caused thereby ...the knife to descend to its work, ... for retracting the knife after the ... been made and for returning the ... to normal position, substantially as ...

... section-cutter having the parallel-... counterbalanced hanger, the cutter-... secured thereto and having a trip-lug ... projection, the cutter, the retracting-spring ..., the counterbalanced cam-lever, the ... which secures said cam-lever in operative position, and the lever having one arm ... a bearing of the knife and its outer ... engaging the said cam-lever, substantially as specified.

6. In a grain shredding or reducing machine, the combination with a pair of reducing-rolls, one of which is circumferentially grooved, and the comb or scraper for removing the product from the grooved roll, of the pivoted scraper arranged to play back and forth upon the upper surface of said scraper, a pair of oscillating, spring-actuated, pivoted levers to which said scraper is attached, ...ed cams upon the shaft of one of the reducing-rolls, and adjustable lugs carried by said levers and engaging the respective cams, substantially as specified.

7. A grain shredding or reducing machine having a pair of rolls or cylinders journaled to rotate in neat contact with each other, one of said rolls or cylinders being circumferentially grooved, the hopper having the sectional, adjustable lateral walls provided with bearings on the ends of said rolls, the cut-off slides seated in ways of the hopper-walls, the driving mechanism for said rolls or cylinders, and clutch-gear whereby said rolls or cylinders may be disconnected from the driving mechanism, substantially as specified.

8. In a grain reducing or shredding machine, the combination with the reducing-rolls having the rabbeted end portions, of the vertically-adjustable hopper having a bearing upon said rabbeted end portions, the bearing-sections of the hopper being separate from the main frame of the hopper and capable of an independent endwise adjustment with relation to the said rolls, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
S. N. ROGERS,
J. M. STANLEY.

78

(No Model.)

H. D. PERKY.

ROLL REDUCING MACHINE FOR PREPARING FOOD.

No. 598,745. Patented Feb. 8, 1898.

Fig 1.

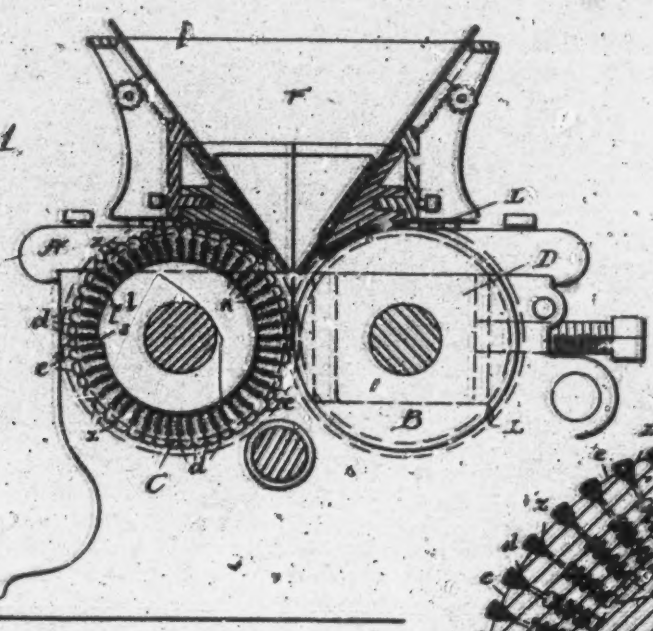


Fig 3.

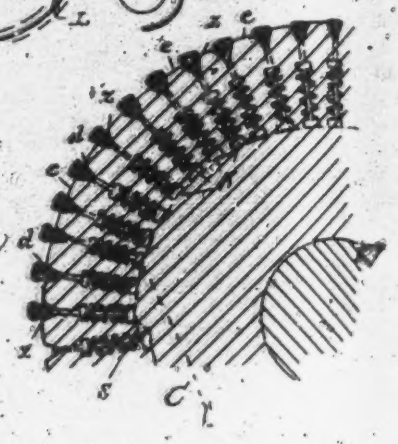


Fig 2.

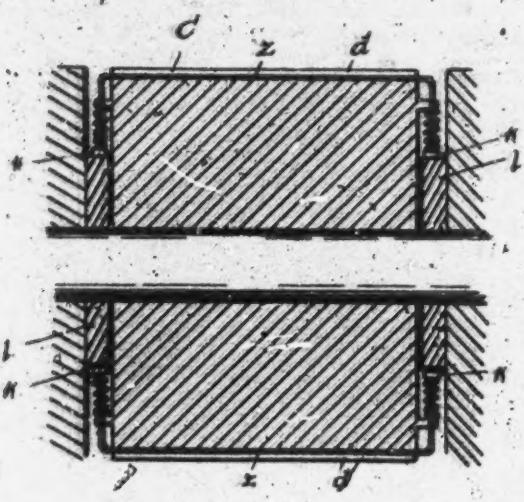
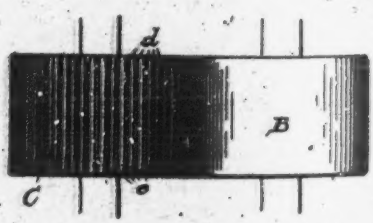


Fig 4.



WITNESSES

E. M. Anderson

Phil. Mason.

INVENTOR

H. D. Perky.

by E. W. Anderson

his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF WORCESTER, MASSACHUSETTS.

ROLL REDUCING-MACHINE FOR PREPARING FOOD.

SPECIFICATION forming part of Letters Patent No. 598,745, dated February 8, 1898.

Application filed August 3, 1897. Serial No. 646,969. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Roll Reducing-Machines for the Preparation of Food; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 of the drawings is a transverse vertical section through a machine embodying my invention. Fig. 2 is a longitudinal section through the roll C and its bearing. Fig. 3 is a transverse section through a portion of said roll, and Fig. 4 is a plan view of the two rolls removed.

In the present invention I have designed to provide a machine for commingling the exterior coats and gluten layer of the grain-berry with its interior portion or starch, reducing the same to definite form for use as food; and to this end I have devised the following mechanism:

The material upon which it is designed to operate is grain, and especially wheat, which has been duly cleaned and cooked and partially dried in order to bring its exterior and interior portions to an equalized consistency, and yet maintain it in the entire or berry form.

In the accompanying drawings the letter A designates the framework of a machine having bearings for back roll B and the front roll C. These rolls are turned exactly true, and one of them should be provided with box-bearings D for purposes of adjustment, as the rolls are designed to be run in contact with each other. One of the rolls, B, may have a plain cylindrical surface. The other roll, C, is provided with longitudinal grooves *d* of V-form in cross-section, a succession of such straight or longitudinal grooves extending parallel to each other around the roll. The grooves are separated by lands *c* of the cylindrical surface.

F represents the hopper of the machine, into which the material, being the prepared grain above referred to or shreds of the same produced by machines of proper character, is fed. The rolls being rotated by means of suitable gearing (indicated at L) cause the material to be pressed into the grooves of the roll C, from which it is discharged in the form of strips of definite length in accordance with the width of the roll in the following manner: Fitting neatly in the bottom of each groove is a steel wire or strip of corresponding cross-section, (indicated at *z*,) the ends of which are secured to movable holders *k*. At each side of the grooved roll is attached to the framing a cam-guide *l*, having an eccentric curvature *l'* sufficient to cause the wire to be protruded from its seat in the bottom of the groove when these curvatures are engaged by the movable holders *k*. The cam-guides are located below the contact-line of the rolls sufficiently to provide for the discharge of the shreds or strips after their formation. The discharging-strips are drawn back to their seats in the grooves by spring action or otherwise. The cams may have slight steps, as indicated at *s*, in order to cause a slight quick movement of the wire *z* to facilitate its discharging action.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. The combination with a pair of reducing-rolls journaled to run in neat surface contact with each other, one of said rolls having therein, a series of longitudinal grooves, of a wire or strip movably seated in the bottom of each of said grooves, movable holders to which these wires or strips are attached, and cam-guides engaged by said holders to successively protrude said wires or strips ffom their seats, together with means for again withdrawing the same, substantially as specified.

2. The combination with a pair of reducing-rolls journaled to run in neat contact with each other, one of the said rolls having therein a series of parallel, longitudinal surface grooves of V form in cross-section, and a feed-hopper arranged to discharge between said rolls, of a wire or strip movably seated in the bottom of each of said grooves, and means whereby the same is momentarily pro-

truded during each rotation of the roll together with means for returning the same to its seat after each protrusion, substantially as specified.

3. The combination of a pair of reducing-rolls, one of which has therein a series of parallel longitudinal grooves, the wires or strips one of which is movably seated in each of the said grooves, the movable holders to which said wires or strips are attached at their end portions, the springs connected to said holders, and the stepped cam-guides engaged by the said holders, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:

SAML. N. ROGERS,

JOHN S. PERKY.

No. 614,338. Patented Nov. 15, 1898.

H. D. PERKY.

MACHINE FOR REDUCING CEREAL FOOD PRODUCTS TO FORM FOR USE.

(Application filed May 21, 1896.)

(No Model.) 2 Sheets—Sheet 1.

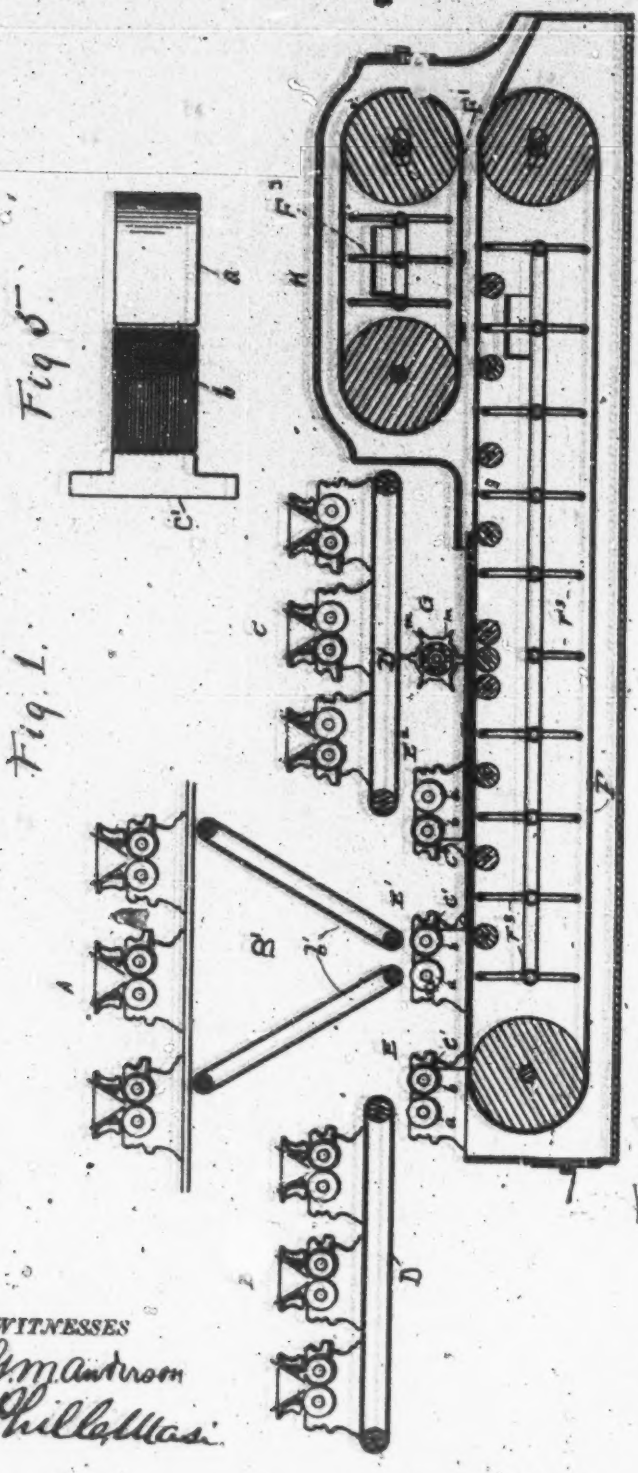


Fig. 1.

Fig. 5.

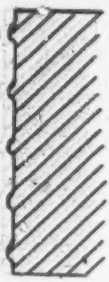


Fig. 4.

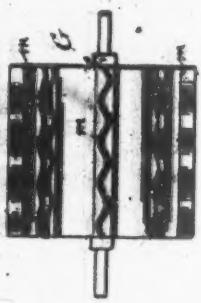


Fig. 3.

WITNESSES

G. W. Anderson

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No. 614,338. Patented Nov. 15, 1898.

H. D. PERKY.

MACHINE FOR REDUCING CEREAL FOOD PRODUCTS TO FORM FOR USE.

(Application filed May 21, 1896.)

(No Model.) 2 Sheets—Sheet 2.

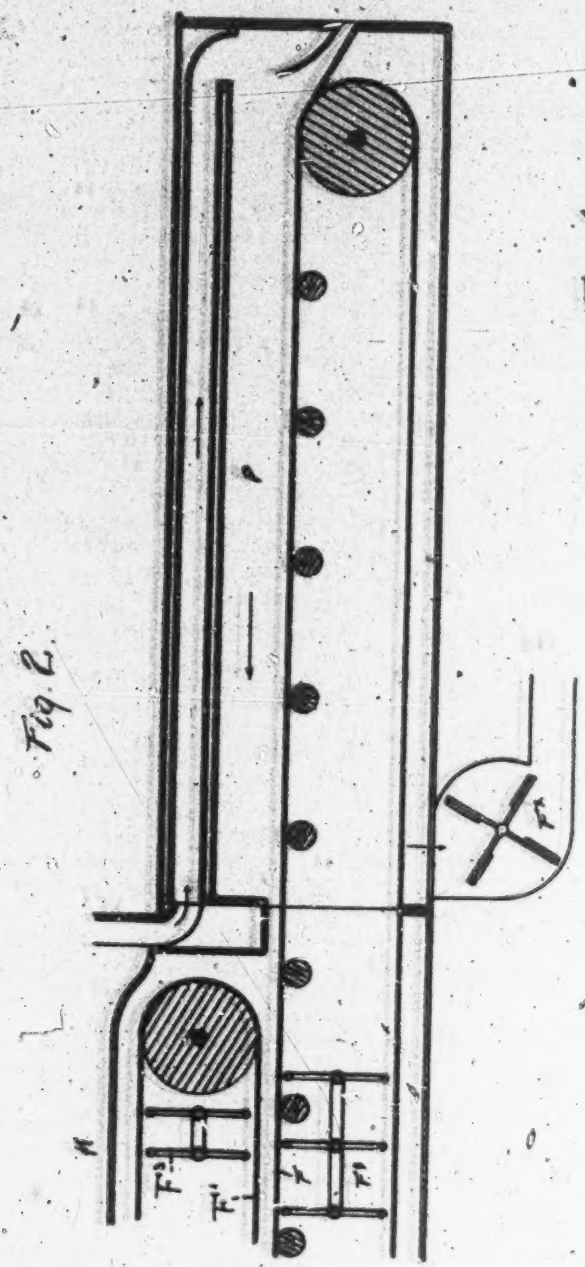

Fig. 2.

Fig. 6.

WITNESSES

J. M. Anderson

Phil. A. Mauzi

INVENTOR

H. D. Perky

by T. W. Anderson

his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF WORCESTER, MASSACHUSETTS.

MACHINE FOR REDUCING CEREAL FOOD PRODUCTS TO FORM FOR USE.

SPECIFICATION forming part of Letters Patent No. 614,338, dated November 15, 1898.

Application filed May 21, 1896. Serial No. 592,493. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Machines for Reducing Cereal Food Products to Form for Use; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 is a central longitudinal section through the devices constituting the invention, being partly diagrammatic. Fig. 2 is a sectional view showing the evaporating-chamber in connection with the oven by a continuous belt. Fig. 3 is a detail view of the cutter or indenter. Fig. 4 is a sectional view illustrating the projections upon the roller *b*. Fig. 5 is a plan view of the rolls *a* and *b* and the scraper. Fig. 6 is a perspective view of the wafer.

The object of this invention is to provide means whereby grain, and especially wheat in its entire or berry form, having been properly cleaned and cooked, is reduced to the form of a band or ribbon in which the interior and exterior portions of the grain or berry are intimately commingled, such band or ribbon being separated or indented transversely to provide sections of suitable size and shape for baking into crackers or wafers. It is also designed to provide means whereby such bands or ribbons of the grain product may be overlaid or plicated and transversely separated or indented in such a manner as to provide sections of suitable size for baking, each section consisting of several thicknesses or layers duly connected at the edges of the section. It is also designed to provide means for baking these sections continuously as they are formed, and, finally, it is designed to provide means for ornamenting the sections superficially by raised or indented configurations in order to give them an attractive appearance.

In the accompanying drawings I have indicated at A, B, and C several sets or gangs of shredding devices, substantially of the character described in detail in Letters Patent No. 502,378, dated August 1, 1893, into the hopper of which the grain in its entire or berry form is fed after it has been properly cleaned and properly cooked, preferably in the manner substantially as set forth in Letters Patent No. 548,086, dated October 15, 1895. The number of shredding-heads in each set or gang is determined by the thickness of the ribbon or band desired and by the rapidity of production contemplated. These roll-shredders discharge the material in the form of threads or shreds, in which the exterior coats and the gluten layers of the grain are intimately commingled with the interior starch. The threads or shreds are transferred by means of a hopper guide or carrier to the hopper of the band-rollers E E' E^2, there being one band-roller to each set or gang of reducing-rollers.

The band-roller consists of a pair of rolls *a* and *b* and a discharger or cleaner C', being similar to the shredding or reducing head in its main features of construction, the rolls, however, not being in contact, as the reducing-rolls are, but being separated from each other a distance corresponding to the thickness of the band desired. The front roll *a* may have a plain cylindrical surface or it may be circumferentially grooved. The back roll *b* may be plain or it may have shallow grooves or indentations or slight projections of ornamental design, such projections or indentations having beveled walls or rounded angles to provide for the ready detachment of the band as it passes from the rolls to the carrier F.

In the arrangement shown in Fig. 1 the three reducing-machines (designated by B) are arranged to discharge upon an endless carrier D, which transfers the product to the hopper of the first band-roller E. The second set of reducing-machines (marked A) discharge into a hopper B', whose lateral walls may, as shown, consist of endless traveling bands *b'*. This hopper discharges the material to an intermediate band-roller E'. The third set of reducing-machines (marked C) discharge onto an endless carrier D', which delivers the product to the third band-roller E^2.

One band-roller, with its set or gang of re-

ducing-heads, will provide a single band upon the carrier F, where by means of a cutter or indenter G it may be separated or indented in a sectional manner to form crackers or wafers. The carrier F is preferably a traveling band of steel adapted to transport the separated or indented band through the oven K, which is preferably heated by gas, as indicated at F', which designates gas-burners. F' designates an upper baking-band, heated by similar burners. In passage through this oven the wafers are baked, and they are discharged at the end of the carrier in crisp condition. This carrier may also extend beyond the oven into an evaporating-chamber, as indicated at F, or it may discharge its contents upon a carrier which moves more slowly through such evaporating-chamber. Said chamber is preferably provided with an exhaust-fan F².

The cutter or indenter G may be of rotating character, as indicated, its blades being rectilinear or curved or of wave-like or other shape in accordance with the design of the cracker or wafer desired to be produced. The cutter is geared to run at the same rate of speed as the carrier.

When it is desired to form a wafer of two or more layers or thicknesses, two or more band-rollers, with their respective sets or gangs of reducing-heads, are employed, the arrangement being in succession, or so that the band produced by the second band-roller will overlie that produced by the first band-roller and will be overlaid by that produced by the third band-roller. In order to insure the connection of edges of the section of a band of several layers, it is designed to provide the cutter or indenter with pressing-shoulders, as indicated at m. In this manner it is designed to provide wafers of several layers or folds each of which is entire or of plicated character when finished in baking. While the means described are designed for the production of these crackers or wafers in large quantities suitable for commercial supply, manipulation of the material is avoided, so that consumers are protected, in an important manner, from a sanitary point of view.

In making a wafer of two or more layers or thicknesses two or more band-rollers may be employed in series, the first band-roller having its grooved roll and scraper or comb in the rear of the plain roll and the last band-roller having its grooved roll and scraper in front of its plain roll, as indicated in Fig. 1. The ribbon of material falling from the first roller upon the receiving-carrier will have an under surface of finely ribbed or corrugated configuration, the size of the ribs or corrugations depending upon that of the grooves of the roll, which may be as small or as fine as those of a grooved reducing-roll. This ribbon of material will form the under layer. The upper layer of material, which is formed by the last band-roller, will have its upper surface of similar ribbed or corrugated character. Intermediate band-rollers may be employed to provide intermediate layers where the wafer is to consist of more than two layers. In any case, however, when the mechanism is arranged, as indicated, with the first and the last band-rollers in reversed position the upper and under surfaces of the wafer will present an ornamental surface of fine ribs or corrugations, and when the bands of material are rolled thin by means of finely-grooved rolls referred to such rolls will have a comminuting or shredding effect such as will reduce the cooked wheat when fed directly into the hopper of the band-rollers, so that the prior action of reducing-rolls is not always required.

The reducing-heads used in combination with the band-rollers are designed to provide for a more intimate and thorough commingling of the exterior layers with the interior portion of the grain or berry, and they serve an important purpose in that regard.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

The combination with one or more band-rolling machines, and an endless traveling carrier upon which said machine or machines discharge their product, of a rotary indenter or cutter above said band, and having a series of blades provided with pressing-shoulders, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses;
SAML. N. ROGERS,
JOHN S. PERKY.

88

No. 618,288. Patented Jan. 24, 1899.

H. D. PERKY.

APPARATUS FOR MAKING FOLDED WAFERS.

(Application filed Aug. 17, 1897.)

(No Model.)

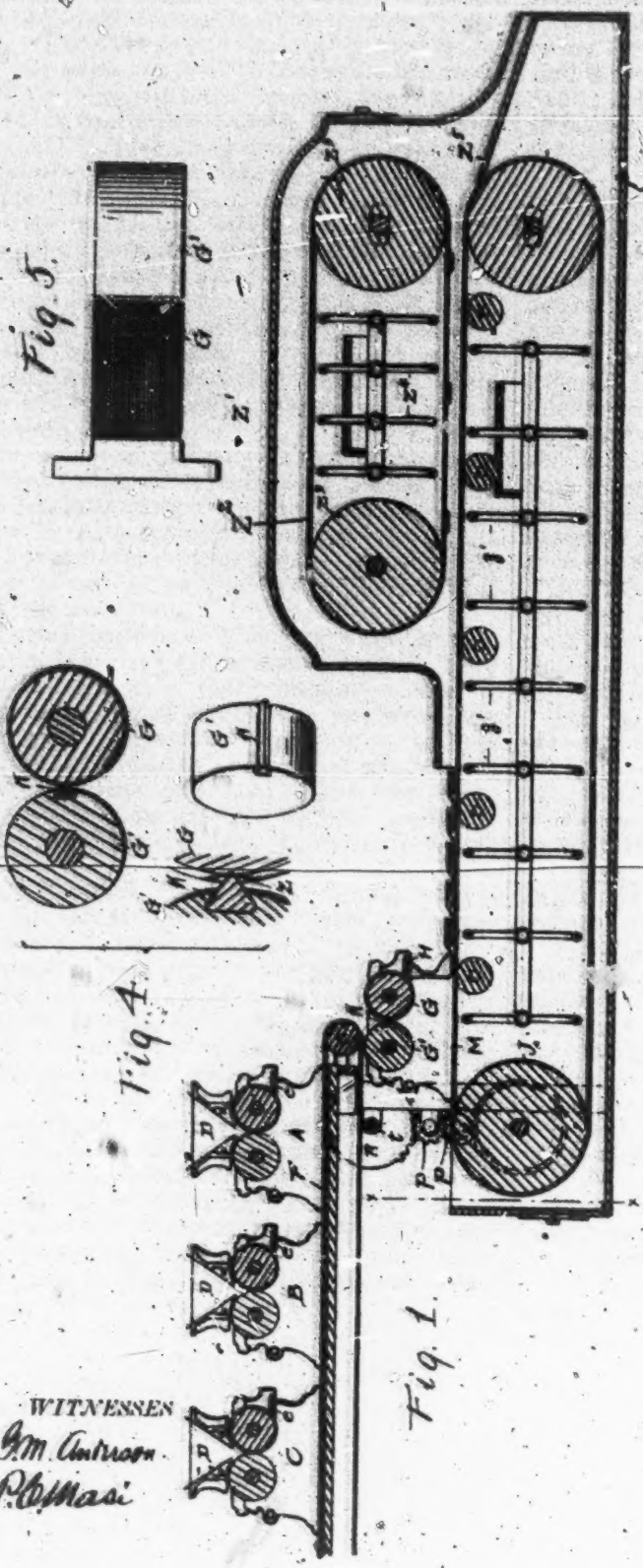

Fig. 1.

Fig. 5.

Fig. 4.

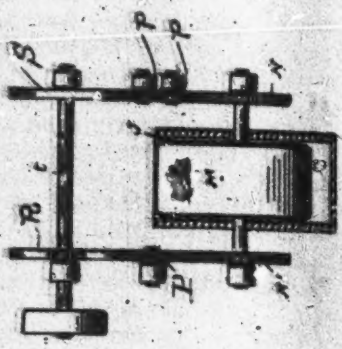

Fig. 2.

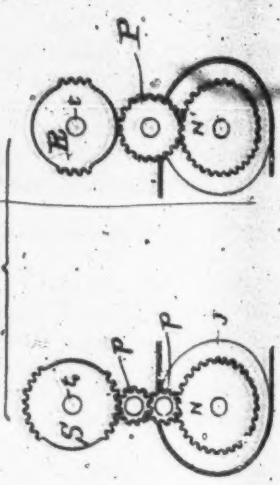

Fig. 3.

WITNESSES

P. M. Antrosco

P. C. Masi

INVENTOR

Henry D. Perky.

by E. W. Anderson

his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF WORCESTER, MASSACHUSETTS.

APPARATUS FOR MAKING FOLDED WAFERS.

SPECIFICATION forming part of Letters Patent No. 618,288, dated January 24, 1899.

Application filed August 17, 1897. Serial No. 648,538. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Apparatus for Making Folded Wafers; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 of the drawings is a vertical longitudinal section of apparatus embodying my invention. Figs. 2 and 3 are detail views of the gearing in side and end elevation, respectively; and Figs. 4 and 5 are detail views showing the rollers G G'.

The object of this invention is to provide apparatus for making folded wafers from grain, and especially from wheat in the entire or berry form.

The grain or wheat is first cleaned and cooked, preferably as described in Letters Patent No. 548,086, dated October 15, 1895. It is then partially dried in order to render the interior and exterior portions of the berry of more even or similar consistency, in which condition it is ready to be fed to the reducing or shredding rolls which are designed to effect an intimate commingling of the interior phosphatic and nitrogenized layers with the interior carbonaceous or starch portion. The shreds or threads of the material discharged from the reducing-rolls are massed and rolled into ribbons or bands which are rolled in layer form to provide wafers of several plies or thicknesses.

In order to avoid handling the material, mechanism is provided as follows:

The letters A, B, and C represent reducing-machines substantially of the character described in Letters Patent No. 502,378, dated August 1, 1893, in which finely-grooved rolls are employed to reduce the grain which is fed into the hopper D to shredded form, the shreds or threads being discharged by means of the combs or cleaners *e*, also described in said Letters Patent. The threads or shreds are transferred by means of an endless carrier or conveyer hopper F to the band-forming rolls G G', which are not run in contact like the reducing-rolls, but are adjusted apart from each other in accordance with the thickness of the band to be produced. One of the rolls G is usually grooved circumferentially, while the other, G', is plain or provided with shallow elevations or depressions of ornamental configuration. A scraper or discharger H is provided in connection with the band-roll G in order to clear the band therefrom after its formation.

K indicates the cutter or longitudinal separating-rib, which may be provided on one of the band-rolls, while the other is grooved or depressed lengthwise, as at Z, to engage the cutter as the rolls rotate. The groove Z should be of an even depth with the fine circumferential grooves of the roll in order that the action of the scraper or discharger H shall not be interfered with.

The ribbon or band of material is designed to be separated into even lengths by this cutting mechanism, and as these lengths are discharged by the scraper they fall upon a traveling band or endless carrier M, which may be of steel, in order that the wafers formed thereon may be passed through an oven and quickly baked. The oven is indicated at Z'.

The driving pulley or drum J of the carrier-band is designed to have an intermittent rotary reciprocating motion in order to give the endless band a longitudinal reciprocating movement of suitable character to effect the folding. At each end of its shaft is provided a gear-wheel N or N', which engage, respectively, idlers P *p p*, which are in turn engaged, respectively, by segment gear-wheels R and S on the ends of the drive-shaft *t*. The toothed segments of the wheel S should have a little more than twice the span of those of the wheel R and should alternate therewith in order that the driving-pulley J may be turned forward more than twice as far as it is turned backward, the reversal being effected by means of idlers.

In the arrangement shown in the drawings I have shown the idler P interposed between the gear-wheel N' and the drive gear-wheel R, while between the gear-wheels N and S are two small idlers, whose combined diameter is equal to the diameter of the idler P. It will

be obvious that by means of these idlers the gear-wheels R and S will drive the pulley or drum J alternately in opposite directions. Other suitable gear may, however, be employed. By this means as the ribbon of the material falls upon the endless carrier it moves with it forward a short distance, then backward the same distance, and then forward, so that a three-ply wafer is formed with scroll ends. The carrier continuing to move forward receives the first portion of the next length of the ribbon of material, and by its reversals forms another wafer in rear of the first, and in such manner the operation of forming the wafers may be carried on continuously, and as the baking may also be effected upon the carrier on which the wafers are folded in a continuous manner it is evident that these wafers can be finished in shape before they have time to settle.

The carrier-band may be heated in the oven Z' by means of gas-jets z' or other suitable means. Z^3 indicates a top baker, which may consist of a second endless band carried and driven by the drums Z^2 and heated by gas-jets Z^4 or other suitable means.

The distance between the baking-surfaces of the two bands should be about equal to the thickness of the wafers.

Z^5 designates a discharging-chute at the distant end of the oven, through which the wafers are automatically discharged as the carrying-band passes around its carrying roll or drum.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. The combination with one or more reducing-machines, and with a carrier or traveling receiver upon which they discharge, of the band-forming rolls which receive the product from said carrier or receiver, a traveling carrier which receives the product from the said rolls, and gear whereby the said carrier has a reciprocatory forward movement, substantially as specified.

2. The combination with the band-forming rolls, of the traveling carrier working underneath said rolls, and gear whereby said carrier is actuated to a reciprocatory forward movement, substantially as specified.

3. The combination with the band-forming rolls of the endless traveling carrier-belt working underneath said rolls, its carrying and driving pulleys, and gear for imparting to said driving-pulleys an intermittent rotary reciprocatory motion, substantially as specified.

4. In a machine of the character described, the combination with the band-forming rolls, one of which has a peripheral longitudinal rib, and the other a longitudinal groove or depression, of the endless traveling carrier-belt working underneath said rolls, and gear whereby said carrier-belt may be actuated to a reciprocatory forward movement, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
SAML. N. ROGERS,
JOHN S. PERKY.

92

No. 867,892. Patented Feb. 12, 1901.

H. D. PERKY.

APPARATUS FOR MANUFACTURING CEREALS INTO FORMS OF FOOD OR BREAD.

(No Model.) (Application filed Feb. 27, 1900.) 7 Sheets—Sheet 1.

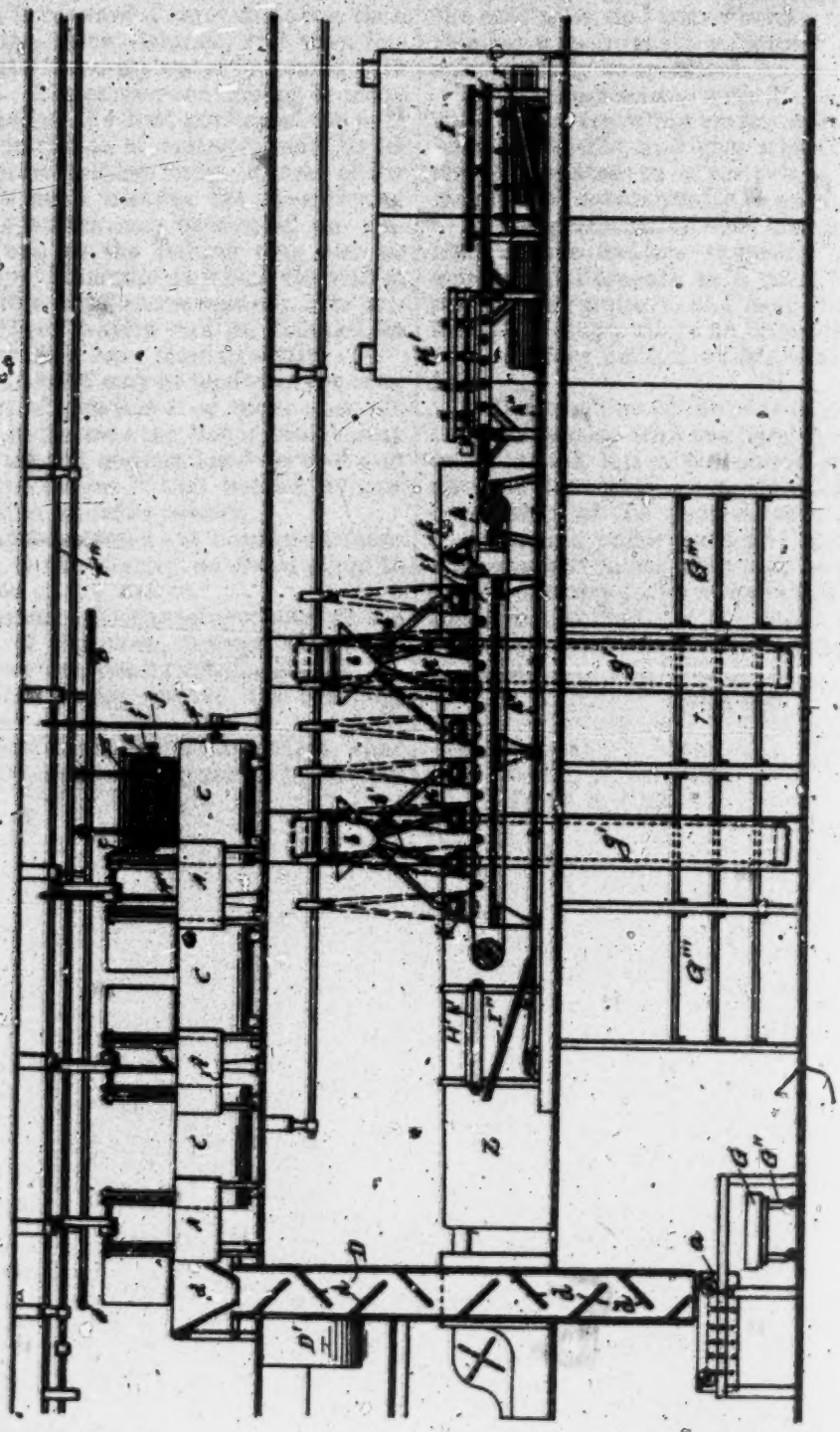

Fig. 1.

WITNESSES

Gmannion

E. G. Mackel

INVENTOR

Henry D. Perky

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94

No. 667,892. Patented Feb. 12, 1901.

H. D. PERKY.

APPARATUS FOR MANUFACTURING CEREALS INTO FORMS OF FOOD OR BREAD.

(No Model.) (Application filed Feb. 27, 1899.) 7 Sheets—Sheet 2.

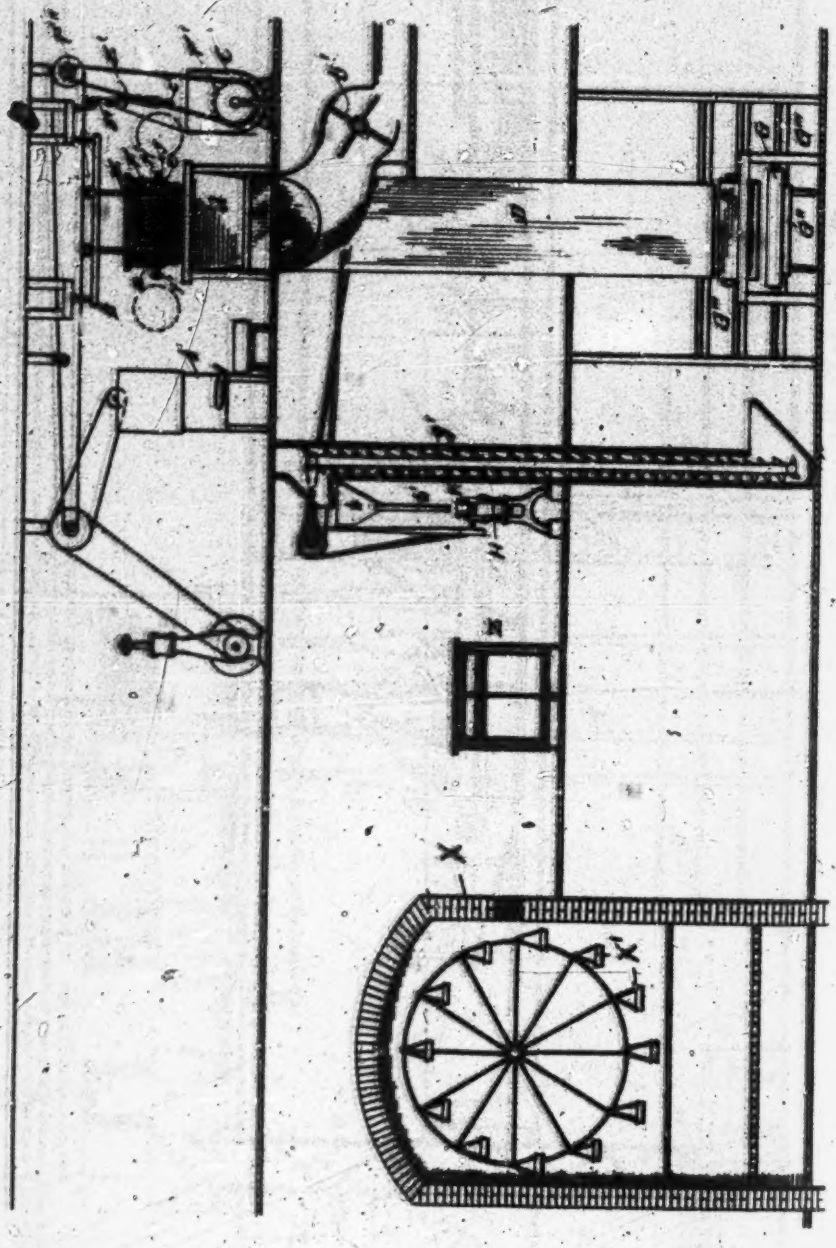

Fig. 2.

WITNESSES

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E. G. Mickel

INVENTOR

Henry D. Perky,

by E. W. Anderson

Attorney

No. 667,892. Patented Feb. 12, 1901.

H. D. PERKY.

APPARATUS FOR MANUFACTURING CEREALS INTO FORMS OF FOOD OR BREAD.

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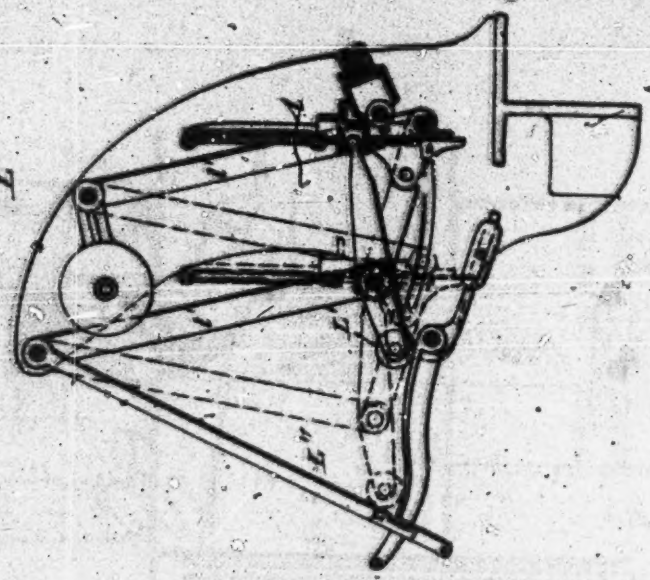

Fig. 1.

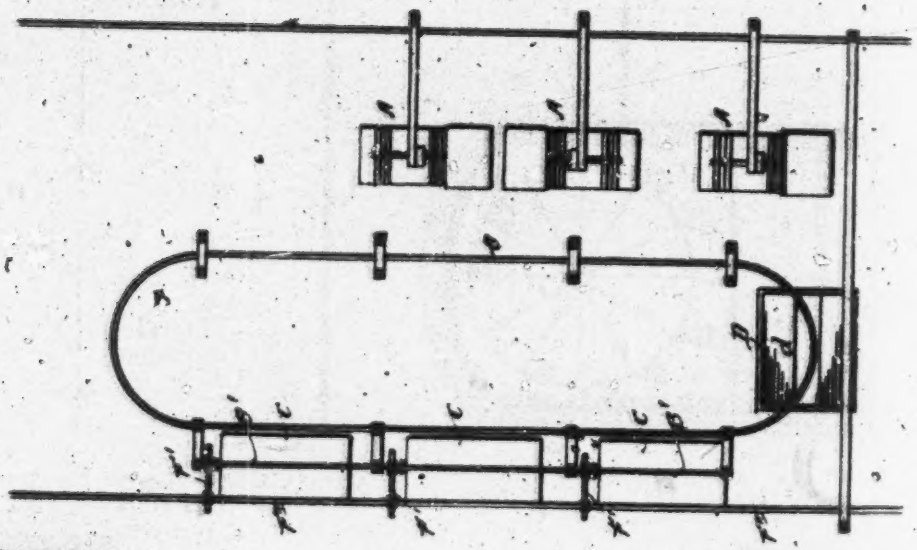

Fig. 3.

WITNESSES

G. Manson

E. G. McKee

INVENTOR

Henry D. Perky

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his Attorney

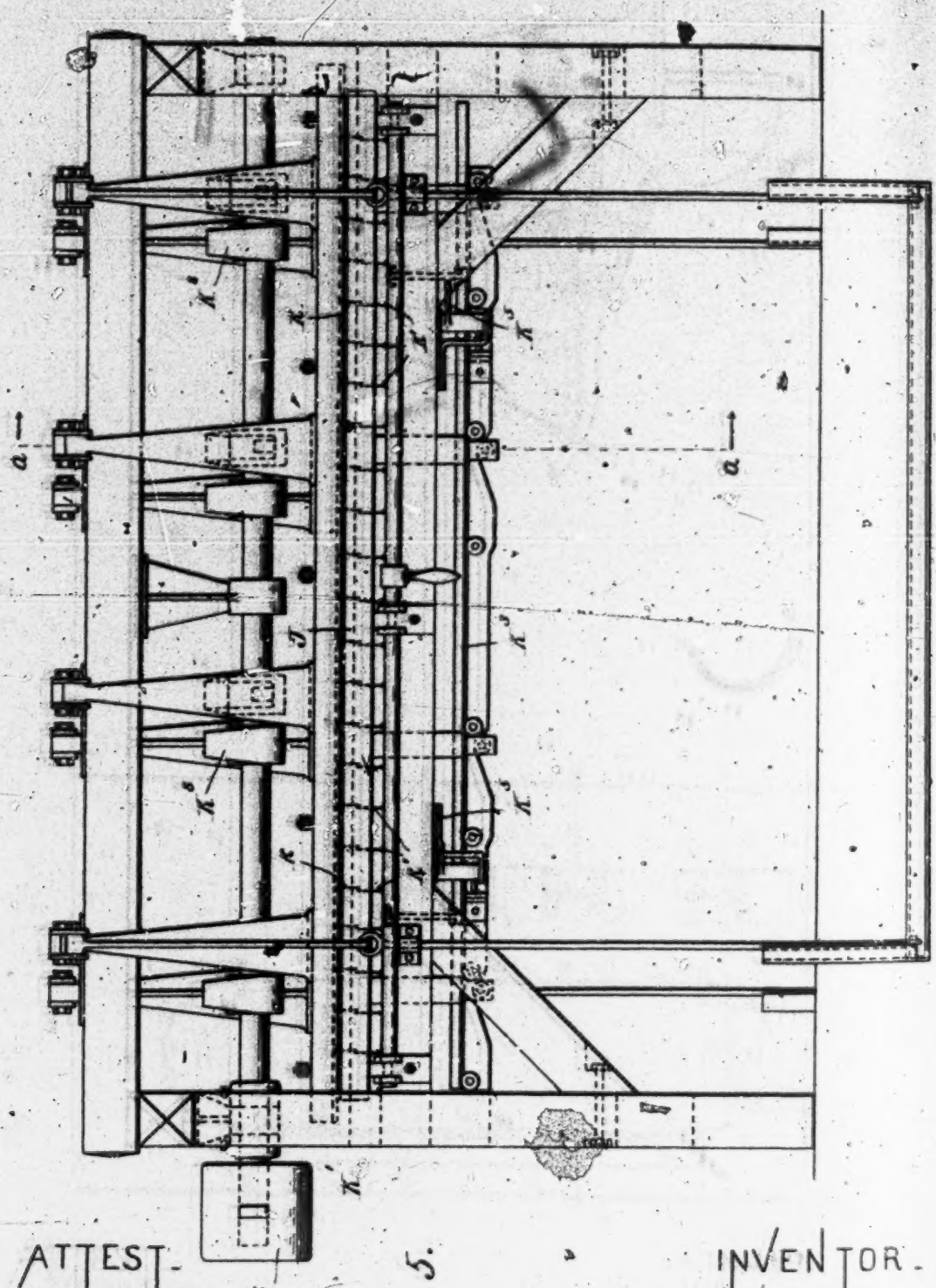
98

No. 667,892. Patented Feb. 12, 1901.

H. D. PERKY.

APPARATUS FOR MANUFACTURING CEREALS INTO FORMS OF FOOD OR BREAD.

(No Model.) (Application filed Feb. 27, 1900.) 7 Sheets—Sheet 4.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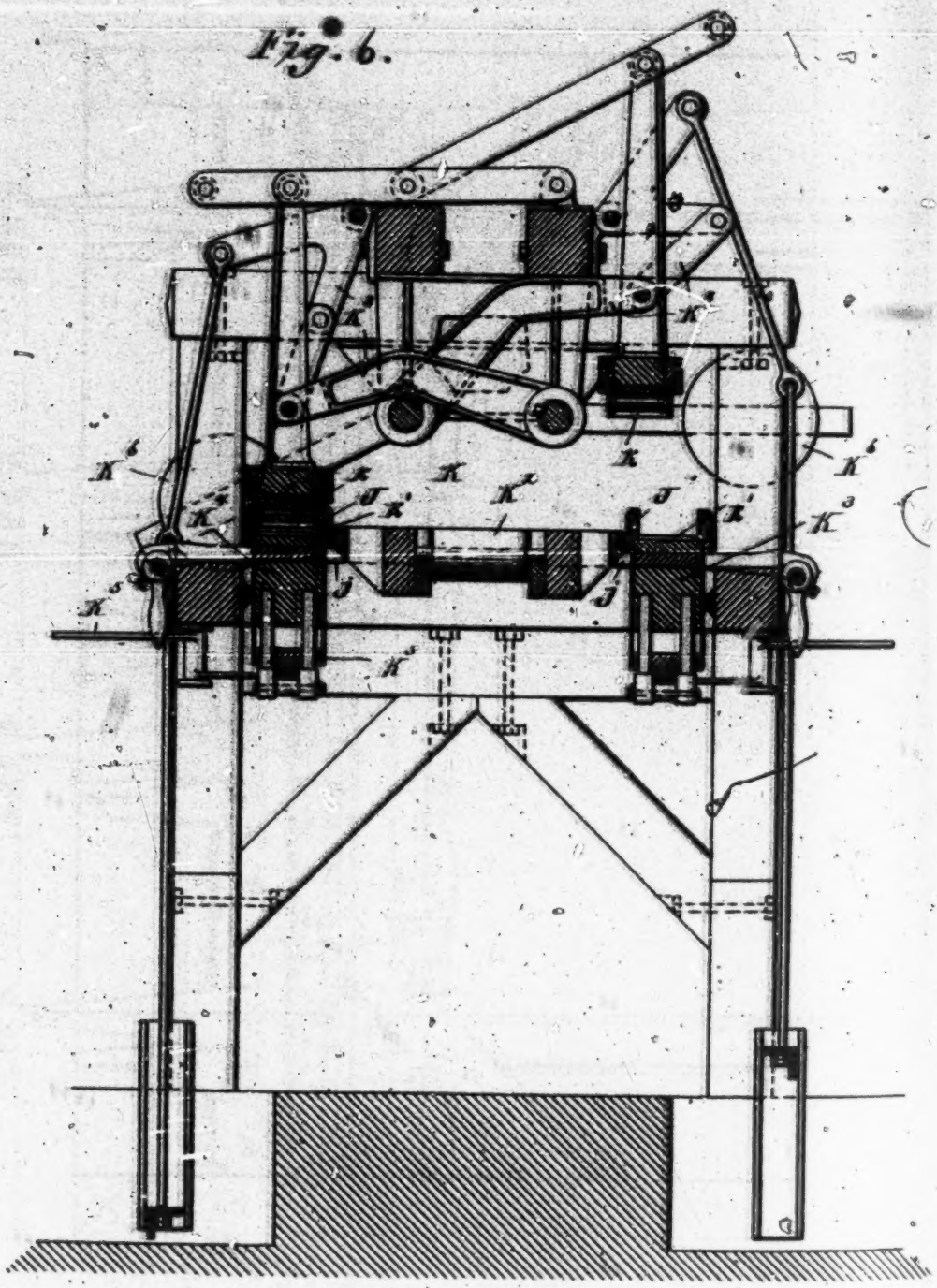
No. 667,892. Patented Feb. 12, 1901.

H. D. PERKY.

APPARATUS FOR MANUFACTURING CEREALS INTO FORMS OF FOOD OR BREAD.

(No Model.) (Application filed Feb. 27, 1900.) 7 Sheets—Sheet 5.

Fig. 6.



ATTEST.

Henry L. Ames.
Geo. H. Andrews

INVENTOR.

Henry D. Perky.
By E. W. Andrews
his Atty.

No. 667,892. Patented Feb. 12, 1901.

H. O. PERKY.

APPARATUS FOR MANUFACTURING CEREALS INTO FORMS OF FOOD OR BREAD.

(Application filed Feb. 27, 1900.)

(No Model.) 7 Sheets—Sheet 6.

Fig. 8

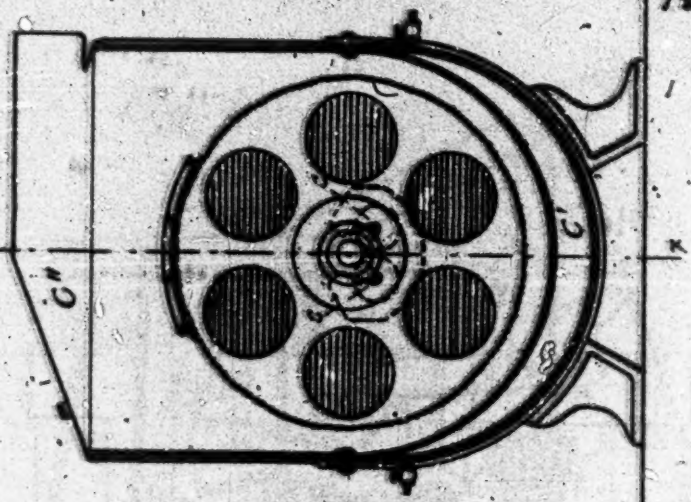
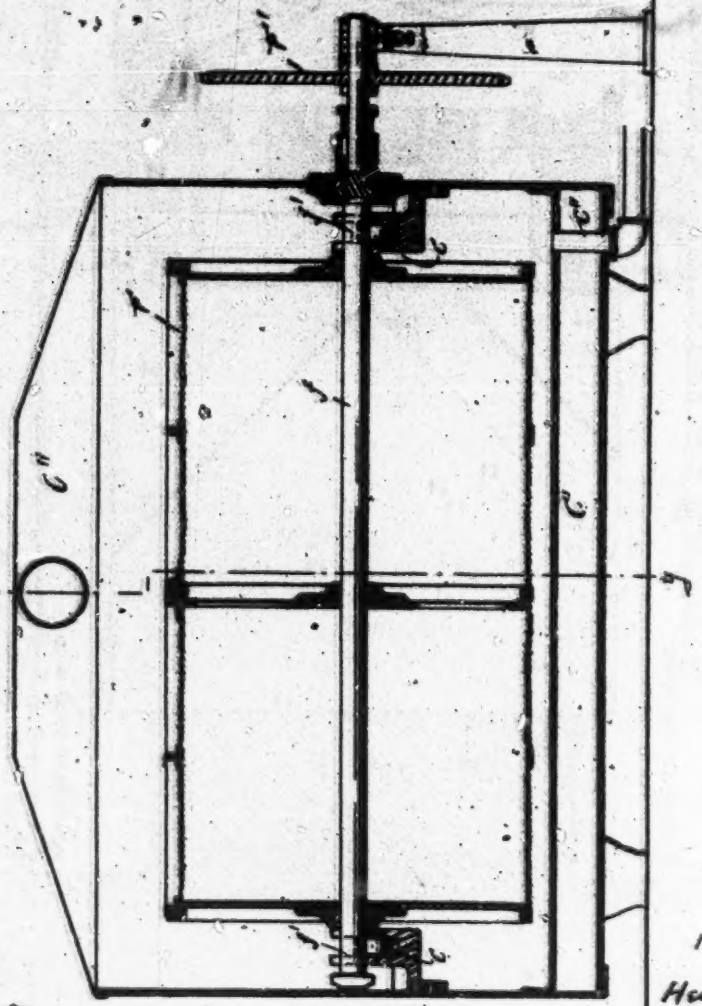


Fig. 7



WITNESSES

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No. 667,892. Patented Feb. 12, 1901.

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APPARATUS FOR MANUFACTURING CEREALS INTO FORMS OF FOOD OR BREAD.

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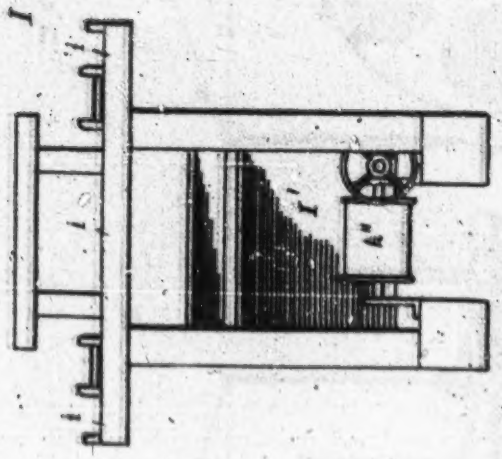

Fig. 10.

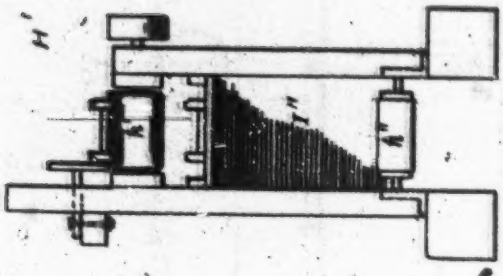

Fig. 9.

Fig. 13.

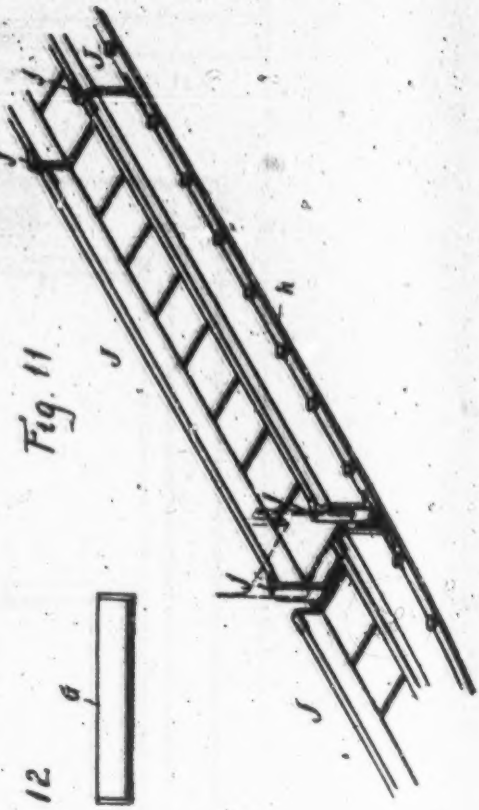

Fig. 11.

Fig. 12.

WITNESSES

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UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF WORCESTER, MASSACHUSETTS.

APPARATUS FOR MANUFACTURING CEREALS INTO FORMS OF FOOD OR BREAD.

SPECIFICATION forming part of Letters Patent No. 667,892, dated February 12, 1901.

Application filed February 27, 1899. Serial No. 707,085. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in an Apparatus for the Manufacture of Cereals into Forms of Food or Bread; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

In the accompanying drawings, Figure 1 is a vertical longitudinal section through a building, showing the plant as in operation. Fig. 2 is a vertical transverse section of same. Fig. 3 is a plan view of boilers, cleaners, travelers, &c., on the top floor of a building. Fig. 4 is a sectional view of the section-cutter. Fig. 5 is a side elevation of the gang-cutter table, gang-cutters, and operating mechanism therefor. Fig. 6 is a section on the line *a a*, Fig. 5. Fig. 7 is a section on the line *x x*, Fig. 8. Fig. 8 is a section on the line *y y*, Fig. 7, the cutter upon one side being raised. Fig. 9 is an end elevation of trough-feeding table. Fig. 10 is an end elevation of the panning-table. Fig. 11 is a perspective view of a portion of the belt and sectional receivers thereon, the section-cutter knife being shown in lowered position in dotted lines. Fig. 12 is a detail sectional view of one of the drying-trays. Fig. 13 is a sectional detail view of one of the compartment-receivers.

In Letters Patent No. 548,086, dated October 15, 1895, I have described the process of preparing wheat or similar grain and reducing it to a convenient filamentous or thread-like form for use without taking from the grain any of the beneficial portions which are possessed by the grain in its original state. The present invention has reference to such preparation of the grain in large quantities and its manufacture commercially into food or bread of uniform first quality and at such low rate of manufacture that it will be within the reach of all.

The plant or apparatus is preferably established in a building having several stories for the more convenient operation of the machines and structures involved in carrying out the process. Upon an upper floor are located the cleaning-machines and boilers, and a drying-flue extends from this floor to a lower floor, where the grain is discharged upon trays for further drying. Upon an intermediate floor are located the reducing-machines in gang form.

In the accompanying drawings the letter A designates a cleaning-machine, which is preferably a pulsatory water-cleaner of the general character set forth in Letters Patent No. 533,821, dated February 5, 1895. Any required number of these machines may be employed, according to the capacity of the plant. The grain of commerce is fed to these machines and when discharged therefrom is clean, being without grit or extraneous matter. An overhead track B of continuous form extends from the cleaners to the boilers C and to the mouth *d* of the drying-flue D. Travelers E, having suspended hooks or catches *e*, are arranged upon the overhead track and serve for the transportation of the wire-cloth cylinders or cages F. The grain discharged from the cleaner is deposited in the cage, which is then closed and fastened and is conveyed by means of the track B to the boiler. Above the series of boilers extends an overhead track B', (see Fig. 3,) having a traveling lift E', Fig. 2, provided with hooks or catches *e'*, said hooks being separated by a distance equal to that between the hooks *e* of the traveler E, this distance being determined by the length of the cage whose shaft *f* the hooks are designed to engage at *f'*. The lift is operated until the weight of the cage and its contents bears upon it, being raised sufficiently for the disengagement of the hooks *e* of the traveler E. The lift is now operated to deposit the cage in the boiler in such manner that its journals rest in the bearing *c* (see Figs. 7 and 8) of the boiler provided therefor. In order to save weight and to avoid grime and smoke, the boilers are heated by steam, the pipes being indicated at *c''*, Fig. 7. The cage is rotated in the boiler by means of suitable gearing, sprocket-wheels and chains being preferred, as indicated at F', in connection with a line-shaft F''. The boilers are provided with steam-

heating chambers C' and with covers C''. When the grain is sufficiently cooked and after it has been salted, the cage is lifted out of the boiler and transferred to the traveler E, whereby it is conveyed to the mouth *d* of the drying-flue D, into which the grain is discharged from the cage. Passing downward through this flue it is diverted from side to side by means of rotary or inclined ledges *d* in order to facilitate the action upon the grain of the suction-blast through the flue produced by means of a fan at D'. The grain is discharged from the flue into a compartment-receiver *a*, (see Fig. 13,) whereof each compartment is designed to hold a sufficient quantity to charge one of the drying-trays G, into which the grain is discharged by opening the movable bottom *g* of the compartment. The drying-tray, Fig. 12, is provided with a wire-cloth bottom, which is usually overlaid with cotton sheeting. The grain is then spread evenly in the tray, which is conveyed by means of a carrier G'' between the lines of racks G''', upon one of which the tray, with its charge of grain, is placed for further drying, or the trays may be loaded into an elevator and placed in racks on the floor above the reducing-machines. In the drawings, however, I have shown grain-elevators *g'*, which discharge into the hoppers *b* of the reducing-machines, each hopper having preferably several branches *b'*, in order that it may feed several heads of the machine.

The reducing-machine H is of gang form, its roller-heads K being arranged in series. These roller-heads are of the general character indicated in Letters Patent No. 532,698, dated January 15, 1895, and in Letters Patent No. 533,555, dated February 5, 1895. The grain fed into the hoppers of the roller-heads is reduced by their grooved rollers to shred or thread like form, each head depositing a layer of the shred-like threads upon the traveling receiver J. As these layers are deposited in succession, the thickness of the product upon the receiver is gradually increased to the extent desired, in accordance with the number of roller-heads constituting the machine or such proportion of them as may be in gear. In order to form biscuit of fair size, I desire to use some thirty-odd heads in the gang.

Below the series of reducing-heads extends the traveling sectional receiver J, (see Fig. 11,) which is carried by the endless belt *h*, running upon a bed of rollers and over suitable end pulleys, one of which is geared to drive the belt. At one end of the gang-machine is the trough-feeding table H', (see Figs. 1 and 9,) having an endless traveling belt *h'*, which moves at a speed a little faster than that of the main receiver-belt *h*. At the other end of the machine is the gang-cutter table K', Figs. 1, 5, and 6, which is usually provided with two gang-cutters, (see Fig. 6,) one on each side, and between said cutters with a roller-bed K^2 to receive the troughs as they come loaded with the product from the gang reducing-machine. The trough-feed belt is geared to be exactly in line with the main receiver-belt and on the same level therewith, as also is the roller-bed K^2 of the cutter-table. Beyond the cutter-table and in line therewith is the panning-table I, Figs. 1 and 10, having slideways *i*, the surfaces of which are level with that of the risers K^3 of the gang-cutters.

Below the receiver-belt *h* is the traveling trough-returning belt h^3, which is designed to extend from a pulley under the panning-table I to a pulley under the trough-feeding table H'. This belt h^3 is supported on suitable rollers, and above it, at its ends, are provided the oppositely-inclined chutes I' and I''. The main receiver-belt *h* and trough-return belt h^3 are usually provided with guide-studs along their edges to keep the troughs in line.

The sectional receiver comprises a number of open-ended troughs J, the bottoms of which are transversely slotted, as indicated in Letters Patent No. 532,286, dated January 8, 1895. The slots are made at equal distance from each other, this distance being that of the width of the biscuit desired. The ends of the troughs are shod with iron to prevent undue wear and to preserve exactness in their length. At the front end of each trough the iron shoe or end piece is provided with a catch lug or projection *j*.

At the delivery end of the gang reducing-machine is located the automatic section-cutter L, actuated by the moving troughs J to divide the reduced product between the troughs and which is provided with a parallel-motion knife-frame *l*, suspended to swinging arms *l'*, and with a lateral projection to engage the catch-lug *j* of the trough J. The spring-retracted knife is moved downward by means of the cam L', which engages the knife-lever as the knife moves forward. An automatic trip is provided at L^2 to release the cam-lever and allow it to fall to prevent the action of the retracting-spring and the return of the knife.

The troughs J returned to the trough-feeder are pushed upward from the return-belt h^3 along the inclined chute I', from which they are fed to the belt *h'*, which carries them to the main receiver-belt *h*, automatically closing each trough against the trough which precedes it, and thereby securing close joints between the sections or troughs on the main receiver-belt. In their passage below the reducing-heads the troughs are loaded with the filamentous layers of the grain product. As each trough is discharged from the gang reducing-machine, its load is separated from that of the next trough or section by means of the automatic cutter L. The loaded troughs discharged upon the gang-cutter table K' are slid laterally in position upon the risers K^3 of the lower gang or set *k* of knives. (See Figs. 5 and 6.) The risers K^3, secured to a frame K^4, are then lowered by means of a lever mechanism K^5, letting the trough down

upon the lower set k' of knives. The upper set or gang k of knives is designed to have vertical motion, its frame being provided with end guides. This gang of knives is brought downward by means of lever mechanism K^3 to divide the load of the product in the trough into biscuit forms. This gang of knives being raised by means of a spring K^6 or weight, or both, the risers are elevated to raise the trough to a level with the slideways of the panning-table, to which the trough, with its load, is quickly transferred by endwise movement. The panning-table is provided with a pan-shelf i', preferably above the level of the slideways or ledges i, to receive the pans m, into which the biscuit are transferred from the troughs by the panners. The empty troughs from the panning-table are transferred by means of the inclined chute I^2 to the trough-return belt, whereby they are returned to the feeding-table. The pans of biscuit are loaded upon carriers, whereby they are transferred to the oven-room X, Fig. 2, and they are then placed upon revolving shelves X' in the oven, wherein they remain until sufficiently browned. When taken from the oven, the interior of the biscuit is still quite soft and moist, and in order to fit them for commercial use they are placed upon racks of carriers and passed through a hot-air chamber Z.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. In apparatus for the purpose described, the combination of the grain-cages, the alined grain-cleaners, the alined boilers adapted for the reception of said cages, the drying-chute, a track leading from said cleaners to said boilers, and to said chute, means for transferring said cages from said cleaners to said boilers and from said boilers to said chute upon said track, and means for transferring said cages from said track into said boilers, and from said boilers back again to said track, substantially as specified.

2. In apparatus for the purpose described, the combination of the grain-cages, the alined grain-cleaners, the alined boilers adapted for the reception of said cages, a track leading from said cleaners to said boilers, means for transferring said cages from said cleaners to said boilers upon said track, means for transferring said cages from said track, into said boilers, and from said boilers back again to said track, and means for rotating said cages in said boilers, substantially as specified.

3. In apparatus for the purpose described, the combination of the grain-cages, the alined grain-cleaners, the alined boilers adapted for the reception of said cages, the drying-chute, a track leading from said cleaners to said boilers and to said chute, means for transferring said cages from said cleaners to said boilers, and from said boilers to said chute upon said track, means for transferring said cages from said track into said boilers and from said boilers back again to said track, a traveling receiver under said chute, having a movable bottom, drying-trays, and a carriage for said trays arranged beneath said receiver, substantially as specified.

4. In apparatus for the purpose described, the combination of the drying-chute, a traveling compartment-receiver beneath said chute, movable bottoms for said compartments, drying-trays, and a carriage for said trays arranged beneath said receiver, substantially as specified.

5. In apparatus for the purpose described, the combination of the grain-drying chute, a traveling receiver under said chute, and having a movable bottom, drying-trays, a carriage for said trays arranged under said receiver, an elevator for the grain, and reducing-machines fed by said elevator, substantially as specified.

6. In apparatus for the purpose described, the combination of a grain-elevator, grain-reducing machines, a hopper into which the grain is discharged from said elevator, and a plurality of spouts leading from said hopper and feeding said reducing-machines, substantially as specified.

7. In apparatus for the purpose described, the grain-reducing machines, means for discharging the reduced product from said machines, a traveling belt beneath said machines, receiving-troughs carried by said belt, the trough-feeding belt, and means for moving said trough-feeding belt a little faster than said first-named belt, substantially as specified.

8. In apparatus for the purpose described, the grain-reducing machines, means for discharging the reduced product from said machines, a traveling belt beneath said machines, receiving-troughs carried by said belt, and a section-cutter operated by said troughs to divide the reduced product contained thereby between the troughs, substantially as specified.

9. In apparatus for the purpose described, the grain-reducing machines, means for discharging the reduced product from said machines, a traveling belt beneath said machines, receiving-troughs carried by said belt, a section-cutter operated by said troughs to divide the reduced product contained thereby between said troughs, and means for returning said cutter to raised position, substantially as specified.

10. In apparatus for the purpose described, the grain-reducing machines, means for discharging the reduced product from said machines, a traveling belt beneath said machines, receiving-troughs carried by said belt, a section-cutter operated to divide the reduced product contained by said troughs between said troughs, and a gang-cutter operated to divide the reduced product contained by each said trough into blocks, substantially as specified.

11. In apparatus for the purpose described,

the grain-reducing machines, means for discharging the reduced product from said machines, a traveling belt beneath said machines, receiving-troughs carried by said belt, and having transverse slits therein, a section-cutter operated to divide the reduced product contained by said troughs between said troughs, and a gang-cutter having knives operating in the transverse slits of said troughs to divide the reduced product of each trough into blocks, substantially as specified.

12. In apparatus for the purpose described, the grain-reducing machines, means for discharging the reduced product from said machines, a traveling belt beneath said machines, receiving-troughs carried by said belt, and having transverse slits therein, a section-cutter operated by said troughs to divide the product contained thereby between the troughs, and a gang-cutter having knives operating in the transverse slits of said troughs to divide the reduced product of each trough into blocks, substantially as specified.

13. In apparatus for the purpose described, the grain-reducing machines, means for discharging the reduced product from said machines, a traveling belt beneath said machines, receiving-troughs carried by said belt, means for dividing the reduced product contained by said troughs between the troughs, means for dividing the reduced product of each trough into blocks, and a panning-table in line with said reducing-machines, substantially as specified.

14. In apparatus for the purpose described, the grain-reducing machines, means for discharging the reduced product from said machines, a traveling belt beneath said machines, receiving-troughs carried by said belt, a trough-feeding belt arranged to move a little faster than said first-named belt, means for dividing the reduced product contained by said troughs between the troughs, and means for dividing the reduced product of each trough into blocks, substantially as specified.

15. In apparatus for the purpose described, the grain-reducing machines, means for discharging the reduced product from said machines, a traveling belt beneath said machines, receiving-troughs carried by said belt, a trough-feeding table having a belt arranged to move a little faster than said first-named belt, means for dividing the reduced product contained by said troughs between the troughs, means for dividing the reduced product of each trough into blocks, a panning-table in line with said reducing-machines, a trough-return belt extending underneath said panning-table forwardly under said reducing-machines and trough-feeding table, a chute leading downwardly from said panning-table to said return-belt, and a chute leading upwardly from said return-belt, to said trough-feeding belt, substantially as specified.

16. The combination with the gang reducing-machines, the sectional, transversely-slotted receivers, and the carrying mechanism for said receivers, of the gang-cutter table having a central roller-way to receive said receivers, and lateral gang-cutters having upper and lower knives, vertically-movable risers adapted to support said receivers thereon, together with suitable mechanisms for actuating the upper knives, and the said risers, substantially as specified.

17. The cutting-table having a central roller-way, and lateral gang cutting mechanisms upon each side thereof, said gang cutting mechanism having vertically-movable risers adapted to support the material being cut, means for actuating the said risers, an upper, vertically-movable gang of knives, and a lower stationary gang, together with suitable mechanism for actuating the upper knives, substantially as specified.

18. The combination with the gang reducing-machines having the roller-heads, the endless feed-belt which travels beneath the said heads, the feed-table at the front of the gang-machine, its feed-belt adapted to be rotated at a slightly-greater rate of speed than the feed-belt of the gang-machines, the sectional, slotted receivers, the section-cutter, the gang-cutters, the panning-table, the endless return-belt, extending from the feed-table to the panning-table, and the inclined chutes, leading from each of said tables to the said return-belt, substantially as specified.

19. The combination with the gang reducing-machines, the endless feed-belt, and the sectional receivers adapted to be carried by the said belt, of the automatic section-cutter, and the gang-cutters, substantially as specified.

20. The combination with the gang reducing-machines, the endless feed-belt, and the sectional receivers adapted to be carried by said belt, and having transversely-slotted bottoms, of the two gang-cutters, having upper and lower sets of knives with actuating mechanisms therefor, and a roller-way between said cutters, and adapted to receive said receivers, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. G. POMERENE,
B. E. SUTTON.

No. 678,127. Patented July 9, 1901.

H. D. PERKY.

MACHINE FOR REDUCING FOOD MATERIAL TO FORM AND DISTRIBUTING SAME.

(No Model.) (Application filed Nov. 20, 1900.)

4 Sheets—Sheet 1.

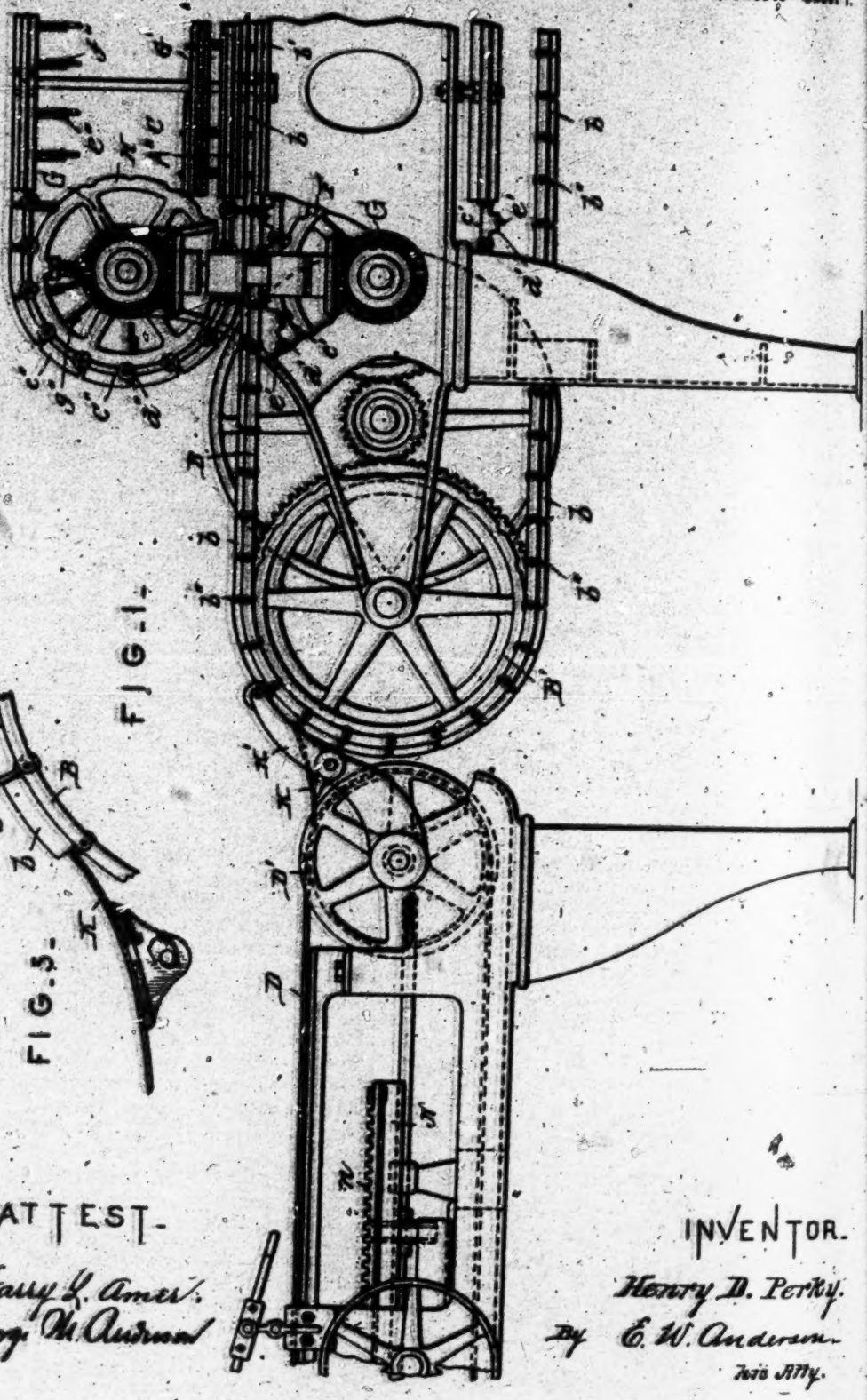

FIG. 1.

FIG. 3.

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MACHINE FOR REDUCING FOOD MATERIAL TO FORM AND DISTRIBUTING SAME.

(No Model.) (Application filed Nov. 20, 1900.) 4 Sheets—Sheet 2.

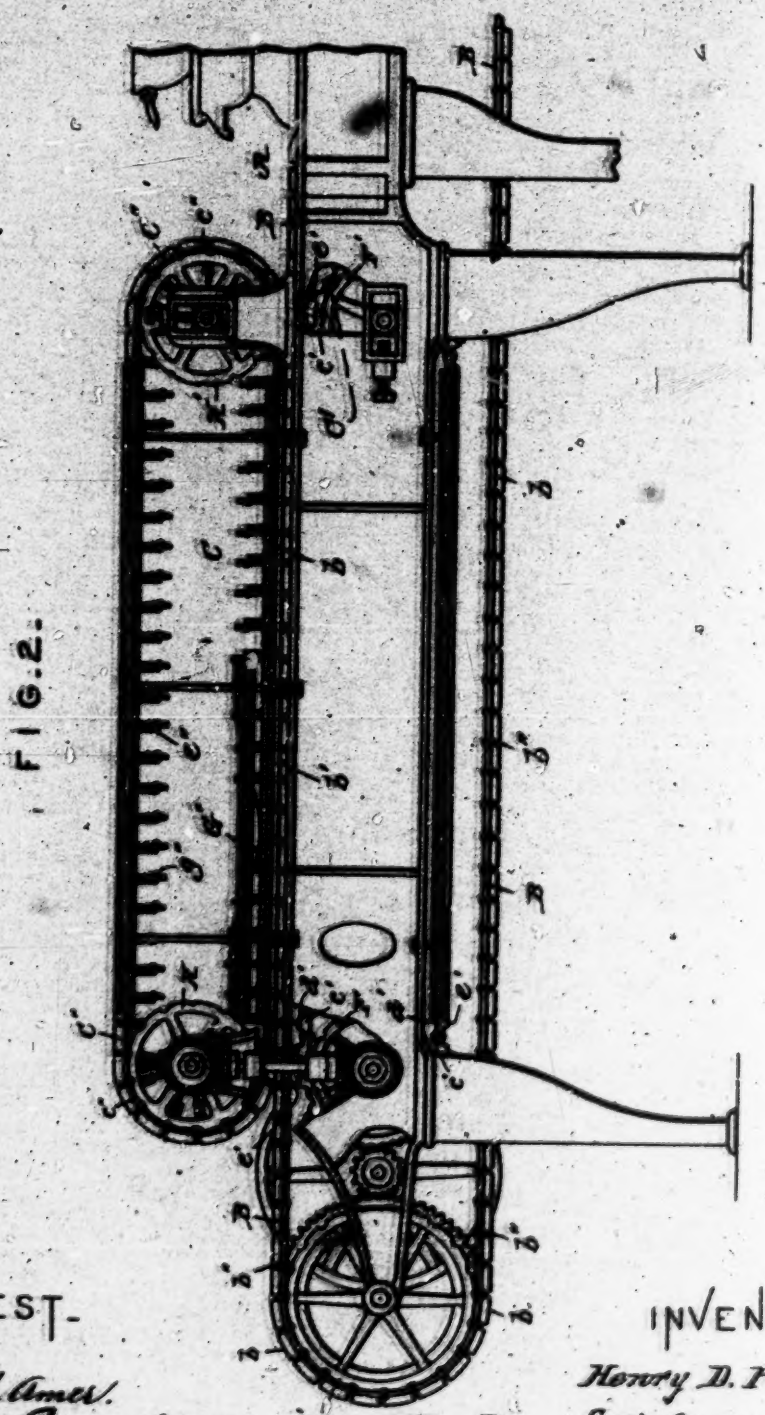

FIG. 2.

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114

No. 678,127. Patented July 9, 1901.

H. D. PERKY.

MACHINE FOR REDUCING FOOD MATERIAL TO FORM AND DISTRIBUTING SAME.

(No Model.) (Application filed Nov. 20, 1900.)

4 Sheets—Sheet 3.

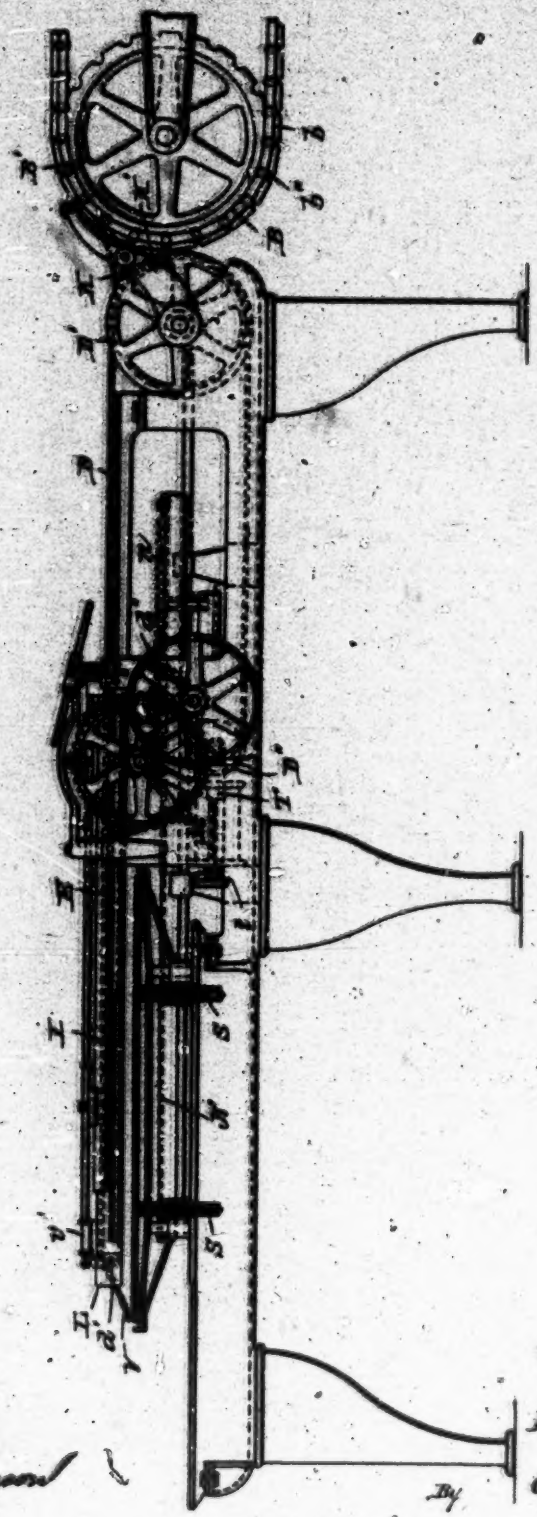

FIG. 3.

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No. 678,127. Patented July 9, 1901.

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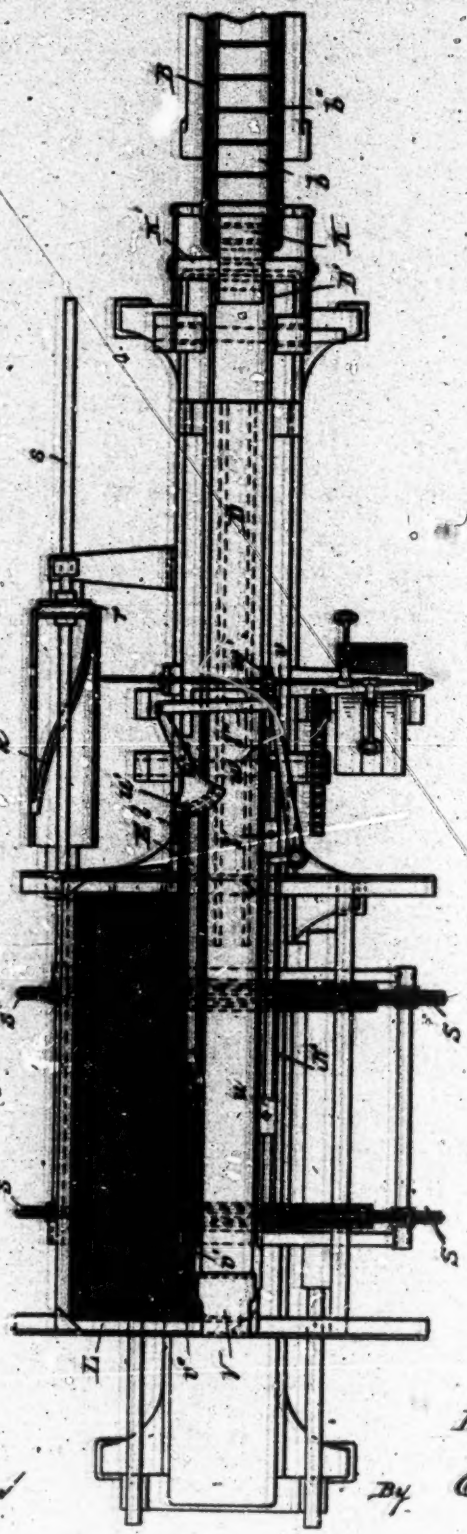
MACHINE FOR REDUCING FOOD MATERIAL TO FORM AND DISTRIBUTING SAME.

(No Model.) (Application filed Nov. 20, 1900.) 4 Sheets—Sheet 4.

FIG. 4.



ATTEST.

Harry L. Ames.
George W. Andrews

INVENTOR.

Henry D. Perky.
By E. W. Anderson
his Atty.

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF WORCESTER, MASSACHUSETTS.

MACHINE FOR REDUCING FOOD MATERIAL TO FORM AND DISTRIBUTING SAME.

SPECIFICATION forming part of Letters Patent No. 678,127, dated July 9, 1901.

Application filed November 20, 1900. Serial No. 37,163. (No model.)

all whom it may concern:

Be it known that I, HENRY D. PERKY, a citi- of the United States, residing at Worces-, in the county of Worcester and State of assachusetts, have invented certain new and ful Improvements in Machines for Reduc- Food Material to Form and Distributing Same; and I do hereby declare the follow- to be a full, clear, and exact description the invention, such as will enable others illed in the art to which it appertains to e and use the same.

In the accompanying drawings, Figure 1 is ide elevation of the abutting end portions the cutting and panning mechanisms. Fig. is a side elevation of the cutting mechanism, reducing mechanism being indicated. g. 3 is a side elevation of the panning mech- sm in conjunction with the belt-trough B. g. 4 is a plan view of the same. Fig. 5 ows the bridge-slide K in section in con- nection with the belt-trough.

This invention has relation to machines for ducing food material in large quantities fed ntinuously in regularly-subdivided form d placing the same upon receivers for bak- g or drying or such other subsequent pro- dure as may be required.

The invention consists, mainly, in means for ntinuously subdividing and depositing the od material in parallel rows upon receivers.

In the accompanying drawings the letter designates that portion of a mechanism hereby the material—such, for instance, as heat—is reduced to shred or thread-like rm and deposited upon a sectional travel- g trough or receiver continuously and in fficient quantity for the thickness of the bis- it or subdivisions which are to be formed.

B indicates the sectional belt-trough of this ducing-machine, which passes through and rms a part of the subdividing machinery , which, being provided with upper and wer traveling knife-belts moving at the me rate of speed as the belt-trough, serves subdivide the continuously-moving ribbon material into biscuit-sections. The sub- ivided material upon the belt-trough, pass- g beyond the cutting mechanism, is taken om the belt-trough by an inclined bridge- lide, which discharges the biscuit-sections order upon the depositing-belt D, whereby, in connection with the moving receiving mechanism E, carrying the receivers or pans, the biscuit-sections are placed regularly and in order thereon. I have illustrated in this connection grooved-roll reducing-machines adapted to discharge the wheat or other material in thread-like form, as indicated in Letters Patent No. 533,555, dated February 5, 1895; but it is apparent that other machines adapted to deposit the food material in ribbon form upon the sectional traveling belt-trough B may be employed. This belt-trough consists of sections *b*, each of which is of proper size to hold one biscuit, and these sections form links of the belt, being connected by lateral lugs and pivots in such manner as to leave the interval between the sections clear for the passage of the knives of the cutting mechanism.

B′ indicates one of the end pulleys of the belt-trough, and *b′* represents the lateral ways of the frame, upon which the lugs of the belt-sections move, these lugs being usually provided with small rollers.

The lower traveling cutter or knife belt C′ consists of sections *c′*, each of which carries a blade *e′*, said sections having each a rise *d′*, adapted to fit a recess *b″* between belt-sections *b*, as the belts come together in such manner that the blade *e′* is passed upward through the narrow interval or slot between the trough-sections, the two belts moving along continuously at the same speed. F and F′ indicate the pulleys of this belt. The upper traveling cutter or knife belt C″, also moving at the same speed, consists of sections *c″*, linked together by means of lugs carrying rollers, as at *d″*, and is usually recessed in its lower face or otherwise shaped to give form to the biscuit or to compress the material where the cut is to be made. The blade *e″* of this section is movable up and down, being carried in a slideway *f‴* formed upon the back of the section and having a friction-spring, and small lateral rollers *g″* are provided upon lugs of the blade-frame, adapted to engage a camway G″ of the main frame, which serves to depress the blades of the sections sufficiently to make them cooperate with the blades of the lower knife-belt in cutting the ribbon of material transversely into sections. H and H′ indicate the pulleys of this

knife-belt, and G represents gearing whereby the knife-belts are caused to travel at the same rate of speed as the belt-trough. A'' indicates guideways of the rollers *d''*.

Resting upon the belt-trough B at its end where it commences to pass downward around the end pulley B' is a bridge-slide K of about the width of the interval between the side flanges of the trough-section. This bridge-slide is connected to a frame K', which is usually pivoted to the main frame. The bridge-slide is arranged in ways of the frame K', which is provided with a spring designed to hold the slide in projected position, but with a yielding pressure. The face of the bridge-slide is usually formed with a concave curvature longitudinally, and the slide is arranged in a downwardly-inclined position to pass the biscuit-sections to the depositing-belt D, which is arranged at a lower level than that of the belt-trough and is geared to run at the same rate of speed continuously, so that the biscuit-sections are taken from the belt-trough as fast as they are formed and delivered thereby. While the receiving end portion of this belt D moves along continuously and steadily in position with the biscuit-sections, which are received thereon from the bridge-slide, the depositing end portion of the belt shortens and lengthens alternately, by the one movement depositing the biscuit-sections upon the receiver or pan and by the other movement carrying forward the line or feed of biscuit-sections to be deposited in a second row upon the receiver or pan parallel to the first row, the lateral adjustment and longitudinal retraction of the receiver or pan taking place while the depositing-belt is lengthening itself.

The reciprocating receiver frame or carriage N for the pans is geared to move at the same rate of speed as the depositing-belt and the belt-trough.

D' indicates the end pulley of the belt D, which is journaled in fixed bearings of the main frame, which is provided with slideways *l* for a carriage L, which carries at its delivering end the small end pulley *d'* of the belt, said belt in its return below passing around a pulley *d''* in bearings of the carriage L and around another pulley D'', which is seated in bearings of an adjustable holding-piece T, which is connected to the main frame by means of an adjusting-screw *t*. The belt D therefore has an upper end branch upon which biscuit-sections are carried and by which they are deposited and a lower branch which acts as a take-up when the upper branch is shortened as the carriage moves backward.

M indicates a reversing-shaft having rack-and-gear engagement with the slide frames or carriages L and N, whereby said carriages are reciprocated in opposite directions, but at the same rate of speed. The carriage N, having the lower rack *n*, carries the pulleys of the sprocket-chains S, upon which the receivers or pans are placed in position to receive the biscuit-sections from the depositing-belt. These sprocket-chains run transversely and serve to convey the proper intermittent movement to the receivers in the lateral direction, said movement being effected by means of a cam R intermittently engaging the pawls *r* of the shaft *s*.

At the end of the carriage L is pivoted a depositing lip or slide V, which takes the biscuit-sections from the end of the depositing-belt D and passes them down its incline to the receiver or pan. By means of reversing-gear (indicated at *v*) this depositing-lip is raised at the end of the movement of discharge and held in the raised position until the extended belt D is in position to place another row of biscuit-sections on the pan, when said lip is lowered promptly to inclined position. The degree of inclination is readily adjustable while the machine is in motion by means of the sleeve-screw *v'*, the operation of which changes the position of the worm *v''*.

The reversing devices are operated automatically by the carriage L through its cam-lugs *l* and *l'*, which alternately engage the switch-lever *l''*. By means of the slides *u* and *u'*, which carry said cam-lugs, and the adjusting-screw mechanism (indicated at *w* and at *w'*) the position of either or both of the cam-lugs can be changed. In this manner means are provided for lengthening or shortening the stroke of the carriages L and N at either or both ends of the movement.

The material carried by the belt-trough between the knife-belts is subdivided thereby, the blades of the lower knife-belt passing upward through the intervals between the trough-sections, which are held in position by their guideways, and the blades of the upper knife-belt being depressed by means of the camways, which engage the rollers of the blade-frames. The upward push of the lower blade and the downward action of the compressing edge of the upper knife-section render the action of the upper knife clean and effectual and at the same time obviate any tendency of the material to adhere in the slot between the trough-sections. The biscuit-sections thus formed are taken from the belt-trough by the bridge-slide, which may have a short reciprocating motion, and passed to the depositing-belt, which, with the aid of its depositing-lip, places them upon the receiver or pan, which by an intermittent lateral movement effects an arrangement of the biscuit-sections in parallel rows. As one receiver or pan is filled another is placed upon the carriage to be filled in turn. Usually the carriage N is made wide enough to hold two or more pans side by side in order to give the attendant sufficient time to remove a filled pan and place an empty one upon the sprocket-belts while an intermediate pan is being filled.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. The combination with reducing mechan-
, and panning mechanism, of upper and
traveling knife-belts, a belt-trough shap-
the material from the reducing mechan-
in elongated or ribbon form, and carry-
the same between the knife-belts whereby
subdivided, and a bridge-slide or transfer
ice whereby the subdivisions or sections
the material are taken from the trough-belt,
placed upon the belt of the panning mech-
m, substantially as specified.

2. The combination with upper and lower
veling knife-belts, and with panning mech-
ism running at the same rate of speed as
knife-belts, of a sectional belt-trough, adapted to carry the material deposited thereon in elongated or ribbon-like form, and passing between the knife-belts at the same rate of speed, and a bridge-slide or transfer device whereby the subdivisions or sections of the material are taken from the trough-belt and placed upon the belt of the panning mechanism, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. R. GILKESON,
ALBERT H. CHAFFEE.

No. 678,625. Patented July 16, 1901.

H. D. PERKY.

PNEUMATIC PANNING OR DISTRIBUTING MACHINE.

(Application filed Sept. 20, 1900.)

(No Model.) 5 Sheets—Sheet 1.

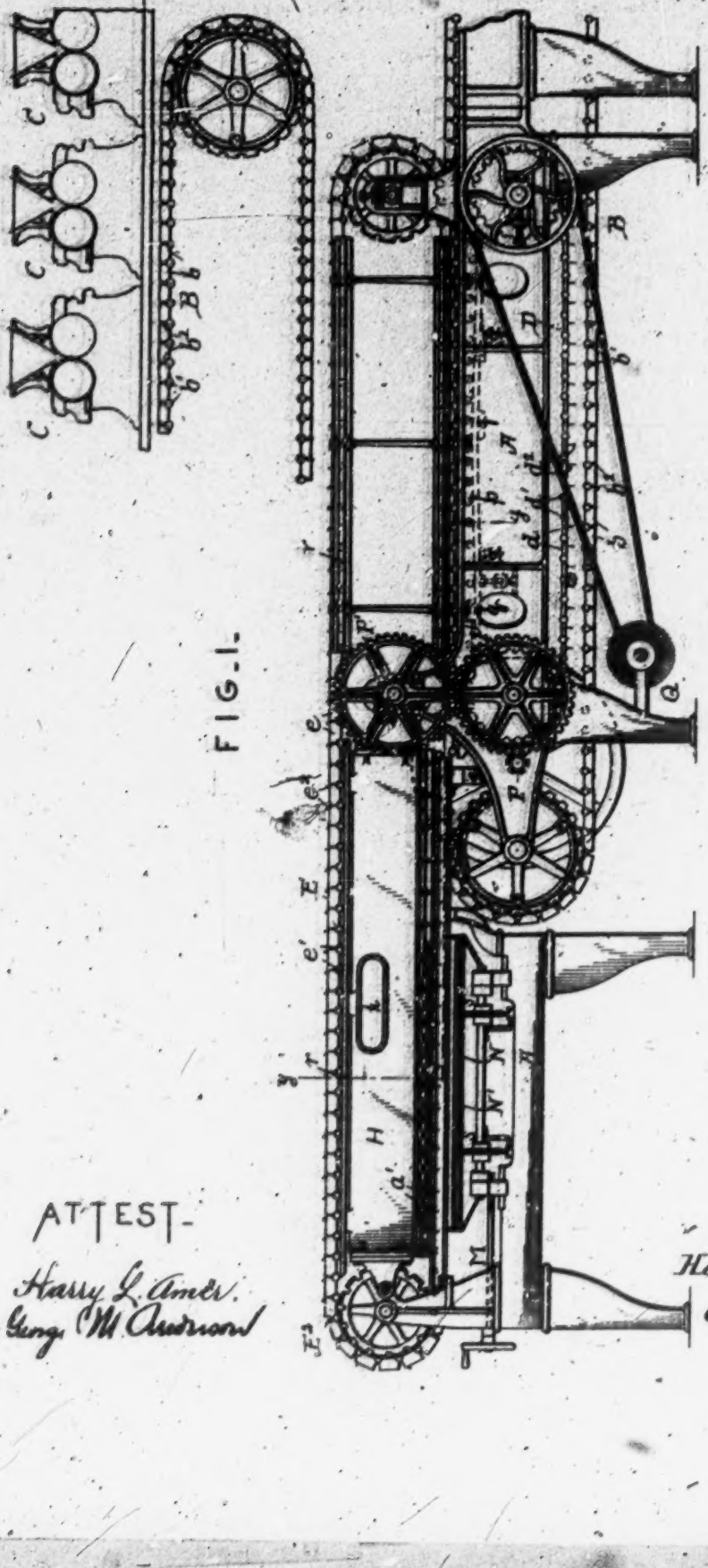


FIG. 1.

ATTEST-

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his Atty

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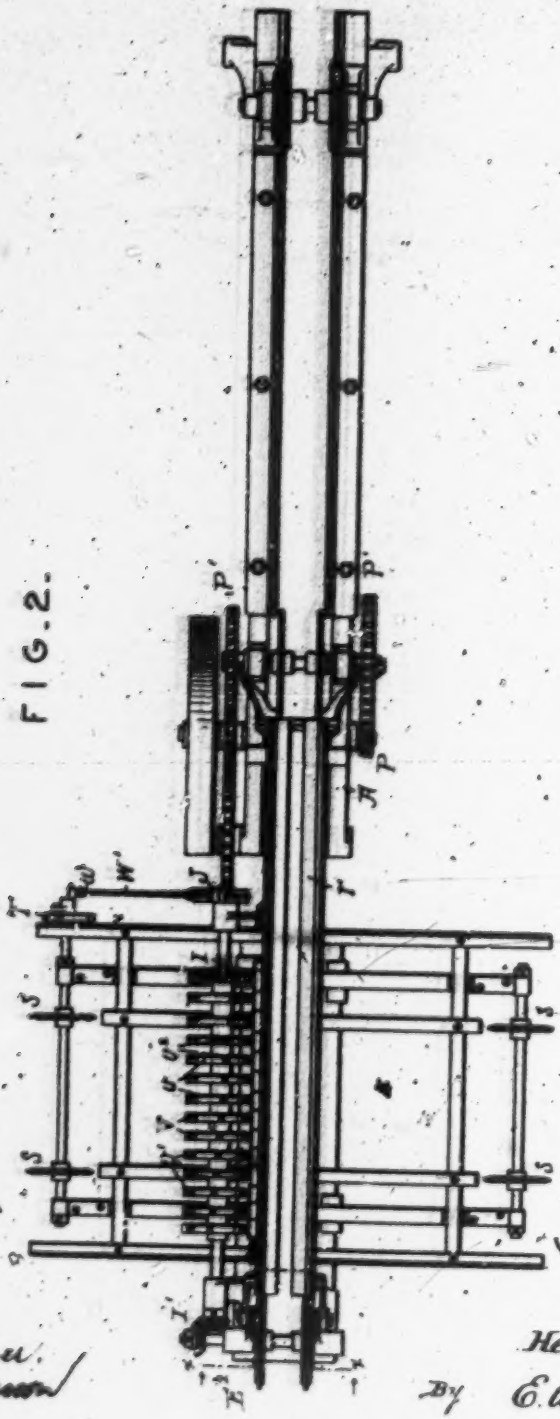
PNEUMATIC PANNING OR DISTRIBUTING MACHINE.

(No Model.) (Application filed Sept. 20, 1900.)

5 Sheets—Sheet 2.

FIG. 2.



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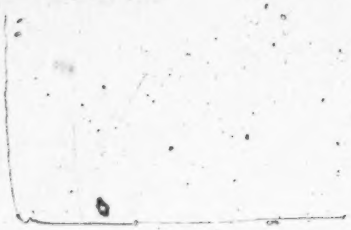

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No. 678,625. Patented July 16, 1901.

H. D. PERKY.

PNEUMATIC PANNING OR DISTRIBUTING MACHINE.

(No Model.) (Application filed Sept. 20, 1900.) 5 Sheets—Sheet 3.

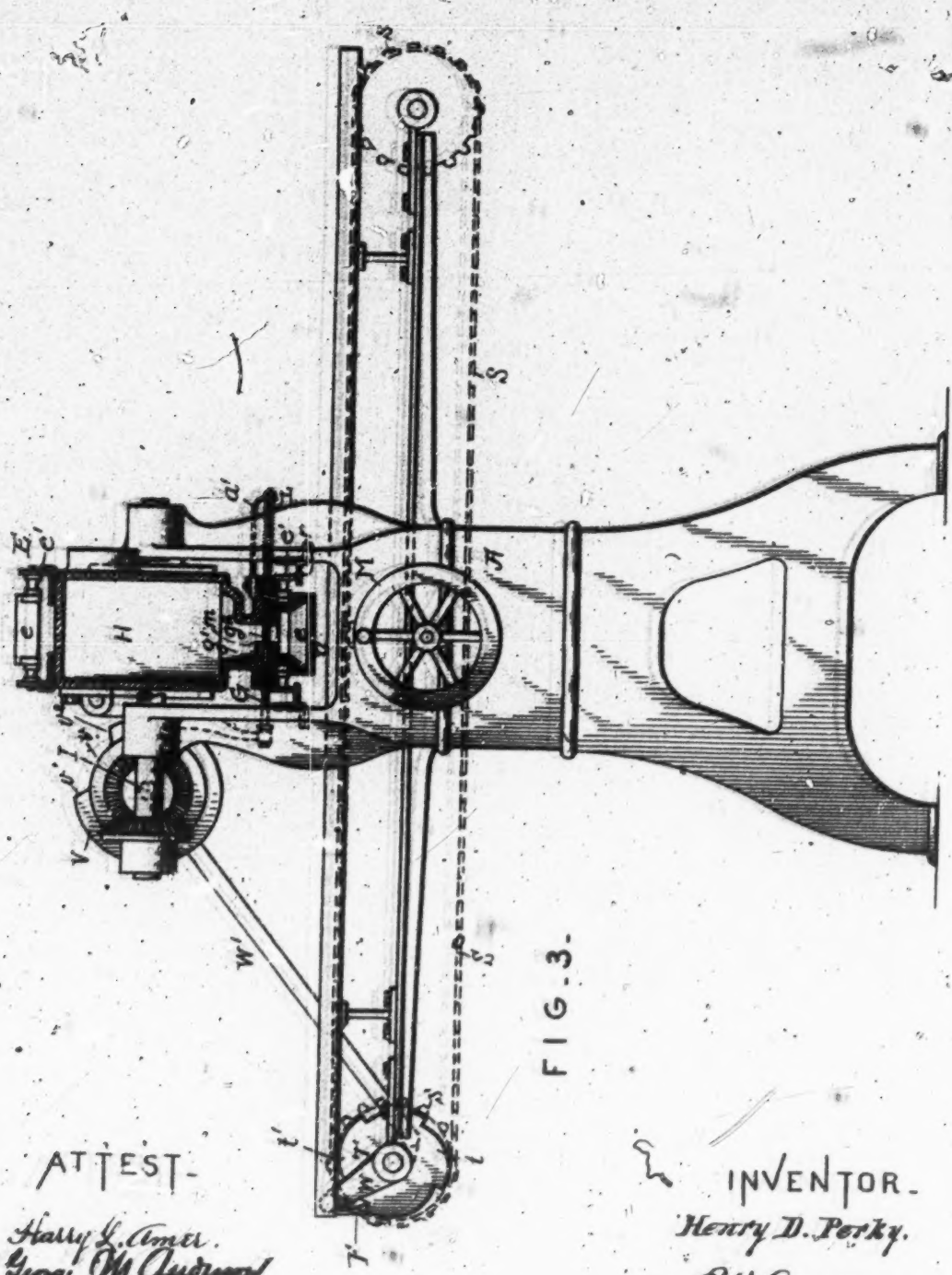

FIG. 3.

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PNEUMATIC PANNING OR DISTRIBUTING MACHINE.

(No Model.) (Application filed Sept. 20, 1900.) 5 Sheets—Sheet 4.

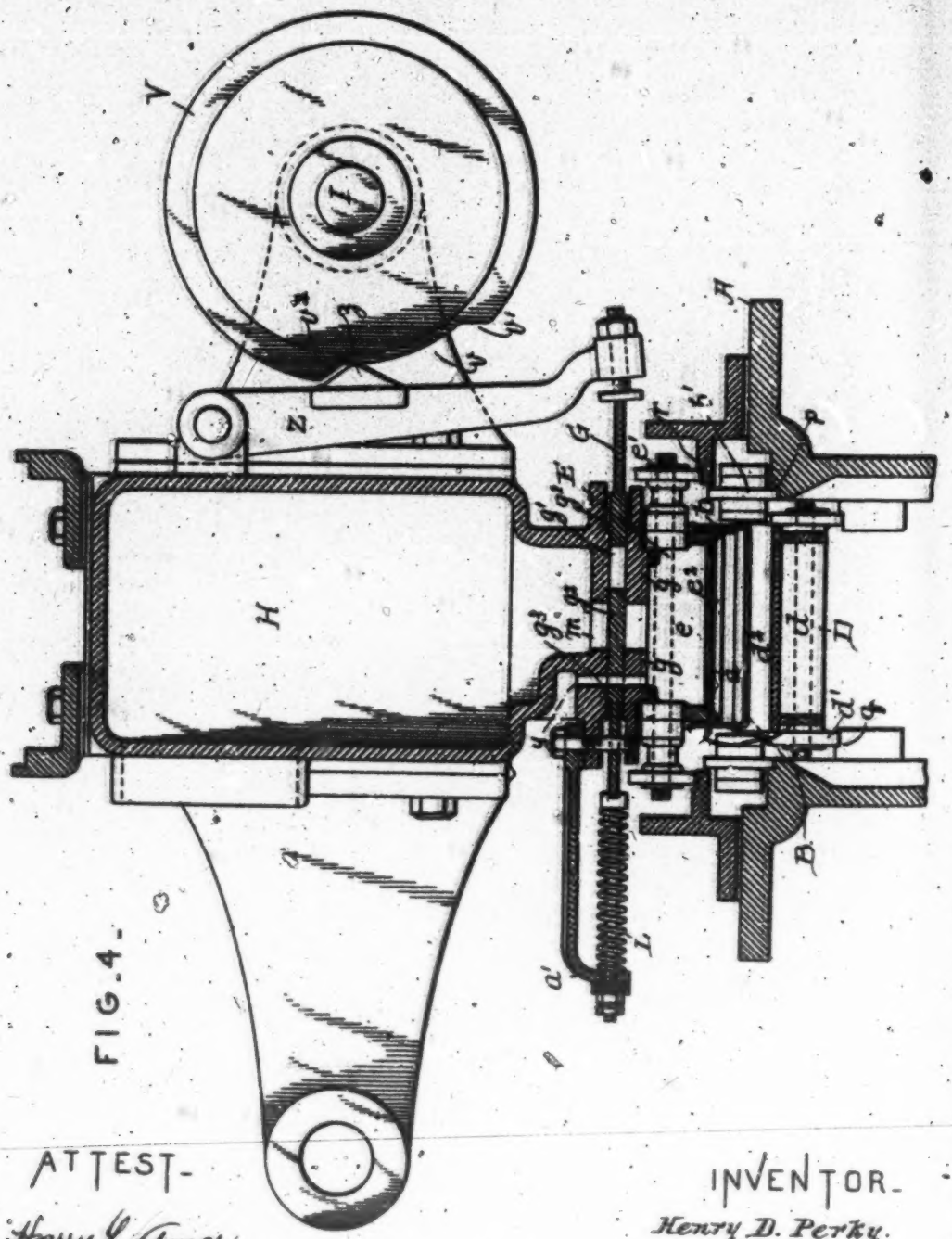

FIG. 4.

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PNEUMATIC PANNING OR DISTRIBUTING MACHINE.

(No Model.) (Application filed Sept. 20, 1900.)

5 Sheets—Sheet 5.

FIG. 5.

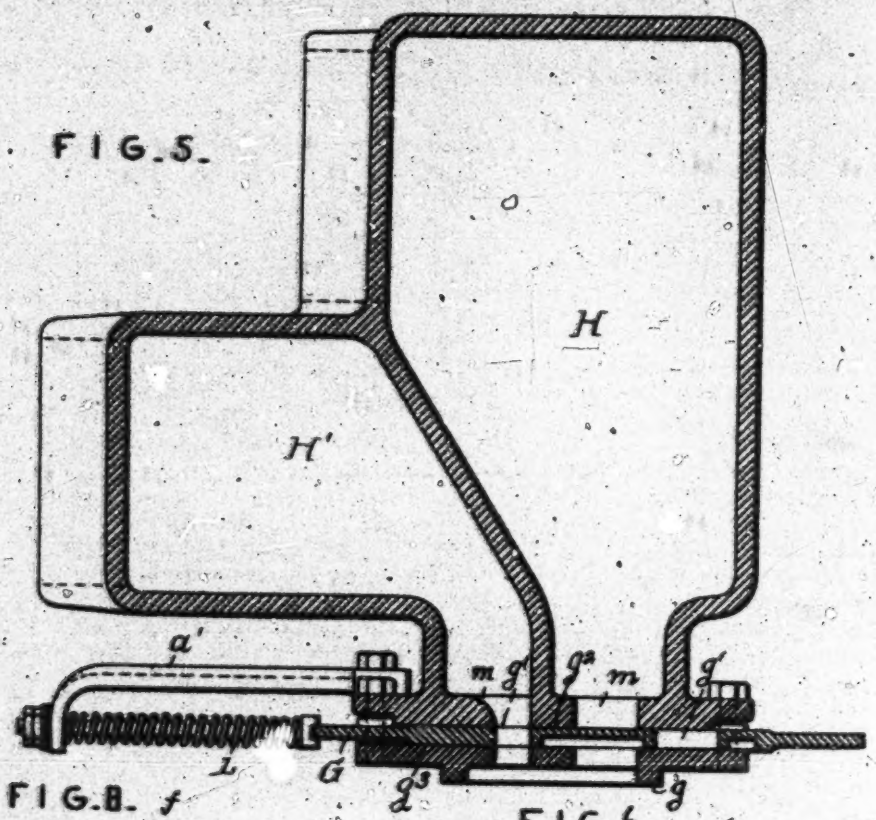


FIG. 8.

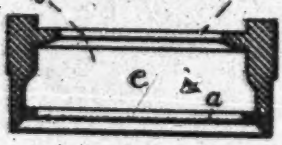


FIG. 6.

FIG. 7.

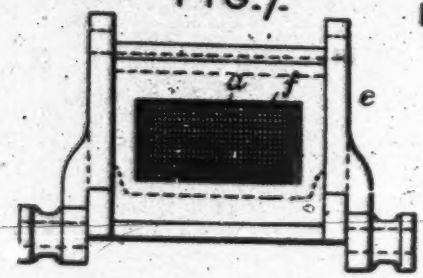


FIG. 10.

FIG. 11.

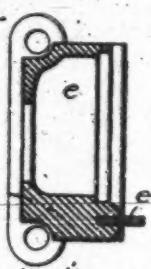
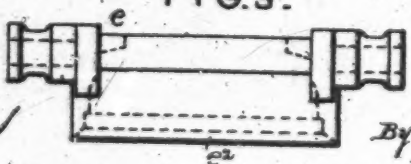


FIG. 9.



ATTEST.

Harry L. Amer.
Geo. W. Anderson

INVENTOR.

Henry B. Perky.

By E. W. Anderson
his Atty.

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF WORCESTER, MASSACHUSETTS.

PNEUMATIC PANNING OR DISTRIBUTING MACHINE.

SPECIFICATION forming part of Letters Patent No. 678,625, dated July 16, 1901.

Application filed September 29, 1900. Serial No. 31,554. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Worcester, in the county of Worcester and State of Massachusetts, have made certain new and useful Improvements in Pneumatic Panning or Distributing Machines; and I declare the following to be a full, clear, and exact description of the same, such as will enable others skilled in the art to which it appertains to make and use the invention, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

In the accompanying drawings, Figure 1 is a side elevation of my invention, partly broken away. Fig. 2 is a plan view of the main portion of the machine, the feeding or carrier chain and divider-chains being omitted. Fig. 3 is a section on the line x x, Fig. 2. Fig. 4 is a section on the line y y, Fig. 1, showing a small opening y from the suction-chain to the atmosphere. Fig. 5 is a view similar to Fig. 4, showing two pneumatic chambers H and H'. Fig. 6 is a plan view of the valve-plate. Figs. 7, 8, 9, 10, and 11 are detail views of one of the upper divider or section links e.

The invention relates to the preparation of articles of food, and particularly to the formation and distribution of crackers, biscuits, &c., in regular order, as in panning the same for baking, the object being not only to facilitate the preparation of food in large quantities, but also to promote its sanitary character by avoiding all handling.

The invention consists in providing a pneumatic transfer in combination with a carrier, in the novel construction and combinations of parts constituting a pneumatic transfer or distributer, in the novel construction and combinations of parts constituting a continuously-acting cutting and panning machine wherein the transfer is made by a pneumatic device, and finally in the novel construction and combinations of devices for the purposes set forth, all as hereinafter more particularly described.

In the accompanying drawings, the letter A designates framework of substantial character and preferably of iron.

B represents an endless feeding belt or carrier, consisting of short sectional plates or troughs b, on which the ribbon of food material is conveyed, being usually fed thereto by a series of reducing-machines (indicated at C C C) or in any other desirable manner.

When reducing-machines such as are indicated in the drawings are employed, it is designed that the ribbon or continuous layer of material shall be formed by shredding the grain, as described in patents which I have heretofore obtained. In such a combination, therefore, it is intended that the grain shall not be touched by hand from the time it is grown in the field until after it is cooked and ready for use as food.

The short sectional plates or troughs b of the endless carrier B are provided with rollers b' b' in order that they shall travel freely on the ways or tracks p, provided in the framing. Between the sectional plates or troughs b b is a narrow interval of separation b^3 for the passage of devices which serve to divide the ribbon of food material into sections.

D represents the lower endless divider or cutter chain, which consists of a belt of links d, having rollers d', which serve to facilitate their movement on the ways or tracks q of the framing, these ways or tracks having a slight arch or rise at q', whereby an upward movement of the cutter-links d is gradually effected in order to cause the separator-blades d^2 of said links to pass upward through the intervals of separation b^3 of the feeding belt or carrier B. Each link d is provided with a blade d^2, which is transversely arranged in the link-body and secured thereto either rigidly or adjustably, as may be found desirable.

The links of the lower divider belt or chain D are arranged to break joints with the trough-links b in order that the blades of the former shall have proper position to pass upward through the interval between the trough-links.

Compared with the length of the feeding-carrier B the lower divider-chain is short, being designed only to assist in effecting the separation of the material on the carrier B into sections.

E represents the endless chain of suction-links e e, which are provided with rollers e' e' to facilitate their movement on the tracks or ways r of the framing. In the construction shown in the drawings this endless chain E

is arranged above the carrier B and is geared to move at the same rate of speed therewith, as is also the lower divider-chain D. Each link *e* of the chain E carries a divider-blade e^2, which may be rigidly secured to its frame or may be made adjustable or even removable, as in some cases it may be desirable to include the length of several links in a section of the food material on the carrier. The suction-link *e* consists of a rectangular tubular or open frame, its upper portion having an opening *f* communicating with a passage *f'* through the link, the lower portion of said passage being also open, but covered or guarded by a wire-cloth or perforated bearing *a*, the design being to allow air to pass upward or downward through the link freely, as may be required in the operation of the machine. The upper surface of the link *e* is designed to move along in approximate contact with a valve-seat *g*, as indicated in the framing, said valve-seat being provided for use in connection with a transverse reciprocating valve-plate G.

The endless suction-chain E extends beyond the endless carrier B and the endless divider-chain D sufficiently to include the pneumatic chamber or chambers H H'. Usually a single pneumatic chamber H will be sufficient, this being a suction or exhaust chamber, kept in exhausted condition by means of a suitable exhaust-fan, the passage to which is indicated at *k*; but if the food-sections are of such character that they adhere too closely to the wire-cloth bearings *a* of the suction-links it may be necessary to employ the pressure-chamber H', which is provided with a connection to a blower-fan. An opening for the admission of atmospheric air when the suction is cut off will, however, usually prove sufficient to release the biscuit or cracker section from the wire-cloth bearing *a*, which should be treated with paraffin.

The valve-plates G are arranged in series in ways or seats g^3 of the frame, these being located in the lower portion or bottom of the pneumatic chamber. The number of valve-plates may be equal to one or two more than the number of biscuits or food-sections designed to form a row on the pan or receiver. Each valve-plate is designed to operate in conjunction with a link of the suction-chain above described, as such link comes into position or nearly into position below it. The series of valve-plates corresponds with the series of openings *m* of the pneumatic chamber, and such series is of suitable length to correspond with the length of the pan or receiver, such as indicated at N', Fig. 1, so that when these openings or suction-passages are closed by means of the valve-plates the food-sections will be deposited on the pan in a row. Besides the openings *m* openings are provided in the bottom of the first portion of the pneumatic chamber. The latter openings are not provided with valve-plates, as they are designed to be in continuous action, serving to convey the food-sections or biscuits from the carrier B to the valved portion of the pneumatic chamber, where the depositing operation is effected.

The valve-plates G are provided with air-passages or openings *g'* and with stop or cut-off portions g^4.

Below that portion of the pneumatic chamber which is provided with valves is located the pan-carrier table N, which consists of an adjustable frame provided with bearings for the shafts of the sprocket-wheels *s*, which carry the transverse sprocket-chains S or endless carriers on which the pans or trays are laid. These sprocket-chains are intermittently operated by means of a pawl F and a ratchet-wheel T, of which one of the teeth (indicated at *t'*) is longer circumferentially than the other teeth *t*, in order to provide sufficient movement of the pans where they lie adjacent to each other to pass from the last row of biscuit-sections of a filled pan to the place of deposit on the succeeding pan where the first row of biscuit-sections is to be dropped. The ratchet-wheel T is operated through the pawl F and pivoted connection W by the crank or eccentric J, which is carried on the end of a shaft I, which also carries a series of circular cams V V, each of which corresponds to one of the valve-plates. The cams V are each formed with a circumferential depression *v*, the depression of each succeeding cam being a little longer than that of the preceding cam and so arranged that while the rear inclines v' are in line with each other and designed to operate together the forward inclines v^2 are spirally arranged, so that they will act in succession. A series of arms Z are pivoted to the framing or to the wall of the pneumatic chamber, said arms corresponding in number to the valve-plates and being provided with projections *z*, whereby they engage the circular cams hereinbefore referred to. The free ends of the arms Z are designed to engage projections or arms of the valve-plates G and serve to give motion to said plates when the cams are rotating. Reverse motion is given to the valve-plates by means of springs L, arranged on the stems of the valve-plates, said springs engaging arms a' of the framing through perforations in which the stems pass. The valve-plates are adjustable, the stems being threaded and provided with nuts for the purpose.

The shaft I, carrying the cams, is operated from the shaft of the end sprocket-wheel E^3 of the endless chain E by means of bevel-gearing, (indicated at I'.)

Under the arrangement indicated while the valves are opened successively to avoid waste of the exhaust they are closed simultaneously, so that a row of biscuits or food-sections is dropped from the links of the pneumatic belt E to the receiver of the pan on the carrier-table.

The connecting arm or rod W', which extends from the eccentric J to the pawl F, is usually pivoted at *w* to provide for lateral play, which is advisable in order to allow adjustment of the pan-carrier frame to accommodate said frame to the drop movement of the valves. This adjustment may be effected by the hand-screw M, having a pivotal seat in the framing.

Q indicates a rotary brush, which is designed to act upon the trough-links of the carrier-belt to keep them clean.

The operation may be described as follows: The trough-carrier links conveying the ribbon of food material as it is formed thereon by deposit from the reducing-machinss move along the tracks of the framing and pass between the lower divider-chain and the suction-belt. The links of these belts being provided with knives or blades, which operate, preferably, by a pressing or abutting movement, serve to subdivide the band or ribbon of food material into sections. After this subdivision the lower chain of cutter-links leaves the work and the chain of trough-links having conveyed the food-sections under the pneumatic chamber also leaves the work. The biscuits or food-sections being now taken up by the exhaust and being carried in contact with the wire-cloth bearings *a* along under the pneumatic chamber reach the valved portion, which is normally closed by the mechanism. As each link of the chain E comes under the series of valves a valve is opened, continuing the suction until a sufficient number of biscuits has been carried along the valved portion from a row, when the valves are closed simultaneously and all the biscuits of said row are dropped or deposited on the pan or receiver below. This pan or receiver remains stationary long enough to receive the row of biscuits and is then moved transversely by the action of the ratchet-and-pawl mechanism or other suitable manner the proper distance to attain a position to receive the next row of biscuits, and the action of the valves being repeated a second row of biscuits is deposited alongside the first row.

In the construction illustrated four rows of biscuits are apportioned to each pan, and the fourth ratchet-tooth is made sufficiently longer than the others to allow in the movement of the pan-carrier chains for the interval between the pans.

It will be observed that the drop motion of the valves, wherein they simultaneously close off the exhaust, is intermittent, taking place in the intervals of the intermittent motion of the pan-carrier. In other words, when the pan-carrier is still the simultaneous cut-off or drop motion of the valves takes place quickly enough to allow time for the drop of the biscuits to the pan before the latter is again shifted. To effect this movement of the valves and the movement of the pan-carriers, the cam-shaft is usually connected to the shaft of the end pulley of the chain E by means of bevel-gearing. In some cases, however, the receiver may have continuous movement.

The machine may be run by means of power applied to a shaft F and gearing F', operating the shafts of the sprocket-wheels B' of the feeding-chain D' of the lower cutter-chain and E' of the pneumatic chain.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. A pneumatic panning or distributive depositing-machine, consisting of an endless belt having open sections provided with perforated or wire-cloth bearings, and adapted to operate in connection with a transversely-moving receiver, and an exhaust-chamber having valved openings, substantially as specified.

2. In a pneumatic panning or distributive depositing-machine, an endless belt having open sections provided with perforated or wire-cloth bearings, substantially as specified.

3. An endless chain or belt having open sections provided with divider-blades, and perforated or wire-cloth bearings, substantially as specified.

4. In a pneumatic panning or distributive depositing-machine, the combination with an exhaust-chamber, and its valved openings, of an endless belt of open links, and perforated or wire-cloth bearings attached to the bottoms of said links, substantially as specified.

5. In a pneumatic panning or distributive depositing-machine, the combination with an endless feeding-carrier, and chain cutters or dividers operating in conjunction therewith, of an exhaust-chamber having valved openings, an endless belt of suction-links, and devices for operating the parts, substantially as specified.

6. The combination with an exhaust-chamber, its openings and valves, an open-link suction-belt, an endless feeding-belt and transverse endless pan-carriers, of devices for giving reciprocating motion to said valves, and intermittent motion to said pan-carriers, substantially as specified.

7. The combination with a pneumatic chamber, its openings and valves, the open-link suction-belt, and the transverse receiver, of the endless feeding-belt, the series of valve-operating cams and devices, the cam-shaft and eccentric and the ratchet-and-pawl devices in connection with said eccentric, for giving intermittent motion to said receiver, substantially as specified.

8. The combination with a pneumatic exhaust-chamber, and an endless feeding belt or carrier, of a suction-belt operating in connection with said exhaust-chamber, valve devices for cutting off the exhaust, a transverse

receiver and mechanism for giving intermittent motion to said receiver, and alternate intermittent cut-off motion to said valve devices, substantially as specified.

9. The combination with a pneumatic exhaust, its valves, and a continuous feed-belt of an endless suction-belt operating in connection with said exhaust, valves and feed, and a transversely-moving receiver, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:

MAUD Y. ANDERSON,

BERTHA E. SUTTON.

136

No. 681,656. Patented Aug. 27, 1901.

H. D. PERKY.

CONTINUOUS CUTTING MACHINE.

(Application filed Dec. 9, 1899. Renewed Feb. 9, 1901.)

(No Model.) 3 Sheets—Sheet 1.

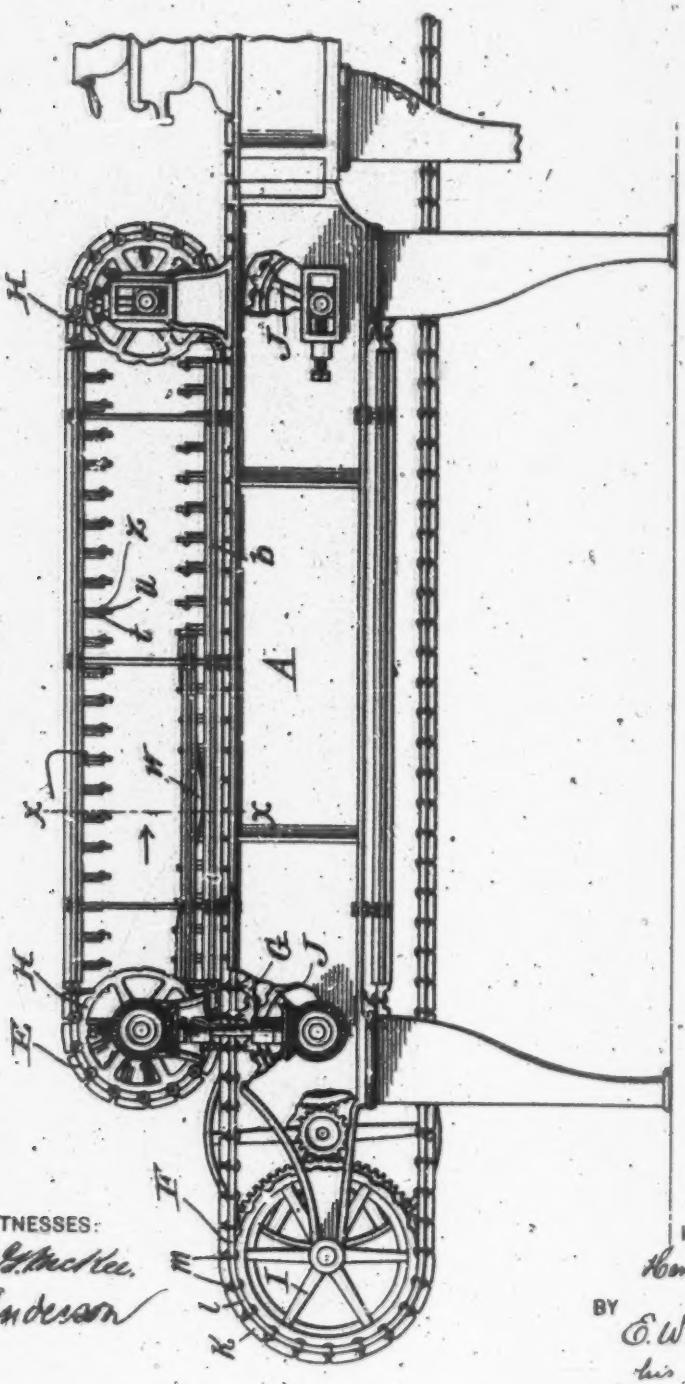


Fig. 1.

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G M Anderson

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Henry D. Perky
BY E. W. Anderson
his ATTORNEY.

138

No. 681,656. Patented Aug. 27, 1901.

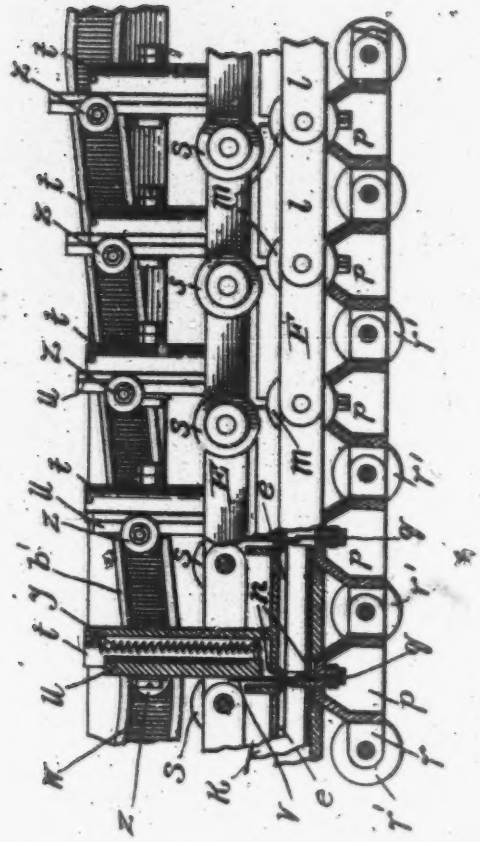
H. D. PERKY.

CONTINUOUS CUTTING MACHINE.

(No Model.) (Application filed Dec. 9, 1899. Renewed Feb. 8, 1901.)

3 Sheets—Sheet 2.

Fig. 2.



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No. 681,656. Patented Aug. 27, 1901.

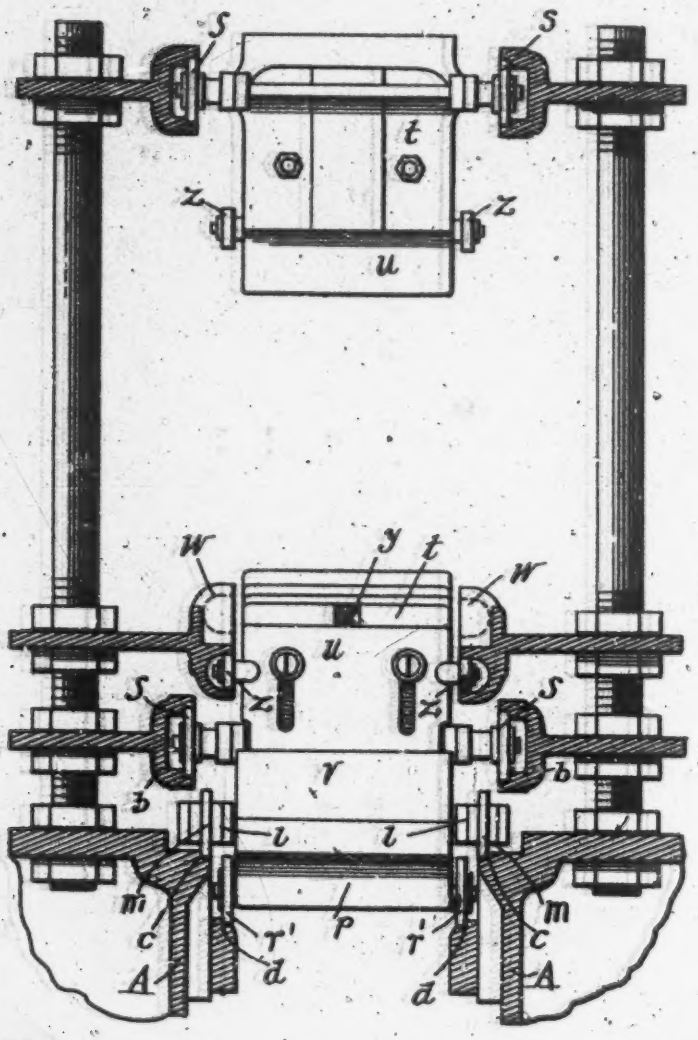
H. D. PERKY.

CONTINUOUS CUTTING MACHINE.

(Application filed Dec. 9, 1899. Renewed Feb. 9, 1901.)

(No Model.) 3 Sheets—Sheet 3.

Fig. 3.



WITNESSES:

Edwin G. McKee.

G. M. Anderson.

INVENTOR

Henry D. Perky

BY

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UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF WORCESTER, MASSACHUSETTS.

CONTINUOUS CUTTING-MACHINE.

SPECIFICATION forming part of Letters Patent No. 681,656, dated August 27, 1901.

Application filed December 9, 1899. Renewed February 9, 1901. Serial No. 46,722. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, residing at Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Continuous Cutting-Machines; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

In the accompanying drawings, Figure 1 is a side elevation of the invention. Fig. 2 is a partial longitudinal section showing the guideways; and Fig. 3 is an enlarged section on the line *x x*, Fig. 1.

This invention has relation to machines for cutting shredded wheat and other food preparations into regular and uniform sections; and it consists in the novel construction and combinations of devices hereinafter set forth, and more particularly pointed out in the appended claims.

In the accompanying drawings, illustrating the invention, the letter A designates the frame of the machine, having parallel sides and elongated form. The frame is formed with tracks or ways, as *b*, *c*, and *d*, upon which the side lugs of the endless-chain belts E, F, and G, respectively, travel, said belts being carried by their end sprocket-wheels H, I, and J. The middle belt F is made of iron, and consists of short sectional troughs having lateral flanges *k* and side lugs *l*. The links or short troughs are pivoted together by means of pins passing through the side lugs, and these lugs usually carry small rollers *m*, whereby their passage along the track *c* is facilitated and whereby engagement with the rims of the sprocket-wheels is effected. The body of each trough-section is formed on its under side with a broad transverse rib, the sides of which are beveled in such manner that each two successive links provide between them a transverse recess, (indicated at *n*.) The belt F so formed constitutes an endless sectional trough having between the sections narrow intervals for the passage of the blades of the cutter-belts. The lower cutter-belt G consists of an endless chain of knife sections or links each consisting of a body portion *p*, having its sides beveled and being properly portioned to engage the recess *n* of the trough-belt F. The knife-sections are provided with the transverse blades *q* and with lateral lugs *r*, usually bearing the rollers *r'* and being pivoted together to connect the sections in chain form. When the machine is in operation, the blades *q* pass upward in succession between the sections of the trough belt. These blades pass upward into the trough sufficiently to lift the material somewhat and to coact with the blades of the upper cutter-belt. The upper cutter-belt E also consists of section-links provided with lateral lugs pivoted together and usually having the lateral rollers *s*. The under side or face of the body portion of the link may be plane, but is preferably fashioned in mold form having a beveled edge rib *e*, (see Fig. 2,) adapted to gather the material somewhat and give it shape as it presses thereon in its downward movement. At the adjacent edges of the sections these ribs or lips also serve to compress the material against the rising blades of the lower cutter, in this manner facilitating the action of the blades of the upper cutter in their descent. At the back of each section of the upper cutter is provided a frame portion or flange *t*, forming a way for the blade-frame *u*, which carries the blade *v*, which has its movement along the plane of the edge face of the section downward to pass the rising blade of the lower cutter in a shearing manner. In order to effect this, camways *w* are provided on the main frame at each side above the trackways *b*, said trackways in this part having over-flanges *b'*, adapted to prevent the body portions of the knife-sections from leaving the trackways. The camways *w*, which dip downward, as indicated, and have a subsequent rise, are designed to engage the rollers *z*, which are connected to lateral lugs of the blade-frame *u*. As the knife-sections pass along their trackway toward the end of the machine the rollers of the blade-frame enter the camways *w* and are operated thereby to depress the blade-frame and blade to make the cut and then to raise the blade-frame and blade, withdrawing the latter from the material through the aid of the edge rib or lip of the section-body. The blade and blade-frame are held in raised position by means of the

friction-springs y, which bear against the slot-bolts connecting the parts. That portion of the machine in front of the camway is made sufficiently long to provide for pressing the biscuit in form. The three endless belts E, F, and G travel at the same rate of speed and are accurately formed and geared in order that the action of the cutter-blades shall be neat and close. The position of the lower cutter-blades is accurately defined by means of the engagements of the lower cutter-bodies with the interval recesses of the belt-trough, and provision is made for micrometric adjustment of the upper cutter by means of slanting set-screws of its sprocket-wheels passing through the hubs thereof and engaging abutments of the shaft on which they are keyed.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. The combination, with a traveling sectional carrier-belt composed of trough-links, of a lower chain cutter-belt having link-blades adapted to pass upward between the trough-links, an upper chain cutter-belt, the plane-tracks and cam-tracks of the frame, whereby the movements of the belts are controlled, and the sprockets and gear devices, whereby the belts are connected to move at the same rate of speed, substantially as specified.

2. The combination with the link troughs, and their connected frames and rollers, of a lower chain cutter-belt having fixed blades and devices for engagement with the interval recesses of the trough-links, substantially as specified.

3. The combination with link troughs, and their connected frames, of the lower chain of link cutters, and an upper chain of links having reciprocating blades, and mechanism for operating, substantially as specified.

4. The combination with camways in the frame, and the connected section-troughs, of an upper chain of connected links, their adjustable blades and sliding frames, having lateral lugs to engage the camways, substantially as specified.

5. The sectional cutter-link, consisting of the body portion and its connecting lugs and rollers, its mold-form face, its trackway, movable blade-frame, adjustable blade and friction-springs, substantially as specified.

6. In a continuous cutting-machine, the combination with chain of section-troughs, of a lower chain of knife-links, engaging said chain of section-troughs, and an upper chain of links carrying movable cutters and means for reciprocating said cutters, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
J. R. GILKESON,
ALBERT H. CHAFFEE.

No. 683,100. Patented Sept. 24, 1901.

L. S. BURBANK.

APPARATUS FOR FACILITATING PACKING.

(Application filed Dec. 21, 1900.)

(No Model.) 2 Sheets—Sheet 1.

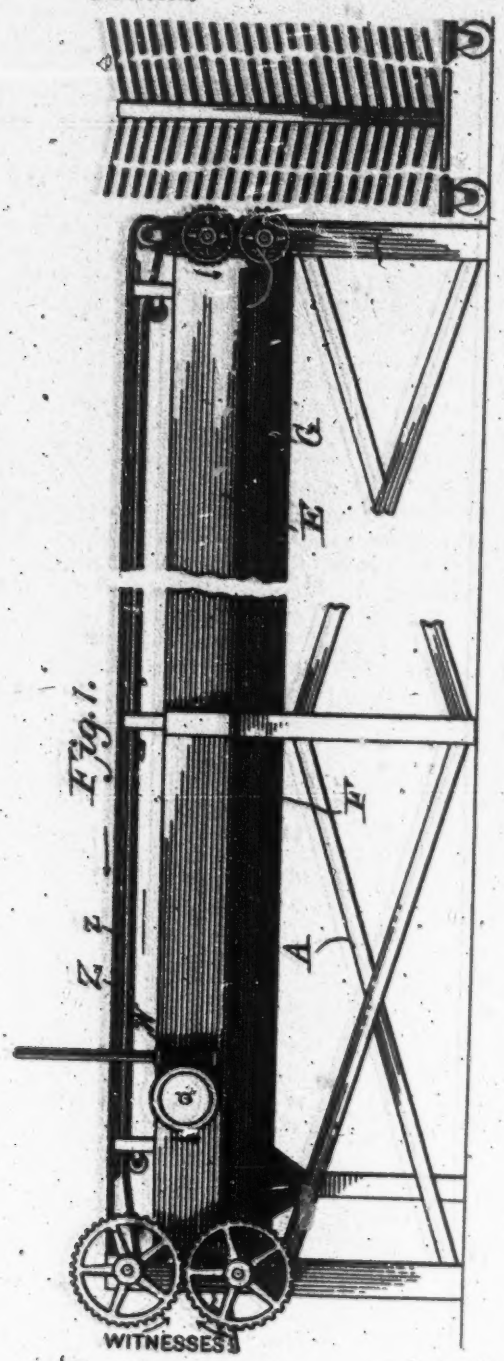

Fig. 1.

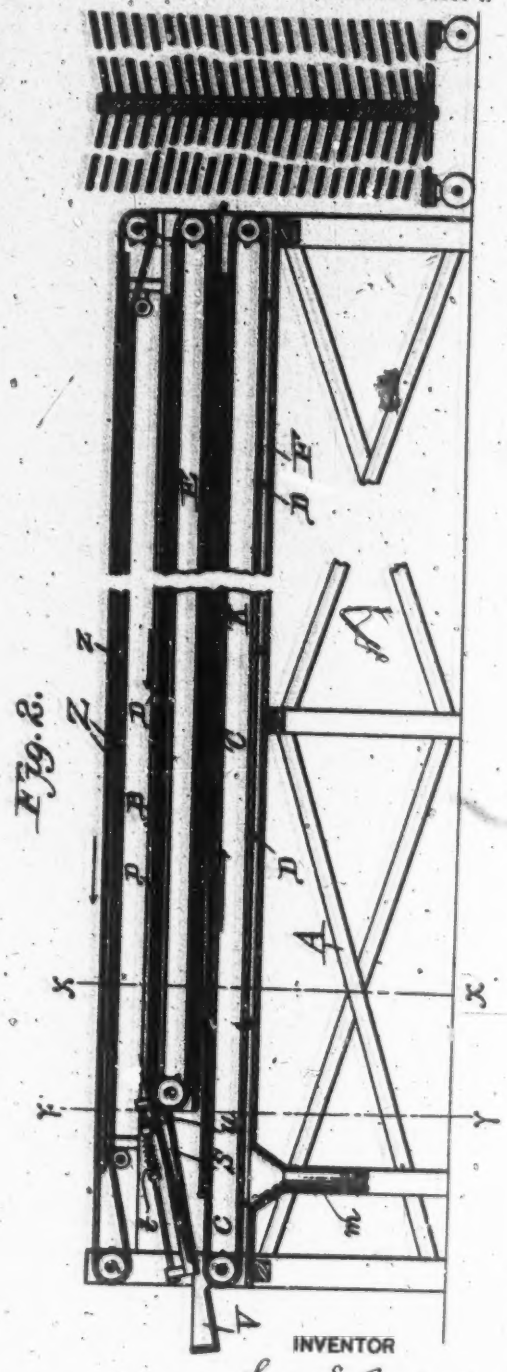

Fig. 2.

WITNESSES:

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G. M. Anderson

INVENTOR

Louis S. Burbank

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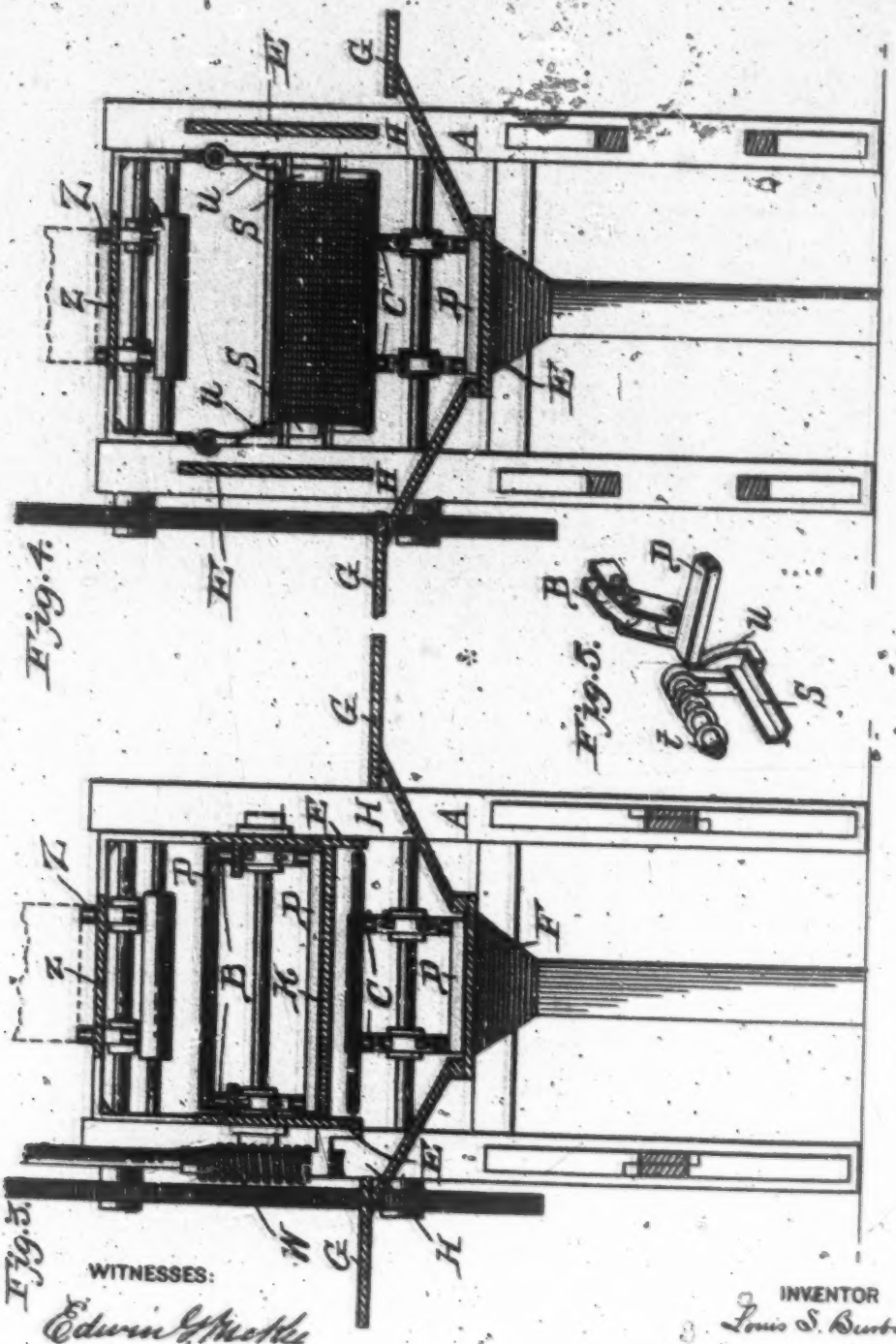
No. 683,100. Patented Sept. 24, 1901.

L. S. BURBANK.

APPARATUS FOR FACILITATING PACKING.

(Application filed Dec. 21, 1900.)

(No Model.) 2 Sheets—Sheet 2.



WITNESSES:

Edwin L. Hecker

G. M. Anderson

INVENTOR

Louis S. Burbank

BY

E. W. Anderson

his ATTORNEY.

UNITED STATES PATENT OFFICE.

LOUIS S. BURBANK, OF WORCESTER, MASSACHUSETTS, ASSIGNOR, BY MESNE ASSIGNMENTS, TO THE NATURAL FOOD COMPANY, OF NIAGARA FALLS, NEW YORK.

APPARATUS FOR FACILITATING PACKING.

SPECIFICATION forming part of Letters Patent No. 683,100, dated September 24, 1901.

Application filed December 21, 1899. Serial No. 741,073. (No model.)

To all whom it may concern:

Be it known that I, LOUIS S. BURBANK, a citizen of the United States, residing at Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Apparatus to Facilitate Packing; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

In the accompanying drawings, Figure 1 is a side elevation of my apparatus. Fig. 2 is a vertical longitudinal section of same. Fig. 3 is a section on the line *x x*, Fig. 2. Fig. 4 is a section on the line *y y*, Fig. 2; and Fig. 5 is a detail view illustrating the engagement of the cross-bars D with the slideways.

The invention has relation to means for facilitating packing small articles, such as crackers, biscuit, cakes, &c., in cartons or cases; and it consists in the novel construction and combination of devices, as hereinafter set forth.

In the accompanying drawings the letter A designates a frame, of elongated form, in which the end sprockets or pulleys of the endless carriers B and C are mounted. Chain carriers are preferred when the goods are delivered in baking pans or trays. The lateral chains of each carrier are connected at intervals by means of transverse bars or scrapers D. The casing of the frame consists of side walls E and a bottom or trough portion F. The upper tray-holding portion of the upper carrier is exposed for the action of the packers, who are located when work is to be done along the sides of the apparatus before the lateral ledges or table-flanges G of the frame. Openings are provided at H at the inner edges of the packing-ledges G, said openings leading to the inclosed trough portion F, in which the lower carrier C runs. The floor of the chamber or boxing of the upper carrier is indicated at K, and in this floor, near the feed end, chutes or openings may be provided for the passage of waste material downward into the lower or trough chamber, from which it escapes through a chute *m* for such disposition as may be advisable. The lower carrier is at one end of the apparatus extended beyond the end of the upper carrier, this extension (indicated at *c*) serving to receive the empty pans or trays when they are dropped thereon by the opening of the lateral receiver-slideways S, which are provided with clearance-springs *t*. These slideways are located in parallel inclined position over the extension *c* of the lower carrier, their higher ends being near the sprockets of the chain carrier and having beveled projections, as at *u*, which are intermittently engaged by the ends of the cross-bars D during the movement of said carrier. This engagement causes the slideways to open or separate sufficiently to allow the pan or tray thereon to fall upon the lower carrier in position to be taken thereby and returned to the feed end of the apparatus. A stop extension V beyond the ends of the slideways and having an inclined bottom serves to prevent the pans or trays from passing too far beyond the ends of said slideways to be engaged by the return carrier. This stop extension also serves to cause the tray to come nearly to a counterbalance, so that it falls gently on the return chain. Elevated a little above the pan-carrier B is arranged a narrow endless carrier-belt Z, which is supported by a board *z* and serves to receive the packed cartons and conveys them away for further disposition. The carriers are moved by means of slow gearing, (indicated at W.)

The operation is as follows: An attendant at the feed end places the charged pans or trays upon the distributing-carrier B, which conveys them along between the lines of packers at the table-ledges, who, taking the biscuit or other articles from the trays as they move along on the carrier, pack them in cartons which are provided at hand and place the filled cartons on the upper small carrier Z to be conveyed away. The empty pans or trays are carried along to the end of this carrier and discharged upon the automatic slideways at its end, whereby they are dropped upon the lower carrier to be returned to the attendant. The cross-bars or scrapers of the carriers on their return movements, being turned downward, move along the floors of their respective chambers and carry such

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waste material as may have accumulated therein to the chutes at the ends of said chambers. The importance of this apparatus in handling large quantities of delicate articles is found not only in saving time and floor-space, but also in avoiding all manipulation of the goods but that which is necessary to place them in the cartons.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. The combination with an upper endless tray-carrier, and a lower endless tray-carrier moving in the opposite direction, and extending at one end, beyond the upper tray-carrier, of the lateral intermittently-acting slideways at the end of the upper carrier and above the extension of the lower carrier, substantially as specified.

2. The combination with the upper and lower chambers, and the upper and lower tray-carriers respectively located therein, of the lateral packing-ledges of the frame, the waste chutes and openings, the carton-carrier, and the automatic drop device for the trays at the end of the upper carrier and over an extended portion of the lower carrier, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

LOUIS S. BURBANK.

Witnesses:
ALBERT H. CHAFFEE,
J. R. GILKESON.

150

No. 683,101. Patented Sept. 24, 1901.

L. S. BURBANK.

APPARATUS FOR CURING OR DRYING GRAIN.

(Application filed Dec. 20, 1900.)

(No Model.) 2 Sheets—Sheet 1.

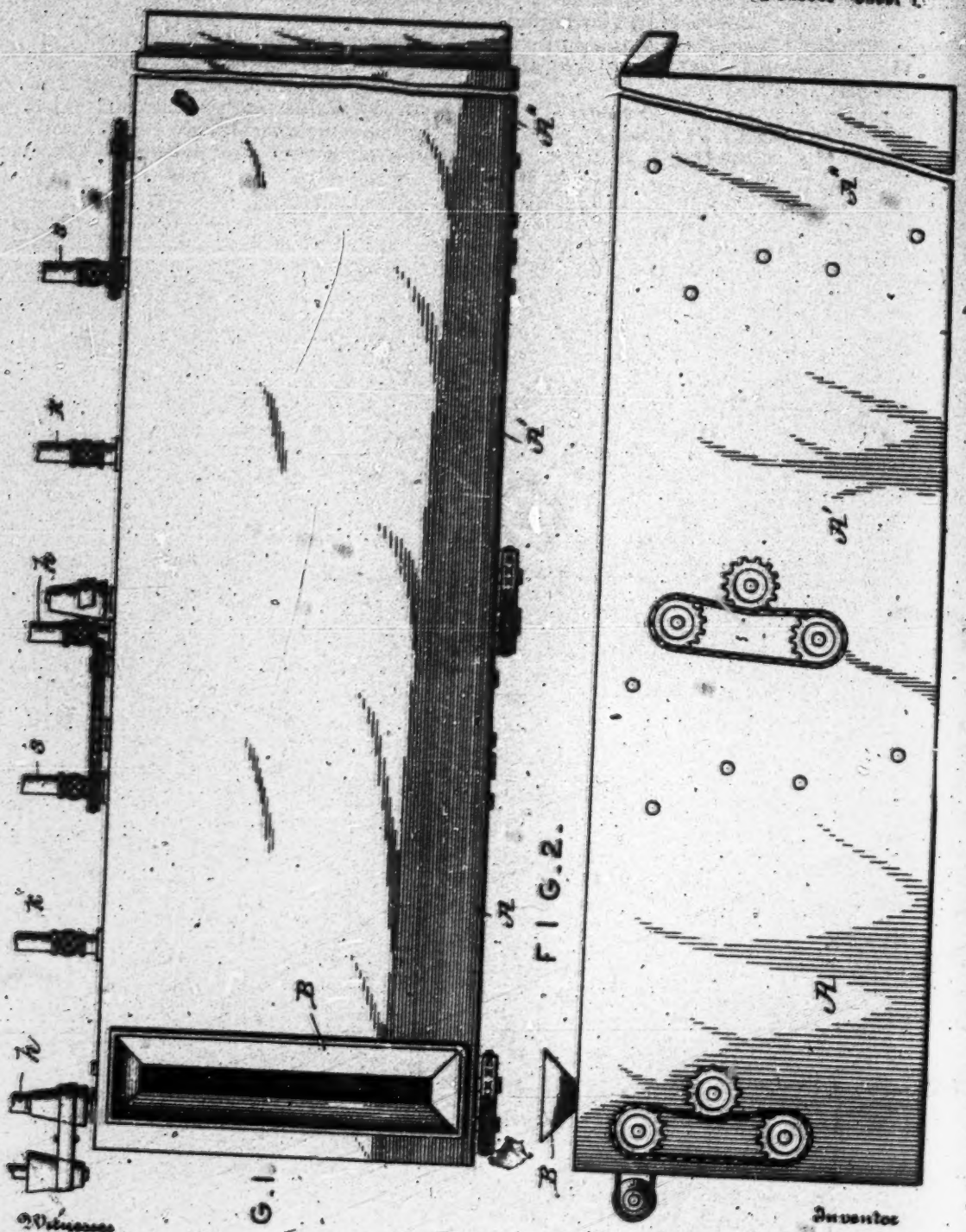

FIG. 1.

FIG. 2.

Witnesses
Harry L. Ames.
E. W. Audison

Inventor
Louis S. Burbank.
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his Attorney

No. 683,161. Patented Sept. 24, 1901.

L. S. BURBANK.

APPARATUS FOR CURING OR DRYING GRAIN.

(Application filed Dec. 10, 1900.)

(No Model.) 2 Sheets—Sheet 2.

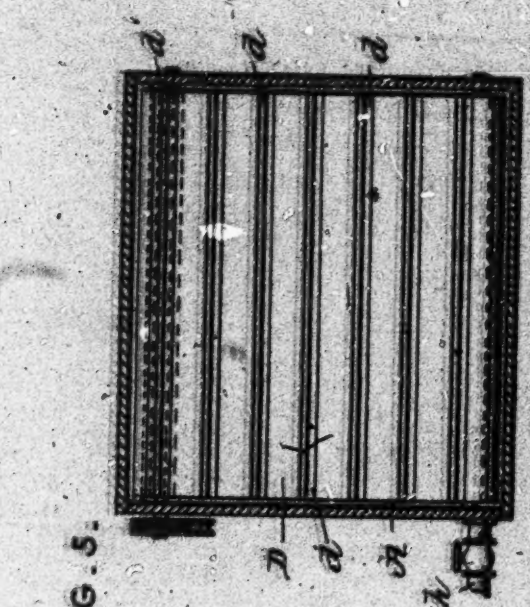


FIG. 5.

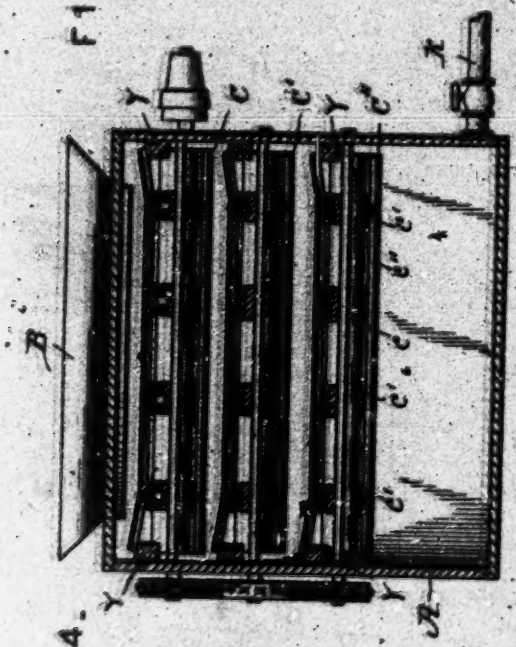


FIG. 4.

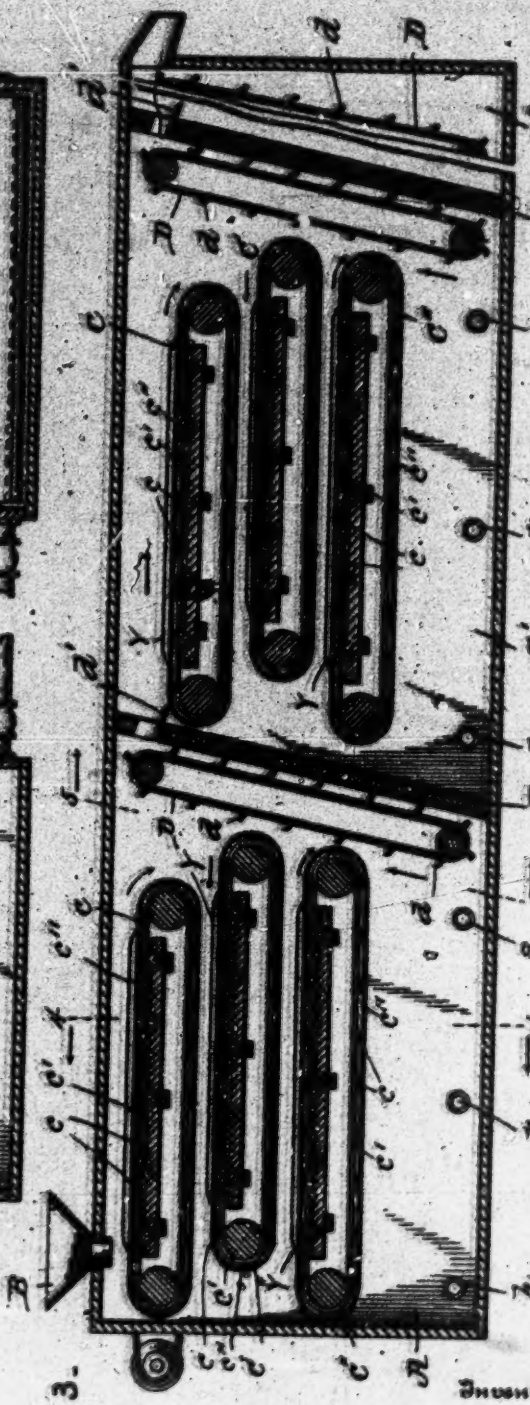


FIG. 3.

Witnesses
Hatty L. Ames.
G. W. Anderson

Inventor
Louis S. Burbank.
by E. W. Anderson
his Attorney

UNITED STATES PATENT OFFICE.

LOUIS S. BURBANK, OF WORCESTER, MASSACHUSETTS, ASSIGNOR, BY MESNE ASSIGNMENTS, TO THE NATURAL FOOD COMPANY, OF NIAGARA FALLS, NEW YORK.

APPARATUS FOR CURING OR DRYING GRAIN.

SPECIFICATION forming part of Letters Patent No. 683,101, dated September 24, 1901.

Application filed December 30, 1899. Serial No. 742,122. (No model.)

To all whom it may concern:

Be it known that I, LOUIS S. BURBANK, a citizen of the United States, residing at Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Apparatus for Curing or Drying Grain or other Matter; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

In the accompanying drawings, Figure 1 is a plan view of my machine, partly broken away. Fig. 2 is a side elevation of the same. Fig. 3 is a central longitudinal section of the same. Fig. 4 is a section on the line 4 4, Fig. 3; and Fig. 5 is a section on the line 5 5, Fig. 3.

This invention is designed chiefly to provide means for curing grain as it comes from the boilers when it has been cooked in such manner as not to destroy the entire form of the berry, and it may be found useful for other curing or drying purposes.

The invention consists in the novel construction and combination of devices, as hereinafter set forth.

In the accompanying drawings the letters A A' A'' designate chambers or compartments which are arranged in series, but are nevertheless isolated from each other in such manner that the temperature or moisture of the air in each can be changed at will without affecting the condition of the air in any of the other chambers. The isolating walls or partitions P are usually inclined, as indicated, in order to economize space and to facilitate the employment of slatted elevator-belts, these being necessarily of broad character in order to convey the grain from one compartment to the next in spread condition.

B represents a discharge-spout delivering the grain into the first compartment and upon the upper horizontal carrying-belt of the series C C' C'', which are arranged one below another, the belts below the upper one having their end portions projecting alternately at opposite ends of successive belts beyond the ends of the overlying belts in such manner that the material falls from the end of each overlying belt upon the projecting end portion of the next belt below, and so on in succession, each belt having a reverse motion from that of the one above it. The material falling from the end of the lowest belt is received upon the lower end of the broad inclined elevator D, is carried up in spread form by the slats *d* thereof through the upper portion of the partition P, and is discharged by the spout *d'* upon the upper belt of the next compartment or chamber, in which the belts are also arranged in series one below another, with the ends of alternate belts oppositely projecting, as already described in referring to the arrangement of the carrying-belts in the first compartment. The grain from this chamber is transferred by a similar inclined elevator to the belts of the next chamber or compartment, and so on throughout the series of compartments until it is discharged from the last one of the series. Each carrying-belt consists of an endless stretch or skeleton belt of transverse slats *c* and endless straps *c'* and which is covered over with the removable endless apron *c''*. The end portions of each said slat are shown as separate from their central portions, the extremities of said end and central slat portions being glued or otherwise suitably secured to the outer straps *c'* in such manner as to allow such end portions a hinged or pivotal movement with respect to said central portions of the slats. The belts of the compartments are run by means of end rollers having suitable sprocket-wheels upon the ends of their shafts, and between these end rollers are provided supporting-rolls and plane bearings or shelving to keep the upper branch of each belt flat and prevent sagging. The speed of the series of belts in each chamber is slow and is adjustable, suitable differential driving devices being provided to enable the speed to be varied in accordance with the requirement of the material. Each compartment is in communication with a hot-air supply, as indicated at *h*, with a cold-air supply having an inlet, as at *k*, and with a steam-supply, as at *s*, these inlets having suitable cut-off valves. In the

first compartment the air is heated in order to effect the drying or partial drying of the grain, which passing into the cooler chambers is carried more slowly along, so that it becomes in a manner piled up or banked upon the belts in order that the outer portion of the berry shall become softened or cured and fit for the action of the reducing-machines. Should the grain not possess sufficient moisture for this purpose after coming from the heated drying-chambers, moist air or steam should be admitted into the banking-chambers to assist in the curing process. The transverse slats of the aprons or belts should be provided with hinged flanges or end portions designed to engage lateral guides Y, extending along the sides of the apron at their middle portion between the end rollers to allow for the heaping or banking of the grain on the aprons. These guides terminate short of the roller ends to allow room for the apron to take its flat position in passing downward over the roller. The canvas belts are designed to be taken off from the stretch-belts for removal, washing, or other purpose.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

Apparatus for the purpose described, consisting of a series of chambers having each means for regulating the temperature and moisture, traveling carriers having means for adjusting their speed, and formed of the endless straps, the transverse slats having end portions adapted to have a hinged or pivotal movement with respect to the main portions thereof, the removable aprons, the lateral guides, and transfer-elevators forming means of communication from one chamber to the next, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

LOUIS S. BURBANK.

Witnesses:

J. R. GILKESON,

ALBERT H. CHAFFEE.

156

No. 684,789. Patented Oct. 22, 1901.

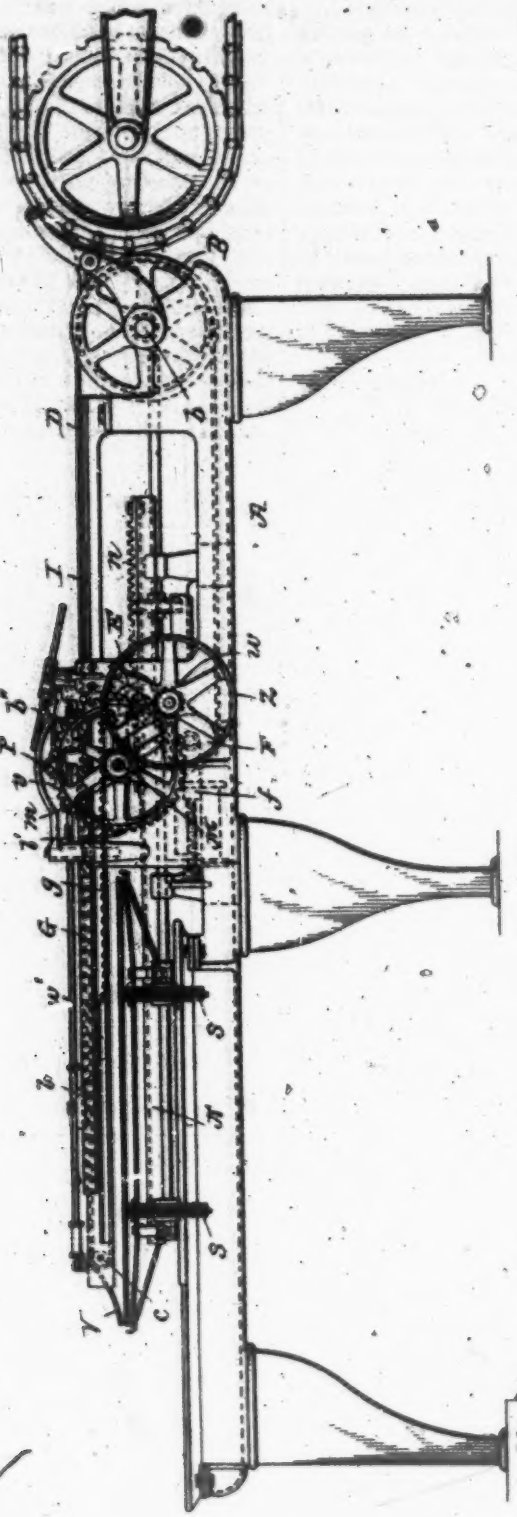
L. S. BURBANK.

DISTRIBUTIVE DEPOSITING OR PANNING MACHINE.

(Application filed Dec. 30, 1899.)

(No Model.) 3 Sheets—Sheet 1.

FIG. 1.



Witnesses
Harry L. Ames.
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Inventor
Louis S. Burbank.
by E. W. Anderson
his Attorney

158

No. 684,789. Patented Oct. 22, 1901.

L. S. BURBANK.

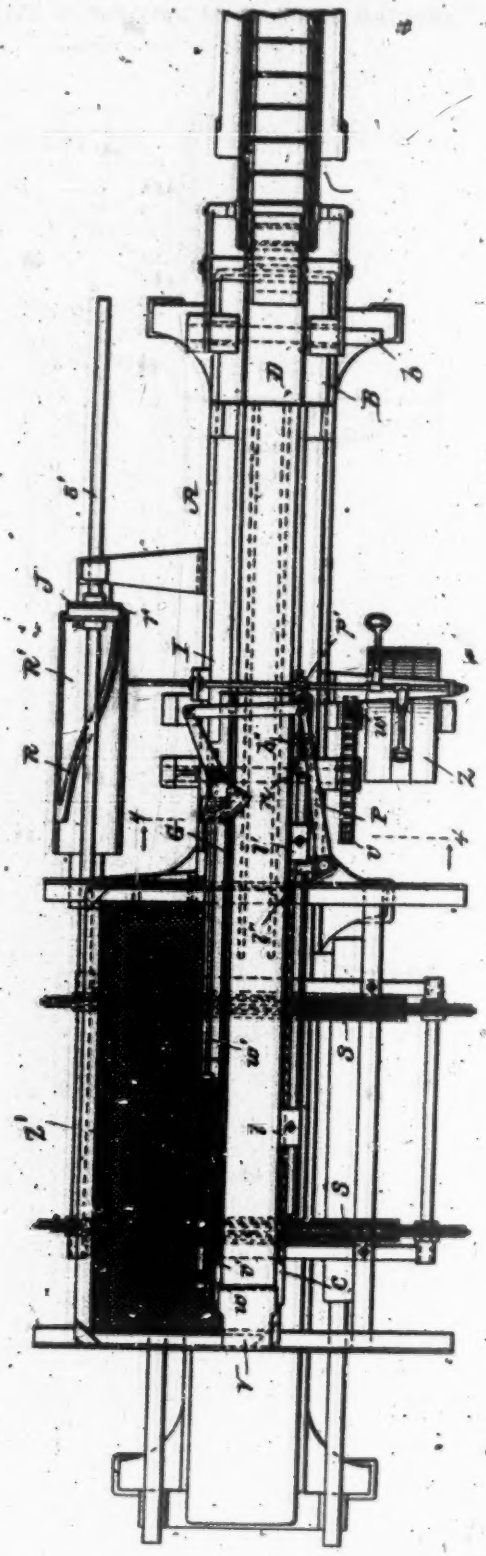
DISTRIBUTIVE DEPOSITING OR PANNING MACHINE.

(Application filed Dec. 20, 1900.)

(No Model.)

3 Sheets—Sheet 2.

FIG. 2.



Witnesses
Harry L. Amer.
G. M. Anderson

Inventor
Louis S. Burbank.
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his Attorney

160

No. 684,789. Patented Oct. 22, 1901.

L. S. BURBANK.

DISTRIBUTIVE DEPOSITING OR PANNING MACHINE.

(Application filed Dec. 20, 1900.)

(No Model.) 3 Sheets—Sheet 3.

FIG. 4.

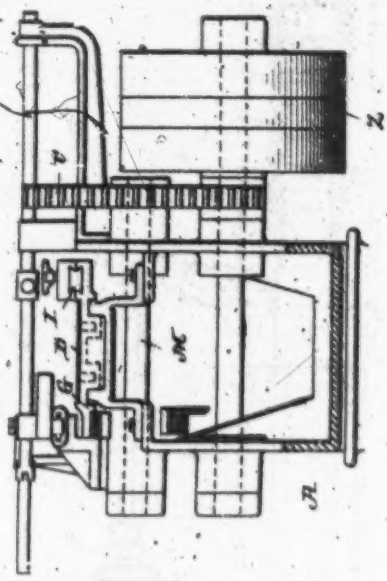
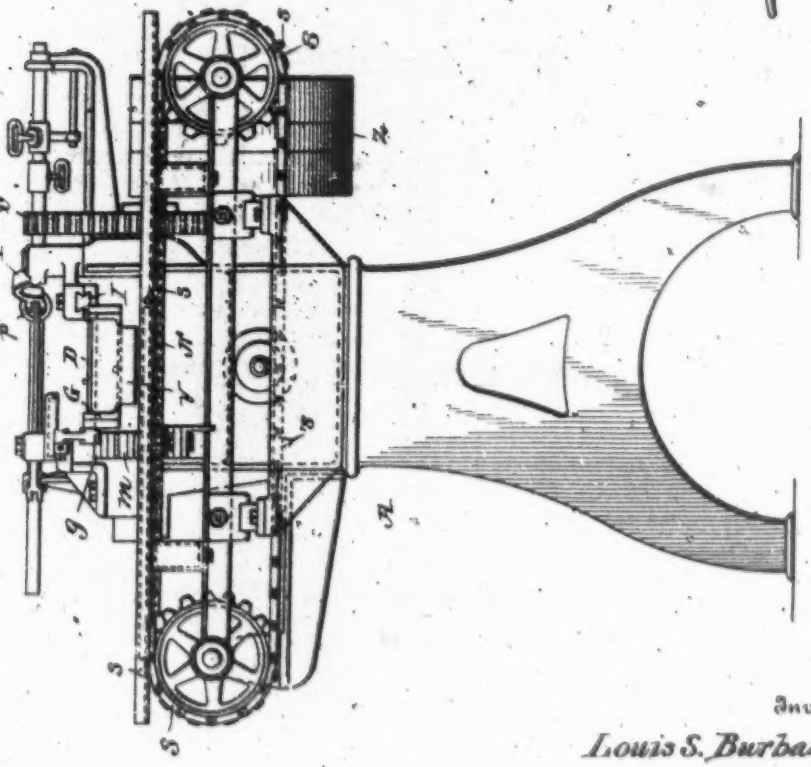


FIG. 5.

FIG. 3.



Witnesses

Harry L. Ames.

W. M. Anderson

Inventor

Louis S. Burbank.

by E. W. Anderson

his Attorney

UNITED STATES PATENT OFFICE.

LOUIS S. BURBANK, OF WORCESTER, MASSACHUSETTS.

DISTRIBUTIVE DEPOSITING OR PANNING MACHINE.

SPECIFICATION forming part of Letters Patent No. 684,782, dated October 22, 1901.

Application filed December 30, 1898. Serial No. 742,121. (No model.)

To all whom it may concern:

Be it known that I, LOUIS S. BURBANK, a citizen of the United States, residing at Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Distributive Depositing or Panning Machines; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

In the accompanying drawings, Figure 1 is a side elevation of my machine. Fig. 2 is a plan view of the same. Fig. 3 is a front elevation of the same. Fig. 4 is a section on the line 4 4, Fig. 2; and Fig. 5 is a detail view illustrating the adjusting mechanism for the depositing-lip.

The object of the invention is to provide a machine for depositing in regular order and in parallel rows upon pans or receivers sections or cakes of shredded wheat or other preparations for cooking and for such other purposes as it may be found useful; and it consists in the novel construction and combinations of devices, as hereinafter set forth.

In the accompanying drawings, illustrating this invention, the letter A designates the main frame of the machine, and B a pulley having its bearings therein near one end, its shaft *b* projecting for the application of power. Around the pulley B passes one end portion of a carrier-belt D, which extends horizontally along the frame and passes around the small end pulley *c* and below and around the take-up pulley E and the tension-pulley F, the latter being also connected to the main frame of the machine, an adjustable bearing *f* being provided for the purpose. The pulleys *c* and E are mounted in bearings of a reciprocating carriage G, the operation of which is designed to alternately shorten and lengthen the carrying portion of the belt D, so that while the receiving portion of this belt moves along continuously and steadily with the sections of biscuit or cakes deposited thereon the other end portion of the belt shortens and lengthens itself alternately, by the one movement depositing the biscuit-sections upon the receiver or pan Z' and by the other movement carrying forward the line or feed of biscuit-sections to be deposited in the second row upon said receiver or pan parallel to the first row, a lateral adjustment and longitudinal retraction of the receiver or pan taking place while the depositing-belt is lengthening. The reciprocating carriage G is geared to move at the same rate of speed as the pulley B and as the reciprocating carriage N of the receivers or pans.

The main frame is provided with slideways I for the carriage G, to which is connected the small end pulley *c* and the intermediate pulley E, which when the delivery portion of the belt is retracted by the backward movement of the carriage G also moves backward and serves as a take-up for the shortening-belt.

M indicates a reversing-shaft having a pinion *m*, which engages by its upper portion the rack *g* of the belt-carriage G and by its lower portion the rack *n* of the carriage N of the pans or receivers. By means of this pinion and a reversing-shipper, in connection with fast and loose pulleys at Z, these carriages are reciprocated in opposite directions, but at the same rate of speed.

The carriage N of the receivers having the lower rack *n* carries the sprockets of the chains S, upon which the receivers or pans are placed in position to receive the biscuit-sections from the depositing portion of the belt D. The sprocket-chains run transversely, and they are provided with guide-studs *s*, placed at proper intervals to insure the correct position of the pans when laid on said chains. The operation of these sprocket-chains by means of slide-shaft *s'*, its pawl device *r*, and the cam J serves to give the proper intermittent lateral movement to the receivers or pans. This lateral movement is effected as the carriage is moving backward, the slide-shaft of the sprockets during this movement moving its pawl device or disk along the camway R', so that one of its pawls *r* engages the spiral cam-rib R, turning said shaft. During the forward movement of the carriage the pawl *r* passes loosely over the

cam-rib, so that there is no engagement therewith, and the pan on the carriage moves in a direct line.

At the end of the carriage G is provided a depositing-lip or slide V, which takes the biscuit-sections from the end of the carrier-belt D and passes them down its incline to the receiver. By means of suitable gearing (indicated at *v* and *w* and operating in connection with the reversing mechanism) this depositing-lip is raised at the end of the movement of delivery and held in the raised position until the extended belt D is ready to place another row of biscuit-sections on the receiver, when said lip is lowered promptly to inclined position and so held until the delivery of this row is completed. The movement of reversal of the depositing-lip takes place at the time of the movement of reversal of the carriages, and is effected by the same reversing devices. A short screw *o'* in connection with the threaded end of the rod *o* serves to change the relative position of said worm, so that an adjustment of the degree of inclination of the depositing-lip may be readily effected while the machine is in motion. The reversing mechanism is operated automatically by the carriage G through its lugs *l* and *l'*, which alternately engage a bent lug *l''* of the switch-lever P. The lugs *l* and *l'* are slides which are adjustable on a longitudinally-adjustable bar at the side of the carriage, which serves as a bearing for said lugs, being engaged by longitudinal channels in the bottoms thereof. These lugs when their adjustment is final on this bar are confidently adjustable by means of a right-and-left screw *b'* engaging a threaded lug of said bar. As either or both lugs are therefore adjustable, means are provided for lengthening or shortening the stroke or varying its position. These adjustments are important in arranging the terminal position of the receiver-carriages as well as that of the delivering-lip of the carrier-belt with reference to the positions of the biscuit-sections. The switch-lever P by means of the slide *p'* actuates the reversing-belts of the fast and loose pulleys and also operates the reversing-gear of the delivery-lip. The biscuit-sections being fed in regular succession upon the belt D are by means of its reciprocating end portion and the depositing-lip placed upon the receiver or pan, the operating mechanism of which by effecting an intermittent lateral movement of said receiver or pan serves to produce an arrangement of the biscuit-sections in parallel rows thereon. As one pan is filled another pan is placed upon the carriage to be filled. Usually the receiver-carriage is made wide enough to hold two or more pans side by side in order to give the attendant time enough to remove a filled pan and to place an empty one upon the sprocket-bolts while an intermediate pan is being filled.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. The combination, with a carrier-belt having a reciprocating end portion, of a reciprocating receiver-carriage, and means for effecting the reciprocation of both in the same times, and at the same rate of speed, substantially as specified.

2. A carrier-belt, in combination with a driving-pulley at one end, and a reciprocating pulley at the other end, the adjustable tension-pulley and the intermediate reciprocating take-up pulley, and mechanism for operating the pulleys, whereby the belt is caused to lengthen and shorten itself at the delivery end, substantially as specified.

3. The combination, with the carrier-belt, its stationary and reciprocating pulleys, and the carriage, for the latter, of the rack-and-pinion device for reciprocating said carriage, substantially as specified.

4. The combination with a continuously-moving carrier-belt, having a lengthening and shortening depositing portion, of a laterally-moving receiver, substantially as specified.

5. The combination with a continuously-moving carrier-belt having a lengthening and shortening end portion, of a corresponding reciprocating receiving device having an intermittent transverse movement, substantially as specified.

6. The combination with a depositing carrier-belt of an intermittently and transversely moving receiving device, and a longitudinally reciprocating carriage for said receiver, substantially as specified.

7. The combination with a carrier-belt, having a reciprocating end portion, and a reciprocating carriage bearing the pulleys of said end portion, of a transversely-moving receiving device, and its reciprocating carriage, substantially as specified.

8. The combination with a carrier-belt, having a lengthening and shortening end portion, pulleys therefor, and a reciprocating carriage for the pulleys of said portions, of the transversely and intermittently moving receiving device, its reciprocating carriage, and reversing mechanism, substantially as specified.

9. The combination with a depositing carrier-belt, having a lengthening and shortening end portion, and a reciprocating carriage for the pulleys of said portion, of a transversely and intermittently moving receiving device, its reciprocating carriage, and rack-and-pinion mechanism, and a reversing device, substantially as specified.

10. The combination with the lengthening and shortening carrier-belt and the pulleys of its depositing portion, of the transversely and intermittently moving receiving device, the carriages for said pulleys and for said receiving device, and means for reciprocating said carriages in opposite directions at the same rate of speed, substantially as specified.

11. The combination with a reciprocating ... device, of a receiver, transverse ... sprocket-chains and sprocket-pulleys there- ... and mechanism for operating said chains ... tently, substantially as specified.

12. The combination with the reciprocating ... frame, and its transverse sprocket- ... and sprocket-wheels, of the slide ... shaft, its pawl device and cam, sub- ... as specified.

13. The combination with the reciprocating ... portion of the carrier-belt, and its pulley- ..., of the pivoted depositing lip or slide ... reversing devices, whereby said lip is ... raised and lowered, substantially ... specified.

14. The combination with a depositing car- ..., having a reciprocating end portion ... reciprocating carriage for said end por- ... reversing mechanism operated au- ... by said carriage, substantially as ... specified.

15. The combination with a depositing car- ..., and a reciprocating carriage oper- ... end portion, of adjustable reversing ... operated automatically by said car- ..., substantially as specified.

16. The combination with the receiver-frame and the carrier-belt, of the oppositely-reciprocating carriages, the transverse intermittently-moving sprocket-chains, the depositing-lip, and automatic reversing devices, substantially as specified.

17. A distributing-machine, comprising an endless carrier, having an alternately extending and retracting end portion, an alternately rising and falling depositing-lip at the end of said end portion, a transverse intermittently-moving receiver device, a reciprocating carriage therefor, and automatically-operated reversing mechanism, substantially as specified.

18. A carrier-belt having a lengthening and shortening end portion, and end pulley, and a take-up pulley and a reciprocating carriage for said end and take-up pulleys, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

LOUIS S. BURBANK.

Witnesses:
J. R. GILKESON,
ALBERT H. CHAFFEE.

166

No. 685,671. Patented Oct. 29, 1901.

L. S. BURBANK.

APPARATUS FOR COOKING AND DRYING.

(Application filed Dec. 21, 1900.)

(No Model.)

Fig. 1.

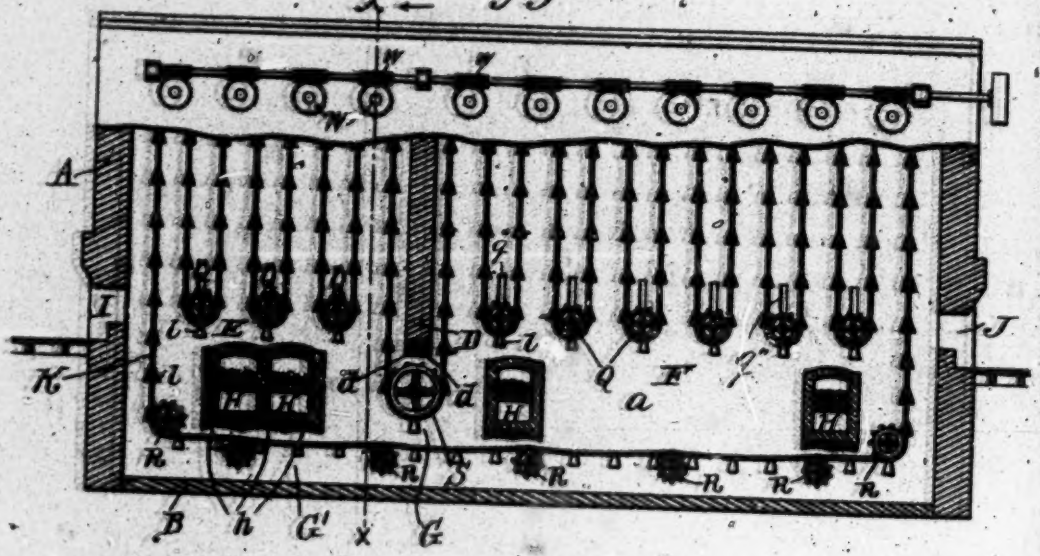


Fig. 2.

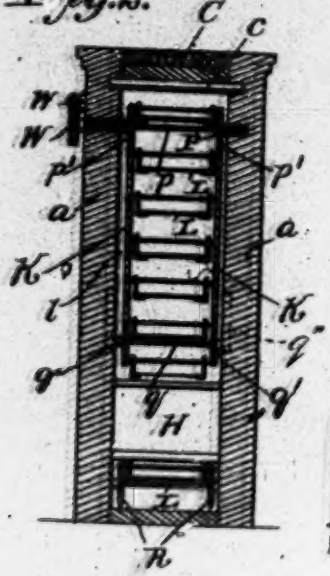


Fig. 3.

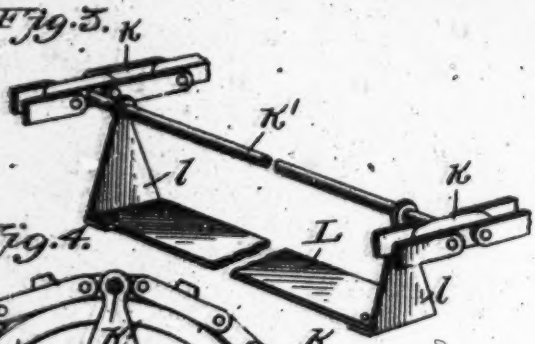
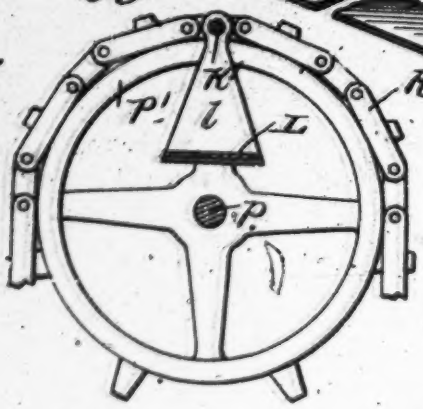


Fig. 4.



WITNESSES:

Edwin G. McKee.

4 M. Anderson

INVENTOR

Louis S. Burbank

BY

E. W. Anderson

his ATTORNEY.

UNITED STATES PATENT OFFICE.

LOUIS S. BURBANK, OF WORCESTER, MASSACHUSETTS, ASSIGNOR, BY MESNE ASSIGNMENTS, TO THE NATURAL FOOD COMPANY, OF NIAGARA FALLS, NEW YORK, A CORPORATION OF NEW YORK.

APPARATUS FOR COOKING AND DRYING.

SPECIFICATION forming part of Letters Patent No. 685,671, dated October 29, 1901.

Application filed December 21, 1899. Serial No. 741,072. (No model.)

To all whom it may concern:

Be it known that I, LOUIS S. BURBANK, a citizen of the United States, residing at Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Apparatus for Cooking and Drying; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

Figure 1 is a side elevation of my apparatus, partly broken away. Fig. 2 is a section on the line x x, Fig. 1. Fig. 3 is a detail perspective view of one of my carriages in connection with the sprocket-chain. Fig. 4 is a detail cross-sectional view of same in connection with the sprocket mechanism.

This invention has relation chiefly to means for cooking and drying food material in large quantities; and it consists, mainly, in the novel construction and combination of devices constituting a cooking and drying oven through which the material is passed in conveyers having vertical as well as horizontal continuous movement, as hereinafter set forth.

In the accompanying drawings, illustrating this invention, the letter A designates the wall of the oven, B the floor or base, and C the top, suitably supported by strong beams c. The parallel side walls a a are comparatively near together, being but a little more distant from each other than the length of the shafting and gearing and sufficiently close to afford bearings for the ends of the shafting beyond the gearing or sprocket-wheels which support the endless carrying chains to which the carriages or swinging shelves are connected. The length of the oven may be according to the requirement of the material and the height about four times the width, more or less.

D represents the partition between the baking-oven E and the drying-chamber F. This partition connects the side walls from the top C downward and terminates a few feet above the floor, being supported by strong iron beams d in such manner that there is provided a low passage-way or opening G below the partition, forming the sole passage or communication between the baking and drying chambers of the oven.

H H indicate the heaters or furnaces, which are supported above the floor or base B by means of suitable girders and arches h in such manner that passages G′ are provided between said heaters and the floor or base.

K represents a continuous carrying-belt composed of lateral sprocket-chains k' and shafts k'', which extend transversely between the sprocket-chains and are connected to links thereof. The arms l of the carriages L swing on said shafts, always hanging vertically and serving to carry the baking shelves or pans m, which are connected to the flanged lower ends thereof.

P P represent the upper set of sprocket-pulleys, each consisting of a shaft p and end sprocket-wheels p' p', secured thereon, said shaft being seated to turn in suitable bearings in the side wall near the top of the oven. The ends of these shafts which extend through the side wall are provided with worm-wheels W, which are operated by means of a worm-shaft w to provide a slow regular motion for the carrying-belt and at the same time to hold the sprocket-pulleys and the depending branches of said carrying-belt in proper position, so that no slipping of any portion of the chain in consequence of overweighting can occur.

Q Q indicate the lower set of sprocket-pulleys, each consisting of a shaft q and end sprocket-wheels q'. These lower sprocket-pulleys are designed to hang in the depending loops or bights of the carrying-chain K, which form vertical branches in passing over the pulleys P and under the pulleys Q. The sprocket-pulleys Q are steadied by the engagement of the ends of their shafts with guides q'' in the opposite side walls. Automatic adjustment is in this manner provided for changes in the length of the shelves caused by variations in the temperature. While the sprocket-pulleys P are located near the top of the oven, both in the baking and in the drying compartments, the lower sprocket-pulleys Q are carried at a level a little above that of the tops of the heaters or furnaces.

R R represent the return sprocket-pulleys,

which are arranged in series a little above the main floor and serve to support and carry the chain of carriages back from the delivery end to the feed end of the oven. In the end walls I indicates the feed-opening, arranged at the proper height above the feed-floor, and J the delivery-opening.

S indicates a large sprocket-pulley located in the upper portion of the opening G below the partition D and spanning the same in such manner that the chain of carriages in passing from the baking-compartment E to the drying-compartment F will be carried around the lower end of the partition through said opening.

The heaters or furnaces of the smaller compartment E are sufficient in number or size to produce a high temperature for cooking the material, while those of the larger or drying compartment are designed to produce a much lower degree of heat. It is evident that the feed may be in either direction, so that the material may be first cooked and then dried or first dried and then cooked, and in some cases when a sharp browning is desired at the end of the process the partition may be placed around the delivery end and a baking heat applied. The carrying-chain is operated by suitable worm-gearing, as hereinbefore mentioned, and as its end branch in rising passes the feed-opening the pans of biscuit or other material are laid on the carriages, which convey them upward into the higher heated portion of the baking-compartment, then downward to near the tops of the furnaces, and again upward and downward, and so on until they are passed through the opening G under the partition D into the drying-compartment. Here they are again, through successive elevations and depressions, moved slowly the length of the chamber, finally descending by the end branch of the conveying-chain near the delivery-opening in the end wall, through which the pans are unloaded, the chain continuing downward and back by the return-pulleys to the feed end to be again charged with pans of the food material.

It will be observed that the operation of this baking and drying oven is continuous, and it is so arranged that the preparatory work of forming the material in shape for baking and drying is entirely separated from that portion of the work which has to do with the cooling and packing for transportation.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

In an oven, the combination of a casing provided with guides, a vertical partition dividing the casing into a drying-chamber and a baking-chamber, said partition being spaced from the bottom of the casing, forming a passage, a series of sprockets in the upper part of the chamber, an endless chain carrying swinging shelves supported by said sprockets and looped within the chambers, a series of sprockets suspended within said loops and operating in said guides, and a plurality of furnaces situated within the lower part of said chambers, the lower part of the endless chain passing below said furnaces, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

LOUIS S. BURBANK.

Witnesses:

ALBERT H. CHAFFEE,

J. R. GILKESON.

170

No. 713,795. Patented Nov. 18, 1902.

H. D. PERKY.

FILAMENTOUS CRACKER.

(Application filed Sept. 29, 1900. Renewed Apr. 16, 1902.)

(No Model.)

FIG. 1

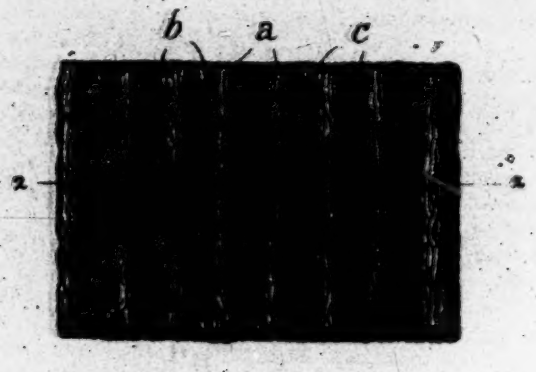
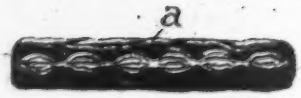


FIG. 2

FIG. 3



Witnesses
Geo. H. Anderson
Nellie M. McCarthy

Henry D. Perky
Inventor
by E. W. Anderson
his
Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF WORCESTER, MASSACHUSETTS, ASSIGNOR TO THE NATURAL FOOD COMPANY, OF NIAGARA FALLS, NEW YORK, A CORPORATION OF NEW YORK.

FILAMENTOUS CRACKER.

SPECIFICATION forming part of Letters Patent No. 718,795, dated November 18, 1902.

Application filed September 29, 1900. Renewed April 18, 1902. Serial No. 103,213. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Worcester, in the county of Worcester and State of Massachusetts, have made a certain new and useful Invention in Crackers; and I declare the following to be a full, clear, and exact description of the same, such as will enable others skilled in the art to which it appertains to make and use the invention, reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification.

Figure 1 is a plan view of the cracker. Fig. 2 is a section on the line 2 2, Fig. 1. Fig. 3 is an end view of the cracker.

The object of the invention is to provide a cracker of filamentous or shredded wheat or other grain; and the invention consists in the novel formation of the cracker, whereby it is given compact and definite shape, while the fibrous or light structure is preserved with sufficient strength for use as an article of food of the character indicated.

In baking biscuits of wheat filaments it has been found that there is a tendency for the biscuit to become loose or somewhat open in its middle portion, owing to the swelling in the baking, and such loose structure is not suitable for the flattened or cracker form. It has also been found that when the material is compressed by a mashing action its filamentous structure, upon which depends its light and porous character, is injured. In order to remedy these conditions and provide a cracker of suitable structure, the article is made in sufficiently thin and flattened form of the filaments which extend in a more or less undulating manner in one direction, superficial ribs being provided extending in the direction of the filaments and between these ribs elongated depressions having in their bottoms locking indentations. To effect this, the filamentous material having its fibers or filaments extending in one direction is laid between baking-irons having teeth studding their inside surfaces in such manner that while the filamentous material is held between the irons during the baking by the approximation of the points of the teeth the filamentous structure is preserved, the pressure between the points being sufficient to cause the locking of the filaments by direct attachment to each other at regular intervals, so that the cracker will hold its form. In this structure it will be readily seen that as the material is distributed with its fibers extending in a more or less undulating manner in one direction the intervals between the teeth of the baking-irons will permit the filaments to extend therein in such a way that the cracker will be provided with superficial ribs *a*, extending in the direction of the filaments. Between these ribs the cracker will be provided with elongated or channel-form depressions *b*, in the bottoms of which are series of pointed or somewhat-pointed indentations *c*, which are caused by the pressure of the points of the teeth of the baking-irons. These indentations are distributed throughout the cracker and show the only places where the material is compressed with any degree of force, the general filamentous structure remaining inviolate, but presenting a close arrangement, which while it does not entirely eliminate the interstices between the filaments as actual compression would nevertheless reduces the interstices sufficiently to give the article the flattened or cracker character designed. At the same time the short binding filaments made between the attachment-points in series have more strength to sustain the form of the article than if they extended loosely across its entire breadth. The baking-iron whereby this cracker is prepared is shown in my pending application, Serial No. 24,205, series of 1900. These irons are studded on their inside surfaces with beveled teeth, which when the irons of a set or pair are placed together approximate contact with each other at their points only. The arrangement of teeth is preferably regular, as indicated, and the teeth are made long enough to provide sufficient depth in the intervals between them to avoid mashing the filamentous material, which is thus enabled to preserve its normal light character, the binding being effected at the locking indentations by the approximate contact of the points of the teeth.

Having described this invention, what I

claim, and desire to secure by Letters Patent, is—

A cracker composed of superposed filaments of grain, which are locked together at a series of points at short distances apart by utilizing the adhesive nature of the material at such points, while leaving the filaments comparatively free from one locking-point to another in such manner as to provide an open structure of even nature on both sides of the article.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
MAUD Y. ANDERSON,
BERTHA E. SUTTON.

174

No. 746,145. PATENTED DEC. 8, 1903.

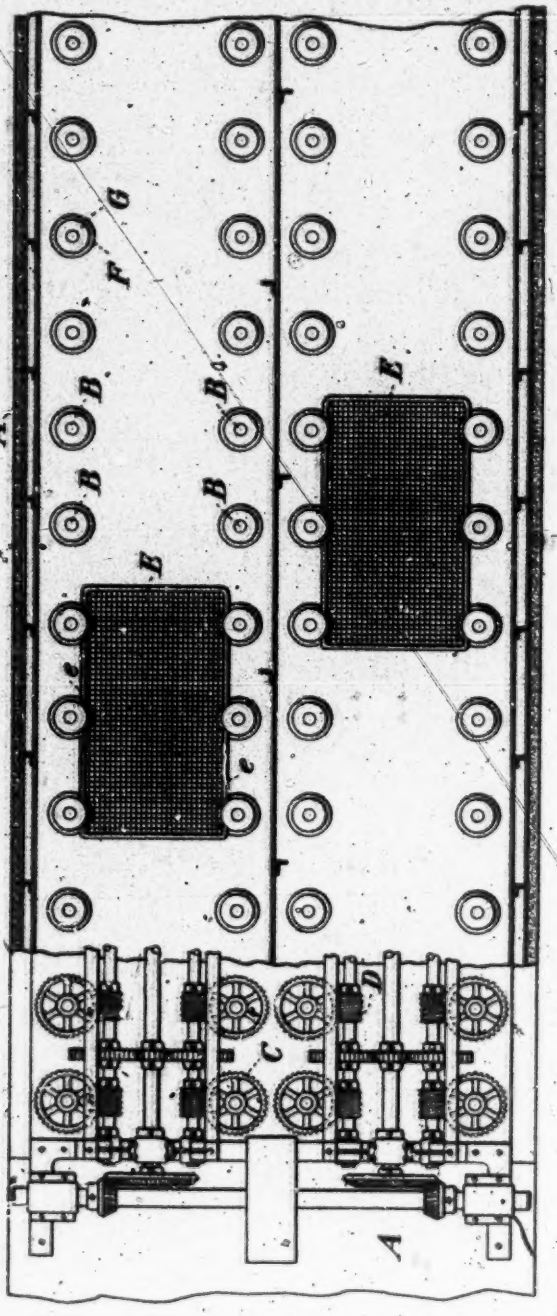
H. D. PERKY.

CONTINUOUS MOTION HEATING AND EVAPORATING APPARATUS.

APPLICATION FILED MAR. 5, 1901.

NO MODEL. 3 SHEETS—SHEET 1.

Fig. 1



Witnesses
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E. P. Connell.

Inventor
Henry D. Perky
by E. W. Anderson
his Attorney.

176

No. 746,145. PATENTED DEC. 8, 1903.

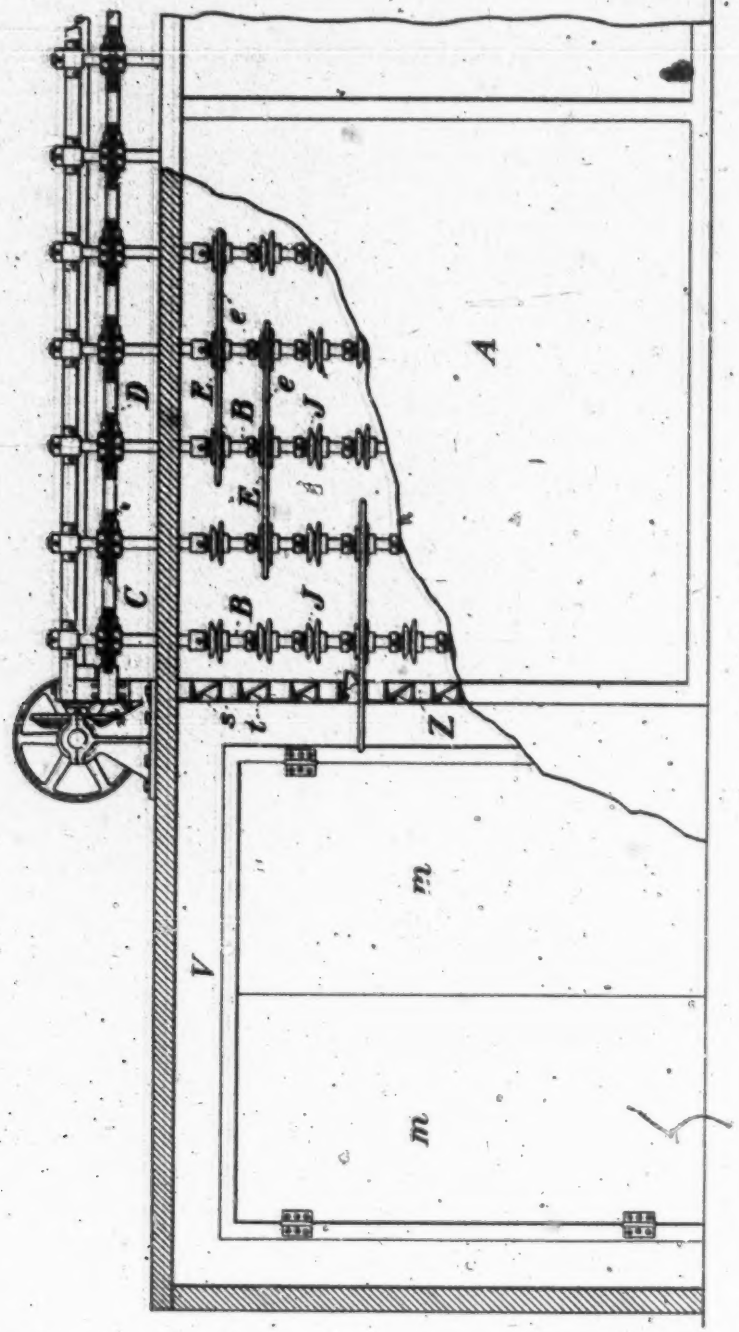
H. D. PERKY.

CONTINUOUS MOTION HEATING AND EVAPORATING APPARATUS.

APPLICATION FILED MAR. 5, 1901.

NO MODEL. 3 SHEETS—SHEET 2.

Fig. 2



Witnesses
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E. O'Connell

Inventor
Henry D. Perky
by E. W. Anderson
his Attorney.

178

No. 746,145. PATENTED DEC. 8, 1903.

H. D. PERKY.

CONTINUOUS MOTION HEATING AND EVAPORATING APPARATUS.

APPLICATION FILED MAR. 5, 1901.

NO MODEL. 3 SHEETS—SHEET 3.

Fig. 4.

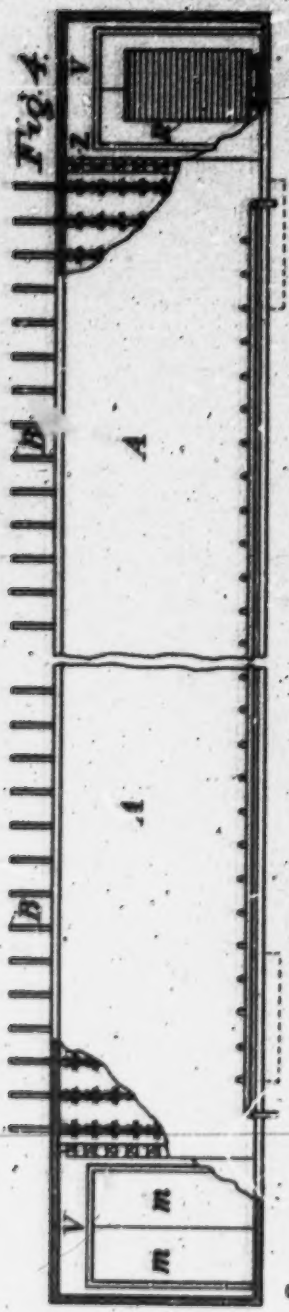


Fig. 5

Fig. 6.

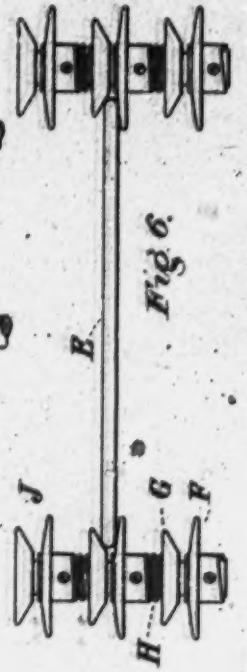
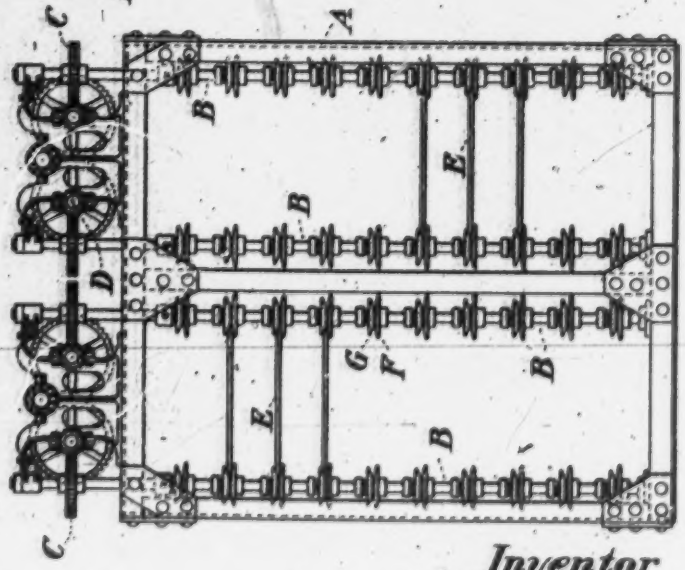


Fig. 7

Fig. 3



Witnesses

S. L. Homer.

E. C. Connell

Inventor

Henry D. Perky

by E. W. Anderson

his Attorney

No. 746,145. Patented December 8, 1903.

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF NIAGARA FALLS, NEW YORK, ASSIGNOR TO THE NATURAL FOOD COMPANY, OF NIAGARA FALLS, NEW YORK, A CORPORATION OF NEW YORK.

CONTINUOUS-MOTION HEATING AND EVAPORATING APPARATUS.

SPECIFICATION forming part of Letters Patent No. 746,145, dated December 8, 1903.

Application filed March 6, 1901. Serial No. 49,883. (No model.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Niagara Falls, in the county of Niagara and State of New York, have made a certain new and useful Invention in Continuous-Motion Heating and Evaporating Apparatus; and I declare the following to be a full, clear, and exact description of the same, such as will enable others skilled in the art to which it appertains to make and use the invention, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 is a plan view, partly broken away to show the interior mechanism. Fig. 2 is a side view, partly broken away to show the interior mechanism. Fig. 3 is an end view of the casing and mechanism, the end wall of the casing being removed. Fig. 4 is a side view, partly broken away, showing vestibules at the ends of the casing. Figs. 5, 6, and 7 represent details of the mechanism.

The invention has relation to means for heating or evaporating food products and other articles; and it consists in the novel construction and combinations of parts, as hereinafter set forth.

In the accompanying drawings the letter A designates the wall or incasement of the heating or drying chamber, which may be provided with steam-pipes or other ordinary means for effecting a temperature of the degree desired. In this chamber are arranged along its length parallel series of vertical shafts B B, the shafts of each series being placed opposite to each other, two and two, as indicated by the drawings. Each shaft is provided with a worm-wheel C, which is rigidly secured thereto and serves when operated by a suitable worm-shaft D, extending horizontally along the series, to cause a slow rotary motion. Usually a worm-shaft is provided for each line of vertical shafts B B, these being so constructed and arranged that all the vertical shafts will be turned at the same rate of speed, but in opposite directions, in each row or line from those in the next row or line. Instead of worm-gearing other means may be employed to turn the vertical shafts; but the worm-gearing is preferred.

E E represent plane pans or trays having their lateral edges *e e* parallel and of sufficient thickness to afford purchase to the rotary grips or edge bearings J of the vertical shafts. All the pans or trays are of similar width, as they are designed to pass between the parallel rows of vertical shafts. These parallel-edge pans or trays are designed to have wire-cloth or foraminated bottoms extending in the plane of their parallel edges and in the plane of their respective edge bearings.

As usually constructed, on each shaft B is rigidly secured a circular flange or disk F, the upper surface of which is convex or in the form of an inverted saucer, and above this convex flange is provided on the same shaft a movable convex flange G, which, however, has its convexity downward in such wise that the convexities of the two flanges are toward each other. As usually arranged the convex surfaces of these flanges F and G are in contact at their central portions, or a thin washer may be placed between them. The upper flange G of each set is elastically pressed toward the lower or fixed flange by means of a spring, (indicated at H.) In this manner each shaft is provided with a rotary guide and vertical-pressure grip of elastic character adapted to engage the purchase edge *e* of the pan or tray, hereinbefore referred to. Means of adjustment are usually provided for the spring, as indicated at K, whereby the force of the grip may be regulated in accordance with the requirements of the work. There may be several grip devices or edge bearings of like character on each shaft at different levels; but whatever be the number all the other shafts must have their grip devices on the same level or levels. The distance between any two shafts or grips in succession must be less than the length of

a pan or tray and usually less that half its length unless auxiliary guides are provided to keep the trays in line with the grips, it being designed that before the engagement of a tray with one set of grips is terminated said tray shall in its forward movement become engaged with the next set of grips.

The worm-shafts are geared to give continuous rotary motion in opposite directions to the parallel rows of vertical shafts, so that the pans or trays will be carried along between them by the bearings in the same direction and in a continuous manner. The movement is designed to be slow in order to avoid great length of heating-chamber, as the drying or cooking operation must be completed when the tray arrives at the discharge end of the incasement. The action being continuous there is no waste of time in stopping for feeding or for the discharge.

At one end of the casing is usually provided a vestibule V, wherein communication is had with the feed end of the series of carrying devices, and in this vestibule is carried on the operation of feeding the charged pans or trays to the evaporator or baker, which is effected by passing them into engagement with the grips or edge bearings of the end shafts of the series. At the other end of the casing a similar vestibule is provided for the operator who takes the trays from the grips of this end after they have passed through the drying-chamber. Sometimes the vestibules may be dispensed with.

In the end walls of the heating-chamber or in the partitions Z are arranged slots or openings just sufficient for the passage of the trays and the articles thereon. The vestibules may be provided at their sides or outer ends with doors *m* in order to economize heat as much as possible. The charged trays may be loaded on racks R, and such racks may also be used in the discharging operation, the object being to avoid frequent openings of the vestibule-doors. In each slot *s* is usually provided a swinging shutter *t*, having lateral cam-flanges which are engaged by the edges of the pan and serve to open the shutter and hold it open until the pan of biscuit has passed through the slot. The shutters are thus opened and closed automatically and serve to prevent loss of heat from the closure.

The edge bearings of the vertical shafts are arranged in vertical series or in tiers, one above another, providing for moving tiers of pans, so that there is great economy of space in the apparatus.

What I claim as my invention, and desire to secure by Letters Patent, is—

1. In heating apparatus, the parallel series of vertical shafts arranged in pairs, a vertical series of vertical-pressure grip devices arranged in pairs on said shafts, horizontal shafts extending along the series of vertical shafts, and the engagement-gearing of said horizontal shafts and vertical shafts, substantially as specified.

2. The combination with a heating or drying closure, of parallel series of vertical-pressure-spring grip devices, or edge bearings, oppositely placed in pairs and in tiers, one above another, and means for rotating said parallel series in opposite directions, substantially as specified.

3. The combination with a heating or drying closure, of parallel series of vertical shafts, the tiers of pairs of convex flanges secured thereto, the movable convex flanges thereon, the pressure-springs of the movable flanges, and the gearing arranged to turn the parallel series in opposite directions, substantially as specified.

4. The combination with a heating or drying closure, of parallel shafts, the moving edge bearings connected thereto, the gearing for turning the shafts, the parallel-edged pans or trays, and the automatic shutters of said closure, substantially as specified.

5. The combination with a heating or drying incasement, and closing devices at its end openings, of parallel series of tiers of pairs of moving vertical-pressure grip devices, or edge bearings, means for rotating said parallel series in opposite directions, and parallel-edge plane foraminated trays or pans adapted to engage said grip devices, substantially as specified.

6. In an oven or closure, the combination with the parallel-edge pans or trays of a plurality of series of vertical rotating shafts, tiers of pairs of opposite edge bearings on said shafts, spring devices to close said bearings on the edges of the pans or trays, gearing for turning said shafts, and automatically-closing devices for the feed and discharge ends of said oven or closure, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:
LEWIS C. MUZZY,
GEORGE H. HOSMER.

182

No. 770,159. PATENTED SEPT. 18, 1904.

L. S. BURBANK.

MACHINE FOR MAKING CARTONS OR FOLDING BOXES.

APPLICATION FILED DEC. 21, 1899.

NO MODEL. 3 SHEETS—SHEET 1.

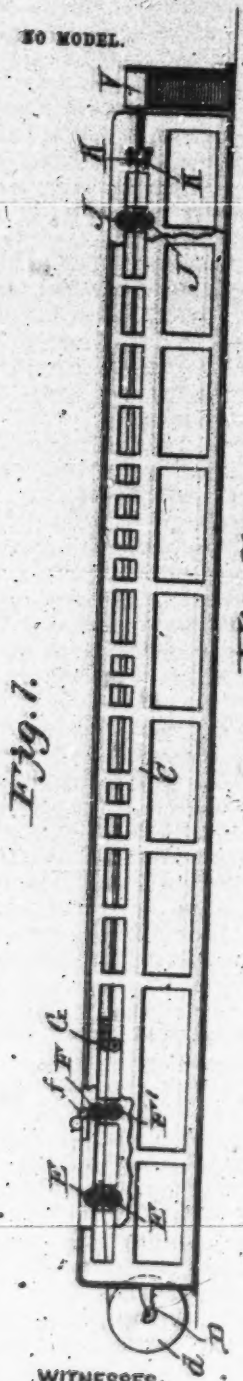


Fig. 1.

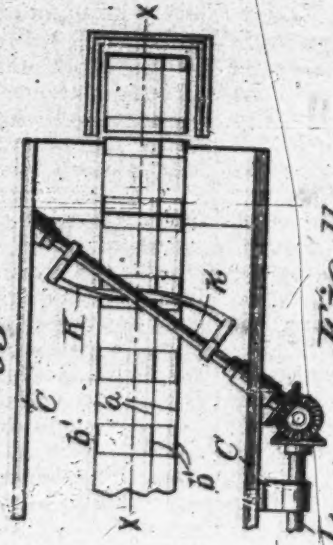


Fig. 10.

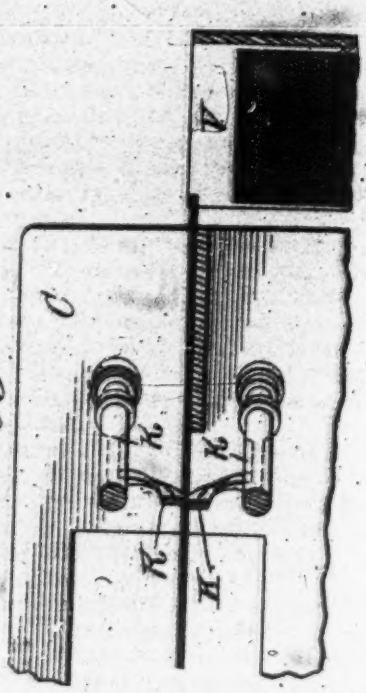


Fig. 11.

Fig. 12.

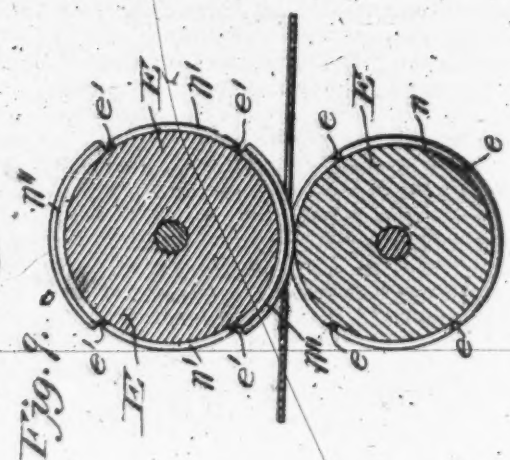


Fig. 9.

WITNESSES:

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G. M. Anderson

INVENTOR

Louis S. Burbank

BY

E. W. Anderson

his ATTORNEY.

184

No. 770,159. PATENTED SEPT. 13, 1904.

L. S. BURBANK.

MACHINE FOR MAKING CARTONS OR FOLDING BOXES.

APPLICATION FILED DEC. 21, 1899.

NO MODEL. 3 SHEETS—SHEET 2.

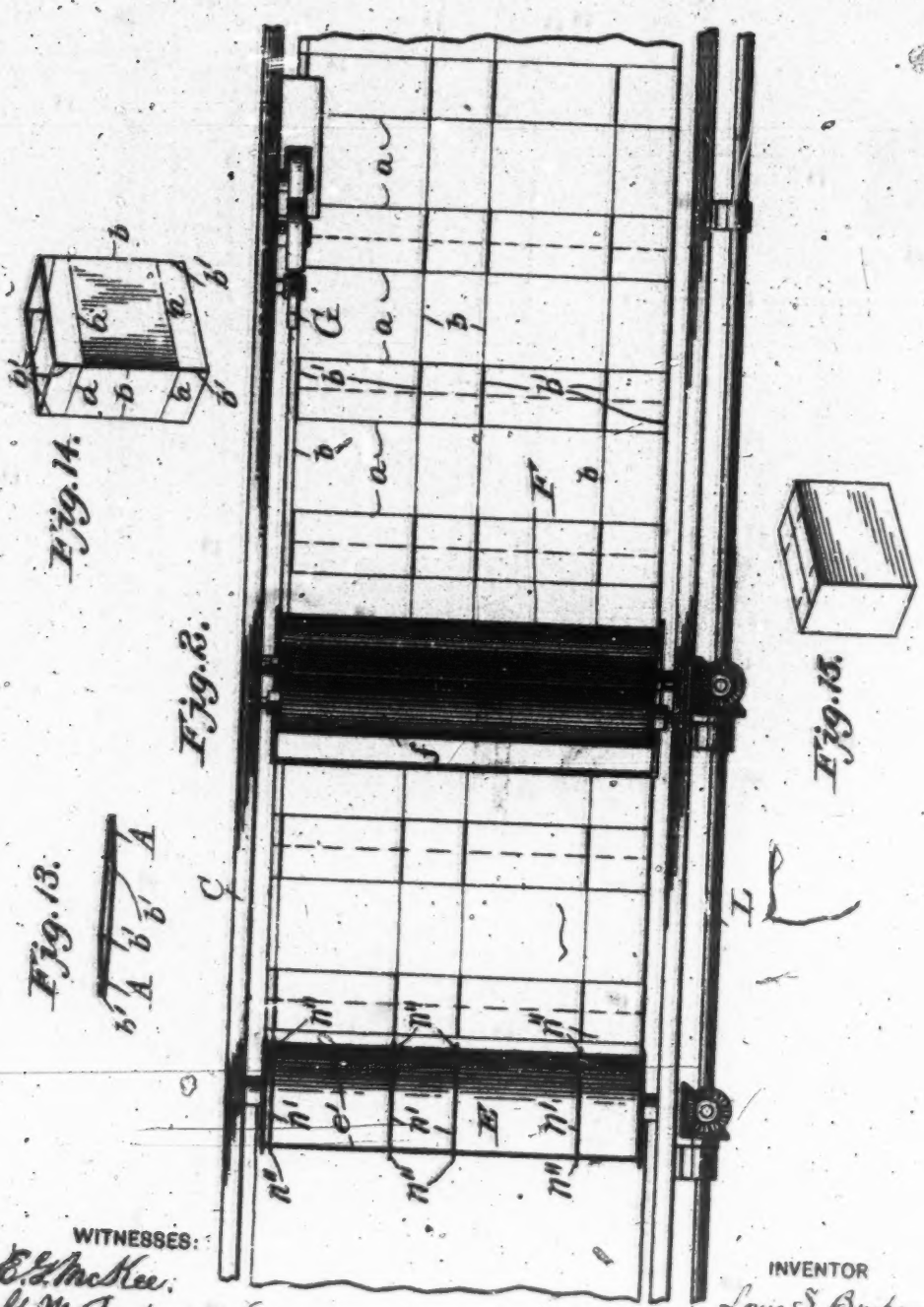

Fig. 14.

Fig. 13.

Fig. 15.

WITNESSES:
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G. M. Anderson

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Louis S. Burbank
BY
E. W. Anderson
his ATTORNEY.

186

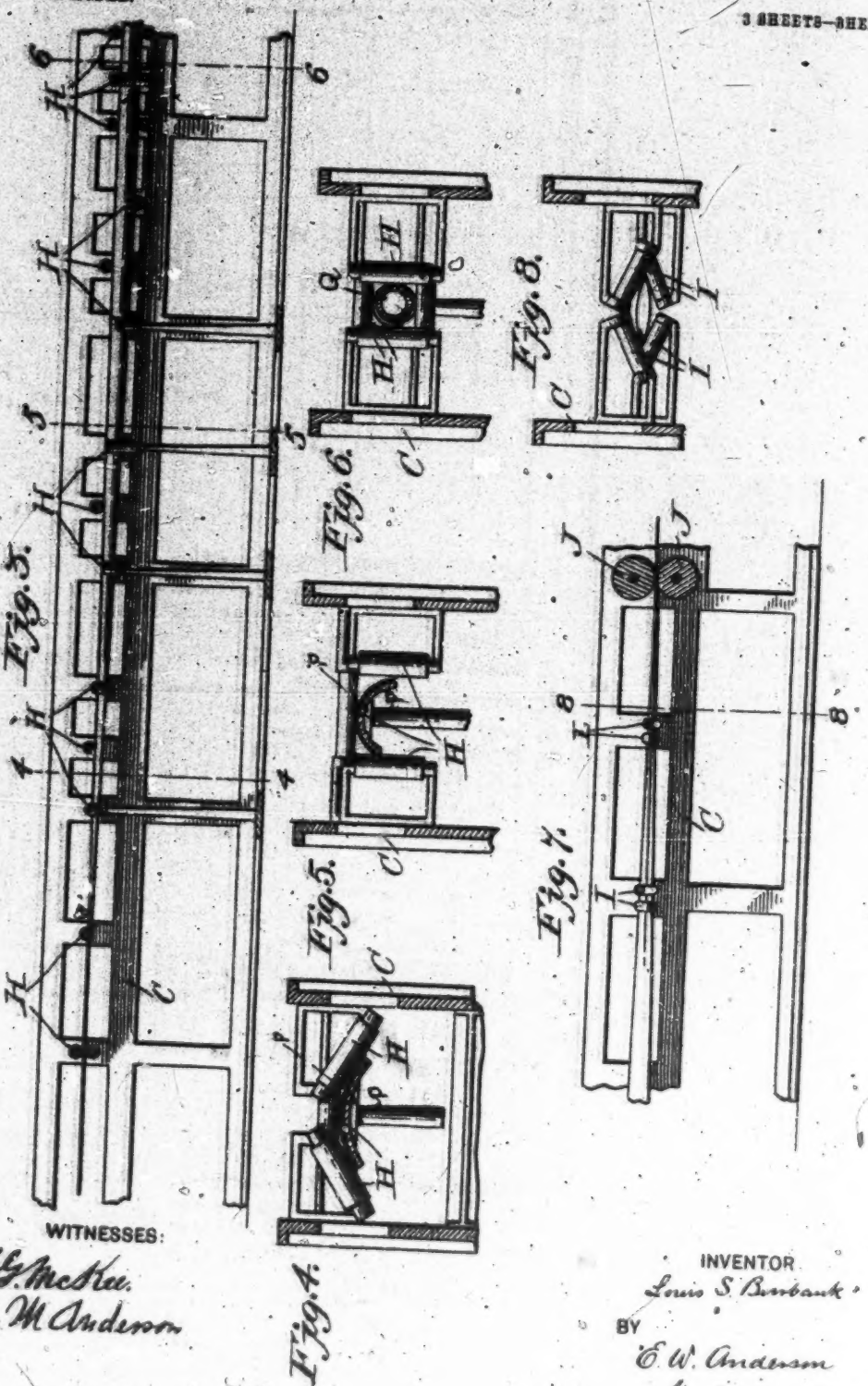
No. 770,159. PATENTED SEPT. 13, 1904.

L. S. BURBANK.

MACHINE FOR MAKING CARTONS OR FOLDING BOXES.

APPLICATION FILED DEC. 21, 1899.

NO MODEL. 3 SHEETS—SHEET 3.



WITNESSES:

E. G. McKee.

G. M. Anderson

INVENTOR

Louis S. Burbank.

BY

E. W. Anderson

his ATTORNEY.

No. 770,159. Patented September 13, 1904.

UNITED STATES PATENT OFFICE.

LOUIS S. BURBANK, OF WORCESTER, MASSACHUSETTS, ASSIGNOR, BY MESNE ASSIGNMENTS, TO THE NATURAL FOOD COMPANY, OF NIAGARA FALLS, NEW YORK, A CORPORATION OF NEW YORK.

MACHINE FOR MAKING CARTONS OR FOLDING BOXES.

SPECIFICATION forming part of Letters Patent No. 770,159, dated September 13, 1904.

Application filed December 21, 1899. Serial No. 741,074. (No model.)

To all whom it may concern:

Be it known that I, LOUIS S. BURBANK, a citizen of the United States, residing at Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Machines for Making Cartons or Folding Boxes; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

In the accompanying drawings, Figure 1 is a side elevation of my machine, partly broken away. Fig. 2 is a partial plan view of same on an enlarged scale. Fig. 3 is a partial vertical longitudinal section of the machine, illustrating the guiding-rollers. Figs. 4, 5, and 6 are sectional views illustrating successive steps in the folding of the paper. Figs. 7 and 8 are detail views illustrating the operation of the creasing-rollers. Fig. 9 is a detail sectional view of the cutting and scoring rollers. Figs. 10 and 11 are detail views illustrating the operation of the cutter. Fig. 12 is an end view of the cutter, and Figs. 13, 14, and 15 are detail views of the finished carton.

This invention has relation to a machine for making cartons or folding boxes of paper; and it consists in the novel construction and combinations of devices, as hereinafter explained.

The object of the invention is to provide such folding cartons economically and in large quantities mainly for the use of factories and other sources of supply wherein the cartons are needed for casing the goods manufactured.

The folding carton made by this machine is rectangular and of doubled flat formation, its upper and lower portions or doublings being in contact with each other, as indicated at A in the drawings. Scorings are represented at *a* and *b* at right angles with each other and edge slits *b'* in line with the scorings *b*. The frame C of the machine is of elongated form and is provided with proper mountings for seating the journals of the mechanism and other special parts.

D represents bearings at the end of the machine for the axis-piece of the supply-roll *d* of paper.

E E designate the scoring-rolls, which should also be provided with edge-knives for trimming the edges of the paper which passes from the supply-roll between said scoring-rolls.

F F represent the printing-rolls.

G indicates a disk whereby a line of glue or paste is applied along one edge of the sheet of paper.

H H indicate a number of sets of edge guiding or folding rolls, whereby the edges of the sheet of paper are gradually guided upward, around, and over toward each other until one edge overlaps the other, the sheet then having the form of a cylinder or sleeve. The overlapping edge portion of the sheet is provided with the line of glue.

In this machine the paper is bent over rounded guides P P, which are secured to the frame and are arranged along the median line, their curved bearing-surfaces *p* presenting upward, preferably in order that the weight of the lateral portions of the strip of paper may assist in the bending. The guides P P are supplemented by the opposite isoclinal folding-rolls H H above referred to, which being arranged along the length of the strip in series with their axis, having gradually-increasing angular relation to the horizontal, gradually turn its edge portions around under the middle portion until it assumes tubular form, when it is supported by a shaping-mandrel Q, which fills out the tube, giving it a true cylinder form.

J represents the pressing-rolls, whereby the cylinder or sleeve is pressed flat to effect the adherence of the edge portions and to bring the doublings in contact.

K K designate the rotary knives, whereby the flattened sleeve is cut into sections, each of which is designed to be a complete folding carton.

The various rolls and moving parts may be operated by means of a longitudinal shaft L, having proper gear connections. The scoring-rolls are provided with corresponding

transverse indentations *e* and fine ribs *e'*, which extend between the edge-trimming cutters *m*. These rolls are also provided with the corresponding circumferential indentations *n* and fine ribs *n'*, alternating with short cutters *n''*, also extending circumferentially in such manner that in their work upon the sheet the longitudinal scorings alternate with the slits in the same lines, or the indentations may be omitted, as the ribs will score on a plain roll sufficiently well. The upper printing-roll F is provided with a circumferential type-face to receive ink from the small rollers of the inking apparatus *f*, and as the sheet of paper passes between the rollers F and F' the printed matter which is designed for the cartons is placed thereon. That portion of the machine along which the folding is effected through the medium of the guiding-rolls H is of considerable length, in order to provide a very gradual bending during the operation, this bending being such that when the edges of the sheet are brought to the lapping position their variation from parallelism will be inconsiderable. The long folding mechanism also allows time for the printing to dry. In order to insure the drying, however, a hot-air incasement may be provided over a portion of the folding mechanism. The disk G, whereby the line of glue or paste is applied to the edge portion of the sheet, may be located in any convenient position. If a drying-incasement is provided over the folding mechanism, it should be located beyond the incasement near the pressing-rolls J.

Lateral creasing-rolls I are arranged to engage the sides of the sheet at its bent or sleeve-form portion where it approaches the pressing-rolls J, said creasing-rolls serving to partially flatten the tube formed by the mandrel Q and its supplementary rollers and start the angular bends and at the same time guiding it in the proper direction between the pressing-rolls. By these rolls the sleeve is pressed flat and the edges of the sheet are secured together along the lapped portion. As the flat sleeve portion passes along from the pressing-rolls it is subdivided into sections or cartons by the rotary spiral shearing-knives K K, the cuts being made transversely and through the middle points of the longitudinal slits of the sheet. The shafts *k k* of the knives are horizontal and parallel to each other and extend transversely but somewhat obliquely over and under the work, and the edges of the cutting-blades are of corresponding spiral formation, adapting them to effect a straight shear at right angles to the line of feed and while the sleeve is in motion. The successive points of the spiral cutting edges as they come together in making the section are in exact transverse position. The cutters are mounted on oblique shafts, in order that the tendency of their spiral formation to move the work laterally askew will be corrected. The cutter-blades are set with their cutting edges presenting radially outward and are designed to act radially upon the work between them. The sections or cartons as they are cut off may be stacked at V.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. In a machine for making cartons, the combination with scoring, trimming and tube-forming rolls, of pressing-rolls, a lower rotary shaft oblique to the line of feed, an upper rotary shaft parallel to said lower rotary shaft, and corresponding oppositely-inclined spiral blades on these shafts, adapted to effect a straight shear cut at right angles to the line of feed, substantially as specified.

2. In a machine for making cartons from a continuous strip of paper, the combination with scoring and trimming rolls, and pasting devices at one end, of pressing-rolls, oblique shafts and their oppositely-inclined spiral cutters at the other end, and below the pasting devices and pressing-rolls, supports for the middle portion of the strip of paper, and opposite isoclinal guide-rolls, whereby it is bent downward, folded under in tubular form, creased, pressed, and cut off in sections, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

LOUIS S. BURBANK.

Witnesses:
ALBERT H. CHAFFEE,
J. R. GILKERSON.

No. 785,554. PATENTED MAR. 21, 1905.

R. HORNER.

APPARATUS FOR CONDITIONING GRAIN, &c.

APPLICATION FILED JUNE 7, 1904.

4 SHEETS—SHEET 1.

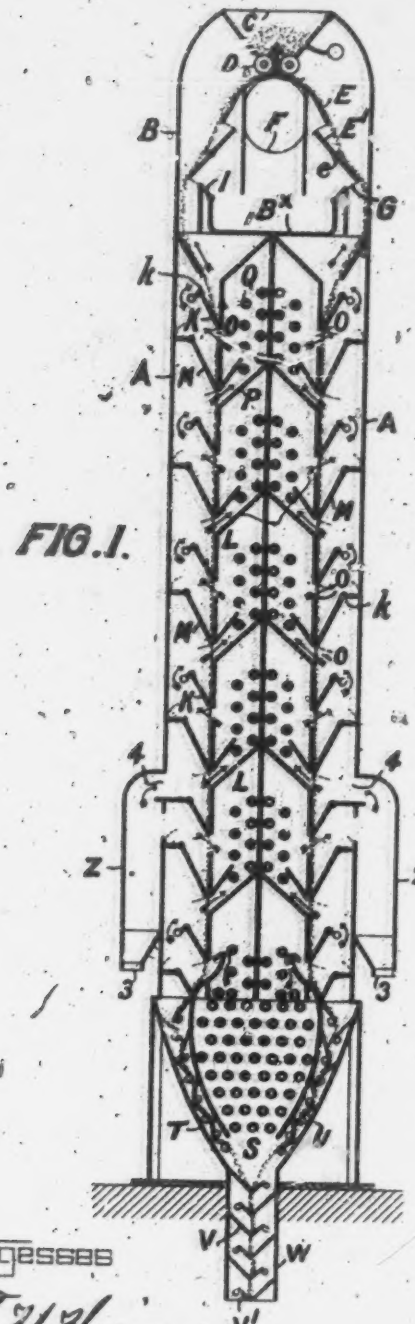


FIG. 1.

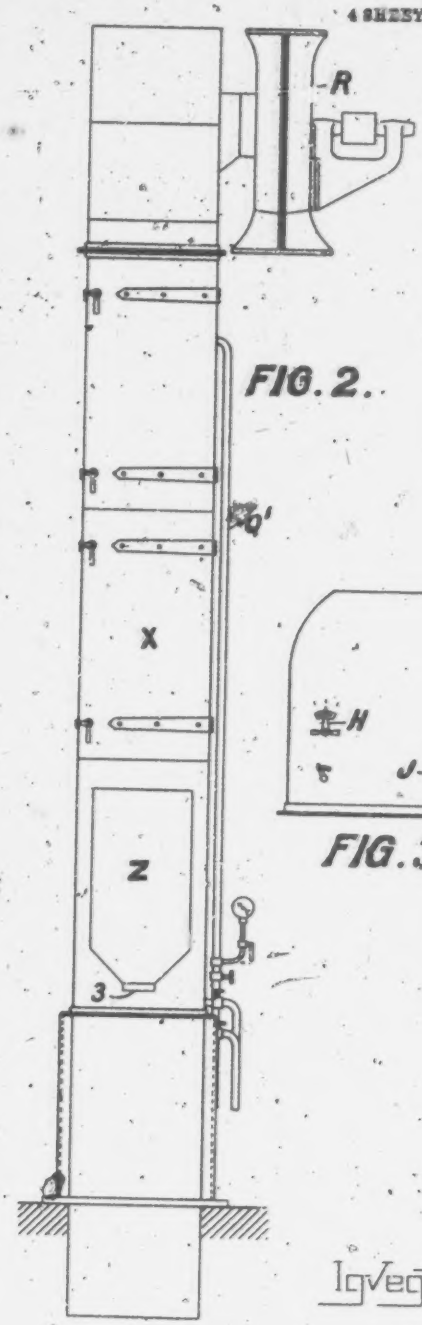


FIG. 2.

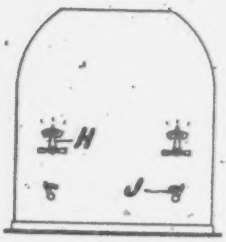


FIG. 3.

Witnesses

S. H. Norman

William J. Flint.

Inventor

Richard Horner

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192

No. 785,554. PATENTED MAR. 21, 1905.

R. HORNER.

APPARATUS FOR CONDITIONING GRAIN, &c.

APPLICATION FILED JUNE 7, 1904.

4 SHEETS—SHEET 2.

FIG. 4.

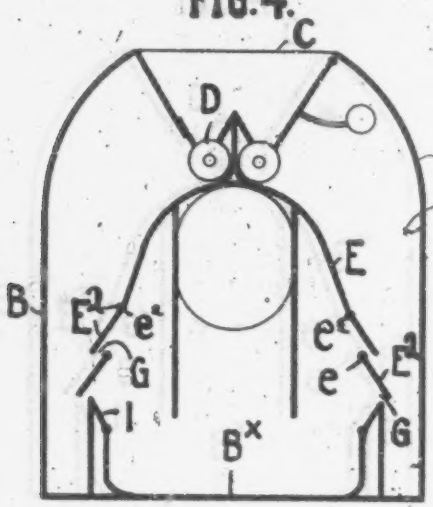
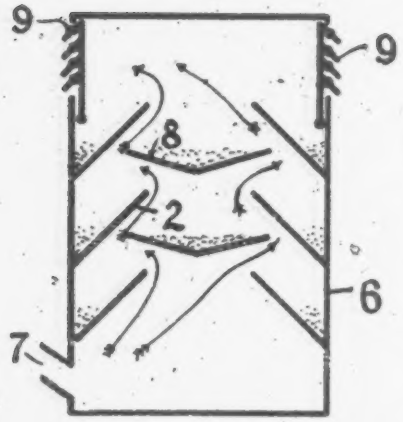


FIG. 5.



Witnesses

F. H. Homer

William J. Firth

Inventor

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194

No. 785,554. PATENTED MAR. 21, 1905.

R. HORNER.

APPARATUS FOR CONDITIONING GRAIN, &c.

APPLICATION FILED JUNE 7, 1904.

4 SHEETS—SHEET 3.

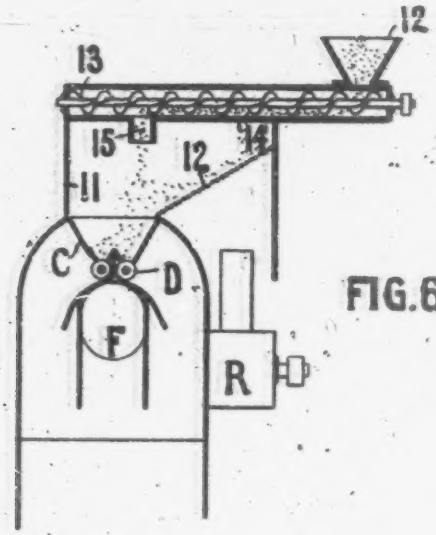


FIG. 6.

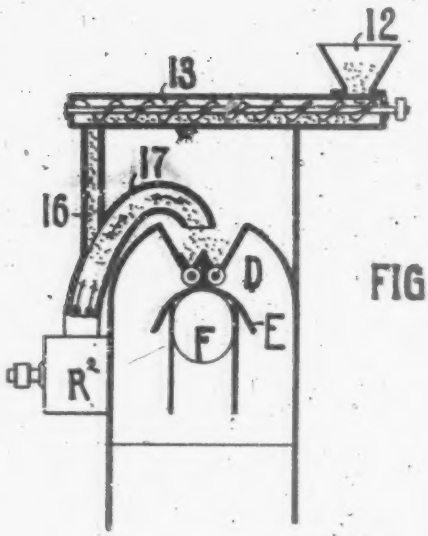


FIG. 7.

Witnesses

F. W. Ulman

William J. Forth

Inventor

Richard Horner

By Henry Connett

Attorney

196

No. 785,554. PATENTED MAR. 21, 1905.

R. HORNER.

APPARATUS FOR CONDITIONING GRAIN, &c.

APPLICATION FILED JUNE 7, 1904.

4 SHEETS—SHEET 4.

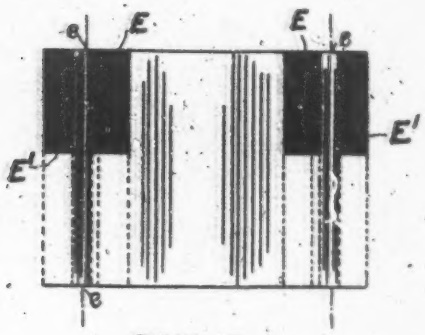
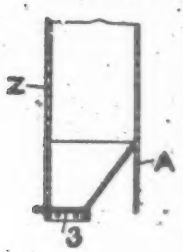


FIG. 8.

FIG. 9.



Witnesses

S. N. Dunton

William J. Firth

Inventor:

Richard Horner

By his Attorney

Henry Connett

No. 785,554. Patented March 21, 1905.

UNITED STATES PATENT OFFICE.

RICHARD HORNER, OF YORK, ENGLAND.

APPARATUS FOR CONDITIONING GRAIN, &c.

SPECIFICATION forming part of Letters Patent No. 785,554, dated March 21, 1905.

Application filed June 7, 1904. Serial No. 211,559.

To all whom it may concern:

Be it known that I, RICHARD HORNER, miller, a subject of the King of Great Britain, and a resident of Heworth, York, in the county of York, England, (whose post-office address is Woodbine House, Heworth, York, aforesaid,) have invented certain new and useful Improvements in and in Apparatus for Conditioning Grain and other Granular Material, (for which application has been made in Great Britain, No. 3,872, dated 18th day of February, 1903,) of which the following is a specification.

This invention relates to apparatus for drying and conditioning grain, beans, oats, and other granular material. It is adapted to take the place of the usual whizzer.

The invention will be understood from the following description, reference being had to the accompanying drawings, in which—

Figure 1 is a vertical section of my apparatus; Fig. 2, a side elevation; Fig. 3, a front elevation of the receiving-chamber; Fig. 4, a vertical section of the receiving-chamber, showing a slight modification in the valves or combs; Fig. 5, an enlarged sectional view of the second dust-chamber; Figs. 6 and 7, detail views of accessories to utilize the hot air. Fig. 8 is a plan view of the grids seen on a small scale in Fig. 1. Fig. 9 is a sectional detail view, on a relatively large scale, of a dust-collector and the door at the bottom thereof.

In carrying the invention into effect I provide vertical casings or trunks A, arranged upright in a straight line at opposite sides of a middle upright chamber L, down which trunks the material to be dried flows and up which a current of air for drying the material is caused to ascend by the suction-fan R. This air-current is heated by the hot-water or steam pipes S and again reheated at intervals by the pipes Q. At the top of the trunks A is a receiving-chamber B, fitted with a hopper C and feed-rollers D, and below this hopper C in the receiving-chamber B there are at each side a series of combs or grids E E', so arranged that as the wet grain passes over the combs they permit the water, assisted by the upward current of air, to drain from the produce and drain off into the tank B^x, from whence it is discharged by a pipe. Some of the combs—viz., E'—are hinged or pivoted at *e*, so that they form valves and can be set to different angles relatively to the other combs, and when so set an opening G is left between them and the adjacent stationary parts, through which openings the air-current is drawn by the exhaust-fan. The air-current, in fact, is drawn in an opposite direction to the thin stream of descending produce as it falls over the combs E E', and the air is forced to pass through this thin descending stream and through the combs, also through the openings aforesaid, thus drawing off the water from the grain. The combs, however, can be so set that they are closed against the adjacent fixed parts, in which case the only exit for the air-current is actually through the combs themselves. Outside indexes H can be employed, so as to indicate the exact angle to which the adjustable combs are set, and thus the opening can be regulated to a nicety or closed altogether. Valves I are also provided in the receiving-chamber for regulating the outlet or discharge of air. When these are closed, the entire air-current finds its exit at the combs. By opening these valves I, however, part is drawn out (through the descending stream of produce) direct to the fan without passing through the combs at all. Thus these valves I allow air that is not required to pass through the combs E E' to be passed direct to the fan.

J represents outside indexes for the valves I.

The hinged combs may be as shown in Fig. 4, in which two combs E' are provided, hinged at e^3, instead of a single valve hinged at middle.

The trunks A, to which the wheat passes when delivered thereto by the receiving-chamber B, are provided at intervals throughout their length with valves K M. These can each consist of a hinged plate sloping downward from the hinge *k* toward the inside walls of the trunk A and are so arranged as to check the rush of wheat and allow of only a thin stream of grain flowing through between the edge of the plate and the inner wall of the trunk. They also enable the rate of descent being regulated to a nicety. The inside wall of the trunk immediately below each au-

tomatic valve is provided with holes or passages O, leading to the middle upright chamber L, and each alternate valve M in the trunk A forms a partition which divides the trunk A into a series of chambers and prevents the air passing straight upward. The middle chamber L is also divided up into compartments by partitions P. The air is therefore forced to pass in a circuitous course from the trunk A through these holes O and the descending stream of produce into the middle chamber L and from thence out through the succeeding holes O and descending stream of produce again into the trunk A, and so on, thus causing the air to take a very devious course back and forth through the wheat, and this passing of the air through the stream of produce is repeated again and again before the air finally reaches the receiving-chamber B at the top of the apparatus. The air is reheated in the middle chamber L after each passage through the cold and wet wheat as it travels up the machine, for which purpose heating-pipes Q are fitted therein. This reheats the air after each contact with the wheat and also converts any remaining water quickly into steam, which steam is immediately drawn off by the fan. There is also provided means for collecting and drawing off any chaff or dust which may accumulate without interfering with the proper working of the machine in any way—namely, a dust-collector Z and a second dust-collector 6. The former comprises chambers Z, located near the bottom of the machine. The upward air-current enters the upper part of this chamber and leaves it at 4, depositing the dust, however, in the chamber and allowing it to fall into the bottom thereof, from whence it can be removed from time to time as required through the doors 3. These doors are shown in detail in Fig. 9. The other dust-collector, 6, is located near the fan R and will be hereinafter described.

The pipe Q in the heating-chambers L is supplied with steam by the pipe Q', which is fitted with a steam-gage 5.

At the bottom of the apparatus are the heating, cooling, and discharging appliances. The heating appliance consists of passages T, one at each side of the main heating apparatus S, which latter heats the air-supply and supplies heat to the heater in the middle chamber L. These passages are fitted with a series of chutes or plates U, which are highly heated by the main heating apparatus, whereby a very high temperature is imparted to the wheat, if required, there being no circulation of air through these side passages T. The two passages converge toward a single passage W below the main heating apparatus S, through which the cold-air supply is drawn. A series of chutes or baffles V V' are placed in the passage W, which allow the cold air to play upon it, and thus chill it down after being highly heated as it is being discharged. The baffles V' are hinged, so as to enable the size of the orifice between them and the edges of V to be regulated, and the air passes back and forth through the material as it descends in a thin stream. The heat abstracted from the produce in the cooling appliance V is taken up by the air, thus slightly heating it before entering the heating-chamber. The air by this heating apparatus is raised to a very high temperature and is divided up and drawn to both trunks A of the machine, down which the wheat is falling. Doors X are provided for giving access to each chamber or pair of chambers in the trunks. The actual heating parts are so constructed and protected that there is no danger of the wheat being scorched or burned, the object being to have a machine that will cause the grain to go effectually through all the processes in one operation and by the means of one current of air which is caused to pass through the machine, which latter has such a gentle action as will obviate all danger of the wheat being roughly used or broken in any way.

The mode of action is as follows: The exhaust-fan R being put into operation a stream of cold air is drawn through the passage V into the main heating apparatus S, where it is heated, and the heated air is then divided up and drawn into both trunks A. This heated air therefore entering the trunks comes into contact with the falling grain, extracting the moisture and drying the grain, also draining off any chaff or dust and depositing it in chamber Z. The air takes a very devious course back and forth through and across the produce and at the same time is reheated after each passage through the cold and wet wheat in the chamber L. Consequently should the hot air have become cooled it is at once reheated in the middle chamber L, so that by the time it reaches the top of the machine it has effectually dried the produce and is drawn off through outlet F. This air, carrying a certain amount of dust in suspension, is discharged into the second dust-collector 6, hereinbefore referred to. It is shown in Fig. 5. 7 is the air-trunk from the fan, through which the air is driven by the fan R into the chamber 6. Inside this chamber are hoppers 2 and baffles 8. The dust-laden air having entered this chamber 6, ascends therein against the baffles 8, the dust falling into the hoppers 2. As the air-current is baffled in its ascent, the dust is bound to be deposited in the hoppers. The air, free from dust, escapes through the valves or louvers 9 at top, these being weighted to keep them just open. Should, however, the wind be blowing against them, the louvers at the side the wind is blowing against will close by the wind-pressure against them, while the others remain open and air-current passes steadily through them. This prevents the wind from any quarter working

against the fan. This dust-collector is made of fireproof material. The valves K M in the trunks A check the wheat in its fall and cause it to descend in thin streams, so that the air-currents may act upon it with the greatest possible effect. The devious course which the air-current takes facilitates the hot air getting free access to every particle of the material to extract moisture therefrom. By adjusting the valves K M in the trunk A the weight of discharge is regulated to a nicety. Finally, before leaving the machine the grain is subjected to the final heating operation in the passages T, (here it is not subjected to air-currents at all,) and then the grain is finally exposed to a current of cold air, which is drawn through V into the apparatus by the suction of the exhaust-fan R. This arrangement dispenses with the use of a separate whizzer and makes the apparatus self-contained. The intermediate sloping plates K in the trunks might, perhaps, in some cases be dispensed with or made fixtures instead of hinged.

The fan R discharges air at 85° to 95°. In order to utilize this, I propose putting, as shown in Fig. 6, a loose hopper 11 on the top of C and fixing a foraminous plate 12 in this hopper. The hot air from the fan R is discharged so as to pass through the perforations in this plate 12 and blow the grain onto the feed-rollers D, thus partly drying it before it reaches the machine. The wet grain is fed into the receptacle R and from thence fed forward by the worm 13 into the hopper 11, into which it falls at 14 and 15. In Fig. 7 the grain is fed forward in a similar manner, but falls through the chute 16 into the pipe 17. Here it meets the ascending stream of hot air from the fan R^2 and is discharged, so that the direction of the stream of grain is diverted and is delivered by the current of air to the feeding-rollers D, the action of the hot air partly drying it.

I declare that what I claim is—

1. An apparatus for drying and conditioning wheat or other granular materials, comprising upright casings, a middle upright chamber between, hinged doors or valves in the casings sloping downward from the hinge in such manner as to allow the granular material to descend in thin streams, holes or passages into said middle chamber located at intervals, through which a current of hot air, reheated at intervals, is passed back and forth across these descending streams, in such a manner as to extract moisture therefrom and effect the drying of the granular material substantially as described.

2. An apparatus for drying and conditioning grain and other granular material, having straight upright trunks for the streams of descending material, said trunks being provided with holes or passages for air, sloping hinged plates or partitions which divide the said trunks into compartments, leaving passages sufficient to enable thin, approximately vertical descending streams of granular material to pass, heating-chambers located in close proximity to the trunks, also divided into compartments and so connected to the trunks at intervals by said holes or passages that currents of air drawn upward through the trunks will be obliged to pass through these holes and the descending streams of material into said heating-chambers, and from these out through succeeding holes and the descending streams of material, again into the trunks, and so on, the air being reheated in the heating chambers every time after its passage through the material, substantially as described.

3. In apparatus for conditioning and drying grain or other granular material, the combination with the upright trunks through which the material descends, of a receiving-chamber at top thereof, means for feeding in wet material, combs or grids over which the wet material is caused to flow in thin streams, so as to permit water to drain from the material before being delivered into the trunks, and through which and through the thin stream of material an air-current is passed by a fan, to further draw off water from the material and the said fan, substantially as described.

4. In drying or conditioning apparatus of the kind mentioned, a receiving-chamber formed at each side with fixed combs or grids E, and combs or grids hinged so as to be adjustable to enable them to be set at an angle relative to the adjacent stationary combs and leave an opening between, over which the descending produce will fall, and through which and the descending stream of granular material, air-currents are passed laterally, substantially as described.

In witness whereof I have hereunto signed my name, this 23d day of April, 1904, in the presence of two subscribing witnesses.

RICHARD HORNER.

Witnesses:
CHAS. GILLIARD,
ALFRED STANLEY HOUGHTON.

No. 797,604. PATENTED AUG. 22, 1905.

H. D. PERKY.

MACHINE FOR PREPARING FOOD.

APPLICATION FILED DEC. 10, 1900.

9 SHEETS—SHEET 1.

Fig. 1

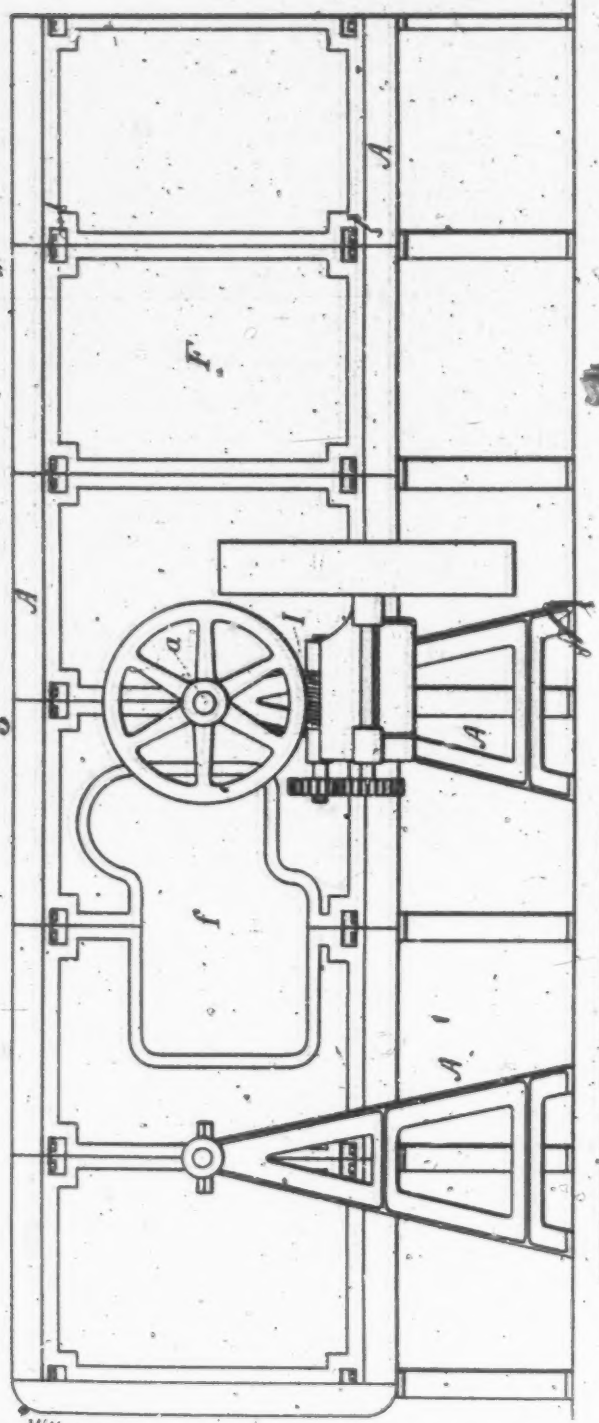


Fig. 11

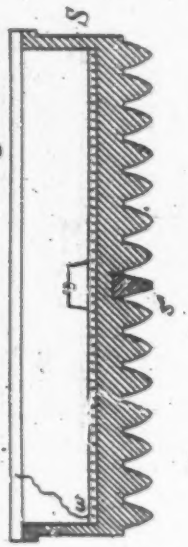
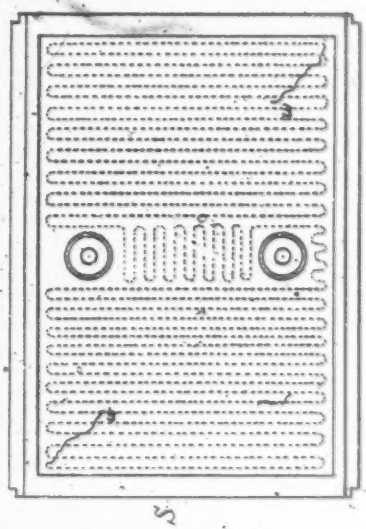


Fig. 10



Witnesses
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C. H. Newcomb.

Inventor
Henry D. Perky
by E. W. Anderson
his Attorney

No. 797,604. PATENTED AUG. 22, 1905.

E. D. PERRY.

MACHINE FOR PREPARING FOOD.

APPLICATION FILED DEC. 30, 1903.

3 SHEETS—SHEET 1

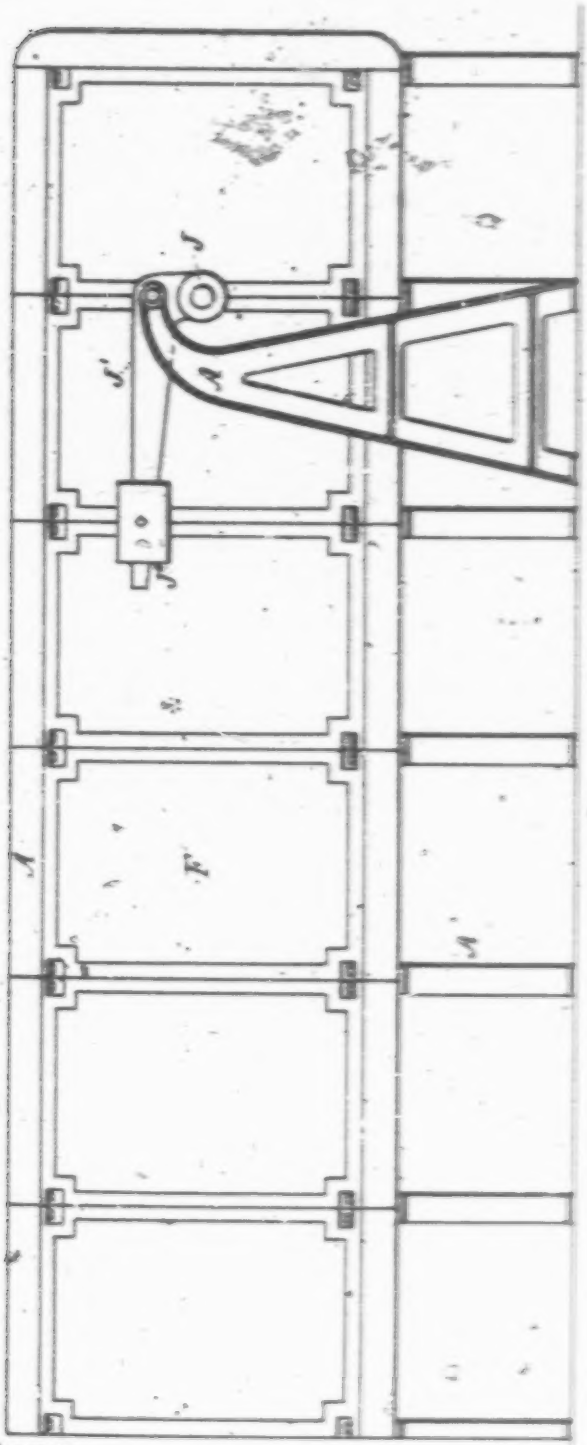

Fig. 1.

Witnesses
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No. 797,604. PATENTED AUG. 22, 1905.

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MACHINE FOR PREPARING FOOD.

APPLICATION FILED DEC. 10, 1900.

9 SHEETS—SHEET 3.

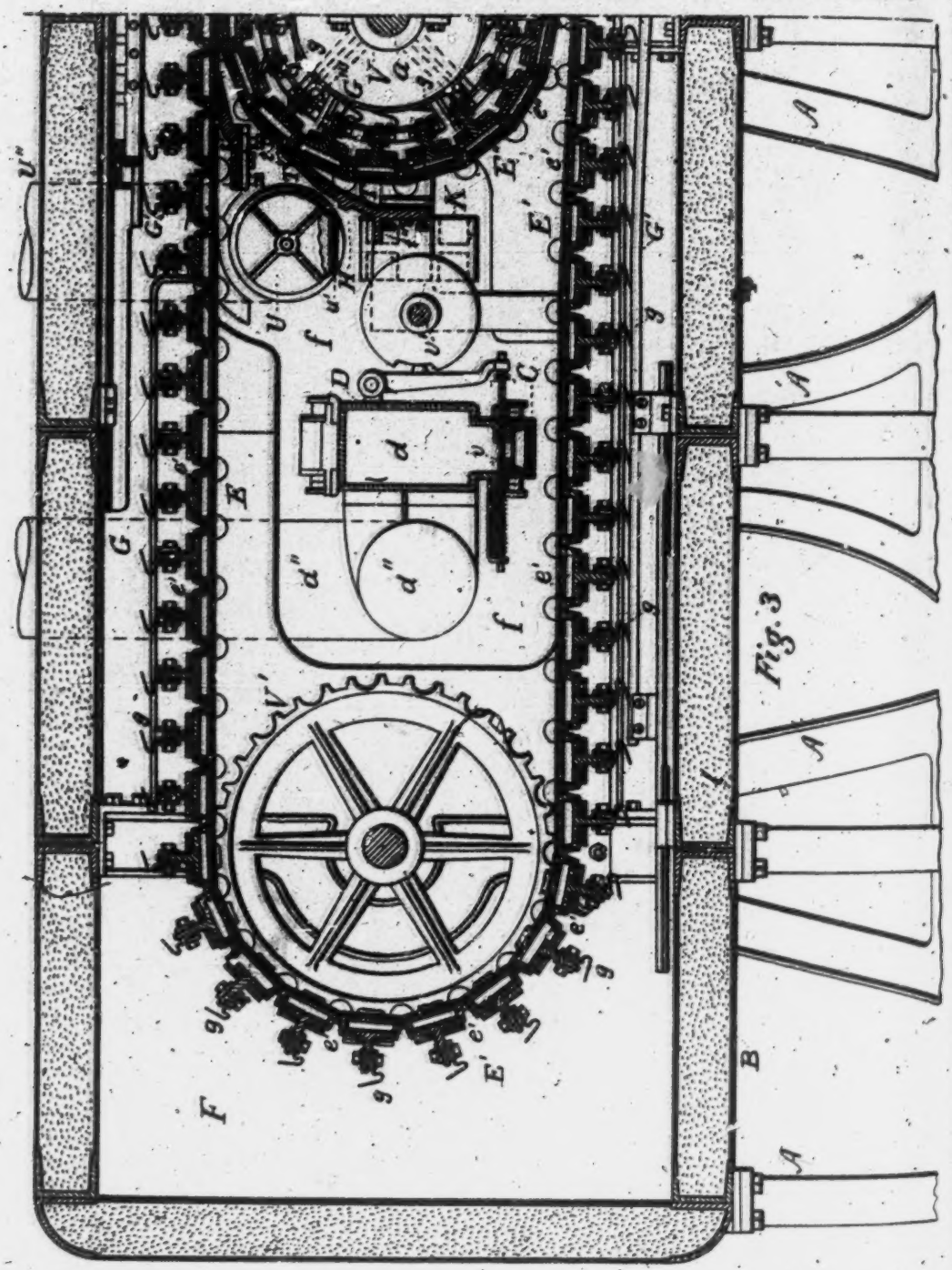

Fig. 3

Witnesses
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No. 797,604. PATENTED AUG. 22, 1905.

H. D. PERKY.

MACHINE FOR PREPARING FOOD.

APPLICATION FILED DEC. 10, 1900.

9 SHEETS—SHEET 4.

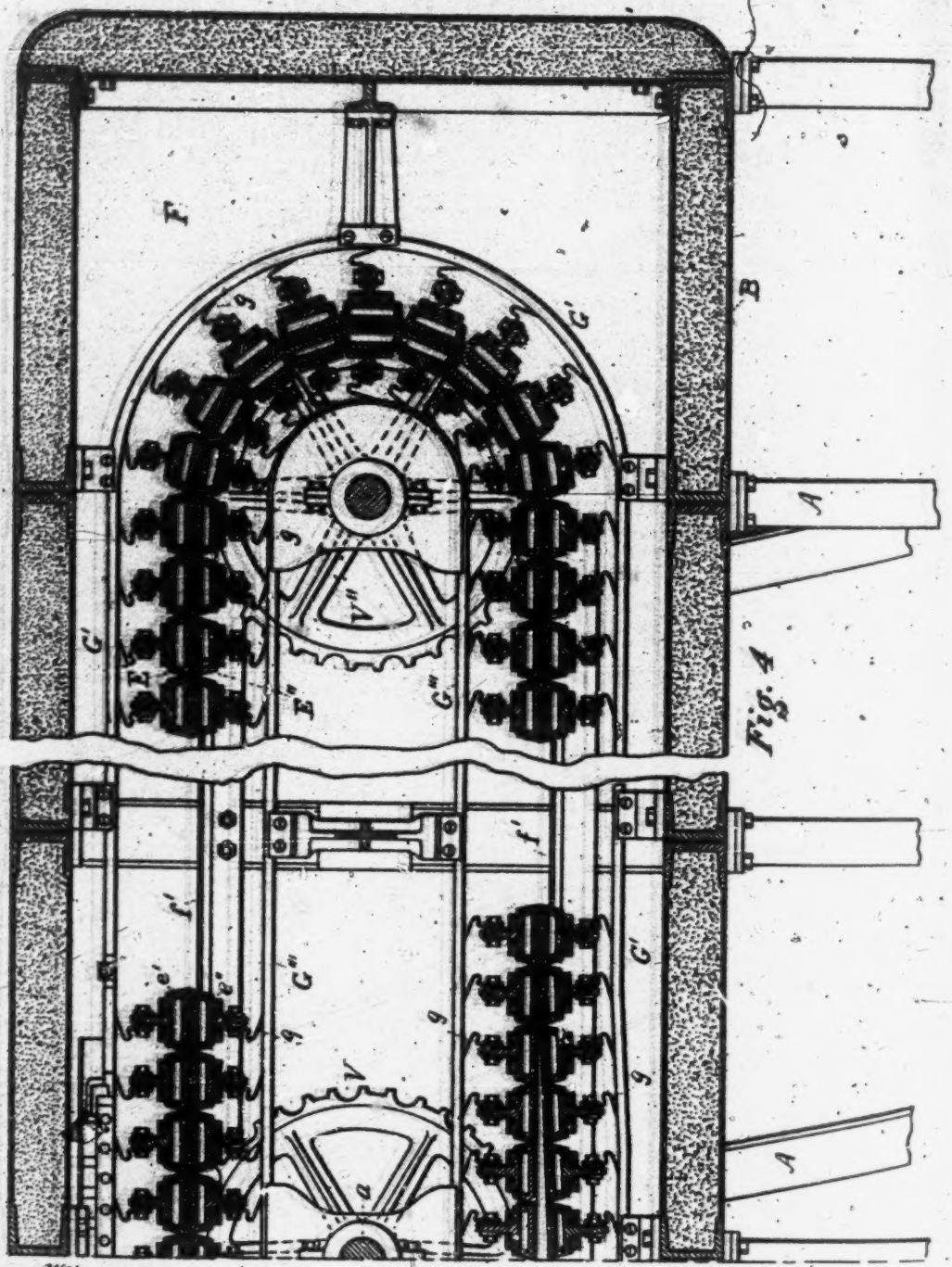

Fig. 4.

Witnesses

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B. H. Newcomb.

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No. 797,604. PATENTED AUG. 22, 1905.

H. D. PERKY.

MACHINE FOR PREPARING FOOD.

APPLICATION FILED DEC. 10, 1900.

9 SHEETS—SHEET 5.

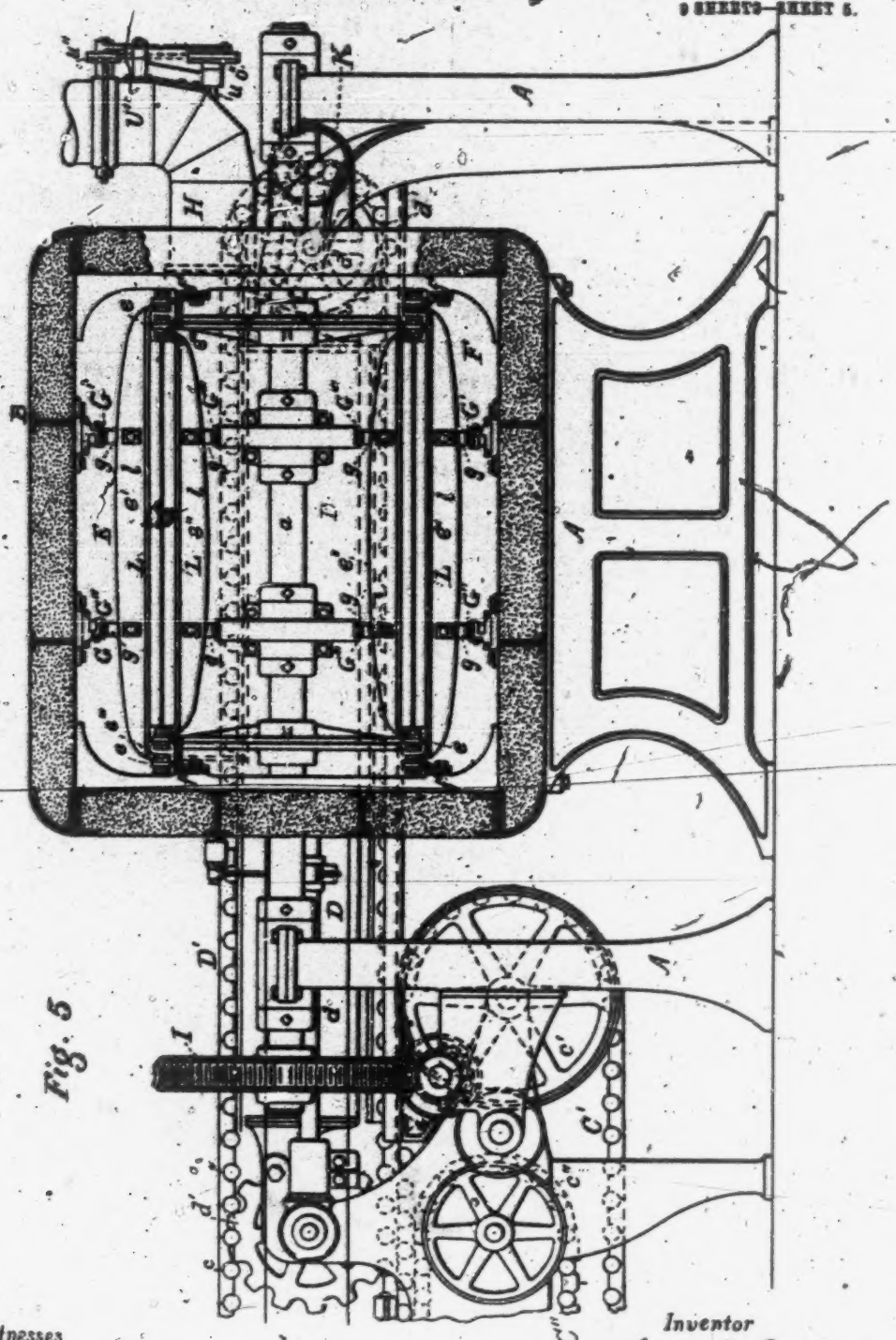

Fig. 5

Witnesses

G. H. Hosmer.

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No. 797,604. PATENTED AUG. 22, 1905.

H. D. PERKY.

MACHINE FOR PREPARING FOOD.

APPLICATION FILED DEC. 10, 1900.

9 SHEETS—SHEET 6.

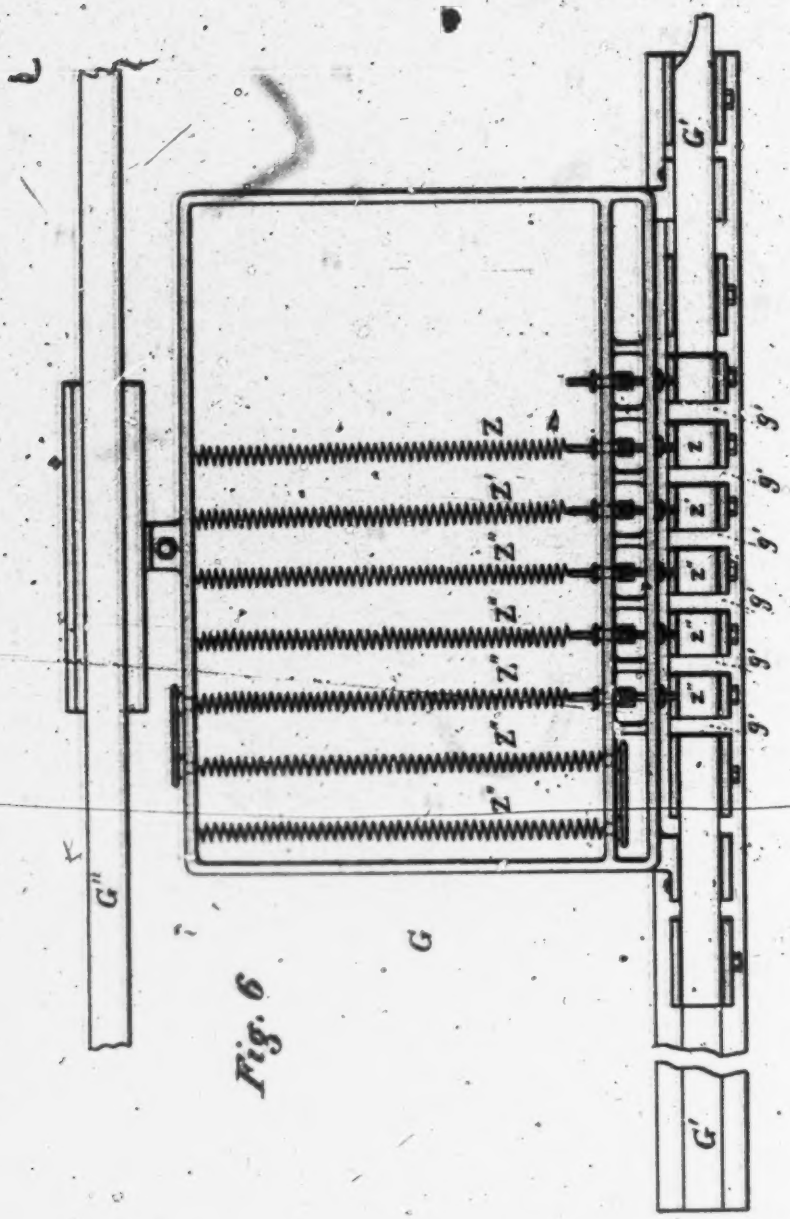

Fig. 6

Witnesses
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No. 797,604. PATENTED AUG. 22, 1905.

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MACHINE FOR PREPARING FOOD.

APPLICATION FILED DEC. 10, 1900.

9 SHEETS—SHEET 7.

Fig. 7

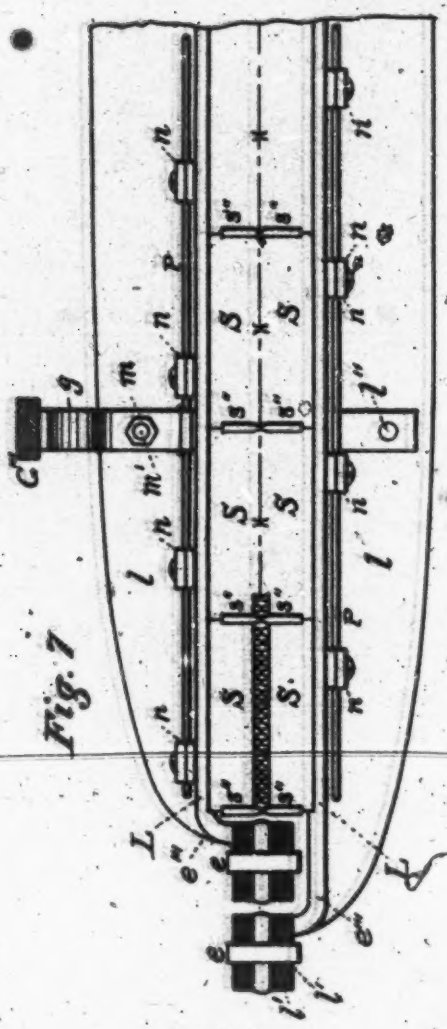


Fig. 8

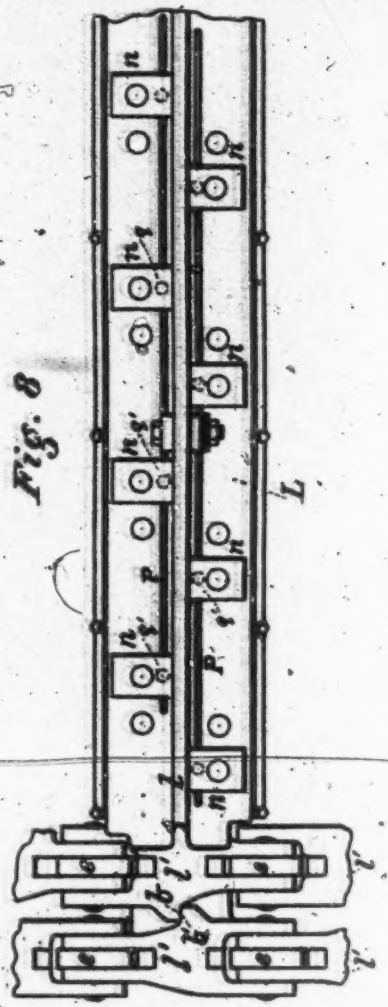
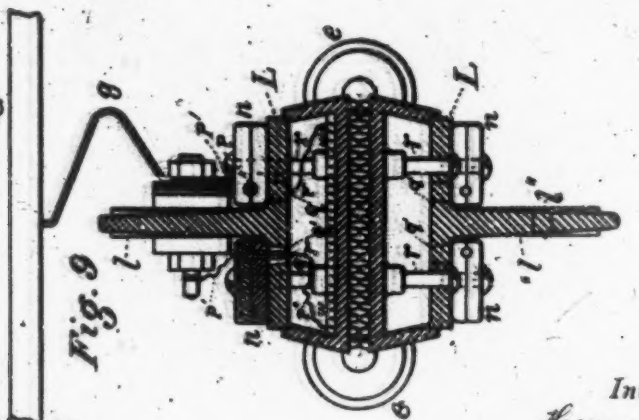


Fig. 9



Witnesses

G. H. Hosmer.

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No. 797,604. PATENTED AUG. 22, 1905.

H. D. PERKY.

MACHINE FOR PREPARING FOOD.

APPLICATION FILED DEC. 10, 1900.

9 SHEETS—SHEET 8.

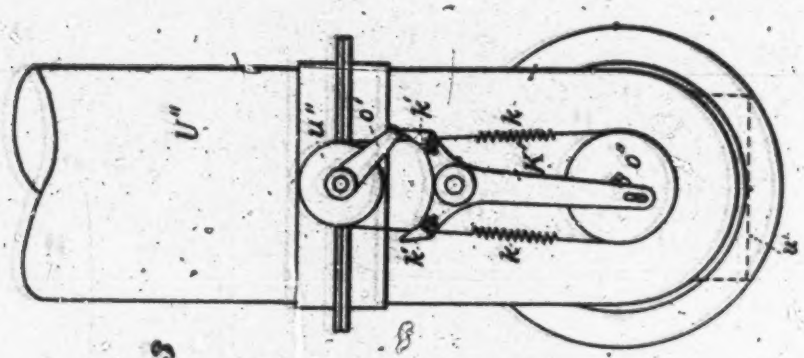

Fig. 13

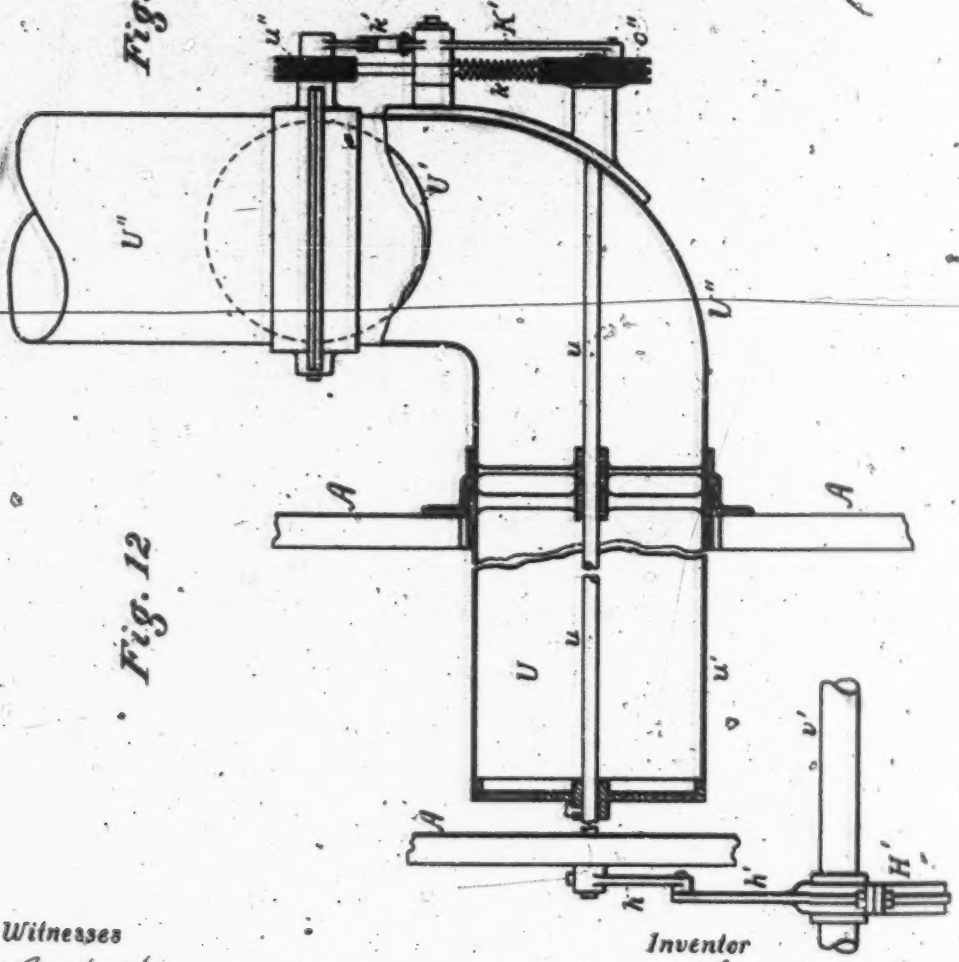

Fig. 12

Witnesses
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No. 797,604. PATENTED AUG. 22, 1905.

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MACHINE FOR PREPARING FOOD.

APPLICATION FILED DEC. 30, 1903.

3 SHEETS—SHEET 1.

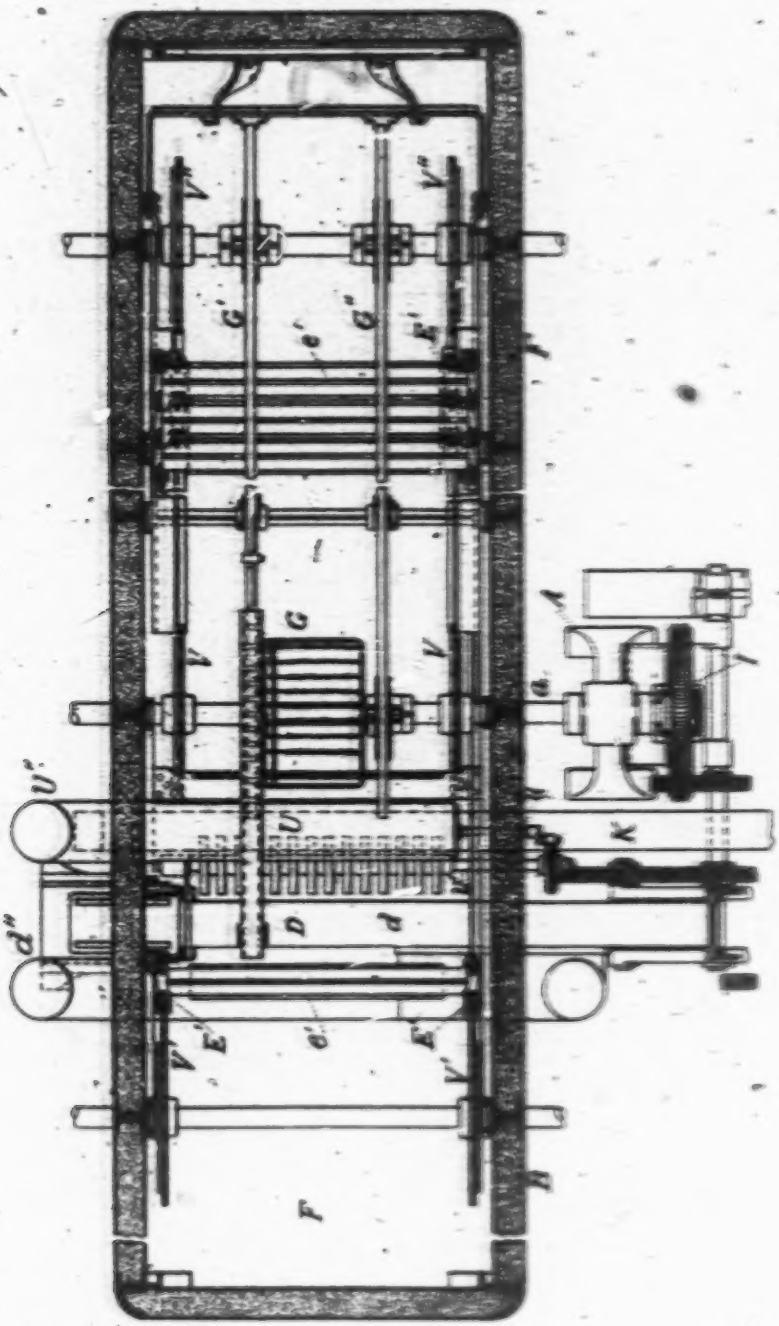

Fig. 14

Witnesses
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Geo. W. Anderson

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by E. W. Anderson
his Attorney

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF WORCESTER, MASSACHUSETTS, ASSIGNOR TO THE NATURAL FOOD COMPANY, OF NIAGARA FALLS, NEW YORK, A CORPORATION OF NEW YORK.

MACHINE FOR PREPARING FOOD.

No. 767,994. Specification of Letters Patent. Patented Aug. 23, 1904.

Application filed December 10, 1900. Serial No. 39,585.

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Worcester, in the county of Worcester and State of Massachusetts, have made a certain new and useful Invention in Machines for Preparing Food; and I declare the following to be a full, clear, and exact description of the same, such as will enable others skilled in the art to which it appertains to make and use the invention, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure 1 is a side view of one end portion of the oven, showing the feed-opening. Fig. 2 is a side view of the other end portion of the oven. Fig. 3 is a longitudinal section through the portion of the oven in which the fuel is located. Fig. 4 is a longitudinal section through the extended portion of the oven in which the heat is mainly applied. Fig. 5 is a transverse section through the feed-opening. Fig. 6 is a plan view of the electric cutter. Fig. 7 is a back view of one of the heaters or stove-sections, comprising a receiving stove-link and a covering stove-link, partly shown. Fig. 8 is a plan view of the end portions of the link-plates, showing the engagement thereof. Fig. 9 is a transverse section of a stove-section, comprising a receiving stove-link and a covering stove-link. Fig. 10 is a plan view showing the inside of a stove and its wiring. Fig. 11 is a longitudinal section of the same. Fig. 12 is a sectional view of a pneumatic transfer for the discharge. Fig. 13 is an end view of the same. Fig. 14 is a sectional plan view showing the features of the baking mechanism and pneumatic feed.

The object of the invention is to provide means for preparing from grain or other material in a continuous and rapid manner and in large quantities biscuit, crackers, and other articles of food; and the invention consists in the novel construction and combinations of devices, as hereinafter set forth.

In explaining the invention I have designed to set forth more particularly its application to the preparation of food from grain, having special relation to the fibered, filamentous, or shredded form of the reduced grain; but it will be apparent that by varying the faces of the stoves in an appropriate manner the invention may be more generally applied. So, also, I have described a mode of heating the stoves by electricity, as it is preferred; but other means of heating may be used.

In the accompanying drawings the letter A designates framework, usually of iron. B represents the oven wall or casing. C indicates a continuous feed; D, a pneumatic transfer for the feed; E, the continuous baking devices; F, the oven, which is of elongated form; G, the heating devices; H, a transfer device for the discharge; K, the conveyor or discharge for the baked biscuit or crackers.

The reducing devices may be of any known character; but I usually employ a series of grooved reducing-rolls, which shred the grain or crush it into fibrous or filamentous form, as described in Letters Patent No. 571,284, dated November 10, 1896.

The material is received upon the continuous trough-chain C', which is composed of trough-links, which move upon guideways or track-bars, said chain being carried by sprocket-wheels, of which the inner one is indicated at c'.

C'' represents the lower chain of cutter-links, and D' the upper chain of cutter-links, which are also suction-links, being open through or provided with a passage for the application of air-pressure. The lower chain of cutter-links is carried by sprocket-wheels, as indicated at c''. The upper chain of suction-links is also carried by sprocket-wheels, (indicated at d'.) The upper chain D' and the lower chain C'' are provided with cutter blades or knives e, which are arranged at intervals corresponding to the length of a chain section or width of the baking-band. Suitable trackways are provided in the framing for the links of the chains D' and C''.

The wall of the oven is suitably packed or lined with asbestos or other non-conductor of heat. The oven is of elongated form and, as shown in the drawings, extends at right angles to the direction of the feed. It is provided with an opening at f in the side near one end for the passage of the end of the feeding-chain D' of suction-links, this constituting with the chain of trough-links a continuous feed, whereby the material is brought into the oven over the baking irons or stoves. As

the trough-chain does not extend into the oven, a pneumatic device is provided to hold the material to the open or suction links, which are faced with wire-cloth, until it reaches position over the stove or baking-iron. The pneumatic device consists of an air-chamber *d*, to which is connected a suction-fan or exhaust by means of a pipe *d'*. The air-chamber is provided along its lower or mouth portion with a valve, or preferably with valves, *v*, which are operated by cam devices on a shaft *v'* to apply the air-pressure progressively as a section of the material is moving into position, when the cam devices operate simultaneously to close the valves in order to effect its deposit on the stove-link. For a further description of the feed and pneumatic transfer devices reference may be had to Letters Patent No. 681,856, dated August 27, 1901, in which I have explained the construction more at length.

The oven E, as hereinbefore mentioned, extends at right angles to the direction of the feed, the lateral opening *f* for which is much nearer one end of the oven than it is the other. At one end of the oven are provided sprocket-wheels V' for the endless outer baking-band or chain E' of receiving stove-links *e'*, and at the other end of the oven are the sprocket-wheels V'' for the inner baking-chain E'' of covering stove-links *e''*. Near and at one side of the opening *f* is provided a drive-shaft, carrying sprocket-wheels V for the inner end of said baking-band or covering-chain E''. In this construction, therefore, one of the baking-chains runs inside the other chain, which is longer than the first or inner chain and is uncovered in that portion of the oven where the feed is located, thereby forming an extension-loop for the inside feed or discharge. The covering stove-links are brought down into position on the receiving stove-links of the larger chain by the wheels V at one side of the feed. From this point the inner and outer stove-links continue together to the end of the oven and back to position at the side of the feed, where the discharge of the baked biscuit or crackers takes place.

Each chain consists of stove-links which are pivoted to each other, the pivotal axis or axis of bend of adjacent links being coincident or in line with the adjacent or meeting edges of the working or baking faces of the stoves and in the plane of such baking-faces.

The outer or receiving stove-link *e'* and the inner or covering stove-link *e''* constitute a stove-section, the parts of which must have an accurate fit in the movements, and to this end one chain, preferably the inner chain, is that which engages the sprocket-wheels of the driving-shaft *a*, while the outer chain is driven by the engagement of its links with those of the inner or driving chain. For this purpose each link of the inner chain is formed with arc-shaped shoulders or projections *b* to engage correspondingly-curved shoulders or projections *b'* of the outer stove-link. The stove-section thus formed of a receiving or outer stove-link and a covering or inner stove-link is made of proper length to take in a section of biscuit or cracker material as deposited by the feed. The outer and inner stove-links are each provided with antifriction-rollers (indicated at *c*) which run on suitable tracks or ways *f'* of the oven. As these links are designed to have the same pitch line, their tracks are arranged side by side and their body portions are formed with bent or angular arms *f''*, the bearings or rollers of which are axially flush with the faces of the stoves and axially in line with the edges of such faces, interferences being avoided by making the arms of one link longer than those of the other. In order to allow for expansion and contraction of the outer chain, each link is provided with a slightly elongated or enlarged opening for the connecting-pin. This construction keeps the working or baking faces of adjacent stoves together at their pivotal edges in moving around the curves, so that the tendency to rupture the material carried thereby is reduced to a minimum. The pivotal axis of the stoves lie in the baking-plane or plane of the baking-faces.

At one end of the oven an automatic take-up or tension is provided for the chain of stove-sections. This consists of a swinging shaft J, carrying the end sprocket-wheels V'' and being journaled in bearings in the vertical arms of the angle-levers J', whose horizontal arms are provided with adjustable weights J''. The movement of the baking-chain is slow and is communicated by means of a worm and a worm-wheel, as indicated at I.

The oven and stoves are preferably heated by means of electricity. To this end, the oven is provided with outer parallel bus-bars or conductor-bars G' G'' and with inner parallel contact-bars G'''. These contact conductor-bars are laterally arranged and parallel and are connected at convenient points to the source of supply. The contact-bars are also parallel to the baking-chains, and on one side the bars may be regarded as positive, the bars on the other side being negative.

It is designed that each stove or baking-iron shall take its heating charge independently in order to facilitate the replacement and repair of parts without undue interference with the baking operation of the machine. Contact is made with these bus-bars by means of the spring-brushes *g*, which are so bent or formed that their contact ends will be in the middle or radial plane of each stove-link, this being the most accurate and economical construction for running the curves of the bus-bars. Usually the contact-brush is formed of two leaves, one extending a little beyond the end of the other, so that the breaks

sude in the current at the cut-off intervals g' g' of the contact-bar G will not be so proportioned as to cause injurious sparking.

The contact-bars G' and G'' for the other chain of the stove-links are not usually extended around the feed end of the oven, as it is designed to cut off the electric action in this portion of the chain, where a baking heat is not needed. The contact-bars G''' for the inner chain are, however, continuous, and this chain is for nearly its entire length in baking position.

To reduce the electric action in the stove-links gradually and finally cut it off, a series of gradually-increasing resistances Z Z' Z'' is employed between the body portion of the contact-bar G' and its several separated portions or contact-sections s s' s'', which are separated from each other and from the main bar by the intervals or breaks g'. As the heads of the stove-links pass over this portion the current, taken off gradually by the several resistances in succession, will be dropped in each stove-link by degrees and finally to zero.

The outer and inner stove-links may be similar to each other, the longer roller-carrying arms of one link, however, extending beyond or encompassing the roller-carrying arms of the other link. Each link consists, according to the construction illustrated, of an elongated body portion or plate L, having a middle projection or rib l extending along its back, the plane of such projections or rib being radial with reference to its movement around the sprocket-wheels. The end arms or extensions of the rib are expanded to form the link connections, as at l'. In proper position with relation to each contact-bar is provided in the rib an opening or perforation l'', in which is seated a non-conducting bushing n, which is secured in position by and forms a bearing for the short conductor bolt or pin n', whereby the spring-brush g is also secured in position.

To the body-plate at each side of the rib l are connected detachable insulation strips or blocks n, preferably of porcelain, between which are seated the conducting-wires p p of the link, one wire serving for the entrance of the current and the other for its exit, or the wires will serve in connection with the alternating current. These wires are connected to their respective brushes g g by small flexible wires p' p', and from these same wires p' p', respectively, small terminal wires p'' p'' pass to the stove-wirings w of each stove or baking-iron through the lava plugs q, which are tapering in form and are seated in beveled openings q' in the body-plates at the sides of the middle rib, these plugs being held in position by the porcelain strips n when used.

The detachable stoves or baking-irons S are arranged in series along the body-plates transversely to the line of movement of the chain. Each stove consists of a rectangular casting, usually hollow or recessed in its outer portion or back, but having its inner or baking face formed to correspond with that of its fellow stove. The preferred construction is to form the baking-face with a surface distribution of pointed studs or projections designed to penetrate the material being cooked and carry the heat into deeper portions. These stoves or baking-irons are provided with dividing plates or knives, (indicated at s'',) which serve to indent or separate the material deposited on the stove-link into parts of convenient size to form crackers or biscuit.

The side walls or flanges of the inner stoves are of inclined formation or beveled, so that they will conform to each other in passing round the sprocket-wheels. On the floor or back of the baking-wall of the recess or chamber of the stove is laid insulating material or insulating-paint, on which is placed the distribution of fine wiring w required for the heating, this wiring being covered in by another layer of insulating material or paint. When each stove-wiring is independently connected or connected in parallel with the other stove-wirings to the link conductors p p, each stove is arranged for independent heating and may be detached without interfering with the other stoves. The recesses of the stoves are covered in with the link plate or body, to which the stoves are secured by means of short bolts or connections r, and in this manner the interior delicate wiring and insulation are effectually protected and additional insulation of air is provided.

To arrange for the clearance and discharge of the crackers or other product after baking, a lateral opening in the oven-wall is arranged near the location of the feed-opening, or the feed-opening f may be made of sufficient size to accommodate the end of the conveyer K, which extends from this location of its receiving end within the oven outward therefrom in a direction at right angles to the length of said oven. Leading to this conveyer is a guide or slide way T, which extends in an inclined or curved manner downward and from the faces of the stoves of the inner or shorter baking-chains as they pass around the upper parts of the inner sprocket-wheels. This guide or slide way is provided with an adjustable comb or clearing device T', having for use in connection with a studded baking-iron, such as has been before described, fingers t, designed to enter between the teeth or projections of the faces of the stoves. By such means as the stoves move around the wheel the biscuit or crackers will be loosened and guided off the stoves to the slideway, on which they will descend to a stop rib or flange t'.

Above the clearing device or comb T' is provided another clearer t', which is designed to

loosen the biscuit or crackers which may adhere to the stoves of the longer or outer chain and cause the same to fall upon the slideway T, above referred to.

The lower portion of the slideway T is located above and at the sides of the conveyer, and both are arranged at about the same radial distance from a shaft *a*, which carries a suction-head U, having a wire-cloth-covered mouth *a'*. This suction-head is connected to an air-exhaust by means of a curved pipe or otherwise. Suitable mechanism is employed to give this suction-head vibratory motion, its movement being quadrantal or through an arc of about seventy degrees. When it is turned toward the slideway T, the suction causes the crackers to adhere to the wire-cloth-covered mouth, whereby on the reverse movement of the head the crackers are carried over the conveyer, whereon they are dropped as the air-valve of the suction or exhaust is closed. In the drawings the exhaust-pipe *b* is indicated at U", the end of the suction-head U bearing in the end of said pipe, the latter carrying the cut-off valve or damper U', whose journal is provided with a pulley *a'*. On the end of the suction-head shaft is provided a crank-arm A, which is connected by a pitman *h'* with an eccentric H' on the shaft *a'*, the rotation of which causes a proper vibration of the suction-head. To move the air-valve or damper U', springs *k k* may be employed in connection with the cross-head or wheel *a''*, which is provided with an arm or catch *o'* to engage the trip and holding lever K', which is vibrated by means of a wheel *o''* on the suction-head shaft *a*. The lever K' has the trip-arms *k' k'*, which respectively engage the catch of the damper, according to the position in which it is thrown by the springs to open or close the air-pipe—that is to say, when the damper is open and the exhaust is on and the suction-mouth applied to the material on the slideway T. The damper is held in this position by engagement with one of the arms *k'* of the trip-lever. As the suction-head moves back over the conveyer the trip-lever is gradually moved until the damper is released from the trip-arm which held it and is suddenly closed by the spring tension, this movement also serving to effect the engagement of the damper-catch with the other trip-arm of the lever K'. The damper is opened in a similar way by the reverse movement of the trip-lever. In order to protect the stove-wirings from injury through short-circuiting or from other accidental increase of current, fuses are provided in the conductors *p' p'*, leading to the brushes, such fuses consisting usually of sections of fine copper wire, or the conductor-wire *p'* may constitute the fuse.

The pneumatic transfer to take the articles from the baking-chain links and deposit them on the conveyer-belt may be dispensed with because they will then readily slide down the guideway to the belt. In this case the slideway T is constructed without ledges to stop the biscuit or crackers.

It is not designed to confine this invention to the construction shown and described, as the stoves and other portions of the mechanism may be varied in ways known to those skilled in the art without departing from the principles involved.

What I claim as my invention, and desire to secure by Letters Patent, is—

1. A machine for preparing food consisting of a series of moving baking-stoves, conduction devices attached to each stove, independent conductors in connection with the conduction devices of each stove, and an electric-supply conductor common to such independent conductors, substantially as specified.

2. In a machine for preparing food, the combination with an endless series of moving baking-stoves, of conduction devices attached to each stove, moving conductors for supplying said conduction devices with electricity, and a fixed conductor common to said moving conductors, substantially as specified.

3. The combination with a body-plate, of a series of detachable stoves or baking-irons, cutting-plates, and means of attachment of said stoves and plates to said body-plates, substantially as specified.

4. An endless chain of link-plates, pivoted to each other, and a transverse series of detachable stoves or baking-irons, attached to each link-plate, substantially as specified.

5. The combination with an inner chain of stove-links, of an outer chain of stove-links engaging said inner chain, and extending beyond the same to form a reception-loop for the food and discharge, substantially as specified.

6. The combination with an endless covering baking-chain, of a longer endless receiving baking-chain having an extension for the feed beyond the shorter covering baking-chain, substantially as specified.

7. The combination with an endless inner baking-band, of an endless outer baking-band, having an extension beyond said inner baking-band for the feed, substantially as specified.

8. A stove-link plate having a back rib or projection extending lengthwise, and provided with expanded link-connection-bearing arms at its ends, substantially as specified.

9. The combination with side-by-side trackways of a receiving stove-plate and a covering stove-plate having bearing-arms of unequal length for such trackways, substantially as specified.

10. A link-plate having a series of detachable stoves connected thereto, and provided at its ends with link connections, and bearings axially flush with the faces of said stoves, substantially as specified.

11. The combination with an elongated link-

plate of a series of independent detachable stoves attached to said plate, and independent wiring for electric heating connected to each stove, substantially as specified.

12. An elongated heater-plate, having a back rib or projection carrying insulated conductors, insulated conductors extending along said plate, detachable stoves, connected to said plate, insulated wiring for said stoves, and conductor-wires extending from said wiring to the conductors extending along said plate, substantially as specified.

13. An elongated plate, having a back rib or projection, insulated conductors attached thereto, detachable insulation on each side of said rib or projection, conductors carried by such detachable insulation, stoves connected to the plate, insulated wiring on said stoves, and independent connecting-wires from such wiring to the conductors carried by said detachable insulation, substantially as specified.

14. In a machine for preparing food, the combination with a driving-wheel, and an endless driving-chain of baking-stoves engaging said driving-wheel, an endless driven chain of opposite baking-stoves, and means of engagement between the opposite stove-links of the driven chain, and driving-chain, substantially as specified.

15. In a continuous baking-machine, the combination with an endless outer or receiving chain of stove-links, of an endless inner or covering chain, of stove-links, sprocket-wheels, and automatic devices to allow for the expansion and contraction of such chains, substantially as specified.

16. In a continuous baking-machine, the combination with the endless outer or receiving chain of stove-links, and the sprocket-wheels, of the endless inner or covering chain of stove-links, and engaging devices of the latter, whereby the outer or receiving chain of stove-links is driven, substantially as specified.

17. The combination with a continuous pneumatic feed of a continuous baking device extending at right angles to the line of movement of such feed, substantially as specified.

18. The combination with an endless baking-band of a continuous pneumatic feed, substantially as specified.

19. The combination with an elongated oven, having a lateral opening for the feed, and track-ways, of an endless outer receiving baking-band, a shorter endless inner or covering baking-band, and means for heating, substantially as specified.

20. The combination with an elongated oven, having an opening for the feed and track-ways, of a long endless outer or receiving chain of stove-links, a shorter endless inner or covering chain of stove-links, and means for heating, substantially as specified.

21. The combination with an oven, having a lateral opening for the feed, and side-by-side trackways, of a long endless outer chain of stove-links, and a shorter endless chain of stove-links, having the same pitch-line, sprocket-wheels for such chains, and means for heating, substantially as specified.

22. The combination with an elongated oven, having a feed-opening, of a feed and a discharge at right angles to the length of the oven, a clearing-slideway, an endless outer or receiving baking-chain, a shorter endless inner or covering baking-chain, and trackways for said chains, substantially as specified.

23. The combination with a long endless outer baking-band, of a shorter endless inner baking-band, clearing devices for such bands, and feeding and discharging devices extending within the loop of the outer band, and at right angles to the length thereof, substantially as specified.

24. The combination with an oven, and an endless baking-band, of the wiring of such band, the contact-bars extending parallel to such band, and the contact-brushes, substantially as specified.

25. The combination with an oven, its trackways, and contact-bars, of the endless chains of stove-links, the link conductors, the series of stoves or baking-irons connected to said links, the wiring of said stoves, and the spring-brushes adapted to engage the contact-bars, substantially as specified.

26. In a baking-machine, the combination with an endless feed, of an endless baking-chain, and conducting devices for the application of electricity to said baking-chain, substantially as specified.

27. In a baking-machine, the combination with endless-motion carrying devices of endless-motion feeding devices, and stoves or heaters connected to said carrying devices, and means for heating the same, substantially as specified.

28. The combination with endless sectional baking mechanism, of an endless pneumatic feed, and an automatic discharge, substantially as specified.

29. In a machine for preparing food, the combination with a continuous feed and endless baking-bands moving at right angles to the direction of the feed, or baking the material in sections, means for indenting the material and locking the same together at points to secure compactness with lightness of structure, and means for discharging the baked product upon a conveyer, substantially as specified.

30. A continuous baking-machine, comprising an endless chain of baking-links upon which the material is received, an endless chain of baking-links adapted to cover in the material upon the links of the first chain, means of engagement, whereby the links of

the two baking-chains are run in exact relation to each other, and means for heating the baking-chains, substantially as specified.

17. A machine for preparing food, comprising two endless chains of links, and means of engagement between said chains, baking-irons connected to said links and wired for electric heating in connection with brushes of said links, conductor-bars in contact with which the brushes of the links move, and means for automatically cutting off the electric action where it is unnecessary, substantially as specified.

18. In a machine for preparing food, the combination with moving stoves, of the insulated line-wiring connected thereto, the electric conductors extending parallel to the line of movement of such stoves, and the moving brushes in connection with said wiring and engaging said electric conductors, substantially as specified.

19. The combination with moving stoves, of the conduction devices attached to said stoves, the electric conductors extending parallel to the line of movement of such stoves, the moving brushes in connection with said conduction devices and engaging said electric conductors, and an automatic graduated cut-off for the electric action, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

HENRY D. PERKY.

Witnesses:

ALBERT H. CHAFFEE,

J. R. GILKESON.

C. E. SMITH.

MEANS FOR MANUFACTURING FILAMENTOUS BISCUIT.

APPLICATION FILED JAN. 23, 1912.

1,195,114.

Patented Aug. 15, 1916.

2 SHEETS—SHEET 1.

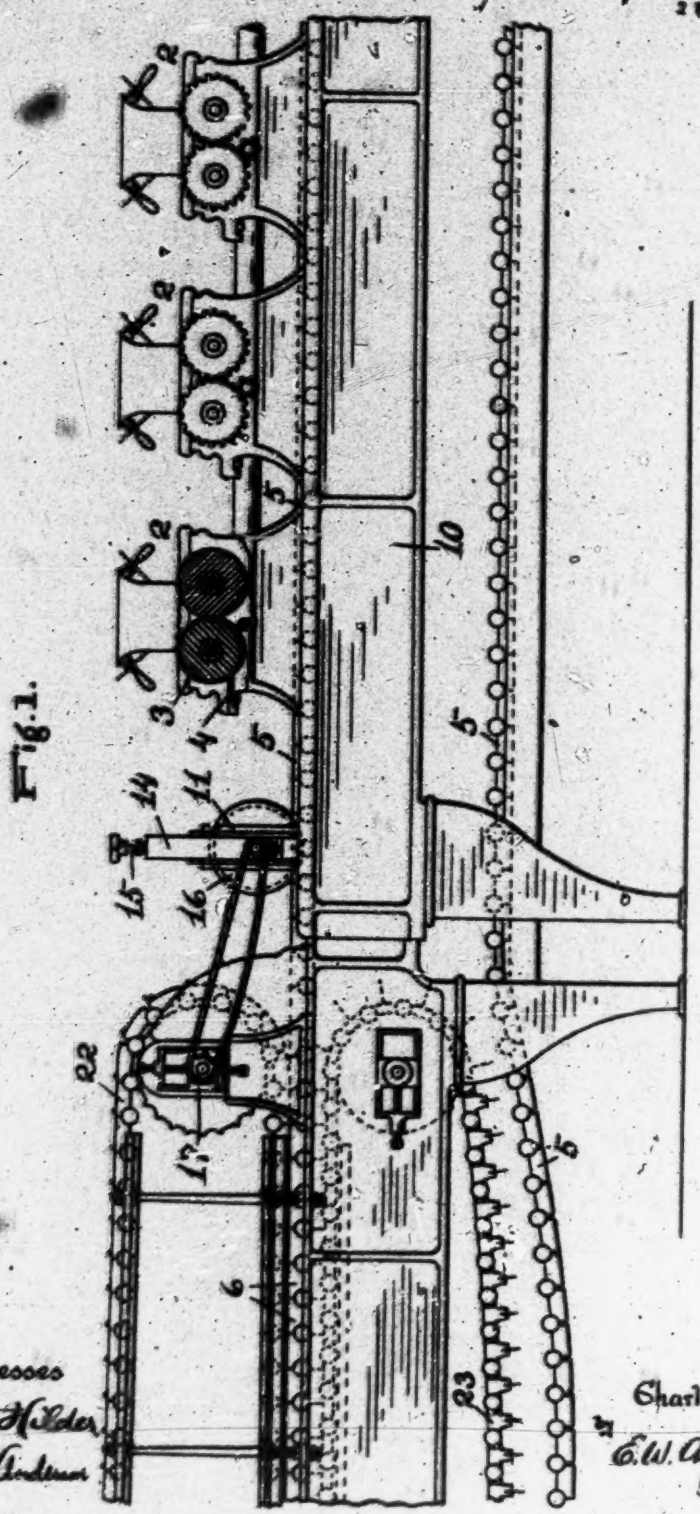

Fig. 1.

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MEANS FOR MANUFACTURING FILAMENTOUS BISCUIT.

APPLICATION FILED JAN. 23, 1912.

1,195,114. Patented Aug. 15, 1916.

2 SHEETS—SHEET 2.

Fig. 2.

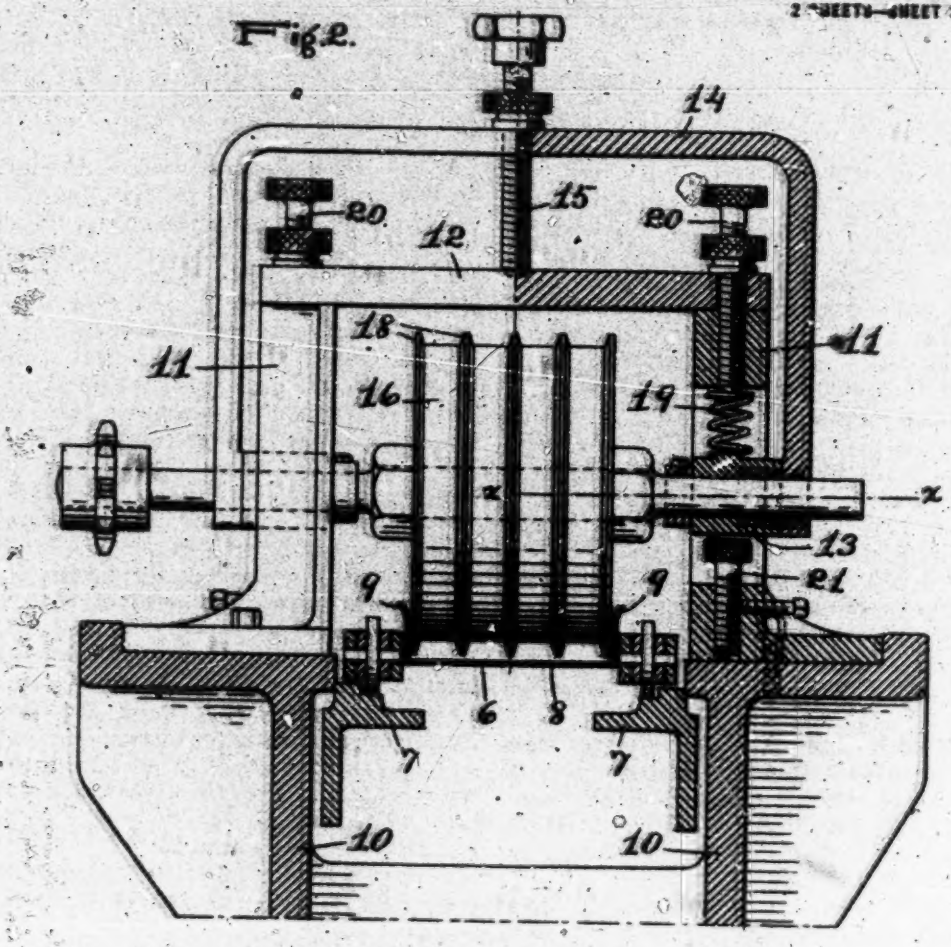
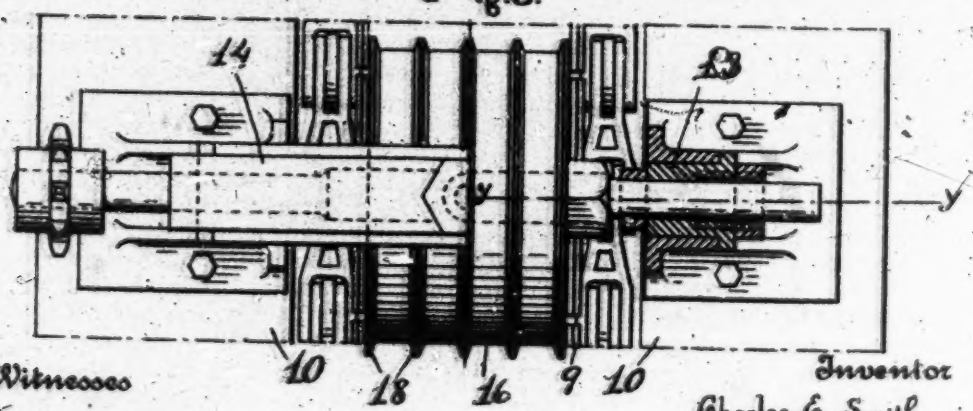


Fig. 3.



Witnesses

Stuart Hilder.

Frances M. Andrus.

Inventor

Charles E. Smith.

E. W. Anderson & Son

his Attorneys

UNITED STATES PATENT OFFICE.

CHARLES E. SMITH, OF NIAGARA FALLS, NEW YORK, ASSIGNOR TO THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK.

MEANS FOR MANUFACTURING FILAMENTOUS BISCUIT.

1,195,114. Specification of Letters Patent. Patented Aug. 15, 1916.

Application filed January 22, 1912. Serial No. 672,893.

To all whom it may concern:

Be it known that I, CHARLES E. SMITH, citizen of the United States, resident of Niagara Falls, in the county of Niagara and State of New York, have made a certain new and useful Invention in Means for Manufacturing Filamentous Biscuit; and I declare the following to be a full, clear, and exact description of the same, such as will enable others skilled in the art to which it appertains to make and use the invention, reference being had to the accompanying drawings, and to letters or figures of reference marked thereon, which form a part of this specification.

Figure 1 is a side view of a roll machine illustrating the invention. Fig. 2 is a transverse view, enlarged and partly in section, on line *y—y* Fig. 3. Fig. 3 is a top view enlarged and partly in section on line *x—x* Fig. 2.

The object of the invention is to provide means for manufacturing filamentous biscuit of smaller size than the width of the reducing rolls, and it consists in the novel construction and combinations of devices, as hereinafter set forth.

Roll machines for the manufacture of filamentous biscuit are of considerable size, the grooved reducing rolls being usually made about five inches long, because smaller rolls would materially increase the complication and expense of connected apparatus for preparing and feeding the grain, as well as of the rolls themselves, considered in relation to the production. The band of piled filaments which is formed on the receiver must be subdivided into biscuit forms, and this has been accomplished by means for pinching the band transversely, this pinching serving not only to subdivide the band into biscuit sections, but also to compress the filaments together at the lines of subdivision, so that each biscuit form is an entirety, its filaments being pinched together and securely joined at their ends. The width of these biscuit forms, however, corresponds with the length of the reducing rolls. In order to make biscuit of less width from such a band of filaments, it is designed to pinch the band longitudinally, that is to say in the direction in which the filaments lie, substantially parallel to each other, in the receiver; and as these filaments are loosely piled they are designed to be brought somewhat closer together, so that the pinching will be effective in forming the edges of the biscuit. In the accompanying drawings, illustrating the mechanism preferred to accomplish these results, the numeral 2 indicates the reducing roll heads, having finely grooved rolls 3, from which the grain, softened by water and cured in the usual manner, is discharged in filament form by discharging strips 4 upon a moving receiver 5, which is in the form of a belt of links 6, which run upon a suitable track 7. The link 6 has a flat bottom 8 and lateral flanges 9.

Means are provided to produce longitudinal divisional creases in the layers or band of filaments upon the receiver, said means consisting preferably of a flanged roller of proper width to run easily between the flanges of the links 6. To this end, supports 11 are secured to the framing 10 at the sides of the track, and these supports are connected by a transverse bar 12, and provided each with a vertical slot, through which passes a bearing lug 13 of a bail-form frame 14 having an adjusting screw 15.

The creasing roller 16, of proper width to run easily between the flanges of the links 6, is provided with a shaft whose journals are seated in the bearing lugs of the frame 14; and, as it is preferred to run the roller by a positive drive, the shaft is provided with a sprocket wheel which is geared to a sprocket wheel 17 in connection with the belt-moving mechanism. On the roller 16 are circumferential V-form or laterally beveled flanges 18, designed to crease or pinch the band of filaments longitudinally against the bottoms of the links of the receiver belt. This roller is suspended by the bail-frame 14 and its adjusting screw, its shaft engaging the bearing lugs of said bail-frame; and engaging these lugs on top or in the upper portions of the slots of the supports 11 are springs 19, which, in turn, are in engagement with adjusting screws 20, seated in said supports. In this way it is designed to regulate the pressure of the springs interposed between the bearings of the creasing roller and the support, to compensate for the adjustment of the yieldable bail-form frame. Inequalities of motion of the receiver and variation in the consistency of the filament material are also provided for.

The adjustable screw 15 of the bail-form frame, bearing upon the support, is capable of being lifted and separated therefrom under strain. Extending into the supports 11 below the bearing lugs are check screws 21, whereby the downward movement of the roller 16 is limited and the thickness of the layer is gaged. The link receiver belt is designed to pass between an upper endless belt 22 of cutting or pinching links and a lower endless belt 23 of cutting or pinching links, the links of each belt having transverse flanges which operate between the carrying links 6 of the receiver. The smooth surface of the roller 16, between its flanges, serves to somewhat compress the filaments together and shape the tops of the sections of the band of filaments, so that they are made of even thickness. The beveled form of the flanges of the roller is designed not only for compressing the filaments laterally, but also to give form to the sides of each section or subdivision and to provide that the flanges shall leave the band of filaments easily and without adhesion. By these devices it is designed that the band of longitudinal filaments piled on the receiver shall be creased or pinched longitudinally and transversely, to subdivide it into small uniform sections. Owing to the preferably limited number of filaments piled upon each other it is quite open in structure and freely pervious to air, and it is designed that the longitudinally creasing means shall compress the band of filaments to substantially close the interstices thereof.

Having thus described my invention, what I claim as new and desire to secure by Letters Patent is:

1. In a machine of the class described, a support, a yieldable frame having an adjustable device bearing upon said support and capable of being lifted and separated therefrom under strain, and a creasing roller having bearings in said frame and yieldable therewith.

2. In a machine of the class described, a support, a yieldable frame having an adjustable device bearing upon said support and capable of being lifted and separated therefrom under strain, a creasing roller having bearings in said frame and yieldable therewith, and adjustable means underlying said bearings for limiting the downward movement of said frame and of said roller.

3. In a machine of the class described, a support, a yieldable frame having an adjustable device bearing upon said support, a creasing roller having bearings in said frame and yieldable therewith, springs interposed between said bearings and said support, and means for adjusting the tension of said springs.

4. In a machine of the class described, a support, a yieldable frame, an adjustable screw threaded in the central portion of said frame and having a bearing upon said support capable of being lifted and separated therefrom under strain, a creasing roller having bearings in said frame and yieldable therewith, springs interposed between said bearings and said support, and means for adjusting the tension of said springs.

5. In a machine of the class described, a support, a yieldable frame, an adjustable screw threaded in the central portion of said frame, having a bearing upon said support capable of being lifted and separated therefrom under strain, a creasing roller having bearings in said frame, springs interposed between said bearings and said support, screws upon said support for adjusting the tension of said springs, and screws underlying said bearings for limiting the downward movement of said frame and of said roller.

6. In a machine of the class described, a support bridging the track of a movable receiver and provided with slots, a yieldable frame having lateral arms engaging said slots, a central adjustable screw carried by said frame and having a bearing upon said support, a creasing roller having bearings in said arms, springs interposed between said arms and said support, screws threaded in said support and engaging said springs, and check screws underlying said bearings to limit the downward movement of said frame and of said roller.

In testimony whereof I affix my signature, in presence of two witnesses.

CHARLES E. SMITH.

Witnesses:
JAS. TRAVERSE,
E. HANNEL.

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G. M. ANDERSON.

MACHINE FOR MANUFACTURING FILAMENTOUS BRICKETS.

APPLICATION FILED JULY 12, 1927.

1,834,429.

Patented Mar. 23, 1930.

4 SHEETS—SHEET 1.

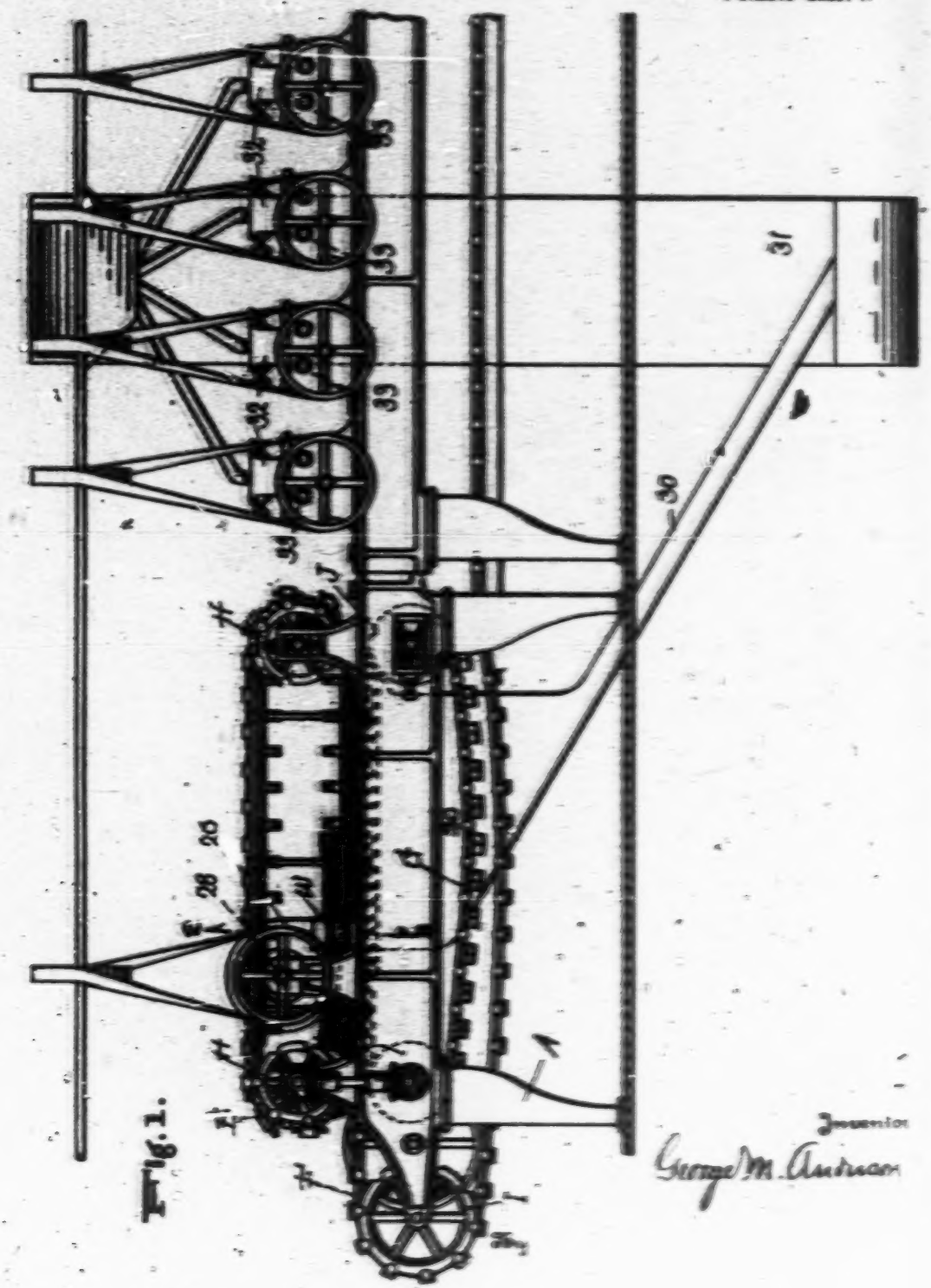


Fig. 1.

Inventor
George M. Anderson

G. M. ANDERSON.

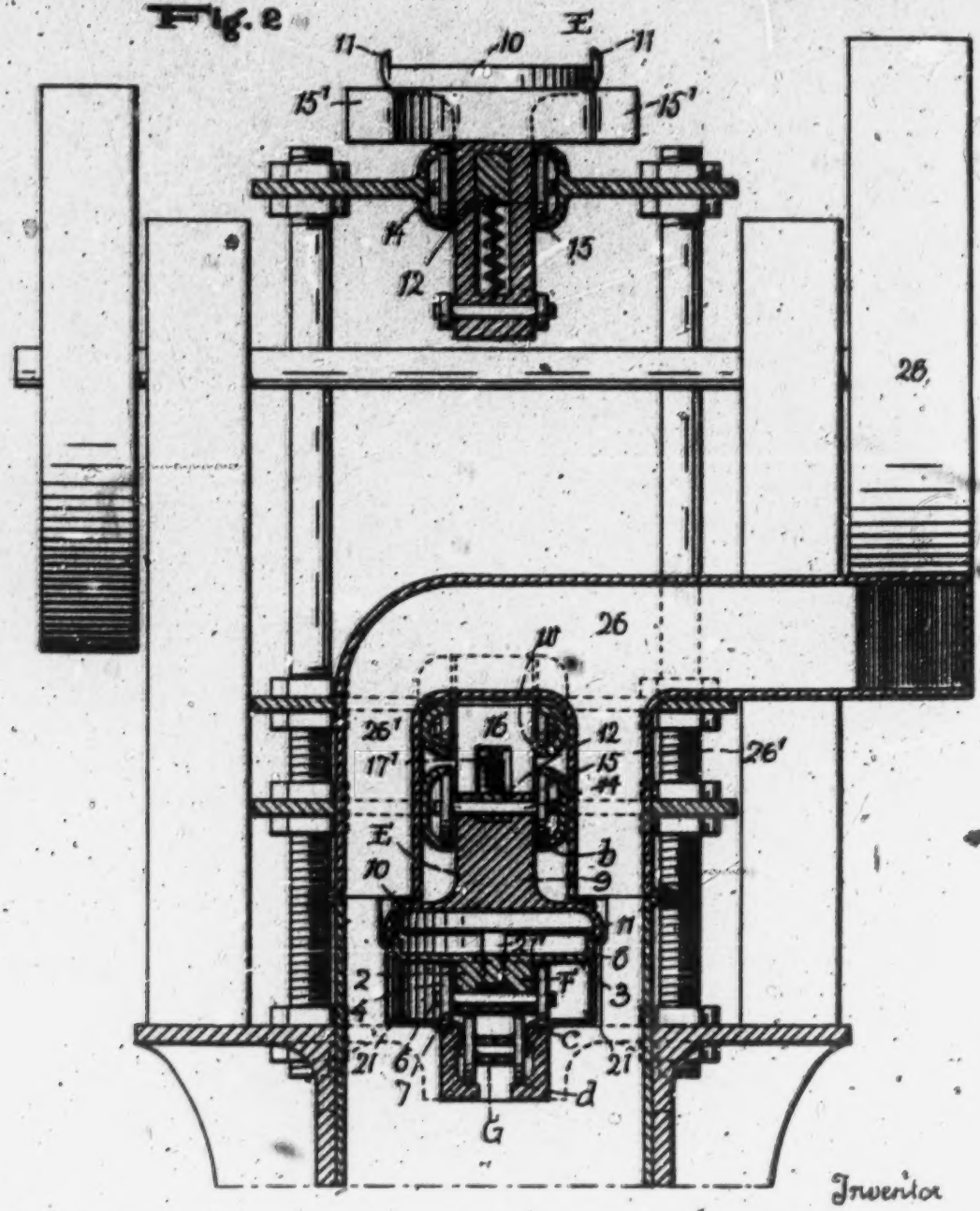
MACHINE FOR MANUFACTURING FILAMENTOUS BISCUITS.

APPLICATION FILED JULY 17, 1917.

1,334,429. Patented Mar. 23, 1920.

4 SHEETS—SHEET 2.

Fig. 2



Inventor

George M. Anderson

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G. M. ANDERSON.

MACHINE FOR MANUFACTURING FILAMENTOUS BISCUITS.

APPLICATION FILED JULY 17, 1917.

1,334,429. Patented Mar. 23, 1920.

4 SHEETS—SHEET 3.

Fig. 4.

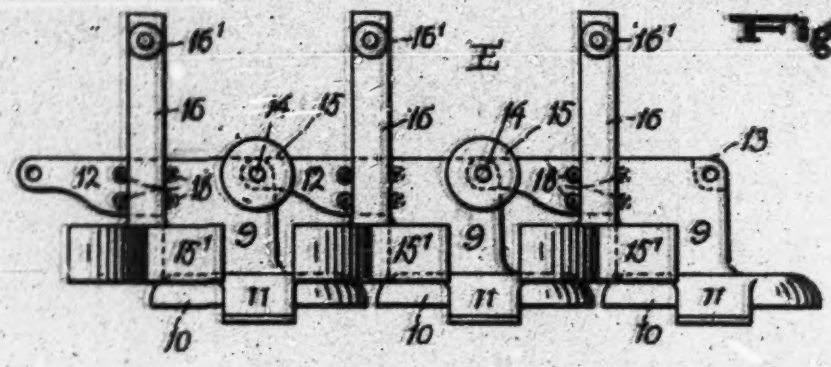


Fig. 5.

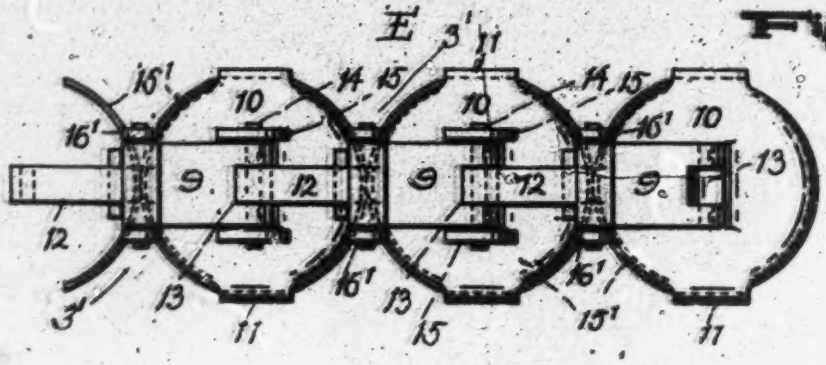
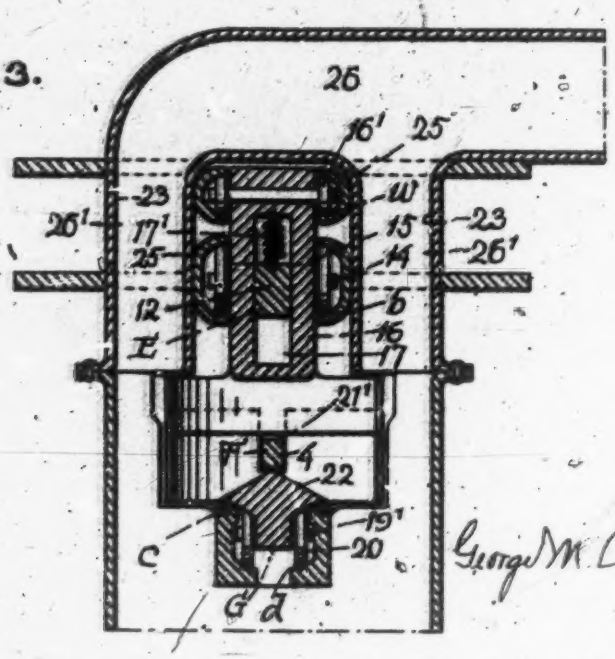


Fig. 3.



Inventor.

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G. M. ANDERSON.

MACHINE FOR MANUFACTURING FILAMENTOUS BISCUITS.

APPLICATION FILED JULY 17, 1917.

1,334,429. Patented Mar. 23, 1920.

4 SHEETS—SHEET 1.

Fig. 6.

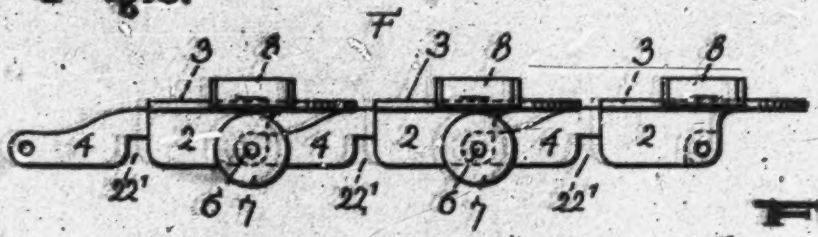


Fig. 7.

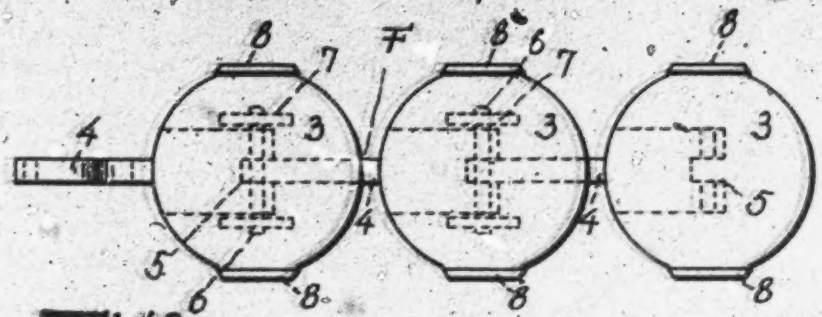


Fig. 8.

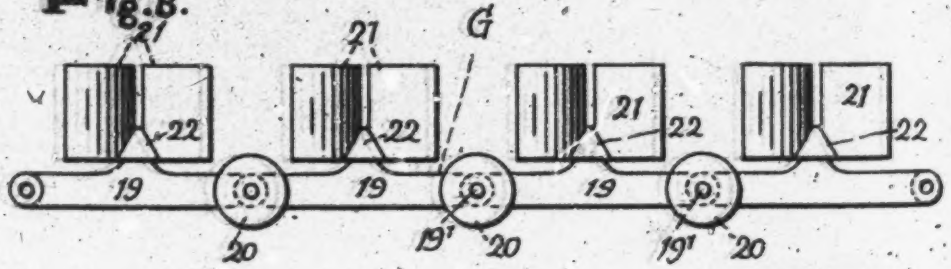
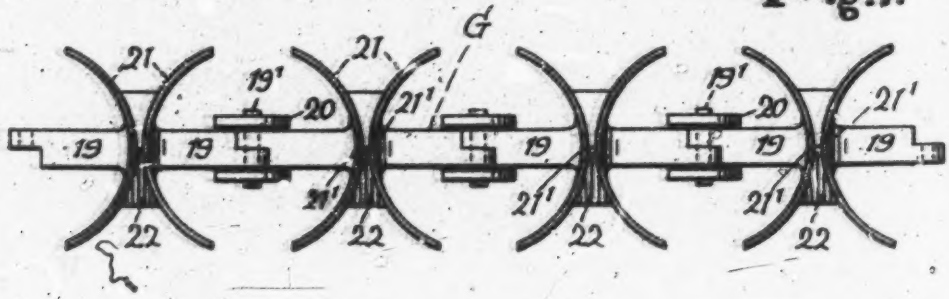


Fig. 9.



Inventor

George M. Anderson

UNITED STATES PATENT OFFICE.

GEORGE M. ANDERSON, OF WASHINGTON, DISTRICT OF COLUMBIA, ASSIGNOR TO THE SHREDDED WHEAT COMPANY, A CORPORATION OF NEW YORK.

MACHINE FOR MANUFACTURING FILAMENTOUS BISCUITS.

1,334,429. Specification of Letters Patent. Patented Mar. 23, 1920.

Application filed July 17, 1917. Serial No. 181,128.

To all whom it may concern:

Be it known that I, GEORGE M. ANDERSON, a citizen of the United States, resident of Washington, District of Columbia, have made a certain new and useful Invention in Machines for Manufacturing Filamentous Biscuit; and I declare the following to be a full, clear, and exact description of the same, such as will enable others skilled in the art to which it appertains to make and use the invention, reference being had to the accompanying drawings, and to letters or figures of reference marked thereon, which form a part of this specification.

Figure 1 is a side view of the invention as applied.

Fig. 2 is a section on the line 2—2, Fig. 1.

Fig. 3 is a similar view with the belts moved the length of half a link.

Fig. 4 is a detail side view of a section of the upper belt.

Fig. 5 is a plan view of the same.

Fig. 6 is a detail side view of a section of the middle belt.

Fig. 7 is a detail plan view of the same.

Fig. 8 is a detail side view of a section of the lower belt.

Fig. 9 is a detail plan view of the same.

The invention has relation to machines for manufacturing filamentous biscuit, wherein a continuous band of filaments is laid down from the shredding or reducing machines upon a moving carrier or belt, said band being usually transversely indented or cut in straight lines, the object of the present invention being the economical production of a round or rounded biscuit. In carrying out this object means are provided transversely dividing the band of filaments on curved or crooked lines, approximately triangular parts of the band of filamentous material being thereby cut away between the biscuit, means being provided to convey these cut-away portions of the filamentous band to the hoppers of the shredding machines, to be again used or shredded with other grain fed to said hoppers.

The invention consists in the novel construction and combinations of parts, as hereinafter set forth.

In the accompanying drawings, illustrating the invention, the letter A designates the frame of a machine for cutting the endless band of filaments into uniform sections, said machine shown and described generally in Letters Patent No. 681,650, dated August 27, 1901, and the present invention including certain modifications of this patented machine, as hereinafter explained. The frame A is provided with overlying tracks, *b*, *c* and *d*, upon which the endless upper, middle and lower chain belts, E, F and G, respectively travel, said belts passing over end sprocket wheels H, I and J.

The middle belt F constitutes an endless sectional pan, having between the sections or links thereof narrow intervals for passage of the upper and lower cutter blades 15′ and 21. The cutter blades 21 of the lower belt pass upwardly in succession between the sections of the middle belt, entering sufficiently therebetween to lift the filamentous material somewhat and to coact with the blades of the upper cutter belt.

The links 2 of the middle belt F each carry, rigidly connected therewith, a pan or receptacle 3, and are provided respectively with a reduced extension 4, the latter engaging at one end with a central seat 5 of the adjacent link, the links being pivoted together by transverse pins 6, located centrally of the pans 3 and carrying end rollers 7, traveling upon the tracks *c*. Each pan 3 is substantially circular and is provided with short lateral upwardly extending flanges 8.

The links 9 of the upper belt E each carry, rigidly connected therewith, a depending cover plate 10, overlying and of similar form to that of the pan 3 corresponding thereto, said cover plate having downturned lateral flanges 11, of similar dimensions to and coöperating with the flanges 8 as hereinafter stated. Each link 9 is provided with a reduced extension 12, engaging at one end with a central seat 13 of the adjacent link, the links being pivoted together by transverse pins 14, located centrally of the cover plates and having end rollers 15, traveling upon the tracks *b*.

The arcuate knives 15′ of the upper belt are connected in pairs, each pair to a vertical stem or shank 16, said shank provided with a horizontal slot 17, the latter being engaged by the reduced extension 12 of a link 9, there being one pair of knives to each said link. The shank 16 has vertical reciprocatory movement in a suitable guideway of the link 9, said guideway usually formed by rollers 18, carried by said link. The arcuate knives 15′ are concentric with and overlie the arcuate spaces between the pans 3.

The links 19 of the lower cutter belt G are pivoted together by transverse pins 19', carrying rollers 20, traveling upon the tracks *d*, and each link carries a pair of arcuate knives 21, cooperating with the knives 15' of the upper belt in cutting the biscuit.

The cover plates 10 of the upper belt E are preferably rounded or beveled at the margins, to gather the filamentous material somewhat and give it shape as it presses thereon in its downward movement. At the adjacent edges of the sections this marginal bevel of the cover plates serves to compress the filamentous material against the rising blades of the lower knives 21, in this manner facilitating the action of the knives of the upper belt in their descent, the upper and lower knives having a shearing action.

The upper and lower cutter blades or knives will, in the cutting operation, inclose each biscuit, except at the portions of the sides bounded by the flanges 8 and 11, these flanges inclosing such portions of the biscuit, which is in this way entirely inclosed and guarded against the blast hereinafter described.

In order to effect the reciprocation of the cutter blades of the upper belt, inclined or cam tracks *c* are provided, above the track *b*. In the operation of the machine, rollers 16' of the knife shanks of the upper belt will enter the cam tracks and, traveling downwardly therein, will depress the knives 15 to make the cut, and then raise said knives, withdrawing the same from the filamentous material. The upper knives are held normally in raised position by springs 17'.

The three endless belts travel at the same rate of speed, and are accurately formed and geared, in order that the action of the upper and lower knives shall be neat and close.

The filamentous material laid down upon the middle belt F by the reducing machines will fill the pan sections of the belt and will bridge the narrow tapering spaces 3' between the pan sections.

The tracks *c* and *d*, whereon travel the rollers of the middle and lower belts, as also the links of these belts, are of a breadth considerably less than the width of the pans 3 and of the filamentous band from which the biscuit are cut, so that the triangular pieces cut from said band in the making of the rounded biscuit will have their descent or fall facilitated. Transverse inclined bridge blocks 22 are located between the knives 21 of the lower belt G, and are of a breadth (or length transversely) somewhat in excess of the breadth of the tracks *c* and *d* and the links of the belts traveling thereupon, whereby the filamentous material deposited between the pans 3 of the middle belt and cut from between the rounded biscuit, will in falling be directed outwardly and enabled to drop freely. In the rise of the lower knives 21, the bridge blocks 22 between said knives engage lower notches 23' of the reduced extensions 4 of the middle belt, said notches having rounded lower corners. In this way the lower knives are accurately guided in making the cut. The reduced extensions 4 of the links 2 of the middle belt F fit within central upper notches 21' of the knives 21 of the lower belt G.

The spaces at each side of the belts E and F are closed in at the outer sides by vertical walls 23, and the upper cutter belt and its knives are inclosed at 25, forming a blast chamber 26, located at the lower part of the cam tracks *c* and through the branches 26' of which a blast of air is delivered by fan 28. This blast chamber extends downwardly at both sides of the overlying belts, and the breadth of the track *b* and of the links of the belt traveling thereon being less than the width of the pans 3, the branches of the blast chamber overlie the lateral margins of the biscuit and of the filamentous band. The blast chamber 26 is suitably closed in at the ends.

Located below the blast chamber 26 is a chute 30, also suitably closed in at the sides and ends, and through which the blast of the fan will carry the triangular pieces of the filamentous band cut from between the rounded biscuit, as also all loose filaments or scrap material located upon the belts and outside the lines of the inclosed biscuit, and, being assisted by gravity, will convey these pieces and material to an elevator 31, whereon they will be deposited and carried upwardly, being delivered from said elevator to the hoppers 32 of the reducing machines 33.

I claim:

1. In a machine for manufacturing filamentous biscuit, means for reducing the material to filaments, a moving carrier upon which the filaments are deposited in a continuous band, means for cutting said band transversely to form the biscuit, and waste removing means operating simultaneously with the cutting means for directing a blast of air downwardly at each side of that portion of the band engaged by the cutting means.

2. In a machine for manufacturing filamentous biscuit, means for reducing the material to filaments, a moving carrier upon which the filaments are deposited in a continuous band, means for cutting said band transversely to form the biscuit and for covering and protecting the biscuit, and waste removing means operating simultaneously with the cutting means for directing a blast of air downwardly at each side of that portion of the band engaged by the cutting means.

3. In a machine for manufacturing fila-

mentous biscuit, means for reducing the material to filaments, an endless carrier chain belt having pans upon which the filaments are deposited in a continuous band, an upper endless chain belt having covers for said pans, a lower endless cutter belt, upper cutters carried by the cover belt, and waste removing means operating simultaneously with the cutters for directing a blast of air downwardly at each side of that portion of the band engaged by the cutters.

4. In a machine for manufacturing filamentous biscuit, means for reducing the material to filaments, an endless carrier chain belt having pans upon which the filaments are deposited in a continuous band, an upper endless chain belt having covers for said pans, a lower endless cutter belt, upper cutters carried by said cover belt, lateral tracks for the carrier belt, the cover belt, the lower cutter belt and the upper cutters all located within the lateral bounding edges of the links of said belts, and waste removing means operating simultaneously with the cutters for directing a blast of air downwardly at each side of that portion of the band engaged by the cutters.

5. In a machine for manufacturing filamentous biscuit, means for reducing the material to filaments, an endless carrier chain belt having pans upon which the filaments are deposited in a continuous band, an endless chain belt having covers for said pans, a lower endless cutter belt, upper cutters carried by the cover belt, lateral tracks for the carrier belt, the cover belt, the lower cutter belt and the upper cutters all located within the lateral bounding edges of the links of said belts, a housing for the tracks of the cover belt and the upper cutters, the pans of the carrier belt projecting laterally over and covering the tracks thereof, and waste removing means operating simultaneously with the cutters for directing a blast of air downwardly at each side of that portion of the band engaged by the cutters.

6. In a machine for manufacturing filamentous biscuit, means for reducing the material to filaments, an endless carrier chain belt having pans upon which the filaments are deposited in a continuous band, an endless chain belt having covers for said pans, a lower endless cutter belt, upper cutters carried by the cover belt, lateral tracks for the carrier belt, the cover belt, the lower cutter belt and the upper cutters all located within the lateral bounding edges of the links of said belts, a housing for the tracks of the cover belt and the upper cutters, the pans of the carrier belt projecting laterally over and covering the main portions of the tracks thereof and of the lower cutter belt, the last named belt having inclined bridge means between the links thereof and projecting over and covering the tracks thereof and of the carrier belt at points between the links of both belts, and waste removing means operating simultaneously with the cutters for directing a blast of air downwardly between the links of the carrier belt and at each side of that portion of the filamentous band engaged by the cutters.

In testimony whereof I affix my signature in presence of two witnesses.

GEORGE M. ANDERSON.

Witnesses:
W. R. Baum,
Stuart Hilder.

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July 13, 1926. 1,592,768

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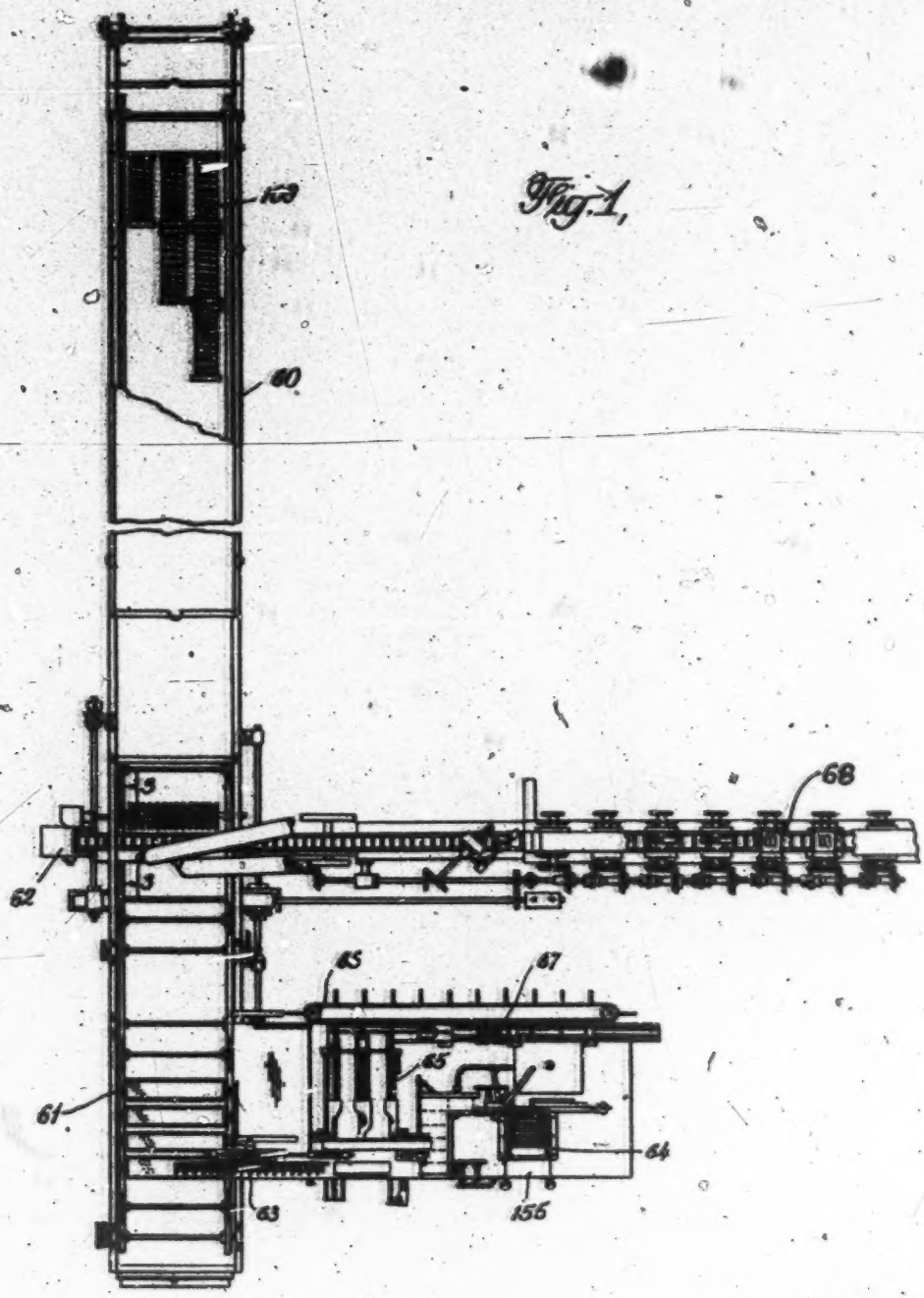
MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

Filed April 30, 1926 19 Sheets-Sheet 1

Fig. 1.



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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

Filed April 30, 1925 15 Sheets-Sheet 2

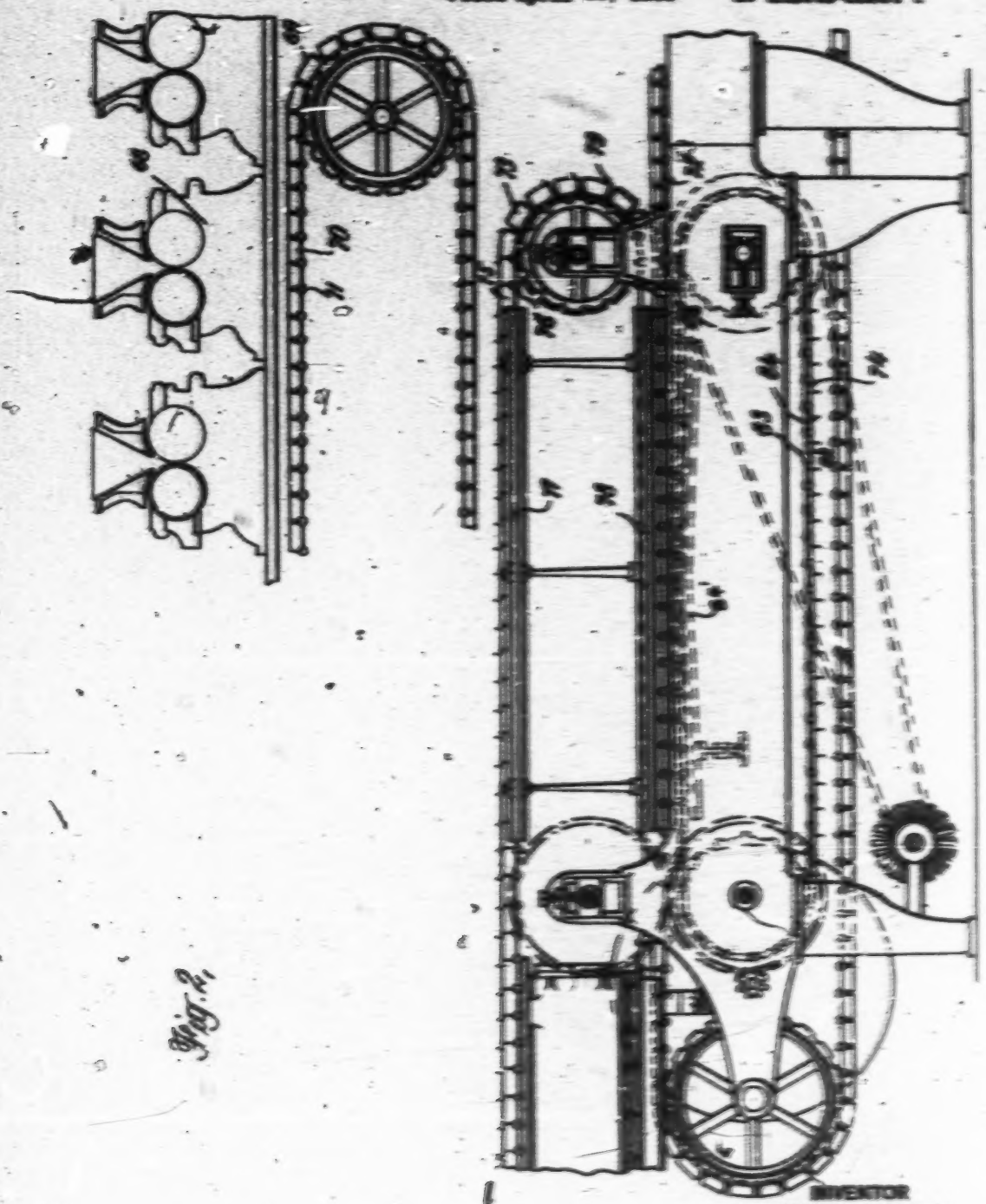

Fig. 2.

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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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Fig. 3,

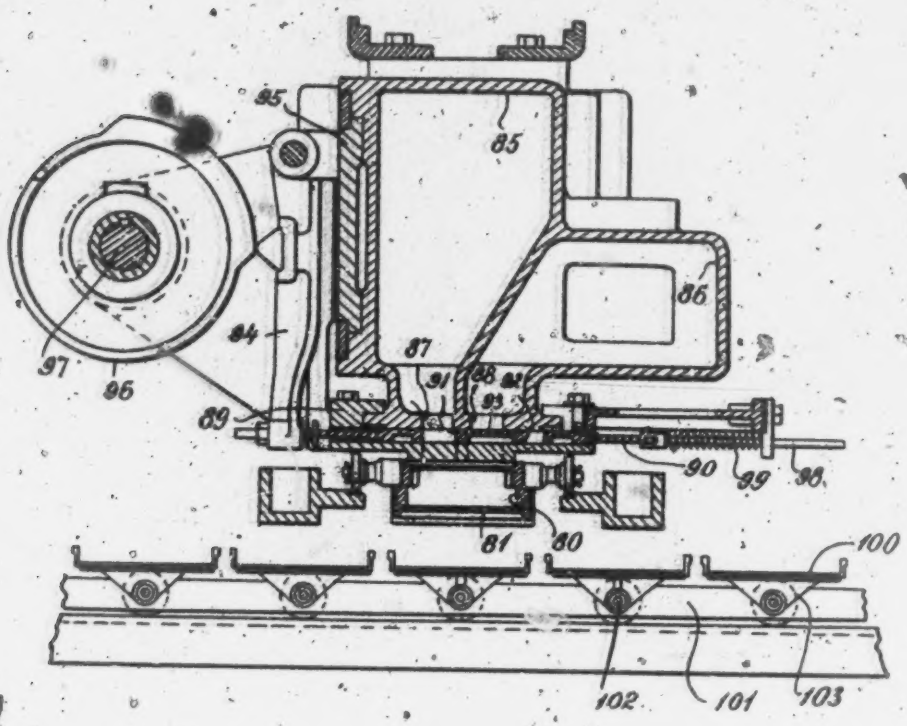
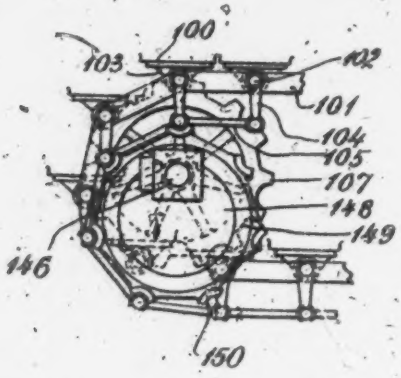


Fig. 5,



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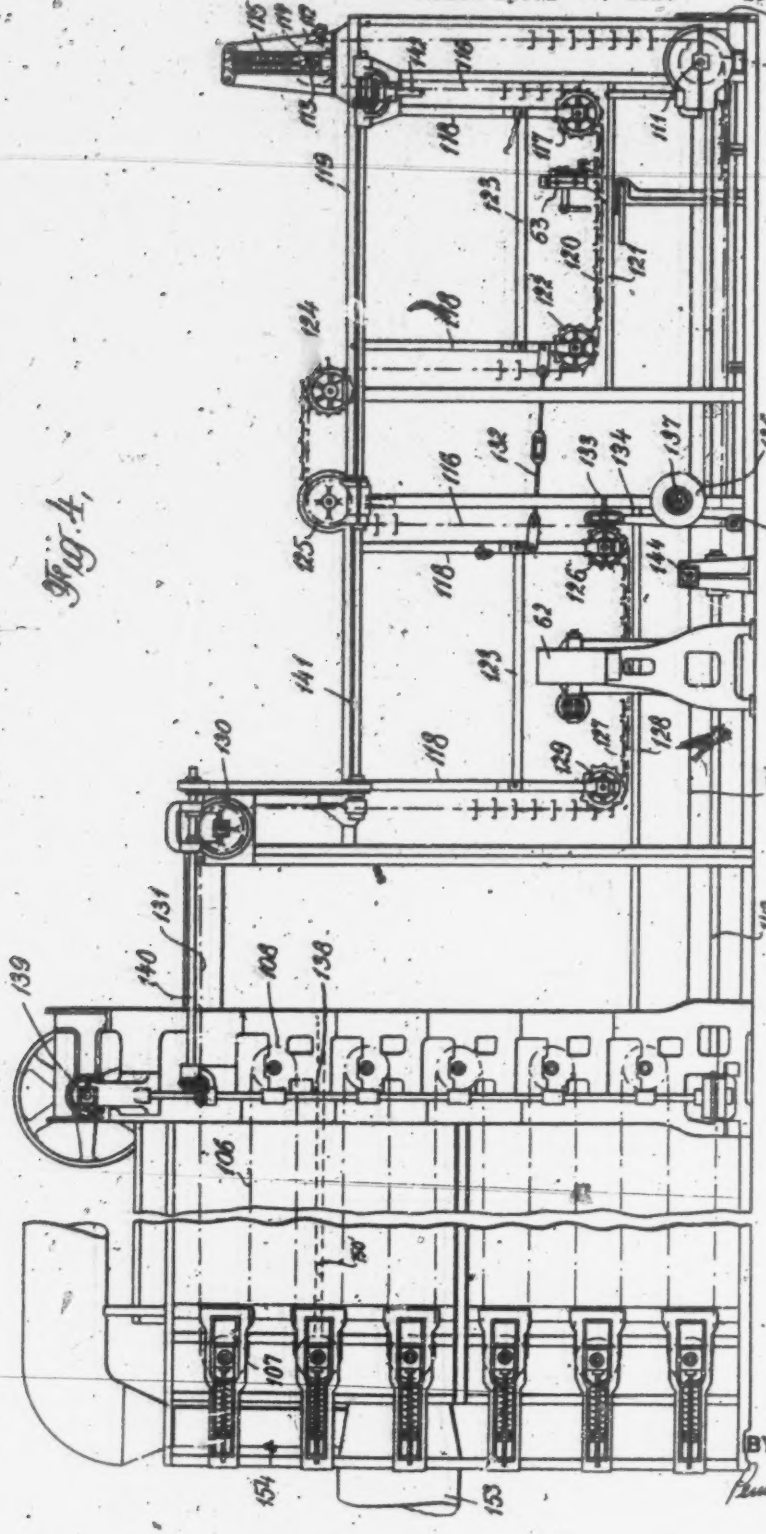
MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

Filed April 30, 1926 19 Sheets-Sheet 4

Fig. 4.



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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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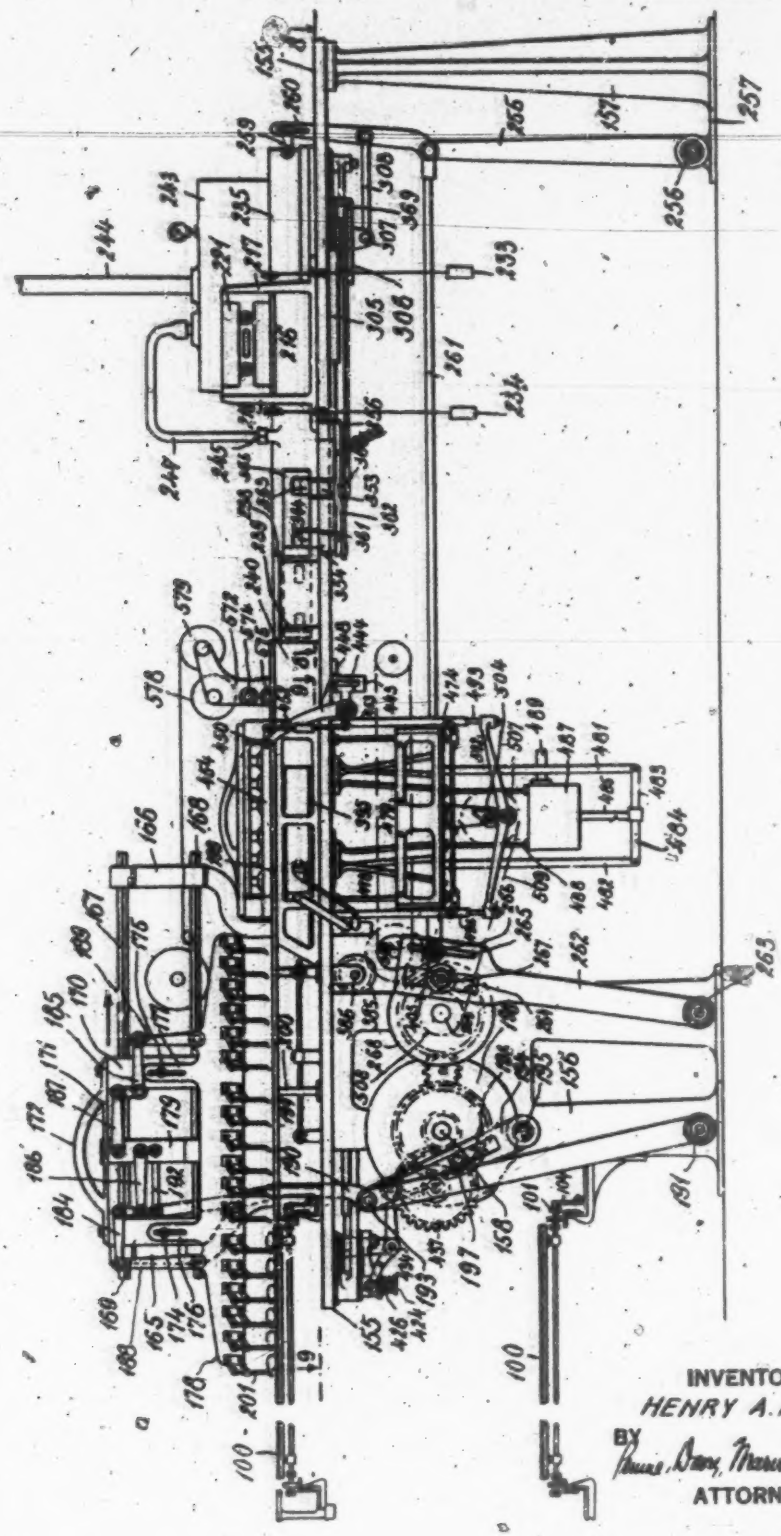

Fig. 6.

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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

Filed April 30, 1926 19 Sheets-Sheet 6

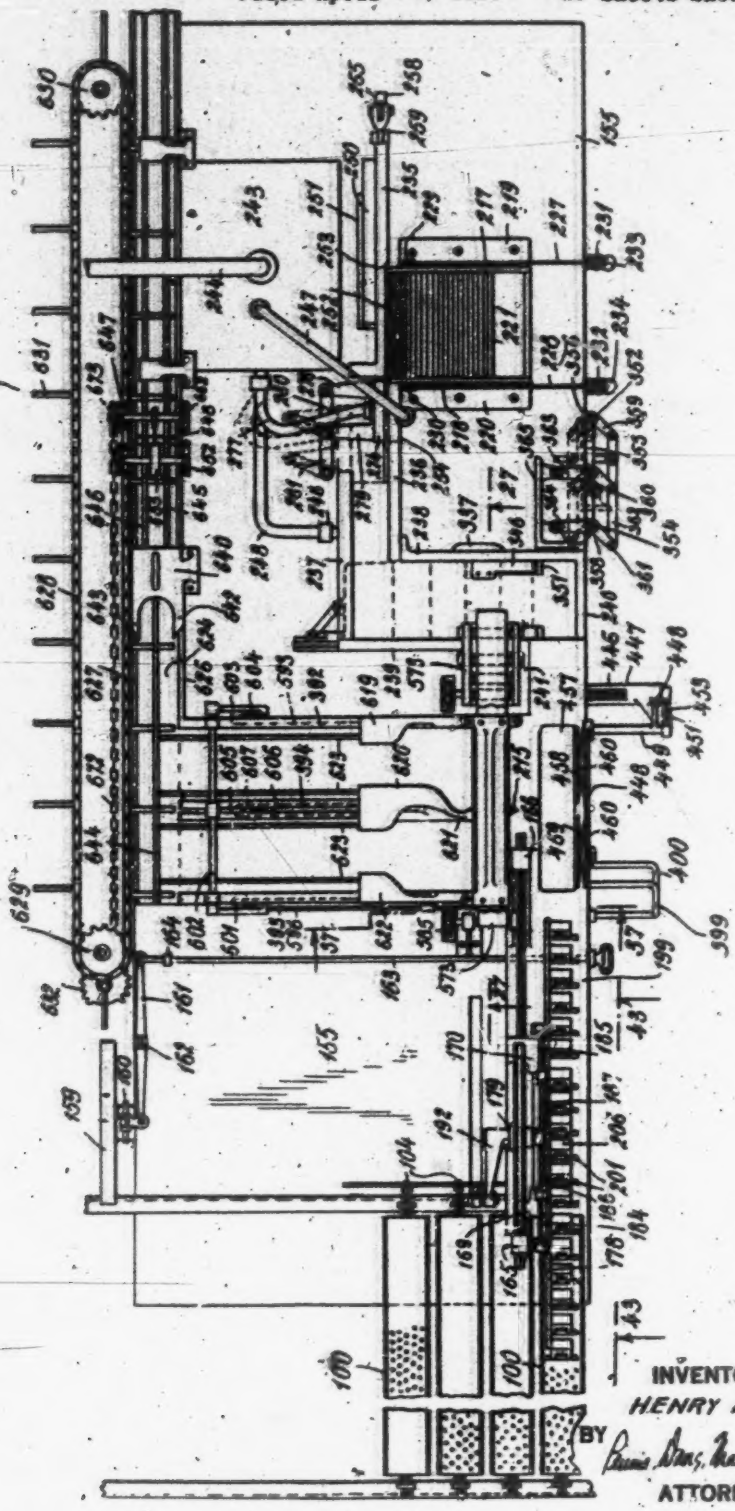

Fig. 7.

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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

Filed April 30, 1926 19 Sheets-Sheet 7

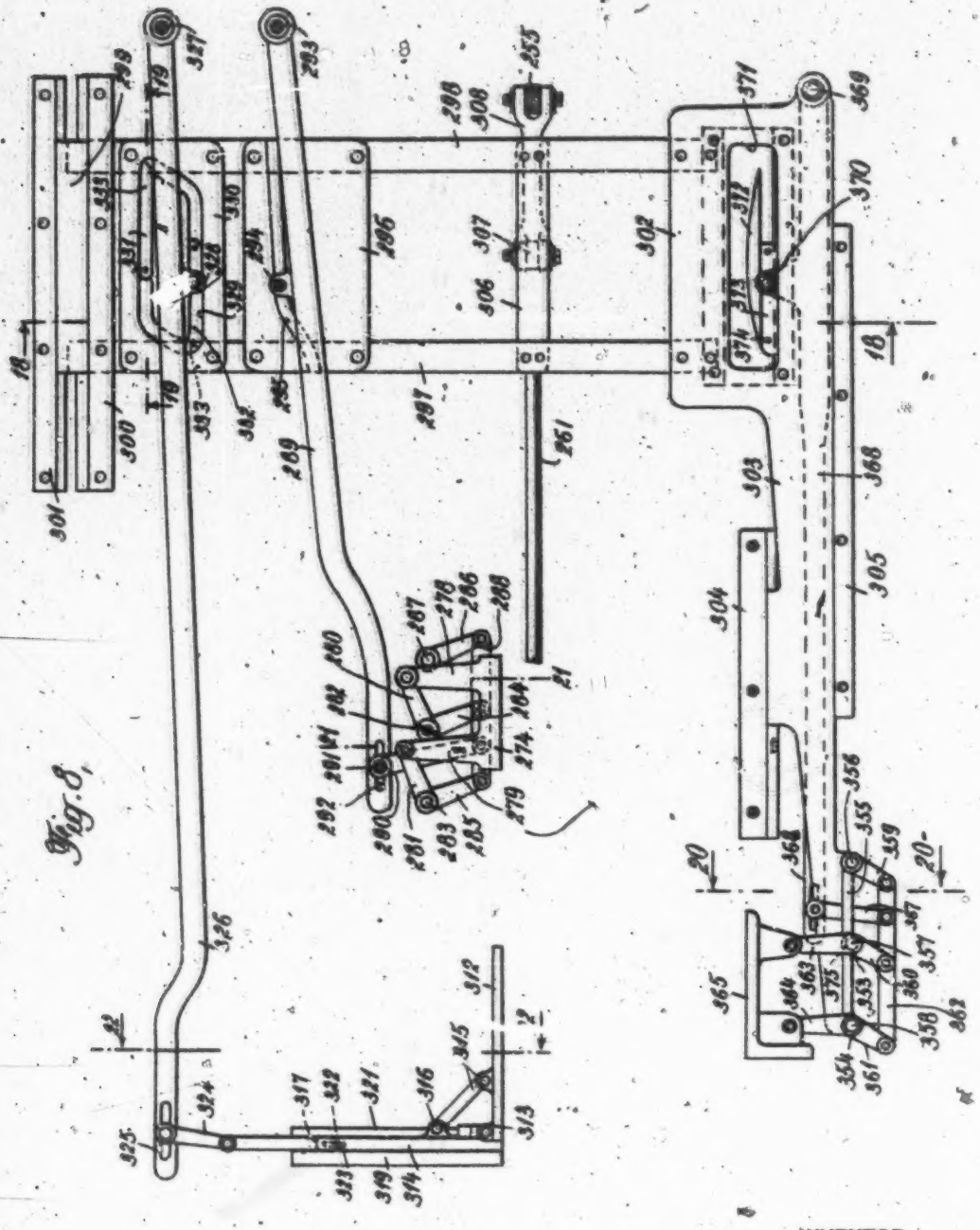

Fig. 8.

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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

Filed April 30, 1926. 19 Sheets-Sheet 8

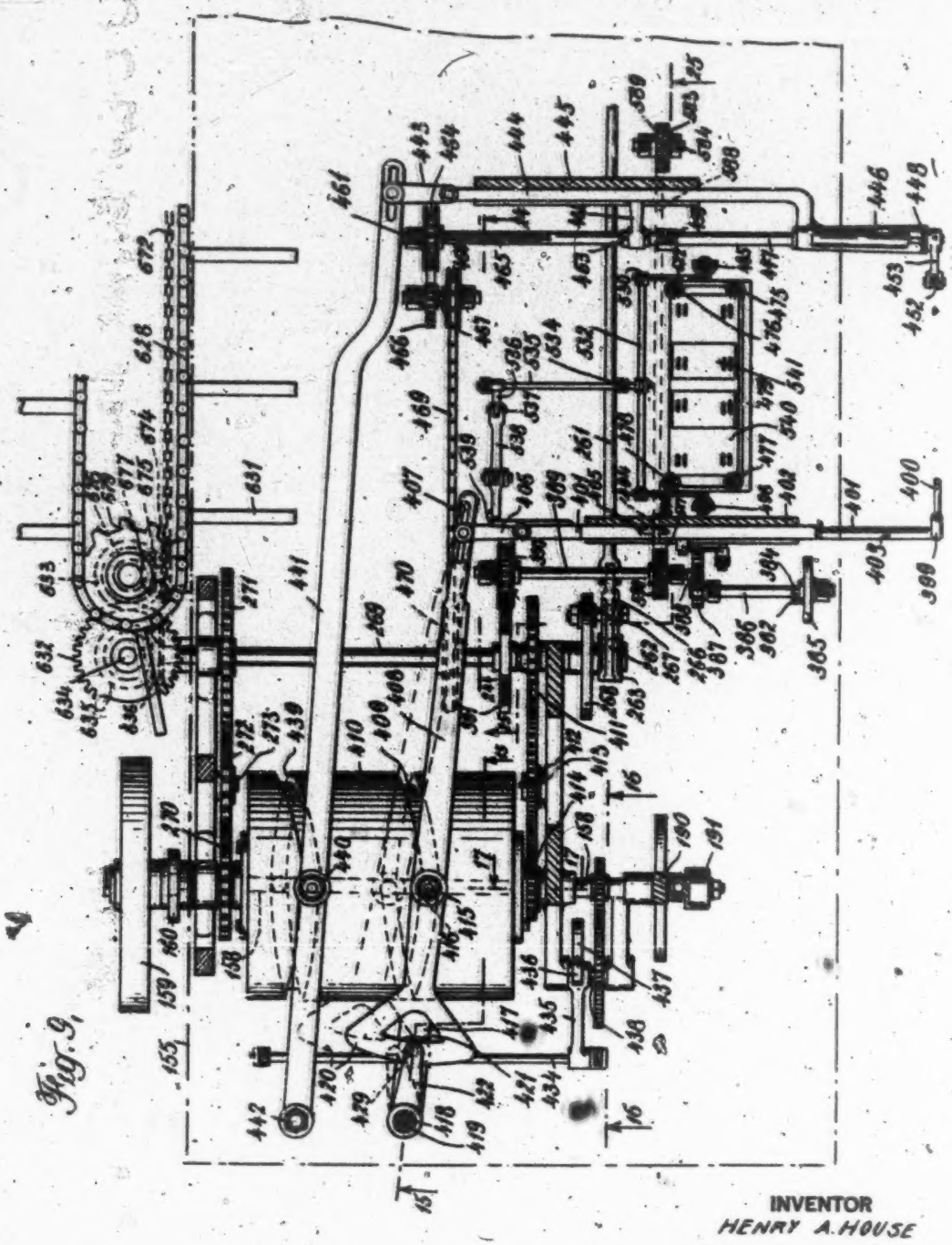

Fig. 9.

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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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Fig. 10.

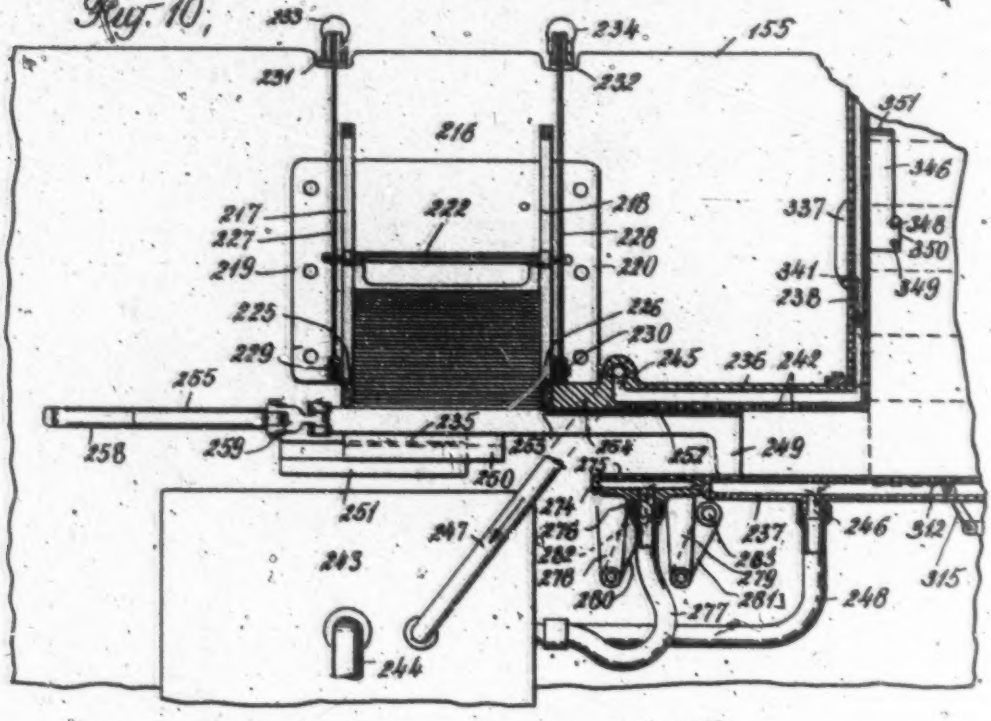
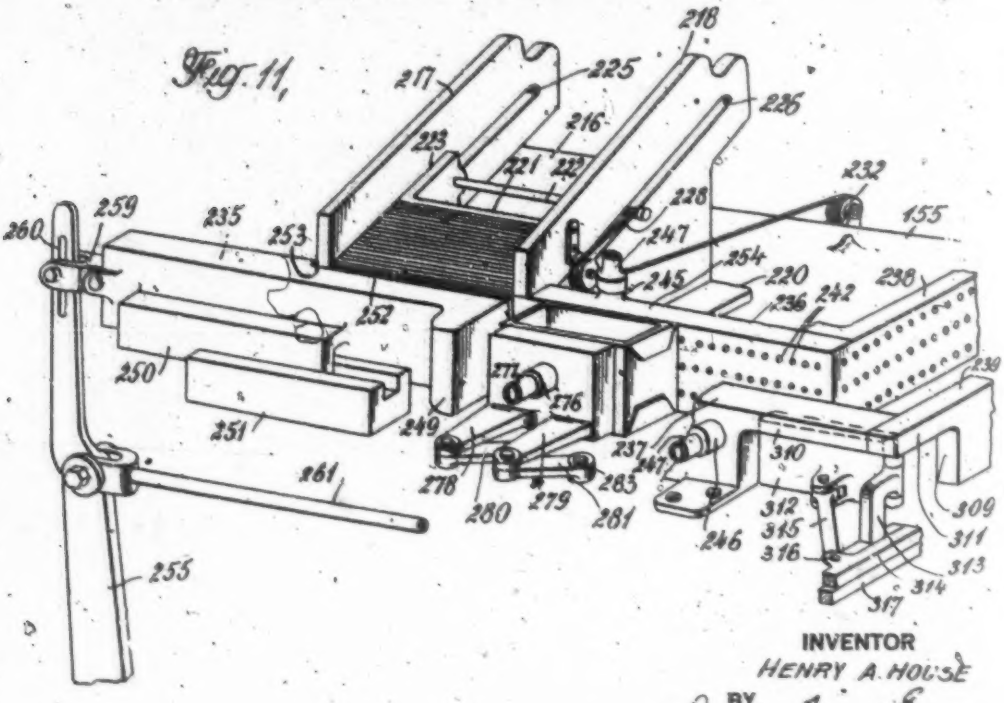


Fig. 11.



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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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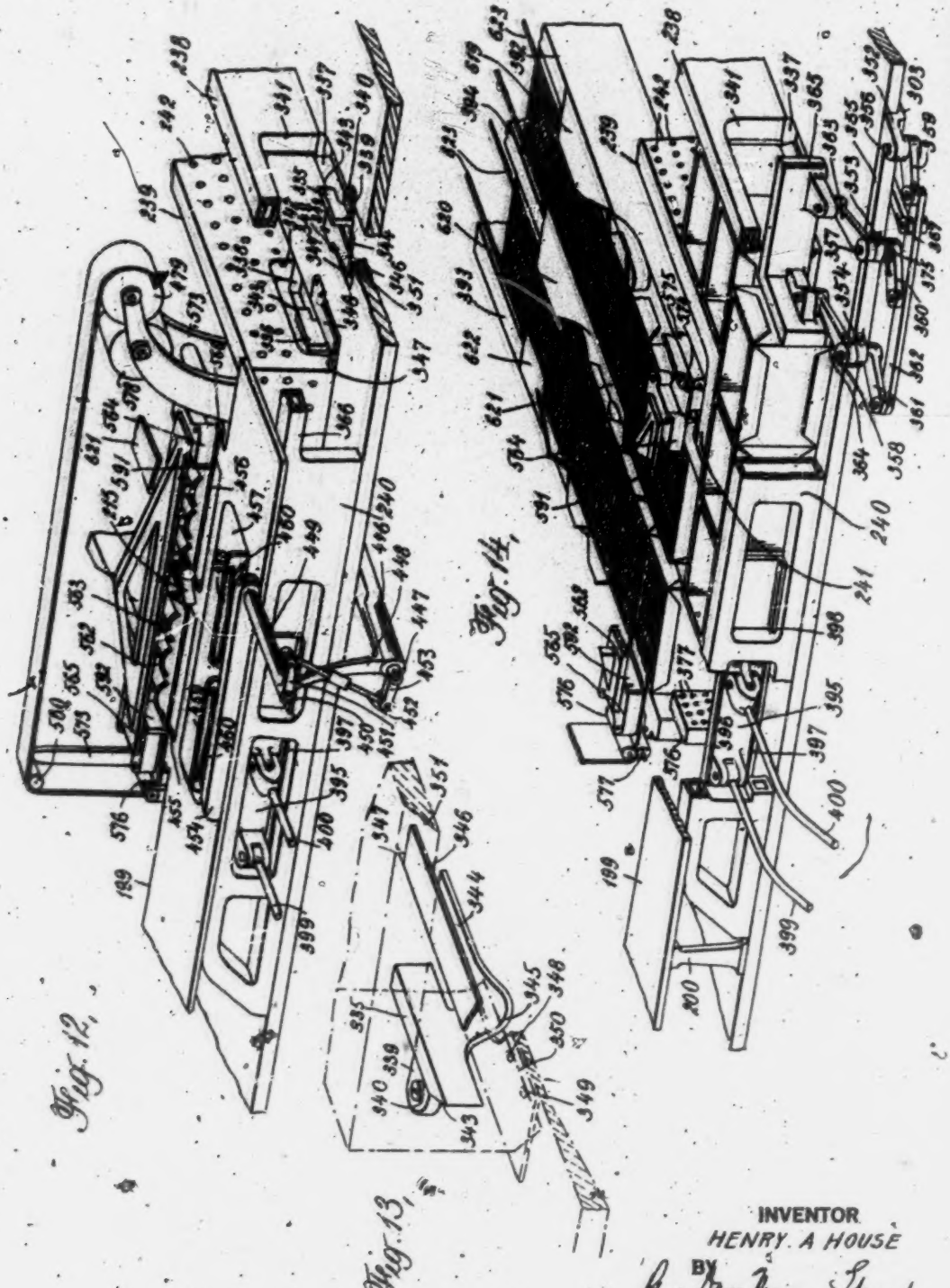

Fig. 12.

Fig. 14.

Fig. 13.

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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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Fig. 15,

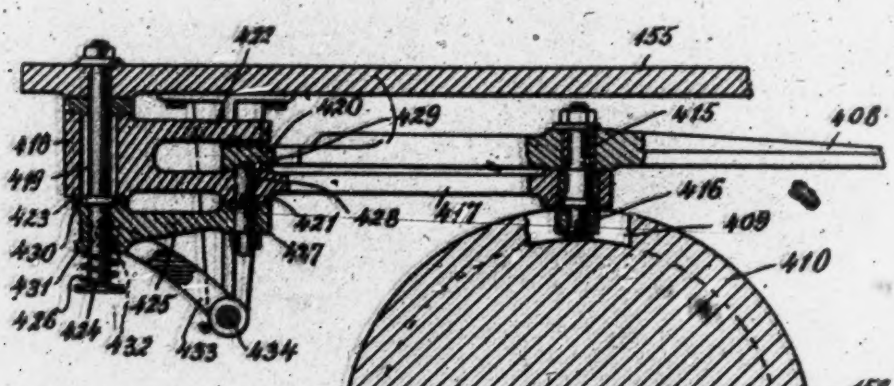
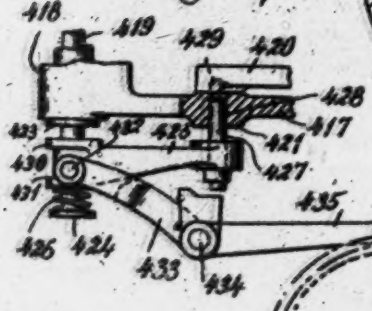


Fig. 16,



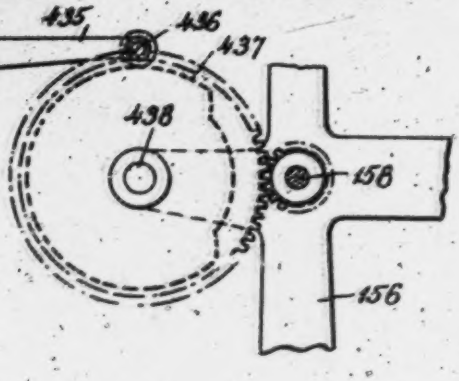
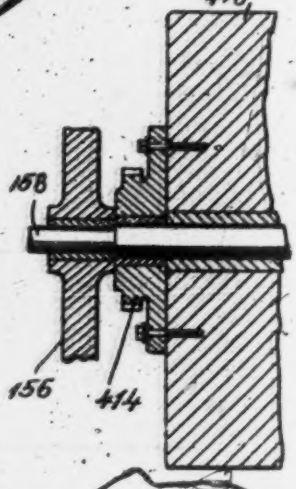


Fig. 17,



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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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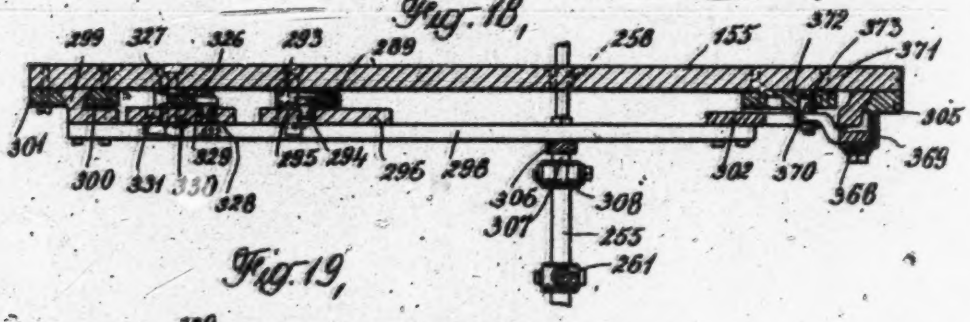
Fig. 18,



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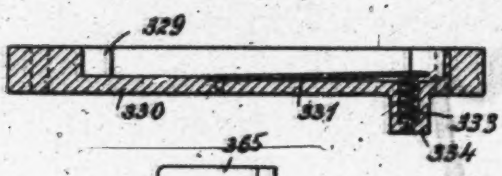

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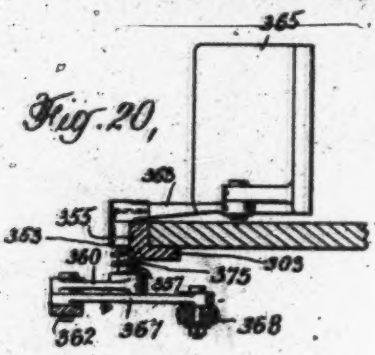

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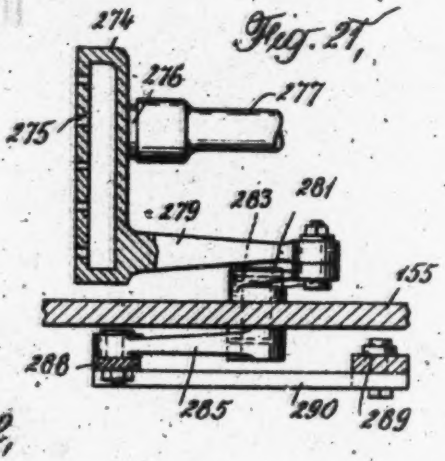

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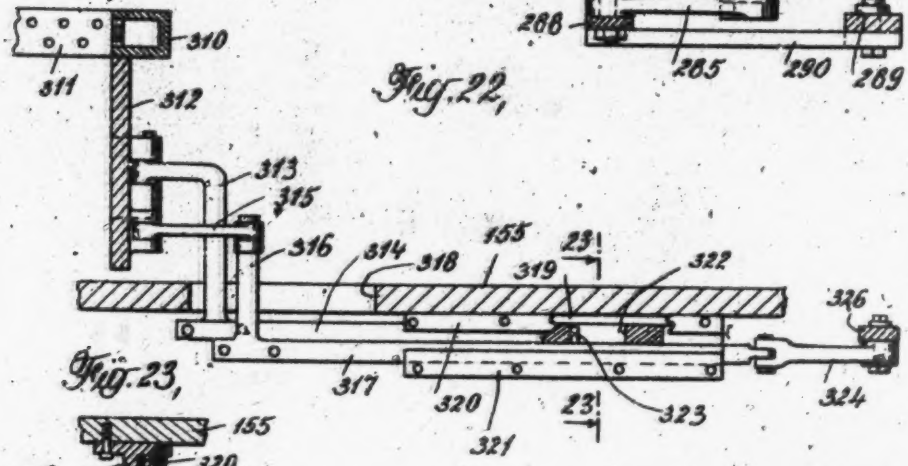

Fig. 23,

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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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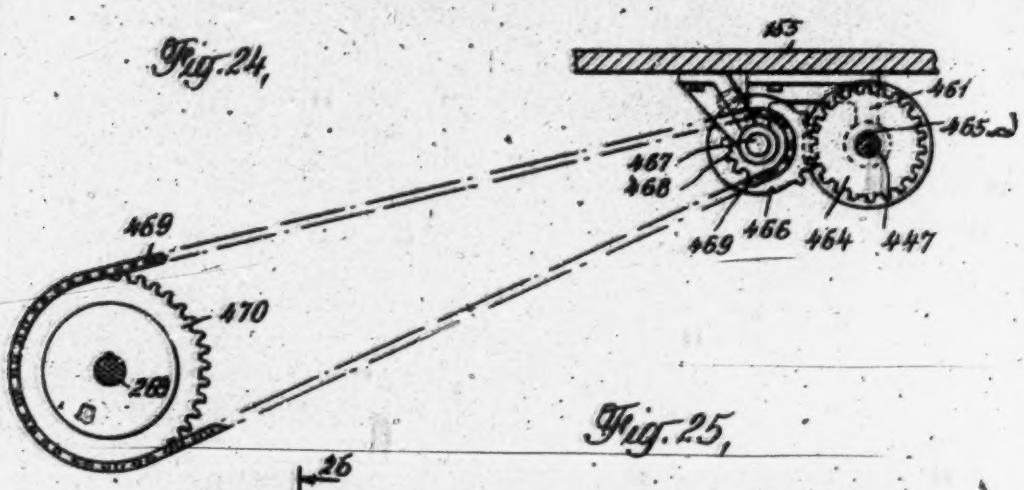
Fig. 24,



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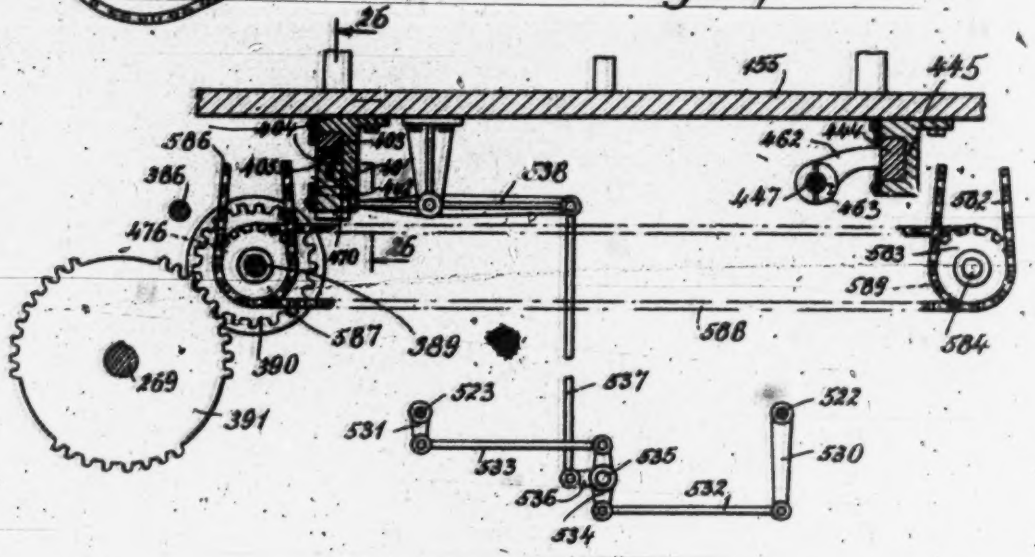
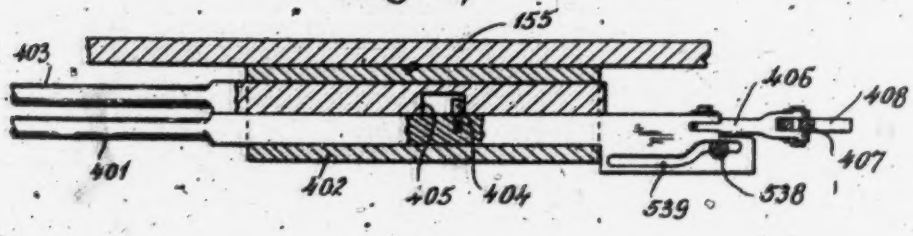


Fig. 26,



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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

Filed April 30, 1926 19 Sheets-Sheet 14

Fig. 27.

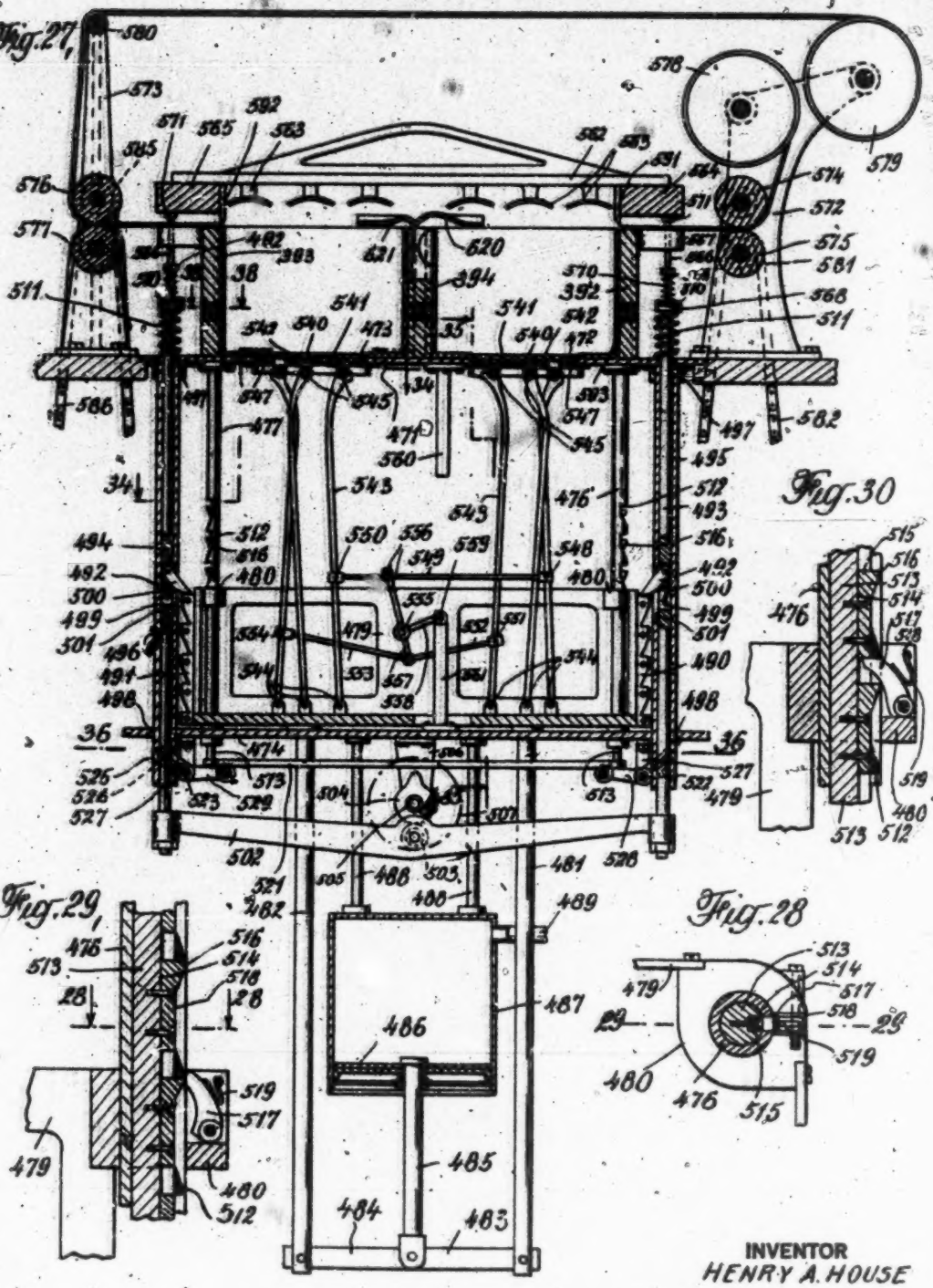

Fig. 30

Fig. 29.

Fig. 28

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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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Fig. 31

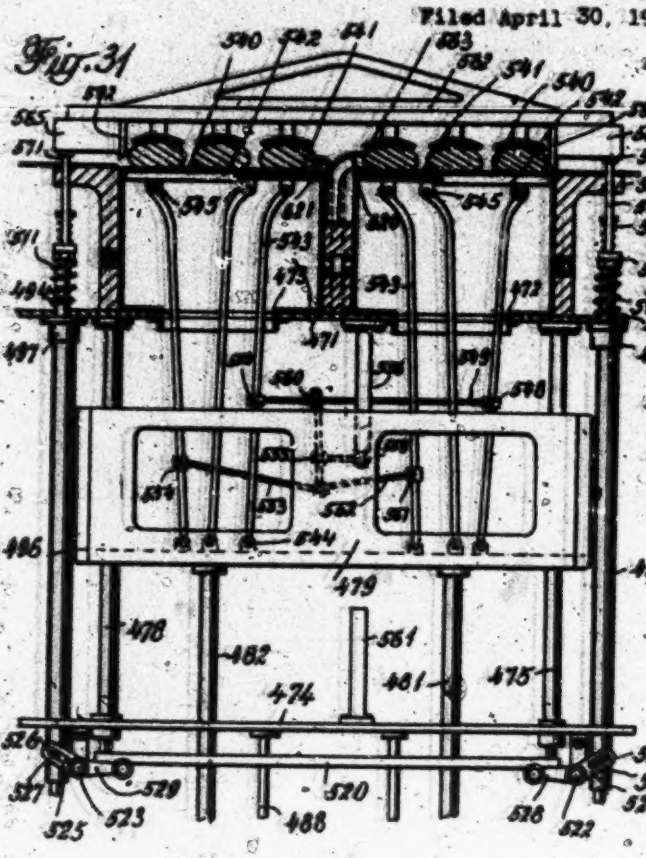


Fig. 32.

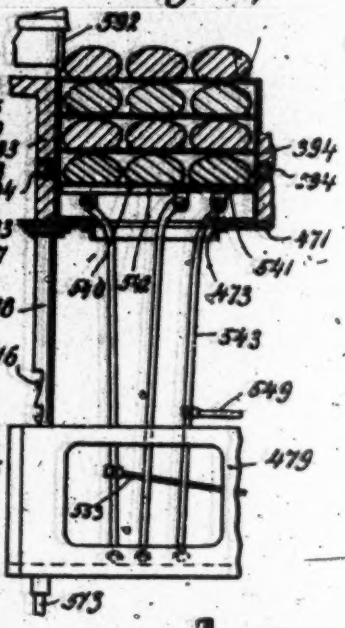
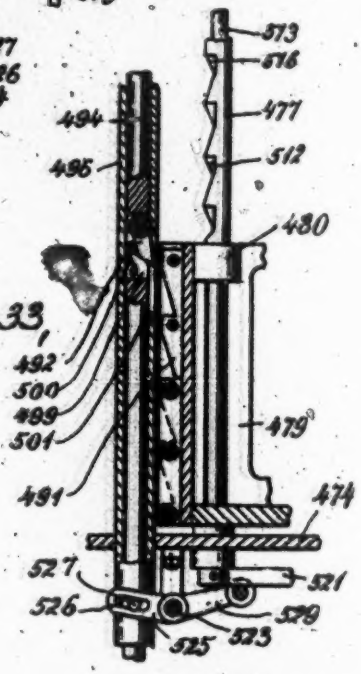


Fig. 33.



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ATTORNEYS

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H. A. HOUSE

MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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Fig. 35.

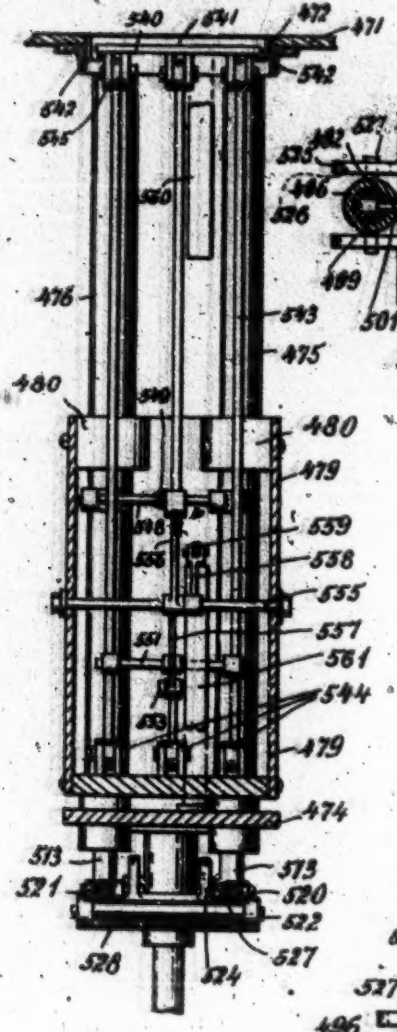


Fig. 34

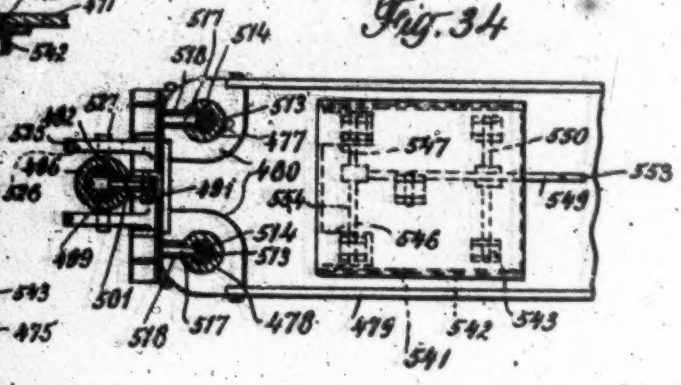
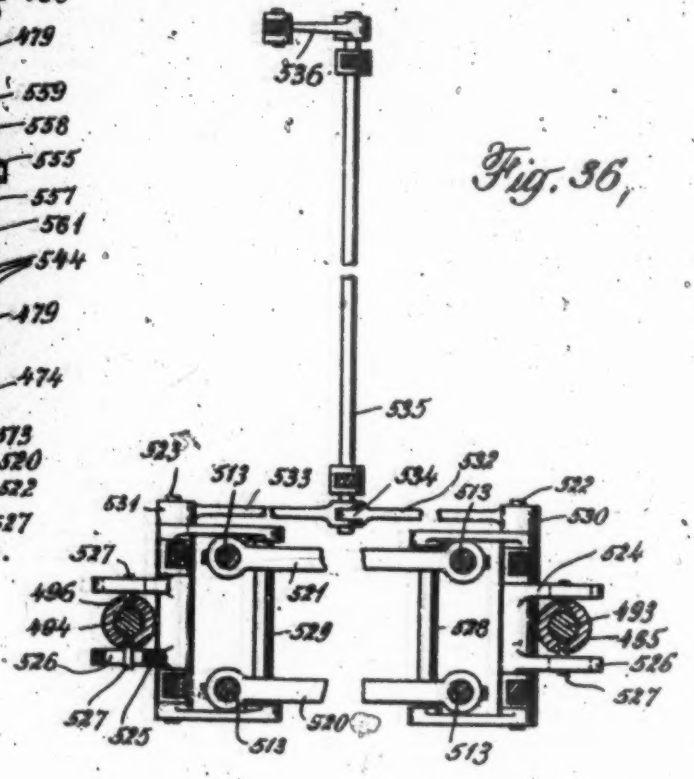


Fig. 36.



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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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Fig. 37.

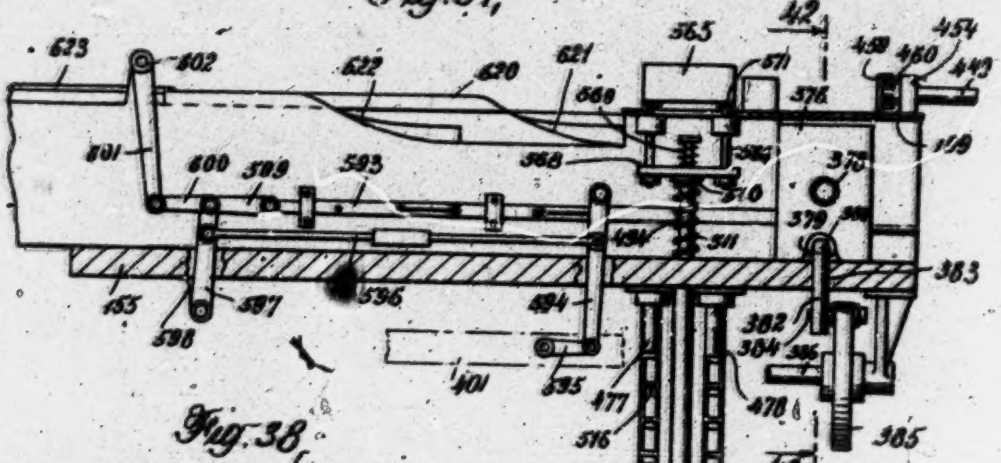


Fig. 38.

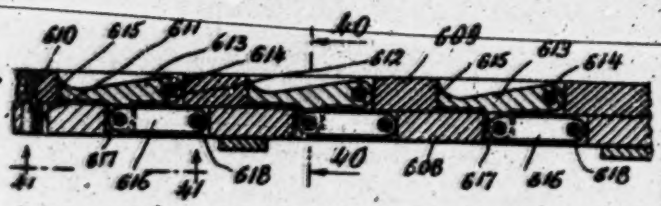


Fig. 39.

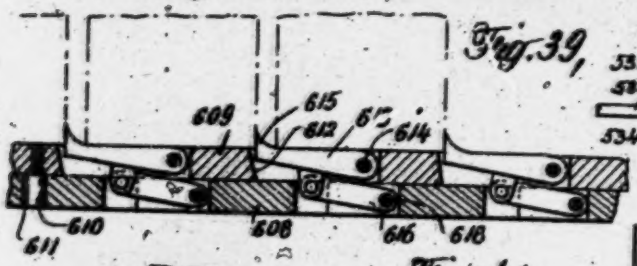
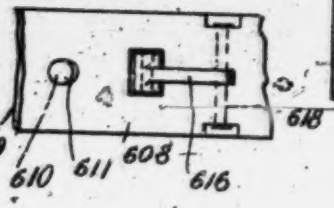
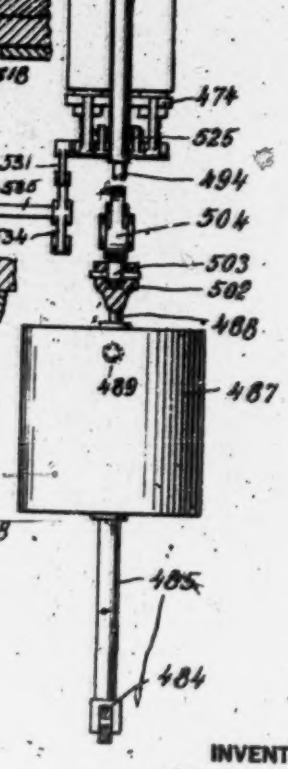


Fig. 40.

Fig. 41.





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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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Fig. 42,

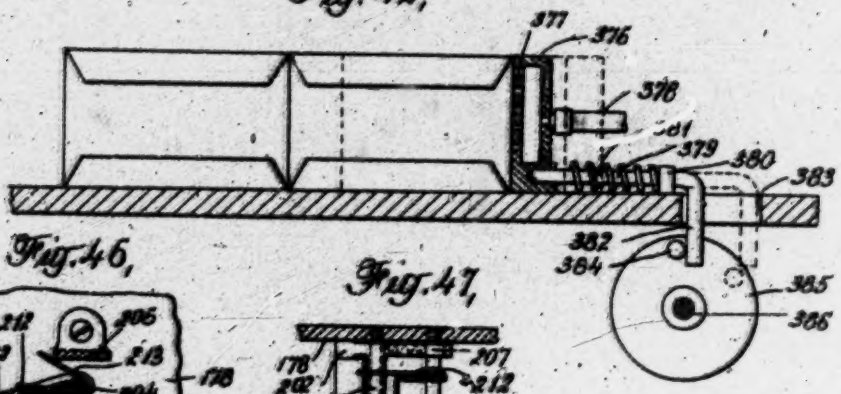


Fig. 46,

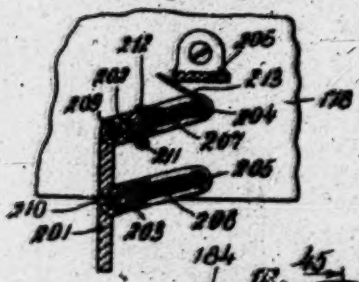


Fig. 47,

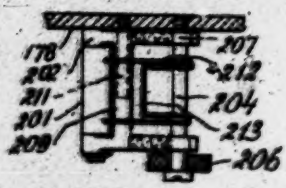


Fig. 43,

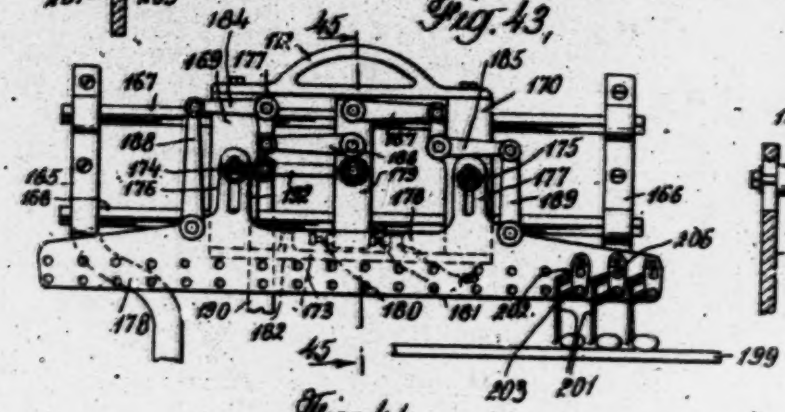


Fig. 45,

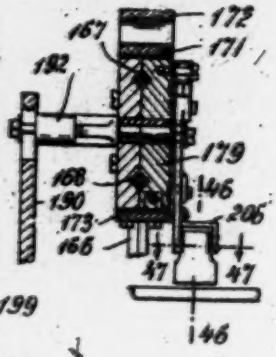
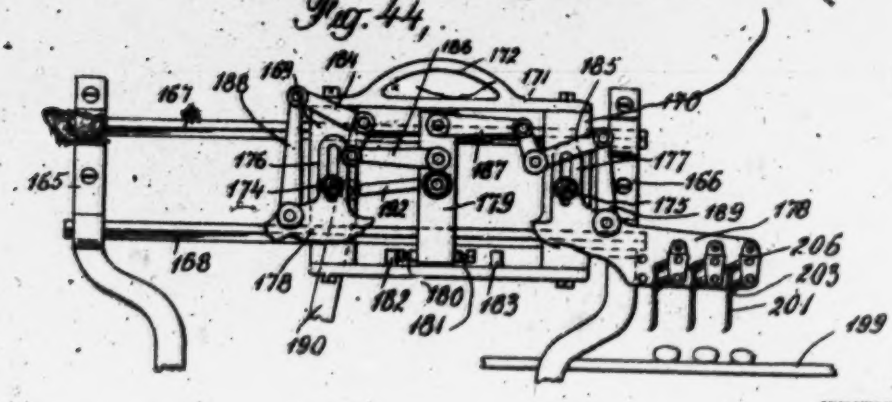


Fig. 44,



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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD

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Fig. 51,

Fig. 48,

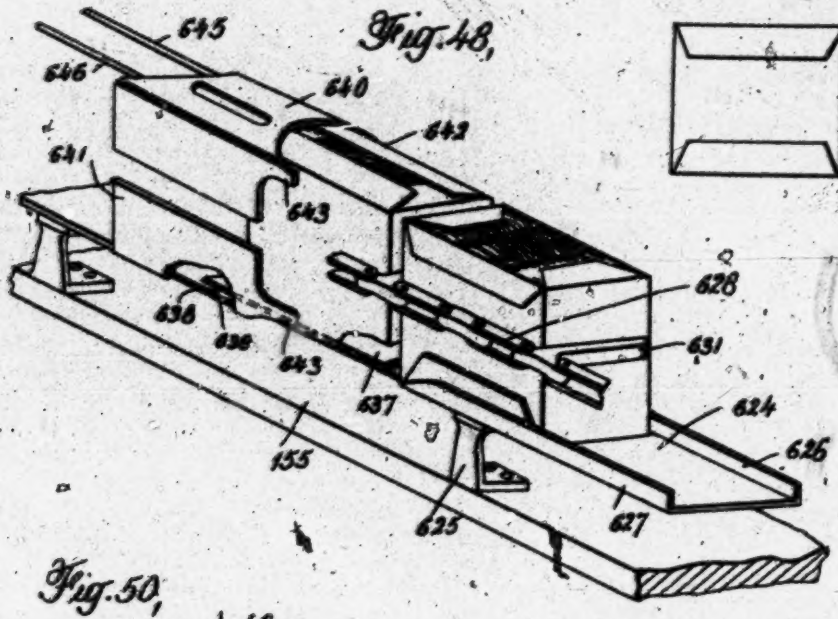


Fig. 50,

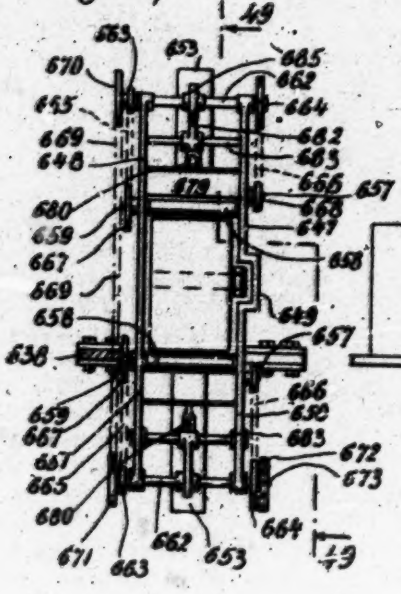
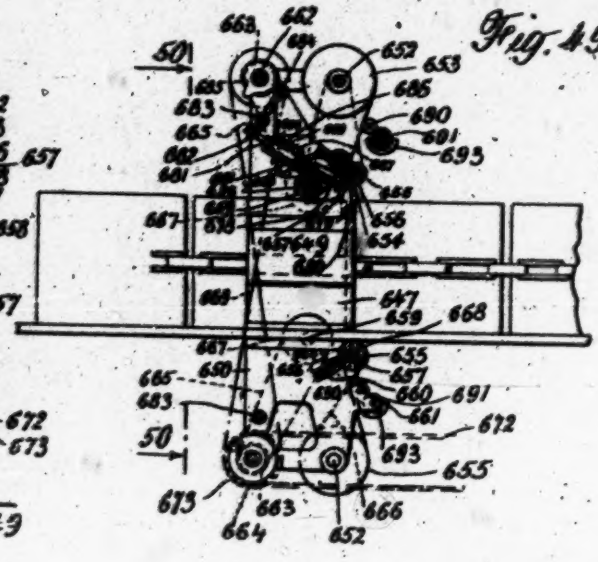


Fig. 49,



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UNITED STATES PATENT OFFICE.

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MACHINE FOR MANUFACTURING AND PACKING ARTICLES OF FOOD.

Application filed April 30, 1926. Serial No. 105,683.

This invention relates to the manufacture of articles of food, such as cereal biscuits, and has to do more particularly with automatic apparatus for performing the several operations involved in producing the articles and packing them in selected quantities in sealed cartons ready for commercial distribution. The apparatus, while capable of use in the manufacture of numerous products, is especially adapted for the production of cereal filamentous biscuits of the shredded wheat type, and a form of the apparatus suitable for that product will be described, although it is to be understood that this use is merely by way of example.

In the manufacture of cereal biscuits as now practiced, numerous manual operations are required. For example, the biscuits formed from the cereal grain by appropriate devices are deposited upon trays which are conveyed to the baking ovens where the trays are inserted in and removed from the ovens manually by the bakers. Then, in a further manual operation, the trays of baked biscuits are caused to traverse a heated chamber wherein the biscuits are thoroughly dried, after which the trays are conveyed to packing tables where the biscuits are removed by packers who prepare cartons from blanks and fill the cartons. The filled cartons are then placed on a conveyor which carries them through devices for closing and sealing the cartons and delivers them at a convenient point in condition for shipment. Owing to the numerous manual operators, such as packers, bakers, etc., required to carry out this method of manufacture, the labor charge is an important element in the final cost and the necessary distribution of the different machines and ovens requires a great deal of floor space. Also, the rate of production is relatively low and can only be increased by duplication of mechanism and of the number of operators.

The object of the present invention is to provide a machine in which the several operations involved in the production of the biscuits and the formation, filling, and sealing of the cartons may be carried on by mechanism which operates automatically and continuously, the various steps in the manufacture being carried out in proper sequence so that the product passes from one mechanism to another successively, eventually being led to a carton-filling mechanism where the biscuits are packed into cartons of the desired capacity and the cartons are closed and sealed ready for distribution.

The new machine includes a baking oven of substantial size, a conveyor which moves into, through, and out of the baking oven and if desired a drying chamber, automatic mechanism for shredding the wheat, making the biscuits from the shreds and depositing the uncooked biscuits upon the conveyor at a suitable point, and automatic mechanism cooperating with the conveyor at a point outside the oven for removing the cooked biscuits from the conveyor and placing them in selected quantities in cartons. The conveyor employed is preferably arranged for continuous slow movement as a whole and periodic arresting of the movement of a portion or portions thereof which cooperate with the automatic mechanism for supplying the uncooked biscuits to the conveyor and removing the cooked ones therefrom.

The operations of making the biscuits and supplying them to the conveyor are preferably accomplished by a mechanism similar to those heretofore employed and this mechanism is arranged transverse to the travel of the conveyor so that a plurality of uncooked biscuits are delivered at regular intervals to the conveyor in a row extending across the latter. This mechanism receives the prepared wheat, shreds it, deposits the shreds upon a traveling link-belt, cuts the strand of shreds to form the biscuits, then supports the biscuits from above while carrying them out over the conveyor and then drops a plurality of the biscuits simultaneously to deposit them on the conveyor in a row extending crosswise thereof. This mechanism is actuated in synchronism with the movement of the conveyor so that the dropping of a row of biscuits takes place when the portion of the conveyor which receives the biscuits is, in effect, at rest.

The automatic mechanism for removing the cooked biscuits from the conveyor includes a reciprocating member which engages a group of biscuits on the conveyor

and moves these biscuits in a row off the conveyor and upon a suitable receiver. A series of individual engaging elements, one for each biscuit in a row, is mounted upon this reciprocating member so that each biscuit is moved free of contact with every other biscuit of the row. This is of importance both to prevent injury to the fragile biscuits, and also to keep accurate control of the positions of all the biscuits and thus make automatic packaging possible. The operation of this reciprocating member or rake is timed accurately with reference to the movement of the conveyor so that the removal of a row of biscuits takes place when the portion of the conveyor with which the rake cooperates, is, in effect, at rest.

This automatic delivery mechanism moves the biscuits of a row or group from the conveyor to a carton-filling station, each biscuit being moved in a straight line transverse to the direction of movement of the conveyor. Preferably the movement is in several steps, the biscuits being first moved off the conveyor and upon and inspection platform, along which they are moved in successive steps to a position from which they are delivered to the carton-filling devices. The cartons are moved to the carton-filling position automatically, being fed successively from a stack of cartons in collapsed condition and in the course of their movement opened and acted upon by folding devices which turn the flaps of the cartons appropriately. At the filling station, groups of biscuits are introduced into the cartons to form successive layers therein, the cartons containing, for example, twelve biscuits in four layers of three biscuits each. Strips of paper are placed in the cartons between successive layers by appropriate mechanism during the filling operation. Since the biscuits are of a delicate structure, they cannot be allowed to drop into position in the cartons. Consequently, at the filling station a platform is provided which is projected up through the carton to be filled. A layer of biscuits is then moved upon the platform and the platform lowered a step. A strip of paper is now placed over the layer of biscuits; then another layer of biscuits is put in position and the platform lowered a second step, these operations being repeated until the carton is filled. It is then ejected from the packing devices, acted upon by a folding mechanism which turns the flaps to close the carton, and then the carton is sealed by suitable sealing devices.

For a better understanding of the invention, reference will be made to the accompanying drawings, in which there is illustrated an embodiment of the invention suitable for the manufacture of shredded wheat biscuits. In these drawings,

Fig. 1 is a plan view of the complete apparatus with certain parts broken away or removed,

Fig. 2 is a view in side elevation of the shredding devices, the strand conveyor, and the biscuit forming devices,

Fig. 3 is a transverse section through the biscuit depositing mechanism taken from line 3—3 of Fig. 1,

Fig. 4 is a side view of the apparatus, with certain parts broken away and removed,

Fig. 5 is a view in elevation of a portion of the baking conveyor, showing the manner in which the pans of the conveyor are maintained upright at all times,

Fig. 6 is a view in side elevation of the biscuit removal device and the mechanism for introducing the biscuits into the cartons,

Fig. 7 is a plan view of the parts of the machine shown in Fig. 6,

Fig. 8 is a horizontal sectional view on the line 8—8 of Fig. 6, showing in plan certain parts for operating the carton-feeding devices,

Fig. 9 is a similar view showing the main drive shaft and the mechanism by which the cartons and biscuits are fed, this figure being taken on the line 9—9 of Fig. 6,

Fig. 10 is a plan view in detail on an enlarged scale showing the mechanism for feeding the cartons from the stack and opening and advancing the cartons toward the packing station, parts of the mechanism being shown in horizontal section,

Fig. 11 is a perspective view of the parts shown in Fig. 10,

Fig. 12 is a perspective view of portions of the carton feeding mechanism, the biscuit feeding mechanism, and the devices for feeding the paper,

Fig. 13 is an enlarged perspective view of parts by which the flaps of the cartons are folded to proper position in the movement of the cartons to the packing station,

Fig. 14 is a perspective view similar to Fig. 7, but showing certain parts removed and other parts in operative position,

Fig. 15 is a vertical sectional view showing parts for feeding the biscuits taken on the line 15—15 of Fig. 9,

Fig. 16 is a front elevation of certain of the parts shown in Fig. 15, taken on the line 16—16 of Fig. 9,

Fig. 17 is a vertical sectional view of the end of the main cam drum, taken on the line 17—17 of Fig. 9,

Fig. 18 is a vertical sectional view through the bed plate of the cam frame, taken on the line 18—18 of Fig. 8,

Fig. 19 is a detail sectional view taken along the line 19—19 of Fig. 8,

Fig. 20 is a detail sectional view of a

carton feeding device, taken along the line 20—20 of Fig 8,

Fig. 21 is a detail vertical sectional view of the carton opening device, taken along the line 21—21 of Fig. 8,

Fig. 22 is a detail vertical sectional view of a carton feeding device taken on the line 22—22 of Fig. 8,

Fig. 23 is a vertical sectional view, taken on the line 23—23 of Fig. 22.

Fig. 24 is an elevational view of a certain drive mechanism, parts being shown in section and the view being taken on the line 24—24 of Fig. 9,

Fig. 25 is a view in elevation of certain drive mechanism, parts being shown in section, the view being taken on the line 25—25 of Fig. 9,

Fig. 26 is a vertical sectional view taken on the line 26—26 of Fig. 25,

Fig. 27 is a view in front elevation and partly in section of the carton filling devices, taken on the line 27—27 of Fig. 7 and showing the parts in lowered position;

Fig. 28 is a horizontal detail view taken on the line 28—28 of Fig. 29,

Fig. 29 is a vertical sectional view taken on the line 29—29 of Fig. 28,

Fig. 30 is a view similar to Fig. 29 showing the parts in a different position,

Fig. 31 is a vertical sectional view, partly in elevation, of the carton filling mechanism, showing the parts in raised position.

Fig. 32 is a similar view with parts broken away showing the parts partially lowered,

Fig. 33 is a vertical sectional view, partly in elevation, of one end of the carton filling devices, showing the packing frame about to be raised,

Fig. 34 is a horizontal sectional view taken on the line 34—34 of Fig. 27,

Fig. 35 is a vertical sectional view taken on the line 35—35 of Fig. 27,

Fig 36 is a horizontal sectional view taken on the line 36—36 of Fig. 27.

Fig. 37 is a side view of the carton feeding and filling mechanism taken on the line 37—37 of Fig. 7.

Fig. 38 is a horizontal sectional view on the line 38—38 of Fig. 27,

Fig. 39 is a similar view, showing the parts in different position,

Fig. 40 is a vertical sectional view taken on the line 40—40 of Fig. 38,

Fig. 41 is a detail sectional view taken on the line 41—41 of Fig. 38,

Fig. 42 is a vertical sectional view of the carton spacing mechanism, taken on the line 42—42 of Fig. 37,

Fig. 43 is a front elevational view of the biscuit removal mechanism, taken on the line 43—43 of Fig. 7,

Fig. 44 is a similar view with parts broken away,

Fig. 45 is a vertical sectional view taken on the line 45—45 of Fig. 43,

Fig. 46 is a detail sectional view on the line 46—46 of Fig. 45,

Fig. 47 is a detail sectional view on the line 47—47 of Fig. 45,

Fig. 48 is a perspective view of mechanism for conveying the filled cartons and for folding the flaps thereof,

Fig. 49 is a view, partly in elevation and partly in section, taken on the line 49—49 of Fig. 50,

Fig. 50 is a transverse vertical sectional view on the line 50—50 of Fig. 49, and

Fig. 51 is a detail view showing one of the collapsed cartons folded in the manner in which it is supplied to the machine.

In the drawings, and with reference particularly to Fig. 1, the apparatus is shown as including an oven 60 of considerable length and a conveyor 61 which moves into, through, and out of this oven. The conveyor is provided with transverse pans and at one point in its travel, preferably outside the oven, the conveyor receives unbaked biscuits deposited in rows in the pans by a feeding mechanism, generally designated 62. The conveyor carries the biscuits through the oven and after being baked and dried the biscuits are removed from the pans by a delivery device, generally designated 63. This device has the form of a reciprocating rake and it removes the biscuits from the pans in rows and deposits them upon an inspection platform. The biscuits are moved across this platform in successive steps, and are eventually delivered in two groups of three to a packing station to which cartons are fed from a supply 64 by suitable devices which open the cartons, fold the flaps appropriately, and move the cartons into position to be filled. After the biscuits have been placed in the cartons to the capacity of the latter, the cartons are moved rearwardly along guide-ways 65 to a conveyor 66 which advances the cartons through sealing mechanism 67. After being sealed, the cartons are discharged.

The biscuits are made from cereal grain given a preliminary cooking treatment and then delivered to the hoppers of shredding devices 68 (Fig. 2) which include a pair of rolls which act on the grain and transform it into a plurality of continuous filaments which are deposited upon an endless link belt 69. Several of these shredding devices are employed so that the strand may have the desired thickness. The belt 69 is made up of links 70 and rollers 71 and the upper horizontal stretch on which the strand is deposited runs on tracks 72. Above this stretch of the belt is an upper cutter chain 73 made up of links 75 connected by rollers 76, and the upper stretch of the chain trav-

els over a track 77 and the lower stretch beneath a track 78. The links 76 carry cutter blades 79 and are hollow, as shown at 80 (Fig. 3) their lower faces being covered by wire screens 81. The upper cutter chain is guided so that its lower stretch lies close to the upper horizontal stretch of the conveyor belt and the chain extends a considerable distance beyond the end of the belt. The lower cutter chain made up of links 82 connected by rollers 83, which carry cutter blades 84, lies within the loop of the conveyor belt and its upper stretch is guided over a track 84' in close proximity to the under surface of the belt. The links of the conveyor belt are separated in such manner that the cutter blades 79 and 84 of the two chains pass between the spaces between the links of the conveyor chain and cooperate to divide the strand of filaments carried by the conveyor into a plurality of individual biscuits.

The portion of the upper chain which extends beyond the end of the loop of the conveyor chain serves as a part of the feeding mechanism and disposed within the loop of the upper chain and extending beyond the end of the conveyor chain loop, is a vacuum chamber 85 with which may be associated a compressed air chamber 86. Both chambers have similar lengthwise slots 87 and 88 in their lower walls. Mounted on suitable flanges on the lower walls of the chambers is a slide 89 which carries a series of valve plates 90 arranged lengthwise of the chambers for controlling the flow of air through the slots. These valve plates move in seats in the slide and have openings 91, 92 separated by a solid part 93. By moving the valve plates horizontally, the openings in the plates will open one chamber and close the other. Each plate is actuated by a rocker arm 94 pivoted on a slide 95 extending along the side wall of the chamber 85, and this rocker arm is rocked by a cam 96 on the shaft 97 mounted in brackets on the slide 95. At the side opposite that engaged by the rocker arm, each plate carries a rod 98 encircled by a spring 99 bearing at one end against a part of the plate and at the other against an extension of the slide 89.

It will be seen that the links in the lower horizontal stretch of the upper cutter chain lie close to the lower walls of the chambers, and in the operation of the mechanism the strand carried by the conveyor is first subdivided by the action of the cutter chains into individual biscuits, and as the biscuits pass along on the conveyor chain in contact with the hollow links of the upper cutter chain, at the appropriate instant the valve plates 90 are moved successively by the rocker arms to a position in which the hollow links are placed in communication with the interior of the vacuum chamber 85. The vacuum lifts the biscuits from the conveyor chain and holds them against the lower faces of the hollow links, and as these links pass along beyond the end of the loop of the conveyor chain, a row of biscuits is thus removed therefrom. The chambers 85 and 86 extend out over the baking conveyor 61 and when a group of biscuits held by suction against the faces of the hollow links is sufficient in number to fill a pan, the valve plates 90 are operated simultaneously throughout the length of the chambers to close the vacuum chamber from the links and to put the pressure chamber in communication with the links. This causes the biscuits to be dropped from the links upon one of the pans 100 of the baking conveyor.

The portion of the baking conveyor passing beneath the depositing mechanism moves with a step by step movement, each step of the movement resulting in a pan being placed in position to receive biscuits. When this pan is filled, another pan is brought into position and during this period the upper cutter chain continues to move, the valve plates are again moved one after another to place the links in communication with the suction chamber, and another row of biscuits is removed from the strand conveyor, brought out over the next pan, and deposited therein.

While it is possible to discharge a group of biscuits upon a pan while the pan is moving continuously beneath the feeding mechanism, the depositing taking but an instant, it is preferable to give the pans the step by step movement and to charge each pan in one of the periods of rest of this movement. For this purpose the conveyor construction illustrated in Figs. 4 and 5 is employed. The conveyor is endless and has a portion which lies within the oven chamber, entering the latter near the top of the front wall and leaving through the front wall near the bottom. The conveyor chain is formed of a pair of side chains made up of links 101 connected loosely by transverse rods 102 which carry lugs 103 to which are secured the pans 100. From the ends of the rods 102 depend lugs 104 connected by links 105. These links form a suplementary chain and by moving this chain with reference to the main chain in an appropriate manner, the pans may be maintained upright, regardless of the position of the links 101 with reference to the pans.

The conveyor entering the oven near the top of the latter is led through the oven in a plurality of horizontal stretches, indicated at 106. The top stretch of the conveyor passes to a point near the far end of the oven and is led around a sprocket wheel 107. The conveyor is then led forwardly, passing around another sprocket wheel 108 near the front end of the oven, and a plu-

rality of open loops are thus formed in the conveyor so that the biscuits on the pans traverse the oven a number of times during the baking operation. Within the oven are heating units, generally desigated 109 and here illustrated conventionally as electrical heating elements. Other heating means for the oven, however, may be employed. These heating devices are arranged so that the unbaked biscuits entering the oven are exposed to a relatively high temperature and then passing downwardly through the oven, are exposed to decreasing temperatures, so that after the preliminary baking the biscuits are dried.

In view of the great length of the conveyor, it is not desirable to move it as a whole with a step by step movement, but those parts of the conveyor that are to receive the biscuits and from which biscuits are to be removed, I prefer to move intermittently in order to facilitate these operations. For this purpose the portion of the conveyor outside the oven is guided through a depending loop consisting of two vertical stretches connected by a horizontal stretch. This horizontal stretch is moved to and fro in a direction lengthwise of the coveyor, and although the conveyor as a whole is moving continuously, the pans in the horizontal stretch of the loop are moved with a step by step movement. These pans pass beneath the biscuit depositing device and successive pans receive biscuits at each period of rest of the movement. The removal mechanism presently to be described also operates to remove biscuits from the pans while the latter are at rest and it is preferable to lead the conveyor through two loops, one associated with the biscuit depositing device, and the other with the biscuit removal mechanism. This permits the deposition and removal of biscuits from portions of the conveyor moving step by step and affords sufficient room for the two groups of mechanism.

The conveyor chain passing out from the bottom of the oven, is led around sprocket wheels 110, one for each of the side chains of the conveyor, the sprocket wheels being mounted on a shaft 111 in suitable bearings. From the sprocket wheels 110, the conveyor passes upwardly over sprocket wheels 112 mounted on a shaft 113. This shaft is journaled in bearing blocks 114 slidable in suitable guide-ways provided in the framing and moved to maintain the conveyor chain taut by means of springs 115. From the sprocket wheels 112, the conveyor passes down in a vertical stretch 116, then around sprocket wheels 117, mounted in rods 118 pivotally suspended from a bar 119 of the frame. From the sprocket wheels 117, the conveyor passes in a horizontal stretch 120, suitably supported on tracks 121, to sprocket wheels 122 mounted on a shaft carried in the lower ends of similar arms 118. The two sets of arms 118 are connected by a cross member 123. From the sprocket wheels 122, the conveyor extends upwardly to sprocket wheels 124 supported on shafts mounted on the framing, then across to similar sprocket wheels 125 and then downwardly around sprocket wheels 126 supported on a shaft in the lower ends of arms 118. From sprocket wheels 126, the conveyor passes in a horizontal stretch 127 running on a track 128 to sprocket wheels 129 mounted on the shaft on the ends of another pair of arms 118. The conveyor then passes upwardly and around sprocket wheels 130 supported on a shaft journaled in bearings in the framing and from the sprocket wheels 130 the conveyor passes in a horizontal stretch 131 into the oven through an opening in the front wall.

The conveyor led around the sprocket wheels in the manner described, forms two depending loops having horizontal stretches 120 and 127. The arms 118 in each loop are connected by rods 123 and the arms of the two loops are connected by a connection rod 132. Connected to the bearing of the shaft of sprocket wheels 126, is a rod 133 having an adjustable connection with a rock arm 134 pivotally mounted on the bed of the machine at 135. This arm 134 is reciprocated by means of cams 136 mounted on a driven shaft 137.

The conveyor as a whole is driven by means of the sprocket wheels 108 at one end of the oven, which are driven by suitable gearing connections from vertical shafts 138 driven by gearing from a main drive shaft 139, which is in turn driven from any suitable source of power. A horizontal shaft 140 is driven through gearing connections from the vertical shaft 138 and through gearing connections drives the shaft on which sprocket wheels 130 are mounted. A second horizontal shaft 141 is driven through a suitable connection from shaft 140, and this shaft drives the shaft of sprocket wheels 125 and also drives the vertical shaft 142 which drives the shaft 111. A horizontal shaft 143, driven through gearing from the shaft 138, drives a transverse shaft 144 which drives the shaft 137 through suitable connections (not shown). The sprocket wheels 112 and 124, and the sprocket wheels carried in the ends of the depending arms 118, are idlers. The spring take-up for the shaft 113 keeps the conveyor chain taut outside the oven, and similar spring take-ups are employed in connection with the shafts of the sprocket wheels 107.

The conveyor as a whole has a continuous movement, but the portions forming the horizontal stretches of the two loops are reciprocated on their tracks by means of the

cams 136 and the rocker levers 134. In each movement of the rock levers in a direction opposite to that in which the conveyor is moving, one link of the conveyor chain in each vertical stretch 116 of the loops is placed by the sprocket wheels 117 and 126 on the tracks 121 and 128, and sprocket wheels 122 and 129 release a link carrying a pan from this horizontal stretch and permit the link to move upwardly. The remaining links of the horizontal stretches remain at rest. When the rock levers 134 reciprocate in the direction in which conveyor chain is moving, the horizontal stretches are advanced by one link. Accordingly, the pans are brought successively to rest in one loop beneath the depositing mechanism 62 and in the other loop beneath the biscuit removal mechanism 63. At each period of rest of the pans, a group of biscuits is deposited in a pan by the depositing mechanism and a group of biscuits is removed from a pan by the biscuit removal mechanism.

In order that the pans may be maintained upright at all times throughout the movement of the conveyor chain, suitable guiding devices are provided for the supplementary chain. One of such devices is illustrated in Fig. 5, where the conveyor chain is shown passing about a sprocket wheel such as 107. On the journal box of the shaft 146 of the sprocket wheels 107 is mounted an eccentric disc 148 and a ring 149 is mounted for rotation on this disc. This ring is provided with seats 150 in its rim and each seat receives the end of a lug 104 as the conveyor chain passes around the sprocket wheels 107. The eccentricity of the disc 148 is such that the lugs 104 are given a movement relative to the links 101 sufficient to maintain the pans in vertical position, even though the links 101 are inverted after their movement around the sprocket wheels 107. Similar guiding devices are employed at each point where the conveyor chain changes direction.

The oven enclosure through which the conveyor chain is led is formed of side walls of suitable installating material and is provided with a partition 150' dividing the enclosure into an upper shallow baking chamber and a lower deeper drying chamber. Passing out of the oven near the bottom of the front wall through a suitable opening, the conveyor travels through a conduit indicated generally at 151 and provided with a gate 152 at its rear end, by which the ingress of air may be controlled. Additional air may be introduced into the oven through the opening near the top of the front wall through which the conveyor chain enters the oven, and at the rear end of the oven is an air outlet 153 connected to suitable air suction means by which air may be drawn through the openings mentioned and passed completely through the oven from one end to the other. A branch line 154 leads to openings in the top of the oven (not shown) and provides means for removing the moisture-laden air from the oven chamber.

The delivery mechanism (Figs. 6, 7, 43 to 47, inclusive) by which the baked dried biscuits are removed from the conveyor, is disposed opposite the first conveyor loop at the right in Fig. 4, and operates in timed relation to the intermittent movement of the pans in the horizontal stretch of the loop, the biscuits thus being removed from the pans while the latter are temporarily at rest. This device is mounted on the bed plate 155 supported on suitable standards 156, 157. Beneath the bed plate near one end is journaled a main drive shaft 158 driven from any convenient source of power and preferably connected with the drive shaft 139, the shaft 158 carrying a fly wheel 159. The shaft 158 drives the biscuit removal mechanism directly and drives the cartor feeding and filling devices through gearing, and the drive is so arranged that by operating a clutch 160 only the biscuit feeding mechanism will continue in operation, the other devices being disconnected from the shaft. This clutch mechanism includes the clutch 160 actuated by a lever 161 pivoted at 162 on the bed plate and controlled from the front of the machine by a rod 163 sliding in a bearing 164. At its forward end the rod has a handle by which it may be manipulated by the attendant.

The delivery mechanism includes upright supports 165 and 166 secured to the bed plate 155 and carrying spaced parallel bars 167 and 168 which are of square cross-section and turned edgewise to resist bearing strain. Upon these bars is slidably mounted the frame consisting of uprights 169 and 170 having passages therein engaging the bars 167 and 168 and connected at their upper ends by a cross piece 171 having an arched handle portion 172. These uprights are connected at their lower ends by a cross piece 173.

Upon the front faces of the uprights 169, 170 are stud bolts 174, 175 upon which are mounted vertical slotted extensions 176, 177 of an elongated plate 178 which is adapted to have a longitudinal movement in unison with the frame and a vertical movement relatively thereto. Within the frame and slidably mounted upon the bars 167, 168, is a slide piece 179 preferably formed of two pieces bolted together and provided at each side of its lower end with adjustably mounted bolts 180, 181, arranged to engage stop lugs 182, 183, upon the cross piece 173 as the slide piece is moved to the right or left. Upon the upright parts of the frame 169, 170 are pivotally mounted bell crank

levers 184, 185, the lever 185 being inverted with reference to the lever 184. The arms of the levers are connected to the slide block 179 by links 186, 187, while the long arms are connected by links 188, 189 to the plate 178. As the slide block is moved to the right relative to the slide frame, the bell cranks are moved to lower the plate 178, and when the slide block is moved to the left with reference to the slide frame, the bell cranks are caused to raise the plate 178.

A long stroke lever 190 (Fig. 6) is pivotally mounted to the base at 191 and is connected at its upper end to the slide block 179 by a link 192. This lever is jointed at 193 for adjustment and is connected with the upper end of a lever 194 pivoted to the standard 156 at 195. The lever 194 has a slot 196 engaged with a slide block 197 mounted eccentrically upon a disc 198 which is mounted on the main drive shaft 158. The oscillation of the disc imparts a compounded long swing to the lever 190 and in operation the initial swing to the right slides the block 179, lowering the plate 178 through the rotation of the bell crank levers 184 and 185 until the bolt screw 181 strikes the stop lug 183, the slide block and the frame then moving in unison. On the reverse movement, the block 179 first moves to the left, causing the plate 178 to be lifted, this raising movement continuing until the bolt screw 180 engages the lug 182, whereupon the frame and slide block are moved in unison toward the left.

On the plate 178 is a series of blades which are adapted to engage behind the biscuits and feed them forwardly. The horizontal stretch of the conveyor in the first loop passes beneath the end of the plate 178 and mounted on the bed plate of the machine is an inspection table 199 supported on uprights 200. This inspection table extends close to the ends of pans 100 and in each period of rest in the intermittent movement of the conveyor, one of the pans lies with its end in registry with the platform 199. During such movement the plate 178 has moved out to a position over the pan and at the proper instant the plate is lowered so as to bring the blades close to the surface of the pan, the blades entering the spaces between adjacent biscuits on the pan. The plate 178 now moves in unison with the slide block so that the blades carry the biscuits from the pan to the inspection platform and at each reciprocation of the plate 178, six biscuits are moved from the pan to the platform and twelve biscuits previously deposited on the platform are moved by the blades in successive steps to a position whence they are to be transferred to the packing mechanism. As each pan contains twelve biscuits in a row and the removal device only removes six biscuits, a second removal device removing biscuits from the opposite side of the pan is intended to be used in this machine. This biscuit removal mechanism, and the packing devices associated with it, are the same as those illustrated, but they are merely reversed in operation.

Each of the blades 201 by which the individual biscuits are engaged, each biscuit thus being removed under exact control from the pan and similarly advanced along the platform, is flexibly mounted on a pair of pivotal frames 202, 203 which are supported on shafts 204, 205, mounted in brackets 206 secured to the outer side of the plate 178. The side portions of the frames 202 and 203 are slotted so that the shafts 204 and 205 are slidably mounted therein, coil springs 207, 208 being disposed between the shafts and the cross pieces 209 and 210 of the frames so that pressure in either direction on the blades will move either the upper or lower frame relatively to the shafts compressing the springs. Upon release of the pressure, the blades assume their normal positions. A stop pin 211 engaging the under side of the frame 202, limits the downward movement of the blades, the frame being yieldably held against the pin by a spring 212 which is coiled about the shaft and tensioned through the engagement of its end 213 with the bracket 206. The construction is such that the blade is capable of yielding upwardly, forwardly, and rearwardly so that if a biscuit is in the path of the blade when the blade is moved down, the blades will yield so as not to damage the biscuit.

As the biscuits are moved along the platform 199 in successive steps, they are eventually deposited in front of a feed bar 454. The packing mechanism is arranged to fill two cartons simultaneously, and the biscuits are fed to the cartons in groups of three. The six biscuits deposited in front of the feed bar by the action of the biscuit removal device are equally spaced and as the feed bar reciprocates at right angles to the direction in which the biscuits have been led to it, delivering the biscuits to the packing devices, the biscuits are divided into groups of three by a V-shaped deflector 215.

The cartons are supplied from a hopper which comprises an inclined base 216 (Figs. 10 and 11) supported between side plates 217 and 218 secured at their flanged bases 219 and 220 to the bed plate. The cartons are stacked vertically in flattened condition in the hopper, and these cartons have side and end flaps at top and bottom which are turned outwardly so as to lie against the vertical walls of the cartons. A slide follower 221 is mounted in the hopper to force the stack of cartons into the lower end thereof, this hopper having a guide rod 222 which

is mounted in the sides 223 and 224 of the hopper and projects through slots 225, 226 in the side plates. To the ends of the rod are connected cords 227, 228, which extend over guide rolls 229, 230, 231, 232 and carry weights 233 and 234, at their lower ends. These weights force the follower against the stack of cartons.

The front end of the hopper is normally closed by a sliding feed member 235 and extending from the hopper at one side along the feed plate is a guide-way having a hollow wall 236 at one side. Its inner surface is substantially flush with the lower end of the hopper and the other wall 237 of the guide-way is also hollow and is spaced from the wall 236 a distance equal to the width of an opened carton. This longitudinally extending guide-way communicates at its end with a guide-way extending forwardly therefrom and at right angles, this guide-way having a width corresponding to the length of an opened carton and being bounded by hollow walls 238, 239. This guide-way in turn communicates with a third guide-way extending at right angles thereto and parallel to the first guide-way, being bounded by hollow walls 240, 241.

These several hollow walls are suitably secured together by air-tight connections and the spaces between the contacting walls are in communication. The inner surfaces of the walls are perforated as indicated at 242 and a partial vacuum is maintained within the walls by means of a suction chamber 243 connected to an air exhaust by a pipe 244 and to flanged outlets 245, 246 of the walls 236 and 237 by pipes 247 and 248. The suction walls exert a grip on the side walls of the cartons, tending to maintain them in opened condition. The guide-ways are arranged in the manner described so that the cartons may be conveniently fed one by one from a hopper, opened and delivered in single file with their ends in contact to a position in front of the packing devices where the two end cartons are moved abreast to the packing station. In the movement of the cartons from the hopper to the packing station, the bottom end flaps of the cartons must be turned inwardly and this is conveniently done by feeding the cartons at one point along a guide-way through which the cartons move with their sides uppermost, folding devices acting on the bottom end flaps in this movement and turning them inwardly.

The reciprocating feed member 235 moves to and fro in front of the hopper and at its forward end carries a pusher head 249 which is guided in its movement by means of an angle flange 250 projecting at one side and engaging a slotted guide block 251 fixed to the bed plate. The inner face of the slide member is provided with a recess 252 having a shoulder 253 at the end of the recess. As the slide member moves across the end of the hopper, the shoulder picks up a flattened carton and moves it forwardly into engagement with the inner surface of the wall 236, and as the slide member retracts, the flattened carton remains in contact with the surface of the wall, being held there by the suction. The part 254 of the wall adjacent the hopper is solid and unperforated, this part having a length corresponding substantially to the width of the end of a carton. The carton fed by the slide feed member and deposited against the inner surface of the wall 236, is gripped along its side by the suction action, while its end opposite the unperforated part of the wall is free.

The slide feed member 235 is reciprocated by means of a lever 255 pivotally mounted at 256 on an extension 257 of the base of standard 157, the lever extending upwardly through a slot 258 in the bed plate and being connected to a forked link 259 adjustably secured in a slot 260 in the lever. A connecting rod 261 extends from the lever 255 to a lever 262 pivotally mounted at its lower end 263 upon standard 156 and provided on its upper end with an enlarged head having parallel slots 264, 265, the slot 264 being relatively wide and having its axis coincident with the axis of rotation of the lever, while the narrower slot 265 is offset and is pivotally connected to the end of the rod 261 by an adjustable connection 266. The slot 264 receives an eccentric crank pin 267 slidable therein, this pin being mounted on a disc 268 secured to the end of an auxiliary drive shaft 269 journaled in the frame and driven by the main shaft 158 by gears 270 and 271 (Fig. 9) and an intermediate gear 272 mounted on a stud shaft 273. The gear ratio is such that the shaft 269 is rotated once for each two rotations of the shaft 158. Thus, for each four rotations of the main drive shaft, two cartons are fed from the hopper. The gear 270 is loose upon the shaft 158 and is connected thereto through the operation of the clutch 160 so that upon occasion the shaft 158 may rotate without driving the gear 270.

At the end of the wall 237 and substantially diagonal with reference to the solid portion 254 of the wall 236, there is disposed a swinging suction head 274 (Figs. 8, 10, 11, 21) which is hollow and has perforations 275 in its front face. Its rear face has a flanged outlet 276 connected by flexible pipe 277 to the suction chamber 243. Near its base the head has projecting arms 278, 279 which are pivotally connected to the ends of the crank arms 280, 281 mounted on the upper ends of shafts 282, 283 journaled in the bed plate and carrying crank arms 284, 285 on the lower ends beneath the bed plate. A third crank arm 286 is mounted upon a

stud shaft 287 below the bed plate and the ends of the three arms 284, 285, and 286 are connected by a bar 288 so that they will operate in unison.

The bar 288 is swung to and fro transversely of the bed plate to oscillate the crank arms by means of a lever arm 289 to which it is connected by a link 290, adjustably and pivotally connected at one end 291 in a slot 292 in the end of the lever 289 and pivotally connected at its other end to the bar 288. The lever 289 is pivotally connected at 293 to the under side of the bed plate and is provided intermediate its ends with a roller 294 sliding in a cam groove 295 of a cam plate 296 mounted on the reciprocating cam supporting frame comprising rails 297 and 298 (Figs. 8, 18) connected at their rear ends to a dove-tailed slide bar 299 which is slidably mounted in beveled guides 300 and 301. The forward ends of the rails are connected by a plate 302 which has a forwardly extending arm 303 slidably mounted in dove-tailed guides 304 and 305 secured to the under side of the bed plate. An intermediate cross piece 306 also connects the two side rails, a lug 307 formed on its under surface being connected by a link 308 to the lever 255 so that the lever in its oscillation reciprocates the cam frame.

The cam groove 295 of the plate 296 is so arranged that as the lever 255 and the cam frame are moved in a direction to withdraw the slide feed member 235, the lever 289 is swung forwardly from the position shown in Fig. 3. In such movement the head 274 is swung to the full line position shown in Fig. 7 and it contacts with the inner wall of a carton which has been fed by the sliding head. As the cam frame moves in the opposite direction, the head is swung back to its original position and swings the carton open. As the slide feed member 235 again moves forwardly, feeding a flattened carton, its head 249 engages the opened carton and pushes it forward in the guide-way, together with the carton previously opened.

At the corner formed by the meeting ends of the side walls 237 and 239 there is an opening 309 (Figs. 11, 22) bridged over by the reduced ends 310 and 311 of the side walls. Within this opening is a pusher head 312 which is adapted to receive cartons pushed forwardly by the head 235 and to advance these cartons along the guide-way between the walls 238 and 239. The head 312 is mounted at one end upon a bracket 313 which is mounted on the slide rod 314 and the head is connected at its rear face by a link 315 to a post 316 mounted on a slide rod 317 disposed beneath the rod 314 and arranged for movement relative thereto. The bracket 313 and the post 316 extend upwardly through a slot 318 in the bed plate (Fig. 22) and the slide rods are moved in a channeled guide 319 secured to the under side of the bed plate and provided with retaining strips 320, 321, projecting over the channel to hold the rods therein. The rod 314 has a slot 322 formed in it into which enters a pin 323 mounted on the rod 317. The pin 323 is arranged so that when rod 317 is moved in either direction, it first moves relatively to rod 314, then the two move in unison.

The forward movement of the slide member 235 advances a carton beyond the corner formed by the walls 236 and 237 and as the carton advances, the head 312 is being withdrawn and rod 317 first moves relatively to the rod 314 so as to swing the head 312 out of the path of the advancing cartons. On the continued rearward movement of the rod 317, the two rods 314 and 317 move together until the outer swinging end of the head engages the wall 237, whereupon the further movement of the rod 317 causes a slight forward movement of the pin in the slot, resulting in the head 312 being straightened and aligned with the inner surface of the wall 237.

The rear end of the rod 317 is connected to a link 324 (Fig. 8) adjustably and pivotally connected at its end to the slotted end 325 of a lever 326 pivotally mounted at its opposite end 327 on a convenient part of the machine frame. The lever 326 carries a cam roller 328 lying within a cam groove 329 in a cam plate 330 carried on the reciprocating cam frame. This cam groove forms a closed path for the roller and within the cam groove are leaf springs 331 and 332, one end of each of which is embedded flush with the surface of the groove (Fig. 19) while the free ends of the leaf springs are forced upwardly by coil springs 333 in sockets 334. In the reciprocation of the cam frame, the ends of the leaf springs projecting into the cam groove prevent the return movement of the roller along the same path, and insure that the roller will travel in such a way as to swing the lever 326 to advance and retract the rod 317 and with it the head 312.

As the cartons are fed between the walls 238 and 239, their bottom end flaps are turned inwardly partially to close the bottoms of the cartons, by means of flap-folding devices disposed at each side of the guide-way. These devices comprise shoes 335, 336 (Figs. 12, 13) which are mounted above openings 337 and 338 in the bed plate and have bracket lugs 339 secured to the bed plate by screws 340. The shoes extend upwardly into elongated openings 341 and 342 formed in the walls 238 and 239 respectively, the opening 341 being relatively higher and extending forwardly to the end of the wall 240 to accommodate a carton feeding head presently to be described. The front end of each shoe is provided with a

beveled nose portion 343 and at the under side each shoe has a depending turning flap 344 which terminates at one end rearwardly of the nose of the shoe, its beveled edge 345 being substantially a continuation thereof. The flange is bent inwardly beneath the plate 346 which extends over an opening 347 of the bed plate. The plate 346 is flush with the surface of the bed plate and is held in position by screws 348 and 349 which enter a projecting portion 350 of the bed plate, the plate 346 extending rearwardly of the end of the shoe and having its end spaced from the beveled end 351 of the opening 347 to form an outlet slot for the turned end flap. As the cartons move forwardly, the nose portions 343 of the shoes enter between the up-turned end flaps, turn them outwardly along the edges 345 of the flanges to the folded-in position between flanges 344 and plates 347, the inwardly turned flaps then moving out through the slots to the ends of the plates 346.

The cartons advanced to the ends of the guideway defined by walls 238 and 239, are now fed at right angles thereto between walls 240 and 241. The mechanism by which the cartons are advanced in the new direction includes spaced lugs 352, 353, 354, (Fig. 14) on a flange 355 at the forward end of the arm 303 of plate 302. In these lugs are journaled the shafts 356, 357, and 358 to which are secured crank arms 359, 360 and 361, connected at their outer ends by a bar 362. To the upper ends of the shafts 357 and 358 are secured lever arms 363, 364 on which there is pivotally mounted a pusher head 365 disposed in the opening 341 of the wall 238 and adapted to move through a communicating opening 366 (Fig. 12) provided in the wall 240. A link 367 is pivotally connected to one end of the bar 362 and at its other end is connected pivotally to the slotted end of a lever arm 368 pivotally mounted at 369 on the plate 302. A roller 370 carried on an extension of the arm enters an opening 371 in the plate 302 and cooperates with a cam projection 372 provided on a stationary plate secured beneath the bed plate of the machine.

The cam projection 372 cooperates with the wall of the opening to form a closed path of travel for the roller 370 and a leaf spring 373 secured at one end and having its other end forced upwardly by a coil spring 374 disposed beneath it, lies in the path of travel of the roller, so that as the cam slide reciprocates, the roller is forced to pass around opposite sides of the cam projection in its forward and return movement. On the shaft 357 is a coil spring 375 which tends to force the crank arms in a clockwise direction and through the linkage the lever 368 is yieldingly forced to one side so that the roller in one movement bears against the wall of the opening 371, and in the other against the rounded surface of the cam projection.

In the operation of the mechanism, as the cam frame and plate move to the left (Fig. 8) the roller rides along the straight side of the cam and the pusher head 365 engages the end of a carton and pushes the carton, and two other cartons in front of it, forwardly between walls 240 and 241. In the return movement of the frame and plate, the roller passes along the rounded surface of the cam, causing the lever 368 to swing and this movement, through the linkage, moves the pusher head out of the guide-way as indicated in dotted lines in Fig. 7, so that its longitudinal face is flush with the inner surface of the wall 240 and the guide-way is free to receive another carton from the communicating guide-way. When the cam frame reaches the end of its return movement, the lever again assumes the position shown in Fig. 8, and the pusher head is swung into feeding position.

The cartons moving along the guide-way defined by walls 240 and 241 have their end walls in contact. The packing stations at which the two end cartons are to be filled are separated, so that the cartons must similarly be spaced before being advanced to the packing stations. For this purpose there is a hollow suction head 376 at the end of the guide-way having perforations 377 in the front face, the head being connected by a pipe 378 to the suction chamber 243. The head normally lies in such a position that the feeding movement of the head 365 causes a carton to be advanced into contact with the suction head, the end wall of the carton being gripped by the suction face of the head. Secured to the rear of the head is a rod 379 projecting through a guide block 380 and the head is held normally in advanced position by a coil spring 381 encircling the rod. The end of the rod is bent downwardly at 382 through a slot 383 in the bed plate and lies in the path of a pin 384 on a disc 385 on a shaft 386. As the shaft is rotated, the pin moves the head from full line to dotted line position (Fig. 42), drawing the end carton away from the one next to it by the desired amount.

The shaft 386 is journaled in suitable bearings on the under side of the bed plate and at one end carries a gear 387 meshing with a gear 388 on the end of the shaft 389 journaled in suitable bearings and driven intermittently from the shaft 269 by gears 390 and 391, one of these gears having blank sections, as shown in Fig. 9. The shaft 386 makes one rotation for each two rotations of the shaft 269.

The two end cartons in the guide-way defined by walls 240 and 241, separated by the mechanism described, are now pushed for-

wardly to the packing stations along spaced guide-ways formed by outer guide walls 392 and 393 and a central guide wall 394. The cartons are fed by means of a pusher plate 395 having top and bottom edge flanges 396 and 397. This pusher plate normally lies within a recess 398 in the wall 240, so that the cartons can be advanced to a position in front of it. The wall at this point is of skeleton form.

The pusher plate is provided with feeding arms 399 and 400 which extend through a suitable opening in the wall, the arm 399 being pivotally secured to one end of the pusher plate, and the arm 400 being similarly connected to the plate intermediate its ends. The arm 400 is secured at one end to the end of a slide bar 401 (Fig. 26) reciprocating in a guide 402, and on the upper surface of the bar 401 slides a second bar 403 connected to bar 401 by a slot and pin connection 404, 405. The arm 399 is connected to the outer end of the bar 403 and when the bar 401 is reciprocated to the right (Fig. 26) the bars are moved together so that the plate 395 engages a pair of cartons which lie in a line and advances these cartons abreast in the separate guide-ways to the packing station. Upon the reverse movement of the bar 401, it moves independently of the bar 403 for a distance corresponding to the length of the slot, so that the plate is swung about the end connected to arm 399 as a center. Its free end is thus retracted in advance of the connected end, moving out of the way of the cartons being advanced to a position in front of the plate, the plate being swung to normal position at the end of its retractile movement.

The end of the bar 401 is flexibly connected by a link 406 to the slotted end 407 of a lever 408, this lever cooperating with a cam groove 409 of the barrel cam 410 and having latch mechanism, presently to be described, by which the lever is rendered inoperative throughout certain rotations of the cam.

The barrel cam 410 is mounted loosely on the main shaft 158 and is driven therefrom by the countershaft 269 through a gear 411 secured to the shaft 269, an intermediate gear 412 journaled on the stud shaft 413, and a gear 414 secured to the end of the cam. The lever 408 is pivotally mounted upon a stud shaft 415 (Figs. 15, 16) having a rotatable bushing 416 at is lower end in the cam groove 409. Between the bushing and the lever is pivotally mounted on the stud shaft the end of a rock lever 417 having a hub end 418 pivotally journaled upon a vertical shaft 419 suspended from the bed plate. On the end of the lever 408 is an arcuate head 420 which slidably engages an enlargement 421 of lever 417 below a retaining arm 422, projecting from the hub 418. On the lower end of the shaft 419 and between the flange 423 and a head 424 on the extremity of the shaft is pivoted a lever 425 held in position against flange 423 by a coil spring 426. The lever carries a locking pin 427 which extends through a passage 428 in the enlargement 421 of lever 417 and in its upper position (Fig. 15) the pin projects into a socket 429 in the arcuate head 420 and thus locks the levers 408 and 417 together.

On the hub of lever 425 are upper and lower flanges 430 and 431 engaged by trunnion pins 432 in the forked end of a lever arm 433 secured on a horizontal rock shaft 434 supported in suitable brackets upon the bed plate. A rock lever 435 is secured upon the shaft and at its end carries a roller 436 which rides upon the surface of a cam 437 on a shaft 438 supported in suitable bracket bearings and driven by the shaft 158 by suitable gearing. The gearing is so arranged that the cam has one rotation for every four rotations of the shaft 158, and this cam is so formed that during three-quarters of the rotation of the cam the arm 435 depresses the lever 425, thus releasing the levers 408 and 417. When thus released, the lever 408 is oscillated about its pivotal connection to the bar 401 by the action of the cam, but causes no movement of the bar. At the same time the lever 417 is swung about its shaft 419. During the remaining quarter turn of cam 437, the two levers are locked together and are thus rocked as a unit by the cam 410. This rocking movement causes a movement of the lever 401 and the cartons are moved into position to be filled, by head 395.

The packing mechanism as illustrated is arranged to pack two cartons simultaneously, each carton receiving twelve biscuits arranged in four layers of three biscuits each, with a strip of paper inserted between adjacent layers. The biscuit feeding mechanism is actuated by the barrel cam 410 which has a cam groove 439 engaged by a bushing 440 on a lever arm 441 pivotally mounted on the bed plate at 442 and connected at its other end by a link 443 to a slide bar 444 mounted to reciprocate in a guide-way 445 (Figs. 9, 25) secured to the under side of the bed plate. At its forward end the bar 444 has an offset portion 446 (Figs. 9, 12) in which is journaled an elongated shaft 447, the offset portion 446 also having an upstanding arm 448 which, at its upper end, is provided with a sleeve 449 in which is housed a shaft 450 carrying a rocker arm 451 connected by a rod 452 to a rock lever 453 on the end of the shaft 447. Upon the inner end of the shaft 450 is mounted a feed bar 454 which rests upon a plate 199 upon which the biscuits are fed by the removal mechanism in groups of six.

The biscuits are deposited by this removal

mechanism in front of the bar 454 which feeds the biscuits forwardly into openings 455 and 456 above the cartons to be filled. In the plate 109 is a glass insert plate 457 so that the position of the cartons beneath the plate may be observed. On the front face of the bar 454 are mounted plates 458, 459, carried on springs 460, these plates engaging the biscuits lightly and moving them forward as the plate advances.

The shaft 447 is slidable in a bracket 461, depending from the bed plate, and is connected to the bar 444 to reciprocate therewith by means of an arm 462 extending from the bar 444 and having a portion through which the shaft extends, retaining collars 463 on the shaft being placed on either side of the arm. At its inner end the shaft is provided with a gear 464 having a spline entering an elongated slot 465 in the shaft 309, this connection permitting the movement of the shaft lengthwise with reference to the gear but connecting the two rigidly for rotation. The gear 464 is intermittently rotated by means of a segmental gear 466 carried on a shaft 467 mounted in suitable bearings beneath the bed plate of the machine and continuously rotated by means of a sprocket gear 468 and a sprocket chain 469 from a sprocket gear 470 on the shaft 269.

When the biscuit feeding bar 454 reaches the end of its feeding movement, the gear 466 meshes with the gear 464 and turns it through a partial rotation. This causes a movement of the rock arms 451 and 453, resulting in the feed bar being swung upwardly about the shaft 450 as a pivot. The feed bar remains raised until it returns to its retracted position, whereupon the segmental gear 466 is disengaged from the gear 464 and the feeding bar is permitted to drop back into its lowered position. The raising of the bar permits the next group of biscuits to be fed into place before the feeding bar has been fully retracted, and as the feeding bar thus moves forward and backward, biscuits are placed in position to be fed during the backward movement of the bar and these biscuits are advanced to the packing station in the forward movement of the bar.

The cartons fed forwardly in the separate guide-ways by means of the pusher plate 395 are supported on a floor plate 471 having openings 472 and 473. When the cartons are in position, a collapsible platform is projected through each opening into the carton, expanding near the top of its upward movement to provide a support for a layer of biscuits. As each layer of biscuits is received by the platform, the latter is lowered by a step, the operations continuing until the carton is filled. In the last step in the downward movement of the platform it is collapsed and withdrawn from the bottom of the carton and the filled carton is then ejected from the packing position by suitable mechanism.

The packing mechanism, (Figs. 27–36) includes a shelf 474 suspended below the bed plate 471 by tubular posts 475, 476, 477, 478, and a frame 479 provided with apertured corner pieces 480 through which the posts extend, is mounted for sliding movement on the posts. On the under side of the frame are secured downwardly extending posts 481, 482, connected at their lower ends to arms 483, 484 of a piston rod 485 connected to the piston head 486 slidable in a suction cylinder 487 supported from the shelf 474 by hanger rods 488 and having a connection at its upper end to a vacuum chamber by a pipe 489. The suction above the piston tends to move it upwardly at all times to raise the frame to its uppermost position.

At the ends of the frame are racks 490, 491, having four teeth engageable by pawls 492 carried on vertically reciprocating shafts 493 and 494 mounted in sleeves 495 and 496, these sleeves being mounted for vertical movement relative to the shafts. Guide collars 497 on the plate 471 support the upper ends of the sleeves, while the lower ends slide in apertures 498 of the shelf 474. Each pawl 492 is pivotally mounted in an opening 499 of the shaft and a leaf spring 500 normally forces it through a slot 501, in the sleeve to a position in which it engages the rack.

The lower ends of the shafts 493 and 494 project beyond the ends of the sleeves and are connected to the ends of a cross beam 502 having a central roller 503 which is engaged by a cam 504 on a shaft 505 journaled in suitable bearing brackets 506 and driven from the main shaft 269 by sprocket gears 507 and 508 and a sprocket chain 509.

The upper ends of the shafts extend above the plate 471 and are provided with shoulders 510 against which bear helical expansion springs 511, bearing at their other ends against the plate and exerting a lifting force on the shafts which retain the roller 503 in engagement with its cam. The rotation of the cam causes the intermittent raising and lowering of the shafts and the pawls successively engage the racks to force the frame downwardly one tooth of the rack at a step.

The posts 475, etc., are provided longitudinally on their outer sides with a series of openings 512 having the form of teeth, and within each of the posts is a slide bar 513 having a groove 514 in which are mounted spaced blocks 515 provided with projecting teeth portions 516 oppositely inclined to the teeth 512. Each bar is arranged to be moved upwardly relatively to the posts by a suitable mechanism so that the teeth 516 are

brought into such relation to the teeth 512 that a substantially unbroken outer surface on the posts is provided. When the strips are lowered the teeth are separated so as to form recesses which may be engaged by pawls 517 in slots 518 in corner blocks 480, the pawls being held yieldably in position by leaf springs 519.

The ends of the rods 513 extend below the shelf 474 and are connected in pairs by bars 520 and 521 secured to the rods by set-screws. Rock shafts 522 and 523 mounted in suitable bearings depending from the shelf 474 carry yoke members 524 and 525 which embrace the sleeves 495 and 496 and have slots 526 in their arms which engage trunnion pins 527 provided on the ends of the sleeves. At the outer sides of the bearings the rock shafts carry yoke members 528 and 529, each comprising side arms and a connecting bar, the connecting bars engaging the bars 520 and 521 from beneath. At one end of each rock shaft is a lever arm 530 and 531, these arms being connected by links 532 and 533 to the arms of a rock lever 534 on the end of a shaft 535 mounted in suitable bearings. At the end of the shaft 535 is a lever 536 connected by a link 537 to one end of a lever 538 suitably journaled in a bracket depending from the bed-plate. The end of the lever 538 enters a cam slot 539 provided in the end of the slide bar 401 (Figs. 25, 26).

In the operation of the mechanism for raising and lowering the frame, when the frame is in its uppermost position the pawls 492 engage the lowermost teeth of the racks 490 and 491 and as the cam 504 rotates, the shafts 493 and 494 are reciprocated, causing the pawls to move the racks downwardly by the amount of one tooth at each reciprocation. At each step in the downward movement of the frame, the latter is held against return upward movement after it is released by the pawls by means of the pawls 517 entering the teeth 512. The frame is thus moved downwardly with an intermittent movement of four steps, and when it reaches the end of its downward movement it is restored to its uppermost position in a single step. To permit such movement, the lever 538 is swung by the cam slot, and through the linkage rocks lever arms 530 and 531, which raise the cross bars 520 and 521 and with them the shafts 513, thus raising the toothed blocks 515 from the position shown in Fig. 30 to that shown in Fig. 29, the pawls 517 being forced out of engagement with the teeth. At the same time the yoke members 524 and 525 swing downwardly, drawing the tubular posts 495 and 496 downwardly so that the upper ends of each slot 501 forces the pawl 492 into the opening 499 collapsing spring 500 and thereby releasing the frame (Fig. 33). The frame is now free to move upwardly and is so moved by the action of the suction cylinder.

The frame 479 (Fig. 27) carries a pair of collapsible platforms which are of similar construction, so that but one need be described. Each platform comprises telescoping plates 540 and 541, the plate 540 having side flanges 542 which embrace the side edges of the plate 541. The plates are supported on upright arms 543 pivotally connected at their lower ends at 544 to the frame and at their upper ends to the under sides of the plates at 545. Two of the arms are connected to the outer end of each plate, and one of the arms is connected centrally at the inner end of the lower plate, this latter arm preventing the tilting of the plates in their collapsing or expanding movements. Slots 546, 547, are formed in the plate 541 to permit the plate to be moved together to the collapsed position. A cross bar 548 connects the arms supporting one plate of one of the platforms and a link 549 connects this cross bar to a cross bar 550 connecting similar arms supporting the same plate of the other platform (Fig. 27). The other pair of arms of the first platform are connected by a cross bar 551 connected by a link 552 to the end of a link 553, the other end of which is connected to a cross bar 554 connecting the other pair of arms of the second platform.

A transverse shaft 555 mounted in the frame carries a bell crank lever having three arms. Arm 556 is connected with the link 549, arm 557 is connected to the connection between links 552 and 553, and arm 558 carries a roller 559 which lies between the ends of vertical stop posts 560 and 561 provided on the plate 471 and the platform 474, post 561 projecting through an opening in the base of the frame in the lowered position of the latter.

As the frame is raised to its upper position, the roller 559 strikes the post 560 (Fig. 31) and the bell crank lever is rocked clockwise. Through the linkage this causes the arm supporting the plates of the two platforms to swing and move the plates to expand the platforms. When the frame is lowered step by step the roller eventually strikes the lower post, rocking the bell crank in the opposite direction and causing the platforms to be collapsed so as to pass through the openings in the plate 471. When the platforms have thus been moved out of the lower ends of the cartons, the latter are completely filled and feeding mechanism is operated to remove the filled cartons and bring empty cartons into position. When this occurs, the cam 539 through the mechanism described, releases the frame and the latter is drawn to its upper position by the action of the suction

cylinder, the platforms entering the cartons and expanding to form surfaces to receive biscuits.

Above the cartons in position to be filled is a vertically reciprocating bar 562 provided with a series of curved plates 563 which are arranged to engage the separate biscuits and to hold these biscuits against movement when the platforms lower the biscuits into the cartons. The bar 563 is supported at its ends on end blocks 564 and 565 which are carried on the upper ends of the vertical slide rods 566 which are guided through projecting portions 567 of the walls 392 and 393 and are connected beneath these portions by cross pieces 568.

At the upper ends of the shaft 493 and 494 (Fig. 37) there are reduced extensions 569 which project through openings centrally of the cross pieces and provided at their upper ends with enlargements between which and the cross pieces are helical expansion springs 570. As the shafts move downwardly to lower the frame step by step, the connection of the frame with the cross bar 526 permits the latter to partake of the initial downward movement, but the shafts continue their down stroke after the bar is stopped by abutment of the stops 571 against the upper surfaces of the walls 392 and 393.

The layers of biscuits within the cartons are separated by strips of paper which are placed in the cartons beneath each layer of biscuits, the proper length of paper being cut as each layer is fed downwardly. The paper feeding mechanism includes supporting standards 572 and 573 (Figs. 25, 27), at the sides of the walls 392 and 393.

Guide rollers 574 and 575 are mounted on suitable shafts on the standard 572 and rollers 576 and 577 are similarly mounted on standard 573. A strip of paper drawn from a supply roller 578 on standard 572 is fed between rollers 574 and 575 and another supply roll 579 is mounted on this standard, from which the strip is drawn around a guide roller 580 in the upper end of standard 573 and thence downwardly between rollers 576 and 577. The rollers 575 and 577 are intermittently operated to feed the proper lengths of paper by sprocket connections with the intermittently rotated shaft 389 (Fig. 25) the connections consisting of a sprocket pinion 581 secured to the shaft of roller 575 which is connected by a sprocket chain 582 to a sprocket gear 583 on a shaft 584 mounted below the bed plate and a sprocket pinion 585 on the shaft of roller 577 connected by a chain 586 to a sprocket gear 587 on the shaft 389. The shaft 584 is driven in correspondence with shaft 389 by a sprocket chain 588, extending around sprocket gears 589, 590 on the respective shafts. The feed rolls draw paper from the supply rolls and feed the paper across the tops of the cartons being packed. When strips of the desired length have been drawn from the supply, these strips are severed by means of knife blades 591 and 592 secured on the inner sides of the end blocks 564 and 565 and cooperating with the inner edges of the walls 392 and 393.

When the cartons are filled they are moved forwardly through the guide-ways formed by walls 392, 393, and 394, to permit empty cartons to be fed to filling position, and the filled cartons are moved by ejecting mechanism so that their weight will not cause the collapse of the cartons advancing to be filled. The walls 392, 393, and 394 are slotted (Fig. 37) and in these slots are reciprocating feed bars, generally designated 593. The bars are of similar construction. On the outer side of the wall 392 is pivotally mounted a lever arm 594 connected by a link 595 to the bar 401 and connected intermediate its ends by a tie rod 596 to a lever 597 pivotally mounted on a bracket 598 extending downwardly from the bed plate of the machine. The upper end of the lever 597 is connected to the jointed ends of links 599 and 600, the link 599 being connected to the end of a feed bar 593, while the link 600 is connected to the lower end of a lever 601 secured to a rock shaft 602 journaled in suitable brackets on the upper surfaces of the walls of the guide-ways and extending across them. At its other end the rock shaft is provided with a lever arm 603 connected by a link 604 to another of the bars 593 and intermediate its ends it is provided with a lever arm 605 which extends downwardly in an opening 606 of the wall 394 and is connected by a link 607 to the other bars 593. Thus as the bar 401 is reciprocated to feed empty cartons to filling position, the bar, through the linkage described, causes a reciprocation of the feed bars 593.

The construction of these bars is illustrated in Figs. 38–41. Each bar is made up of two parts 608 and 609 which have a limited relative movement through the pin and slot connection 610 and 611. As the part 608 is positively reciprocated in one direction or the other, it has a limited initial movement independently of the other part 609, but thereafter the two parts move as one. The part 609 has a series of openings 612 in each of which is a finger 613 pivotally mounted at its forward end upon a pin 614 and at its rear end having a tooth 615 of such size that it may be drawn entirely into the opening when the finger is swung on its pin. Each finger 613 is connected to the part 608 by a link 616 in a slot 617 of the part 608 and pivotally mounted on a pin 618.

As the part 608 is reciprocated rearwardly to feed cartons, its initial movement inde-

pendent of part 609 forces the fingers out of the openings 612, so that the teeth of the fingers engage one of the cartons. The continued movement of the two parts of the bar in unison then causes the cartons to be fed to the rear, the bar 395 at the same time feeding the empty cartons into position to be filled through the reciprocation of the bar 401. In the reverse movement of the part 608 its initial movement relative to the part 609 causes the fingers to be withdrawn into the pockets, where they are held until the forward movement again begins.

As the cartons are fed to the rear by the ejecting mechanism, their upper end flaps are turned inwardly over the tops of the cartons by folding devices 619, 620, 621, 622 (Figs. 7, 27) these devices being so shaped as to enter between the flaps which are folded down against the ends of the cartons and to turn the flaps inwardly over the upper ends of the cartons, where the flaps are held thereafter by holding-down wires 623. The intermediate folding devices 620 and 621 are combined, as shown in Fig. 7 and the folder 621 is placed in front of the folder 620 so that the flaps of the cartons in the right-hand guide-way will be folded before the flaps of the cartons in the left-hand guide-way, thus preventing interference between the flaps in the folding operation.

The cartons fed through the guide-ways from the packing station are received upon a longitudinal platform 624 (Fig. 48) mounted upon supports 625 and provided with guide flanges 626 and 627 which extend along the edges of the platform for a portion of its length to retain the lower side flaps of the cartons folded upwardly. An endless conveyor chain 628 running around sprocket wheels 629, 630, carries spaced arms 631 which are moved over the platform 624 with a step by step movement, so that as two cartons are moved upon the platform a feeding arm engages these cartons and moves them along the platform, the extent of the movement being sufficient to permit the next pair of cartons to be moved to position during the period of movement of the chain. The chain is driven from the shaft 269 by means of an intermittent spur gear 632 which meshes with a pinion 633 upon the shaft of sprocket 629 and is mounted upon a vertically disposed shaft 634 which is provided with beveled pinion 635 meshing with a beveled gear 636 on the end of the shaft 269.

Beyond the flanges 626 and 627 the platform is provided with a raised extension 637 (Fig. 48) overlying the end of a longitudinal platform 638 and slightly spaced therefrom, as indicated at 639. As the cartons are fed along the platform 624 upon the portion 637 between flanges 626 and 627, they are presented to the flap-turning members 640 and 641 mounted on the end of the platform 638 and arranged to turn the side flaps of the cartons inwardly at top and bottom. These flap-turning members are provided at their sides with projecting fingers 642, 643, having their forward edges sharpened and arranged to enter between the flaps and the sides of the cartons, the upper edges of the members 642 and 643 being curved so that the flaps are turned inwardly, the lower flaps being first folded beneath the extension portion 637 of platform 624 and then passing through the space 639 upon the platform 638. A holding-down wire 644 (Fig. 7) extends above the platform 625 to the flap-turning member 640 and serves to hold the inwardly turned end flaps in their down position. Similar holding-down wires 645 and 646 extend from the member 640 above the platform 638 and hold the side flaps in their down position until the cartons are presented to the sealing devices. These devices paste sealing strips along the adjacent edges of the side flaps across the space between them and the ends of the paper strips overlie the folded-in end flaps, thus sealing the cartons and preventing the displacement of the flaps.

The sealing mechanism is illustrated in Figs. 49 and 50 and includes side plates 647 and 648 mounted on the platform 638 at each side of the cartons, the plate 647 being bent outwardly as at 649 to embrace the chain 628. These plates at their ends support mechanism for feeding and pasting the strips to be applied to the upper sides of the cartons and are provided with downwardly extending portions 650 and 651 beneath the platform 638 for supporting mechanism for feeding and pasting strips on the bottoms of the cartons. The two mechanisms are alike but in inverted relation, so that the description of the upper mechanism following applies equally to the lower mechanism.

On a shaft 652 is mounted a roll of pasting tape which is led between feed rollers 654 and 655 mounted on shafts 656 and 657, and thence beneath the pressure roller 658 which engages the upper sides of the cartons, this pressure roller being mounted on the shaft 659. The shaft 656 of roller 654 is yieldingly mounted in slots 660 in the side plates and forced toward the roller 655 by springs 661 so that it engages the paper tightly. A driving shaft 662 is journaled in the plates and carries pulleys 663 and 664 which are connected by belts 665 and 666 with pulleys 667 and 668 provided on the shafts 657 and 659 of the feed and pressure rolls respectively. The drive shaft 662 of the upper mechanism is driven from the corresponding drive shaft of the lower mechanism by a belt 669 which extends over pulleys 670 and 671, the drive shaft

of the lower mechanism being intermittently driven by the mechanism by which the carton feeding mechanism is driven by a sprocket chain 672 extending around a sprocket gear 673 on the lower driving shaft 602 and a sprocket gear 674 on the shaft 675 which is driven from the shaft 634 upon which the chain driving sprocket 629 is mounted, by beveled gears 676 and 677.

The strip fed by rollers 654 and 655 beneath the roller 658 is cut periodically in proper lengths by means of a stationary knife blade 678 mounted between supporting plates with its edge in proximity to the inner face of the paper strip, while at the outer side of the latter is a blade 679 transversely disposed and mounted on a reciprocating bar 680 slidable in the guide 681 and connected at its end to one end of a trip lever 682 upon a shaft 683, this lever being provided at its other end with a roller 684 engaging a cam 685 on the shaft 602. A spring 686 is connected at one end to a pin 687 of the guide block 681 and at its other end to a pin 688 on the bar 680 which moves in the slot 689 in the block 681. The spring holds the roller 684 in engagement with the cam, and as the shaft is revolved the cam intermittently trips the lever 682, moving the blade 679 to cooperate with the stationary blade 678 to sever the length of paper.

The paper preferably employed is gummed on one side and as it is fed, the gummed surface is moistened by a roller 690 engaging a roller 691 which is rotated in a water pan 693. These rolls may be positively driven or driven by frictional contact of the roller 690 with the surface of the tape. As the cartons are fed through the strip-pasting devices, they advance along the platform 638 and are removed from the machine as the arms 631 pass around the sprocket gear 630, the filled cartons then being removed and delivered to the point where they are to be packed in cases.

The different associated devices in the apparatus are driven in suitable timed relation, and in the operation of the machine the shredding devices deposit a continuous cereal strand upon the strand conveyor, where the strand is divided into individual biscuits by the cutter chains. These biscuits are picked up by the upper cutter chain, carried out over the baking conveyor, and deposited in rows on the pans of this conveyor brought successively to rest beneath the depositing mechanism. The filled pans are carried through the oven and the drying chamber with a continuous movement and then are brought successively to rest beneath the delivery mechanism, where the individual blades of that mechanism engage adjacent biscuits in a row and transfer a group of biscuits to the inspection platform. The group of biscuits are moved across this platform in successive steps to a position in front of the feed bar by which two sub-groups, in this case of three biscuits each, are moved simultaneously to the two cartons. The group of three biscuits forms a layer in a carton and this layer is lowered in place by the packing platform. After a layer is placed in the carton, the platform moves downwardly a single step and the operations continue until the cartons are filled, whereupon the filled cartons are ejected and empty cartons fed to filling position. During the packing operation collapsed cartons are withdrawn from the hopper and opened, and the opened cartons fed successively to the packing station. In this movement the bottom end flaps of the opened cartons are turned inwardly.

The operation of the carton opening and moving devices is so timed that while the packing devices are filling the cartons in a succession of operations, two empty cartons are placed in position in front of the packing station. Upon the next action of the parts, the filled cartons are removed, two empty cartons substituted in their places, and the packing platforms moved to the tops of these cartons to receive the first layers of biscuits. In the last filling operation for each carton, the platforms are withdrawn from the lower end of the cartons so that the cartons may be ejected. Beneath each layer of biscuits is placed a strip of paper, the paper being drawn from a supply and strips of the desired length severed from it. Passing from the filling devices, the cartons have their flaps folded appropriately to close the cartons, and thereafter a sealing mechanism operates to apply sealing strips to hold the flaps in closed position.

I claim:

1. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, a traveling feeding mechanism cooperating with a portion of the conveyor to deposit articles to be baked thereon, and a delivery device spaced from the feeding mechanism and cooperating with a portion of the conveyor lying outside the oven, this device having a movement transverse to the direction of movement of the conveyor and operating to remove the articles from the conveyor after they have been carried on the latter through the oven.

2. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, means for advancing the conveyor with a

continuous movement, means for giving a portion of the conveyor lying outside of the oven an intermittent advancing movement during the continuous movement of the remainder of the conveyor, a traveling feeding mechanism cooperating with the portion of the conveyor lying outside the oven to deposit articles to be baked upon a portion of the conveyor while it is at rest, and a delivery device spaced from the feeding mechanism lengthwise of the conveyor and operating in a direction transverse to the direction of movement of the conveyor to remove baked articles from a portion of the conveyor while it is at rest.

3. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through and out of the oven, a traveling feeding mechanism cooperating with a portion of the conveyor to deposit articles thereon in rows extending across the conveyor, and a delivery device spaced from the feeding mechanism and movable in a direction transverse to the direction of movement of the conveyor to withdraw groups of baked articles from the conveyor in single file.

4. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, means for advancing the conveyor with a continuous movement, means for advancing a portion of the conveyor lying outside the oven with an intermittent movement during the continuous movement of the remainder of the conveyor, a traveling feeding mechanism cooperating with a portion of the conveyor to deposit articles to be baked thereon in rows extending across the conveyor while said portion of the conveyor is at rest, and a delivery device spaced from the feeding mechanism lengthwise of the conveyor and operating to remove from a portion of the conveyor groups of articles arranged in single file while the said portion is at rest.

5. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, a traveling feeding mechanism cooperating with the portion of the conveyor lying outside the oven to deposit articles to be baked upon the conveyor, and a delivery device spaced from the feeding mechanism and cooperating with the conveyor, this device carrying a plurality of members each of which is adapted to engage an individual article and to remove this article from the conveyor upon the operation of the device.

6. In apparatus of the type described, the combination of an oven, an endless conveyor having a portion lying within the oven, a traveling feeding mechanism operable to deposit articles on the conveyor in rows extending transversely of the conveyor, and a delivery device spaced from the feeding mechanism and having a plurality of members arranged in line and each adapted to engage an article in a row across the conveyor, the delivery device being movable in a direction transverse to the direction of movement of the conveyor and in correspondence with this movement whereby the articles of a row on the conveyor are moved individually in single file from the conveyor.

7. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, a traveling feeding mechanism cooperating with a portion of the conveyor to deposit articles to be baked upon the conveyor, and a delivery device spaced from the feeding mechanism and cooperating with the conveyor to remove the articles from the conveyor after they have been carried on the latter through the oven and to deliver these articles to a selected point in successive steps.

8. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, means for advancing the conveyor with a continuous movement, means for giving a portion of the conveyor lying outside the oven an intermittent advancing movement during the continuous movement of the remainder of the conveyor, a traveling feeding mechanism operating to deposit articles to be baked upon a portion of the conveyor while it is at rest, and a delivery device spaced from the feeding mechanism lengthwise of the conveyor and operating to remove baked articles from a portion of the conveyor while it is at rest and to deliver the articles from the conveyor to a selected point in successive steps.

9. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, means for advancing the conveyor with a continuous movement, means for giving a portion of the conveyor lying outside the oven an intermittent advancing movement during the continuous movement of the remainder of the conveyor, a traveling feeding mechanism cooperating with a portion of the conveyor and operating to deposit articles on the conveyor in rows extending across the conveyor, and a delivery device spaced from the feeding mechanism lengthwise of the conveyor and operating in a direction transverse to the direction of movement of the conveyor to remove groups of baked articles arranged in single file from said intermittently advancing portion of the conveyor while it is at rest, this device being arranged to deliver these groups of ar-

ticles to a selected point in successive steps.

10. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, means for advancing the conveyor with a continuous movement, means for giving a portion of the conveyor lying outside the oven an intermittent advancing movement during the continuous movement of the remainder of the conveyor, a traveling feeding mechanism cooperating with a portion of the conveyor to deposit articles on the conveyor in rows extending across the conveyor, and a delivery device spaced from the feeding mechanism and having a plurality of members arranged thereon in line and each adapted to engage an article in a row across the conveyor, said device being movable in a direction transverse to the direction of movement of the conveyor and in correspondence with the step by step advance of said intermittently advancing portion of the conveyor to remove a group of articles from the conveyor in single file, the device having a movement of less extent than the length of a row.

11. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, a continuously moving feeding mechanism operating to deposit articles to be baked on the conveyor, and a reciprocating delivery device spaced from the feeding mechanism and cooperating with the portion of the conveyor lying outside the oven, this device reciprocating in a direction transverse to the conveyor and operating upon each reciprocation away from the conveyor to remove articles therefrom after they have been carried on the conveyor through the oven.

12. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, a traveling feeding mechanism operating to deposit articles to be baked upon the conveyor, and a delivery device spaced from the feeding mechanism and cooperating with the conveyor to remove articles from the conveyor after they have been carried on the latter through the oven, this device including conveying means operating to transfer the articles out of the path in which they are removed from the conveyor to a packing station.

13. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, a traveling feeding mechanism operating to deposit articles to be baked upon the conveyor, and a delivery device spaced from the feeding mechanism and operating to remove articles from the conveyor after they have been carried on the latter through the oven, this device including reciprocating conveying means operating to transfer the articles removed by said device out of their path of travel from the conveyor to a packing station.

14. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, a traveling feeding mechanism cooperating with the conveyor to deposit articles to be baked upon the conveyor, a platform outside the oven adjacent the conveyor and spaced from the feeding mechanism, and a delivery device outside the oven cooperating with the conveyor to remove articles from the conveyor after they have been carried on the latter through the oven and to deposit the articles upon the platform.

15. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, a traveling feeding mechanism cooperating with the conveyor to deposit articles to be baked thereon, a platform adjacent the conveyor and spaced from the feeding mechanism, and a delivery device cooperating with the portion of the conveyor to remove articles from the conveyor along a path transverse to the conveyor after the articles have been carried on the conveyor through the oven and to deposit the articles upon the platform, this device including conveying means for transferring the articles deposited upon the platform to a packing station.

16. In apparatus of the type described, the combination of an oven, an endless conveyor movable into, through, and out of the oven, a traveling feeding mechanism cooperating with a portion of the conveyor to deposit articles to be baked thereon, and a delivery device spaced from the feeding mechanism and operating in a direction transverse to the direction of movement of the conveyor to remove articles from the conveyor after they have been carried on the latter through the oven and to deliver these articles to a selected point in successive steps.

17. In apparatus of the class described, the combination of an oven, a conveyor movable into, through, and out of the oven, means for depositing articles to be baked on the conveyor, a delivery device operating to withdraw groups of baked articles from the conveyor in single file and to deliver these articles to a packing station, means for feeding cartons to the station, and packing mechanism at the station operating to introduce the delivered groups of articles into the cartons while maintaining the articles in the arrangement in which they were removed from the conveyor.

18. In apparatus of the class described, the combination of an oven, a conveyor movable into, through and out of the oven,

means for depositing articles to be baked in transverse rows on the conveyor, a delivery device operating transverse to the conveyor to withdraw groups of baked articles from the conveyor in rows in single file and to deliver these articles to a packing station, means for feeding cartons to the station, and packing mechanism at the station operating to introduce the delivered groups of articles into the cartons while maintaining the articles in the arrangement in which they are removed from the conveyor.

In testimony whereof I affix my signature.

HENRY ALONZO HOUSE.

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July 13, 1926. 1,592,797

E. P. WEBSTER

BISCUIT DEPOSITING MEANS

Filed March 11, 1925 4 Sheets-Sheet 1

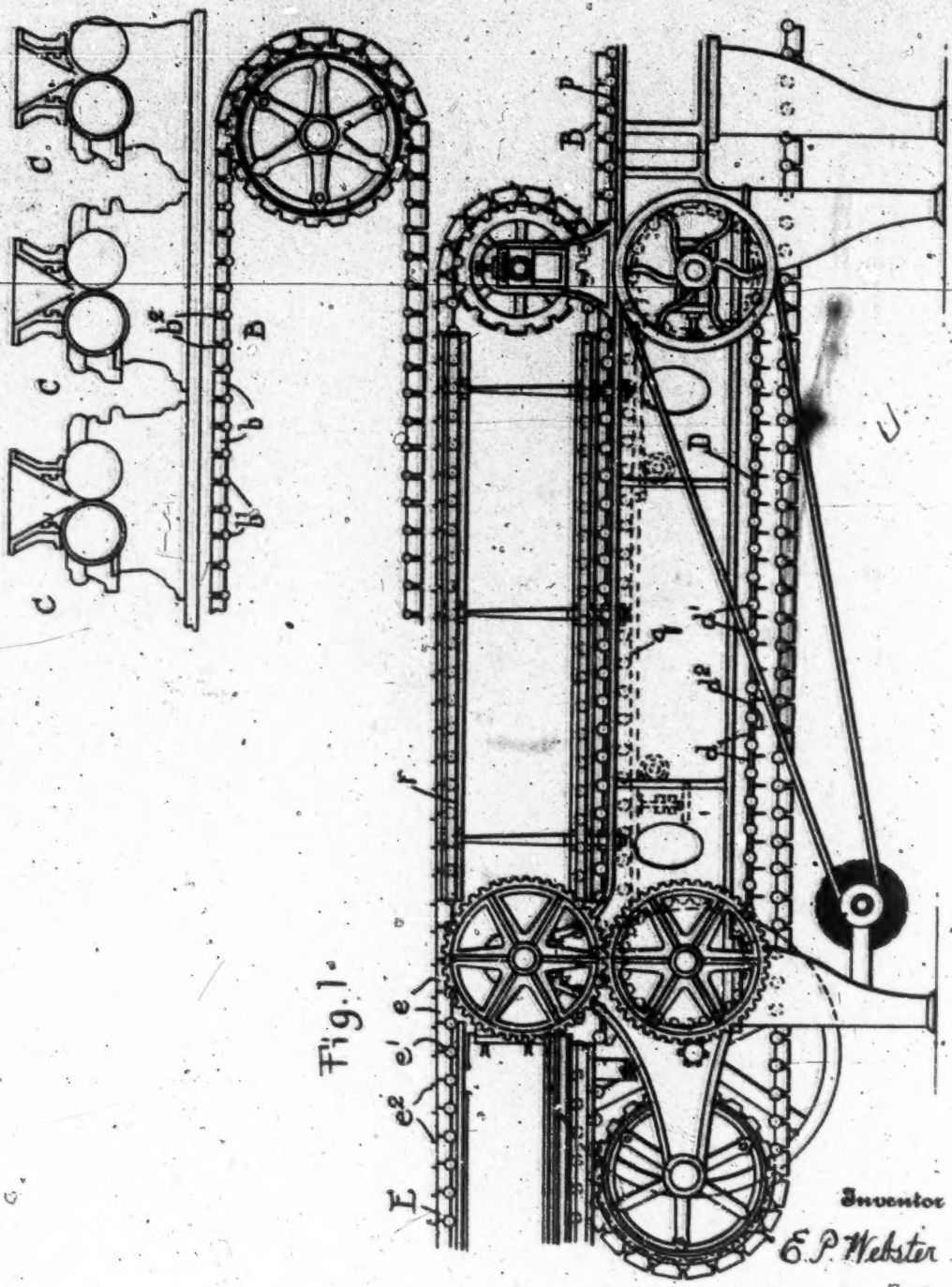

Fig. 1.

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BISCUIT DEPOSITING MEANS

Filed March 11, 1925 4 Sheets-Sheet 2

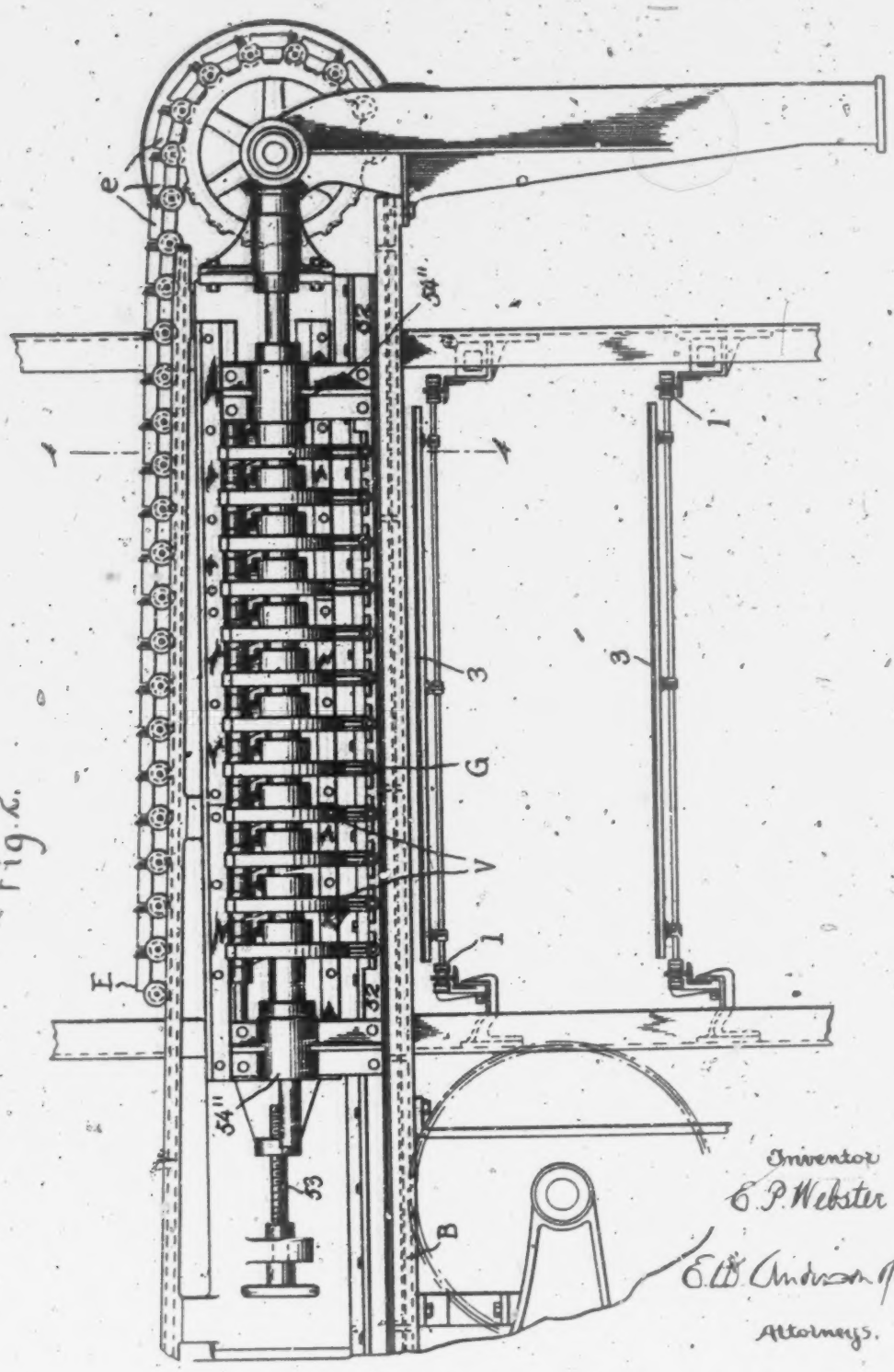

Fig. 2.

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July 13, 1926. 1,592,797

E. P. WEBSTER

BISCUIT DEPOSITING MEANS

Filed March 11, 1925 4 Sheets-Sheet 3

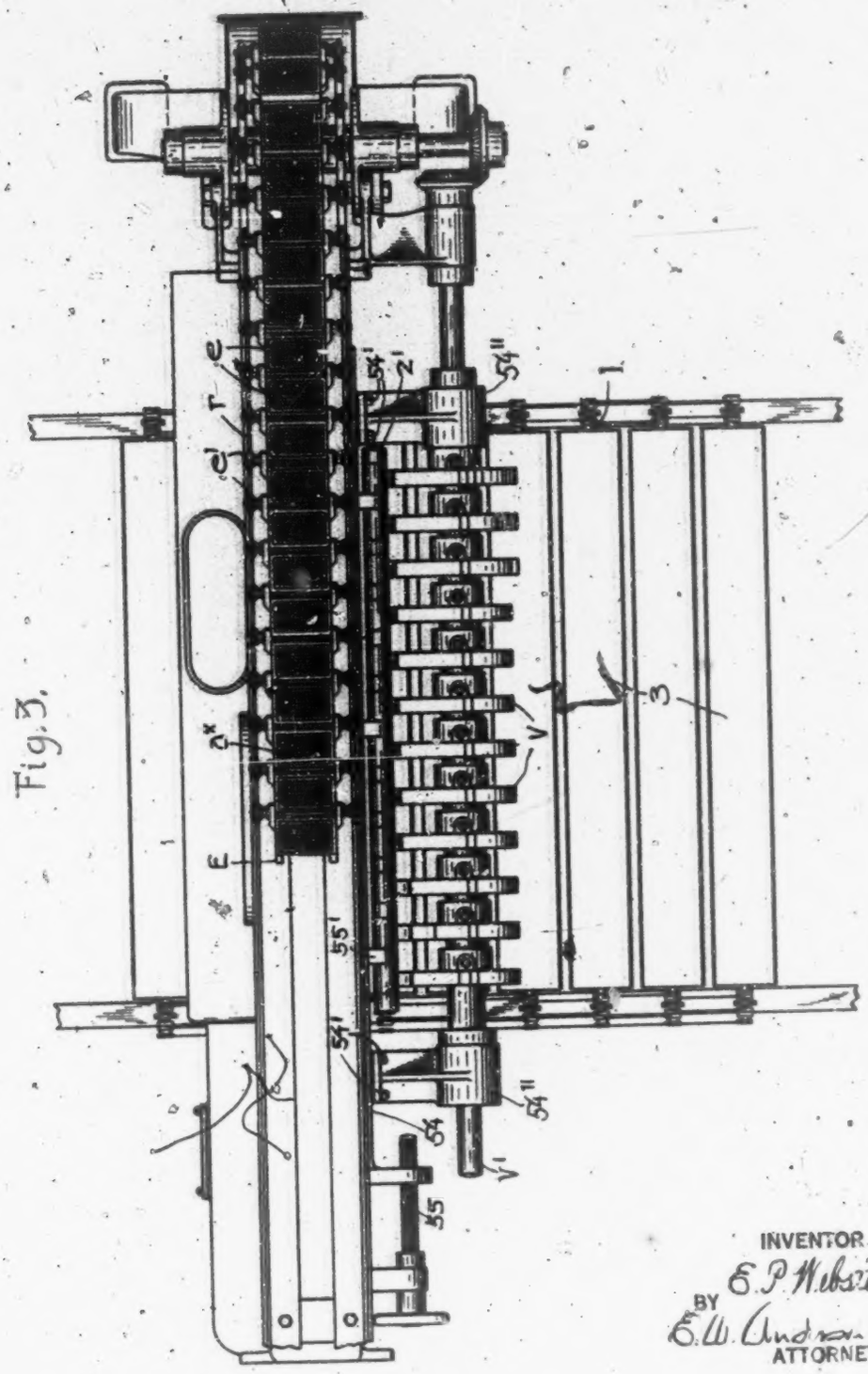

Fig. 3.

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July 13, 1926. 1,592,797

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BISCUIT DEPOSITING MEANS

Filed March 11, 1925 4 Sheets-Sheet 4

Fig. 4.

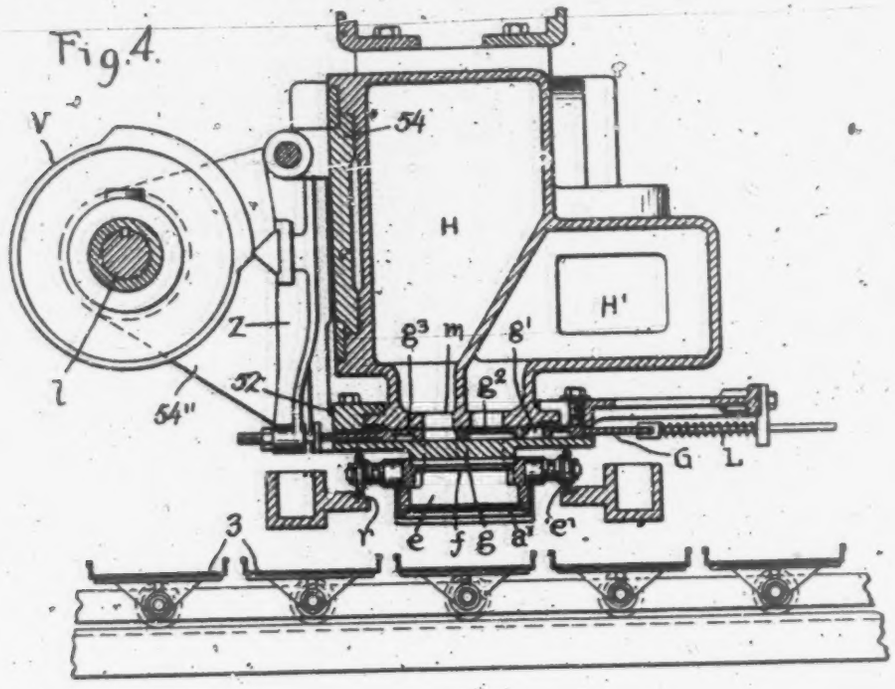
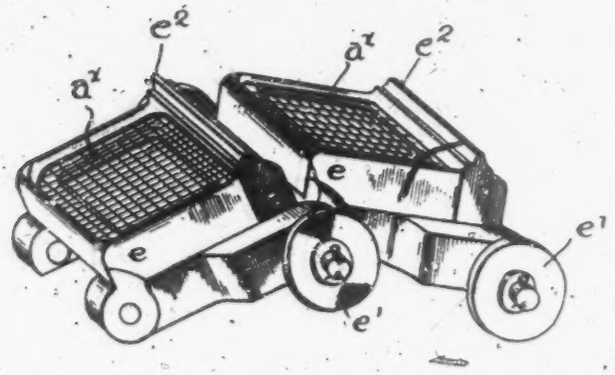


Fig. 5.



Inventor

E. P. Webster.

E. W. Anderson & Son.

By

Attorney

1,592,797

Patented July 13, 1926.

UNITED STATES PATENT OFFICE.

EARL P. WEBSTER, OF NIAGARA FALLS, NEW YORK, ASSIGNOR TO THE SHREDDED WHEAT COMPANY, OF NIAGARA FALLS, NEW YORK, A CORPORATION OF NEW YORK.

BISCUIT-DEPOSITING MEANS.

Application filed March 11, 1925. Serial No. 14,727.

This invention relates to the manufacture of food products by automatic machines in which the products are continuously formed by suitable devices, deposited on a conveyor and carried through a baking oven. The present invention has to do more particularly with the mechanism by which the uncooked products are deposited on the conveyor, and affords means for adjusting the depositing means so that the products will be properly centralized and positioned in the receptacles on the conveyor in which they are to be baked. For purposes of illustration, the device of the present invention will be described in connection with mechanism used in the manufacture of cereal biscuits of the shredded wheat type, but it is to be understood that its utility is not limited to any particular product.

In the manufacture of shredded wheat biscuits, the cereal grain is shredded by suitable devices and deposited in the form of a continuous strand upon a conveyor. The strand, while being conveyed, is subdivided into individual biscuits which are carried to a position above the pans of the baking conveyor and then discharged in transverse rows upon the pans. The transfer of the biscuits from the strand conveyor to the pans may be accomplished by means of an endless chain having hollow links, these links being brought into contact with the upper surfaces of the biscuits on the strand conveyor and suction applied to remove the biscuits from the strand conveyor and carry them along in position on the surfaces of the hollow links. The chain extends out over the baking conveyor and as each pan is brought to rest beneath it, a row of biscuits held against the links is carried out over the pan; then all the links are shut off from the vacuum and the row of biscuits dropped upon the pan.

The mechanism for effecting the transfer includes a suction chamber lying above the hollow links and a plurality of valve plates are used to control the vacuum. These plates are moved successively to place the chamber in communication with the links as the latter move along the chamber until the time for deposition occurs, when all the plates are moved to closed position simultaneously. In order to insure that the row of biscuits is properly centralized in the pan, mechanism is included to move the plates and their actuating devices to different positions of adjustment relative to the chamber and the present invention has to do with improved adjusting means for the purpose. A depositing device of the general type but without the improvement, is illustrated in Patent No. 678,625, issued July 16, 1901, to H. D. Perky, and this invention permits the utilization of the Perky device in connection with a baking conveyor having a series of pans to be filled successively.

For a better understanding of the invention, reference will be made to the accompanying drawings, in which

Fig. 1 is a side view of the shredding devices, the strand conveyor, and the cutter mechanism,

Fig. 2 is a complementary side view from the opposite side, showing the means for depositing the biscuits upon the baking conveyor,

Fig. 3 is a plan view of the depositing mechanism,

Fig. 4 is a transverse view on the line 4—4 of Fig. 2, and,

Fig. 5 is a detail in perspective of a pair of links of the cutter chain.

Referring now to the drawings, the baking conveyor B is shown as made up of links b connected by pivots b', these links being spaced apart as indicated at b^2. This strand conveyor B is endless and at one point passes beneath a plurality of shredding devices C, which continuously form a cereal strand and discharge it upon the conveyor B. The conveyor B runs on a track p and at one point in its travel, passes between upper and lower cutter chains E and D. The chain E is made up of links e connected by pivots e', these links being provided with cutter blades e^2, and this chain runs over a track r in its upper stretch. In its lower stretch its links lie in contact with the strand on the conveyor B. The second cutter chain D lies within the loop of the strand conveyor, and it is made up of links d connected by pivots d', these links having cutter blades d^2 which are arranged to cooperate with the cutter blades e^2. The upper horizontal stretch of the cutter chain D rides over a track q in close proximity to the under side of the

links of the chain B. The cutter chains are arranged so as to pass through the spaces b^3 of the strand conveyor chain, and the blades divide the strand into individual biscuits.

The upper cutter chain extends at one end a considerable distance beyond the end of the strand conveyor, and this end overlies a baking conveyor 1, provided with transverse pans 3. In this extension of the chain is a housing provided with a vacuum chamber H and a compression chamber H'. The lower walls of both chambers have slots *m* which lie close to the rear surfaces of the links *e* of the upper cutter chain. These links are hollow and have openings *f* in the rear walls through which the interior of the links may be placed in communication with the chamber H or H'. The faces of the links are closed by screens *ax*, and the chain runs on tracks *r* which hold the links in close proximity to the walls of the chambers.

Mounted in a slide 52 beneath the chambers H, H' are valve plates G, these plates moving in seats g^3. The valves have openings such as g', separated by blank spaces g^2, and may be moved so that one or the other of the chambers H, H' is cut off from the links *e*, while the other is in communication with the links. The valve seats *g* assist in guiding the valve plates in their movement. Each plate carries an extension *l* surrounded by a spring which bears at one end against the plate and at the other against an extension from the slide 52. Each plate also has a part which may be acted on by a rocker arm Z mounted for swinging movement on a slide 54, and rotary cams V on a shaft V' driven from a suitable source of power, actuate the arms Z and serve to move the plates to place one or the other of the chambers H, H' in communication with the links at the desired instant. As the biscuits reach the end of the strand conveyor, the first valve plate in the series is moved to open the suction chamber and this biscuit is picked up and held against the under surface of a link *e*. As the link moves beneath the next plate, this plate is moved so that as the operation progresses a succession of biscuits, each of which is held against a link *e* by suction, is continuously moved out over a pan 3. When the row of biscuits is sufficient to fill the pan, all the valve plates are moved simultaneously to shut off the vacuum chamber from the links and connect the pressure chamber thereto. This substitution of pressure for vacuum causes the row of biscuits to be deposited on the pan.

In order to adjust the mechanism so that the biscuits may be properly centralized in the pans, a single adjusting device is provided by which the entire series of valve plates and the entire series of operating cams and arms may be adjusted lengthwise of the chambers so that the deposition of biscuits will occur at the right instant to centralize these biscuits with reference to the pans 3. For this purpose, the slide 54 is provided with an adjustment screw 55 and the slide has bolted thereto at 54' a bracket 54'' which carries the shaft V' on which the cams are mounted. The shaft Z', on which the rocker arms are mounted, is similarly supported on lugs 55' of the slide. A slide 52 which carries the valve plates G, is secured to the slide 54 by means of the end brackets 54'' which extend downwardly to the slide 52 and are bolted thereto. With this arrangement consequently, the operation of the single adjustment screw permits all the valve plates and their operating devices to be moved to different positions lengthwise of the chamber H, H', and thus by a single adjusting means the centering of the row of biscuits in the pans is readily secured.

I claim:—

1. Mechanism for depositing biscuits which comprises a conveyor for carrying biscuits, a second conveyor movable at an angle to the first, and means for depositing successive groups of biscuits upon the second conveyor from the first, this means including a suction chamber overlying a stretch of the first conveyor and having openings, a series of valve plates controlling the openings, a series of operating devices for the plates, and means for simultaneously adjusting the entire series of plates and their operating devices relative to the second conveyor to centralize the groups of biscuits deposited on the second conveyor.

2. In mechanism for depositing biscuits, a conveyor, a second conveyor, means for depositing successive transverse rows of biscuit upon said second conveyor from the first named conveyor including a suction chamber overlying the lower stretch of said first named conveyor and having openings, a slide, a series of valve plates carried thereby and controlling said openings, a second slide, and a series of operating arms and cam devices for said valve plates carried thereby, and means for adjusting simultaneously the entire series of valve plates and the entire series of operating arms and cam devices relative to the said second conveyor to centralize the deposit of the biscuit rows thereon including means of connection for said slides and a single adjustment device only connected to one of said slides.

3. In mechanism for depositing biscuits, a conveyor carrying a succession of biscuits, a second conveyor for receiving groups of biscuits, the two conveyors extending at an angle with the lower stretch of the first conveyor lying in proximity to the upper stretch of the second conveyor, a suction

chamber overlying the lower stretch of the first conveyor and having openings through which the links of the conveyor are in communication with the interior of the chamber, a series of valve plates controlling these openings, a series of operating devices for the valve plates, and means for simultaneously adjusting the position of all the plates and all the operating devices therefor with reference to the second conveyor to centralize the groups of biscuits deposited thereon.

In testimony whereof I affix my signature.

EARL P. WEBSTER.

314

March 22, 1927. 1,621,86

G. M. ANDERSON

METHOD OF MARKING SHREDDED WHEAT BISCUIT

Original Filed May 17, 1918

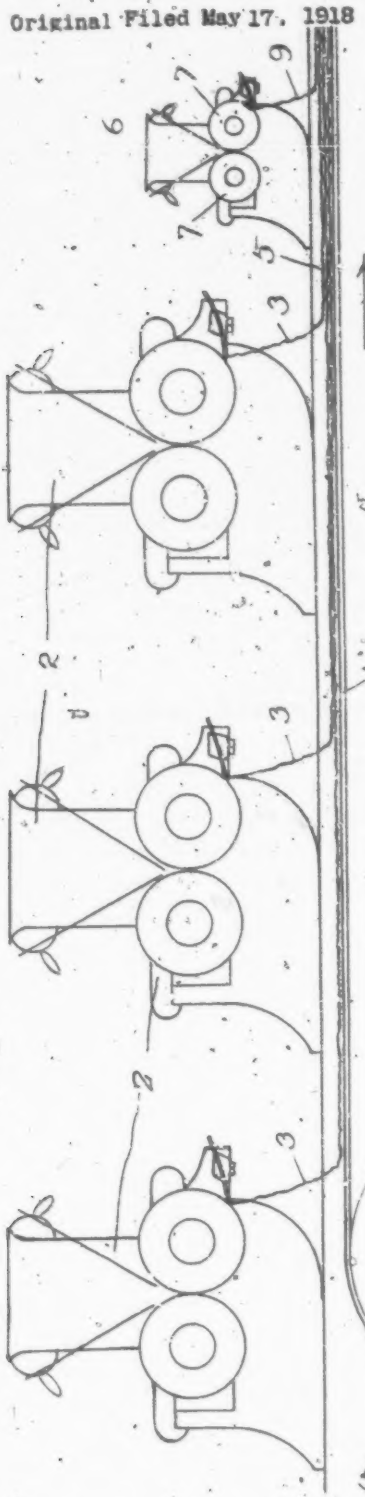


Fig. 1

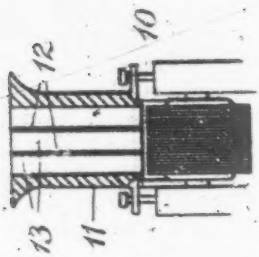


Fig. 2.

Fig. 3.

Inventor

George M. Anderson

1,621,863

Patented Mar. 22, 1927.

UNITED STATES PATENT OFFICE.

GEORGE M. ANDERSON, OF WASHINGTON, DISTRICT OF COLUMBIA, ASSIGNOR TO THE SHREDDED WHEAT COMPANY, A CORPORATION OF NEW YORK

METHOD OF MARKING SHREDDED WHEAT BISCUIT.

Application filed May 17, 1916, Serial No. 235,144. Renewed August 3, 1926.

Figure 1 is a diagrammatic view of a means for carrying out the invention.

Figure 2 is a perspective view of the product.

Figure 3 is a diagrammatic sectional view of a shredding machine, showing a modified means for carrying out the invention.

The invention has relation to a method of superficially marking shredded wheat biscuit, with the idea of distinguishing the product, or to denote origin of the biscuit, and it consists in the novel construction and combinations of parts, as set forth in the appended claim.

In the accompanying drawings, illustrating a preferred means for carrying out the invention, the numeral 2 designates a gang of shredding machines, laying down bands 3 of cereal material upon a moving carrier or belt 4, the band 5, made up of the several superposed layers, being of the thickness of the biscuit, and suitably divided or cut transversely into biscuit form all as disclosed in the prior art, for instance in the patents to H. D. Perky, 681,656, dated August 27, 1901, for continuous cutting machine, and F. Regnier, No, 1,027,762, dated May 28, 1912, for grain shredding machine.

At one end of the gang of shredding machines a shredding machine 6 is provided, shown as of smaller size than the machines 2, and the rollers 7 of which are of the usual character.

The narrow band of shredded material 9, laid down from the machine 6 upon the top of the composite band 5 for the biscuit proper, is designed to be of the thickness of one shred only, and will not materially or appreciably increase the thickness of the biscuit, which can be packed as usual, with no appreciable increase in weight.

This narrow band 9 of shredded material is suitably colored, for instance by chocolate or annatto, mixed with the grain fed to the hopper of the shredding machine 6, and will be easily recognized, contrasting with the color of the top of the biscuit, and the edibility of the biscuit being in no way impaired thereby. This transverse band 9 appears as a hump or projection embossed or in relief upon the top of the biscuit.

A modification of the invention consists in providing a biscuit the top layer of which is of the usual dimensions, but particolored, having one transverse portion, as the central portion thereof, suitably colored before being laid down as stated, and the balance, or the transverse side portions, of natural color, the advantage being that a shredding machine having rolls of full size may be employed, and further in that the resulting product will be of the customary form, having no unusual protuberances or projections upon its top surface.

A means for carrying out this modification involves the use at one end of the gang of shredding machines of a shredding machine 10, the hopper 11 of which is divided by suitable partitions 12 into two or more chambers 13, into one of which grain suitably colored is fed, and into the other or others of which grain of natural color is fed.

I claim:

A method of making and simultaneously distinctively marking shredded cereal biscuit, consisting in laying down superposed bands of shredded cereal to form a composite band of the proper thickness, treating cereal material with a coloring agent and laying down from the same a distinctively colored top band upon said composite band and finally dividing the composite band and said top band transversely to form biscuit.

In testimony whereof I affix my signature.

GEORGE M. ANDERSON.

DEFENDANT'S EXHIBIT NO. 243.

(United States Patent.)

No. PAGE
831,909, to R. E. Valentiné, Dated September 25, 1906 .. 319

320

No. 831,909. PATENTED SEPT. 25, 1906.

R. E. VALENTINE.

MACHINE FOR PREPARATION OF CEREALS.

APPLICATION FILED JUNE 28, 1905.

3 SHEETS—SHEET 1.

Fig. 1.

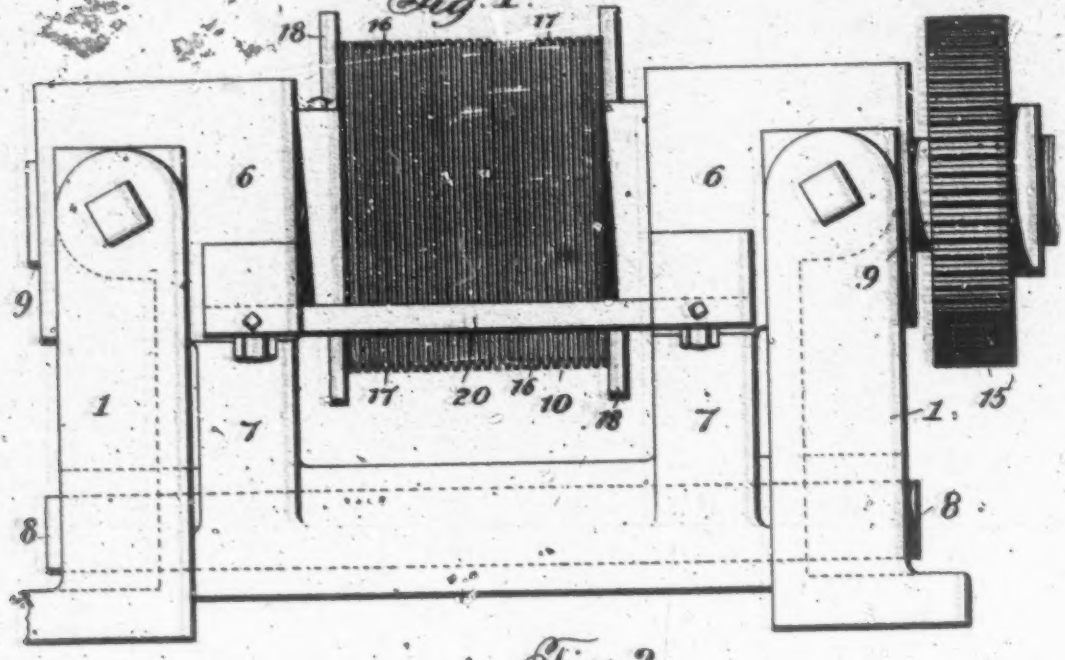
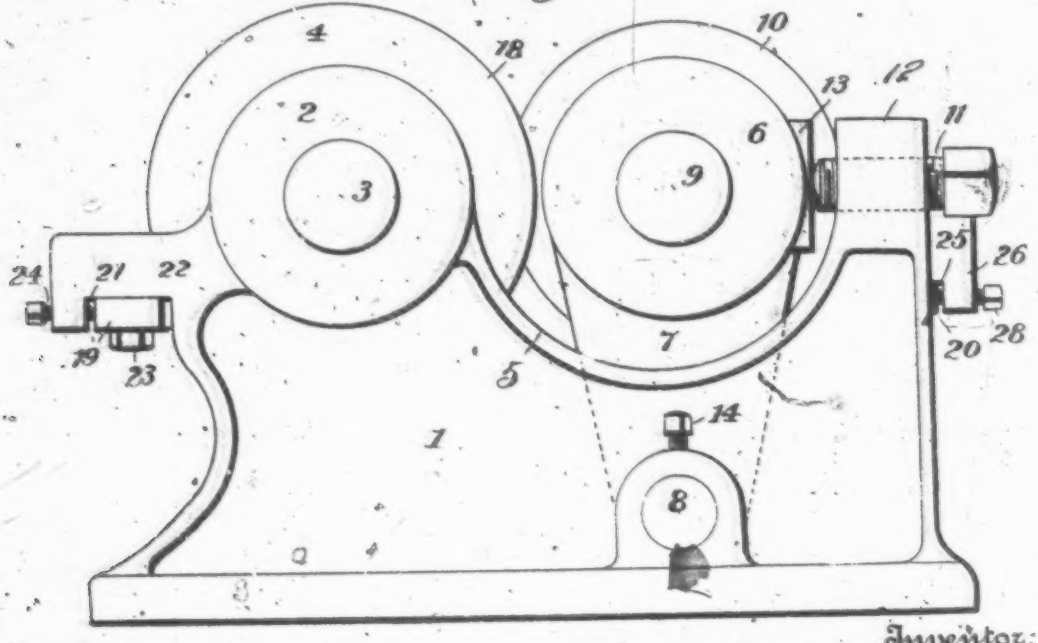


Fig. 2.



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F. P. Fitton

Inventor:
Ralph E. Valentine
by Chas. N. Lemmon
Attorney

324

No. 831,909. PATENTED SEPT. 25, 1906.

R. E. VALENTINE.

MACHINE FOR PREPARATION OF CEREALS.

APPLICATION FILED JUNE 26, 1905.

2 SHEETS—SHEET 2.

Fig. 4.

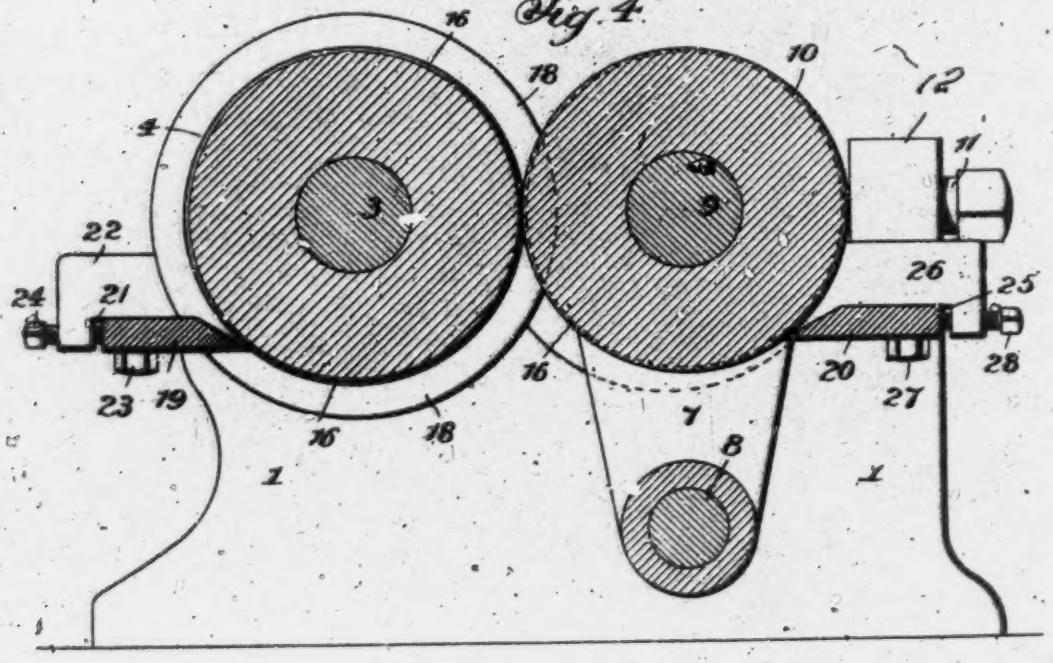


Fig. 6.

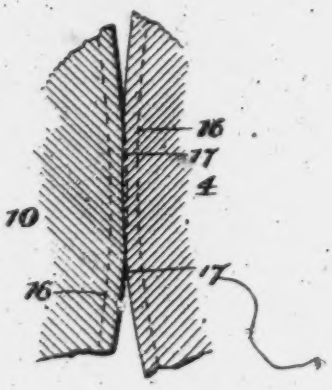
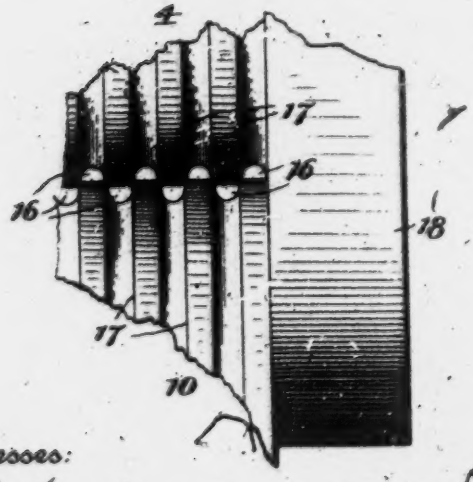


Fig. 5.



Witnesses:
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UNITED STATES PATENT OFFICE.

RALPH E. VALENTINE, OF WORCESTER, MASSACHUSETTS.

MACHINE FOR PREPARATION OF CEREALS.

No. 831,909. Specification of Letters Patent. Patented Sept. 25, 1906.

Application filed June 28, 1906. Serial No. 267,892.

To all whom it may concern:

Be it known that I, RALPH E. VALENTINE, a citizen of the United States, residing at Worcester, in the county of Worcester and State of Massachusetts, have invented certain new and useful Improvements in Machines for the Preparation of Cereals; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

This invention relates to improvements in machines for the preparation of cereals, and is more especially related to machines of that type designed for shredding the cereals.

The main and primary object of the present invention is to provide a machine of the character referred to the construction of which shall be much more effectual in reducing the cereals to a shredded state than the machines now commonly employed, one whereby the capacity of the machine shall be increased, and one wherein the shredding-rolls may be quickly and easily adjusted in their operative relation to compensate for wear, and to also regulate the character of the output of the machine.

The invention further contemplates the provision of a novel form of shredding-rolls designed to effect a saving in the cereals operated upon, thus enabling the machine to be used with the highest degree of economy and with but a minimum loss of the cereals.

Having these general objects in view and others, which will appear as the nature of the improvements is better understood, the invention consists, substantially, in the novel construction, combination, and arrangement of parts, as will be hereinafter fully described, illustrated in the accompanying drawings, and pointed out in the appended claims.

In the drawings, Figure 1 is an end elevation of a machine constructed in accordance with and embodying the herein-described invention. Fig. 2 is a side elevation thereof. Fig. 3 is a top plan view of the machine. Fig. 4 is a longitudinal sectional view on the line 4 4, Fig. 3. Fig. 5 is a fragmentary plan view, on an enlarged scale, of the shredding-rolls. Fig. 6 is a transverse sectional view of one of said rolls.

Referring in detail to the drawings, the numeral 1 designates the supporting-standards of the herein-described machine, which standards may be arranged upon any suitable supporting-base to give solidity to the machine, and said standards may also be formed of any suitable material adapted for the purpose. Adjacent one end of each of the standards 1 is a bearing 2, in which is journaled a shaft 3, and said shaft carries a roll 4 for acting upon the cereal to be treated. By reason of the bearings 2 being formed as a part of the standards 1 it will be seen that the roll 4 is stationary and immovable except by rotation in relation to said standards. The ends of the standards 1 opposite to the bearings 2 are recessed, as at 5, and arranged in said recesses is a pair of bearings 6, which bearings are formed upon a substantially U-shaped support 7, the lower end of which receives a fixed shaft 8, arranged in the lower portions of the standards 1, and upon which shaft the support 7 is adapted to swing, and thereby enable the bearings 6 to approach or recede from the bearings 2. It will also be seen that the bearings 6 are not connected to the standards 1 except through the medium of the shaft 8, and hence said bearings are freely movable for a purpose to be presently stated.

Mounted in the bearings 6 is a shaft 9, which shaft carries a roll 10, which coöperates with the roll 4 for reducing the cereal, and it will therefore be seen that the roll 10 lies in parallelism with the roll 4 and that the edges of said rolls will contact for effectually reducing the cereals fed thereto. The degree of contact of the roll 10 with the roll 4 may be varied in accordance with the character of the cereal operated upon and also in accordance with the character of the output of the machine. To vary the degree of contact, the roll 10 is swung toward or away from the roll 4, and for effecting this adjustment of the roll 10 a pair of adjusting-screws 11 is arranged at the end of the machine contiguous to the bearings 6, said screws being mounted in threaded bosses 12 and having their inner ends impinging against contact-faces 13, formed upon the outer sides of the bearings 6. Upon proper rotation of the screws 11 the same will force the bearings 6 toward the bearings 2, thus bringing the contiguous faces of the rolls 10 and 4 into closer relationship with each other, and by reversely rotating the screws 11 the space between said rolls may be increased. For locking the shaft 8 in fixed position within the standards 1 a set-screw 14 or its equivalent may be employed.

The shaft 3 of the roll 4 is preferably elongated to provide for the application of power

for driving the machine, and mounted upon said shaft and the shaft of the roll 10 is a pair of intermeshing gears 15, whereby motion is communicated from the shaft 3 to the shaft 9 and the rolls 4 and 10 rotated in opposite directions. It will of course be understood that the direction of rotation of the rolls is such that the cereals fed upon the top thereof and opposite to the meeting edges of the rolls will be drawn inwardly between the latter for action thereon by the meeting faces of the rolls.

As before premised, it is one of the objects of the present invention to provide a novel form of shredding-rolls, whereby it is possible to effect saving in the cereals operated upon, and thus enable the machine to be used with the highest degree of economy and with but a minimum loss of the cereals. Referring, therefore, to Figs. 5 and 6, the construction of the shredding-rolls will be very clearly seen, and it will be noted that each of these rolls is provided with a series of circumferential grooves 16 and that between the grooves of the respective rolls a series of plain surfaces or projecting ribs 17 is formed. The ribs 17 alternate with the grooves 16; but the relation of the respective rolls to each other is such that the ribs 17 of each fit within the grooves 16 of the other. It will also be noted that the bottoms of the grooves are shown as substantially semicircular. This is but a preferred form, however, and any configuration desired may be given to the bottoms of the grooves; but it is requisite that the extreme outer edges of the sides of the grooves shall be perfectly straight and at right angles to the axes of the rolls for a slight distance below the face of the projecting ribs 17 and that the width of the grooves must always equal the width of the projecting ribs or be slightly greater than such width. The purpose of this construction is to enable the projecting ribs 17 to enter to a slight extent the grooves 16, whereby the shredding is effected by a shearing or cutting action rather than by crushing or mashing. The interfitting of the ribs of the respective rolls doubles the capacity of the rolls and also decreases the power required for operating the same.

In order to prevent loss of the cereals, one of the rolls, preferably the roll 4, is provided at each of its ends with an annular flange 18, the diameter of said flanges being greater than the diameter of the roll, and consequently when the rolls 4 and 10 are in operative relation the latter roll fits between the flanges 18, which act as guides for the rolls and effectually prevent the diverting of the cereals at the ends of the rolls. To strip the cereal from the faces of the rolls after the same has passed between the latter, a pair of scrapers 19 and 20 is employed. The scraper 19 is arranged in recesses 21, formed at the under side of outwardly-projecting lugs 22, which lugs are formed upon the ends of the standards 1 adjacent to the bearings 2, the scraper 19 being held in position through the medium of bolts 23 or their equivalent, which bolts have a slotted connection with the scraper 19, and in order to adjust the position of the latter to vary the position of the teeth thereof in relation to the grooves of the roll 4 a pair of adjusting-screws 24 is employed, said screws being threaded in the free ends of the lugs 22 and bearing against the outer edge of the scraper 19. The scraper 20 is arranged in notches 25, formed at the under side of outwardly-projecting lugs 26, which lugs are carried by the bearings 6, said scraper being held in position within the notches 25 through the medium of bolts 27, having a slotted connection with the lugs 26, and by reason of the lugs 26 being carried by the bearings 6 it is obvious that the position of the scraper 20 in relation to the roll 10 will always remain the same, irrespective of the adjustment of said roll relative to the roll 4. To adjust the position of the scraper 20 in relation to the roll 10, adjusting-screws 28 are employed, said screws being threaded in the outer ends of the lugs 26 and impinging against the scraper 20. The adjustment of the scraper through the medium of these screws is obvious.

In the operation of the herein-described machine the cereal after being properly prepared by boiling, steaming, or soaking and brought to the proper constituency, which latter is determined by the results at the machine, is fed into the rolls through the medium of a tube or hopper or by any other suitable form of feeding device. The rolls 4 and 10, rotating toward each other, receive the cereals so fed, and by reason of their upper surfaces converging it is obvious that the cereal will pass in between the rolls. In the passage of the cereal the same is pressed into the grooves of the respective rolls, where it is formed into filaments, and in such form the cereal is delivered from the rolls. These filaments will be formed and delivered continuously, as the kernels of the grain will adhere to each other, and they are acted upon by the pressure due to the convergence of the roll-surfaces. The flanges 18 effectually act as guides for the rolls, so that there is no loss of cereal at the ends of the rolls. In the passage of the cereal through the rolls the ribs 17 shear or cut the same in contradistinction to crushing or mashing the cereal, and consequently but a minimum of power is required for operating the rolls. After leaving the rolls the product may be taken up by any suitable form of conveyer or deposited in suitable receptacles for the purpose. The roll 10 may be readily adjusted toward or away from the roll 4, thus decreasing or increasing the space in said rolls, which adjustment is effected by varying the position of the swinging support 7.

Having thus described the invention, what is claimed as new, and desired to be secured by Letters Patent, is—

1. In a machine for preparing cereals, a frame, a stationary roll mounted in said frame, a scraper carried by the frame and cooperating with the stationary roll to strip the cereal therefrom, a support pivoted in the frame, a roll journaled in said support and cooperating with the fixed roll, a scraper carried by said support and coöperating with the movable roll to strip the cereal therefrom, and means for adjusting the position of the movable roll relatively to the stationary roll.

2. In a machine for preparing cereals, a frame, a stationary roll mounted in said frame, a scraper carried by the frame and cooperating with the stationary roll to strip the cereal therefrom, a support pivoted in the frame, a roll journaled in said support and cooperating with the fixed roll, a scraper carried by said support and coöperating with the movable roll to strip the cereal therefrom, and screws carried by the frame for adjusting the position of the movable roll relatively to the stationary roll.

3. In a machine for preparing cereals, a frame, a roll mounted in stationary bearings in said frame, outwardly-projecting lugs carried by the frame, a scraper carried by said lugs and coöperating with said roll to strip the cereal therefrom, means for adjusting the scraper on said lugs relatively to said roll, a support pivoted in the frame, a roll journaled in said support and coöperating with the first-mentioned roll, outwardly-projecting lugs carried by said support, a scraper carried by said lugs and coöperating with the movable roll to strip the cereal therefrom, and means for adjusting the scraper on said lugs relatively to said movable roll.

4. In a machine for preparing cereals, a frame, a roll mounted in stationary bearings in said frame, outwardly-projecting lugs carried by the frame, a scraper carried by said lugs and coöperating with said roll to strip the cereal therefrom, screws carried by said lugs for adjusting the scraper thereon relatively to said roll, a support pivoted in the frame, a roll journaled in said support and cooperating with the first-mentioned roll, outwardly-projecting lugs carried by said support, a scraper carried by said lugs and coöperating with the movable roll to strip the cereal therefrom, and screws carried by said lugs for adjusting the scraper thereon relatively to said movable roll.

5. In a machine for preparing cereals, a frame, a roll mounted in stationary bearings in said frame, outwardly-projecting lugs carried by the frame, a scraper carried by said lugs and coöperating with said roll to strip the cereal therefrom, screws carried by said lugs for adjusting the scraper thereon relatively to said roll, a support pivoted in the frame, a roll journaled in said support and cooperating with the first-mentioned roll, outwardly-projecting lugs carried by said support, a scraper carried by said lugs and coöperating with the movable roll to strip the cereal therefrom, screws carried by said lugs for adjusting the scraper thereon relatively to said movable roll, and means for adjusting the position of the movable roll relatively to the stationary roll.

In testimony whereof I affix my signature in the presence of two witnesses.

RALPH E. VALENTINE.

Witnesses:
HENRY E. COOPER,
FANNIE R. FITTON.

DEFENDANT'S EXHIBIT NO. 244.

Book of Patents Issued to Defendant.

(United States Patents.)

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R. E. VALENTINE.

MACHINE FOR MAKING BISCUITS OF SHREDDED CEREAL.

APPLICATION FILED JAN. 12, 1914.

1,102,614.

Patented July 7, 1914.

7 SHEETS—SHEET 2.

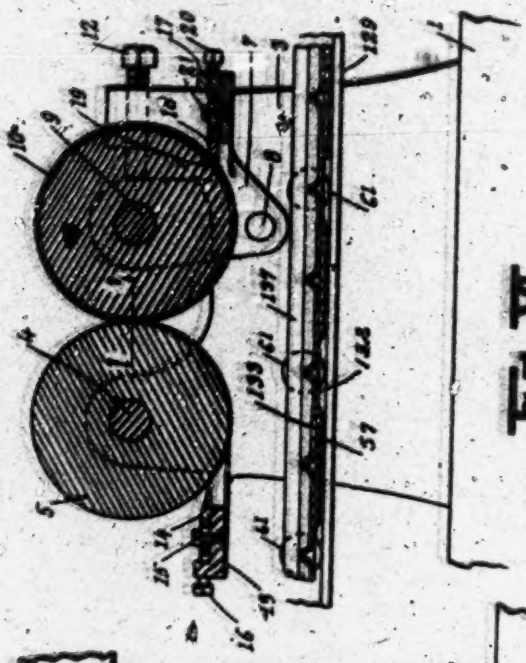


Fig. VI.

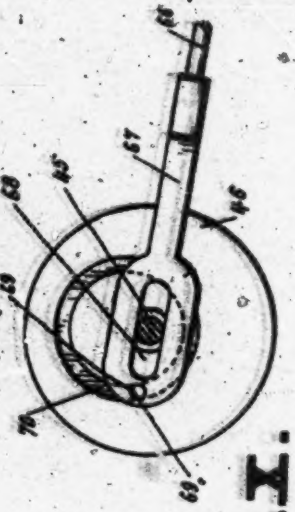
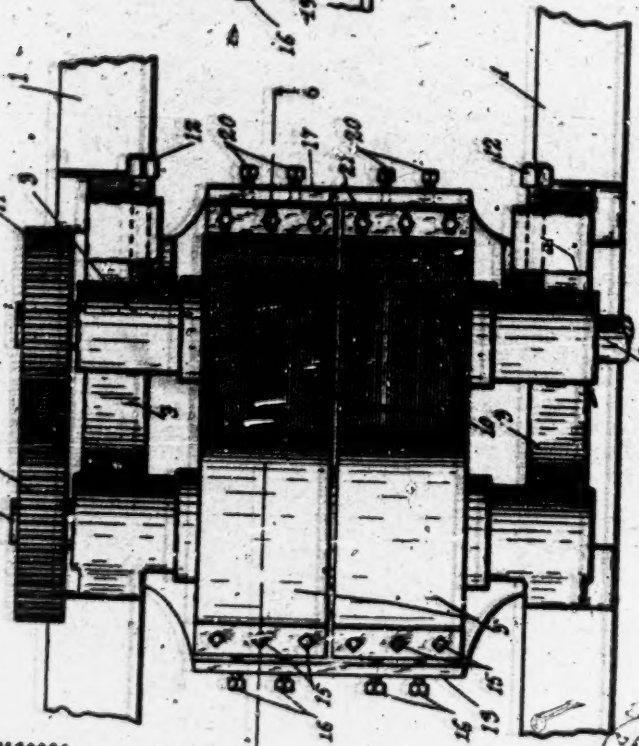


Fig. V.

Fig. VII. Fig. VIIA Fig. X.



Witnesses

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MACHINE FOR MAKING BISCUITS OF SHREDDED CEREAL.

APPLICATION FILED JAN. 12, 1914.

1,102,614.

Patented July 7, 1914.

7 SHEETS—SHEET 3.

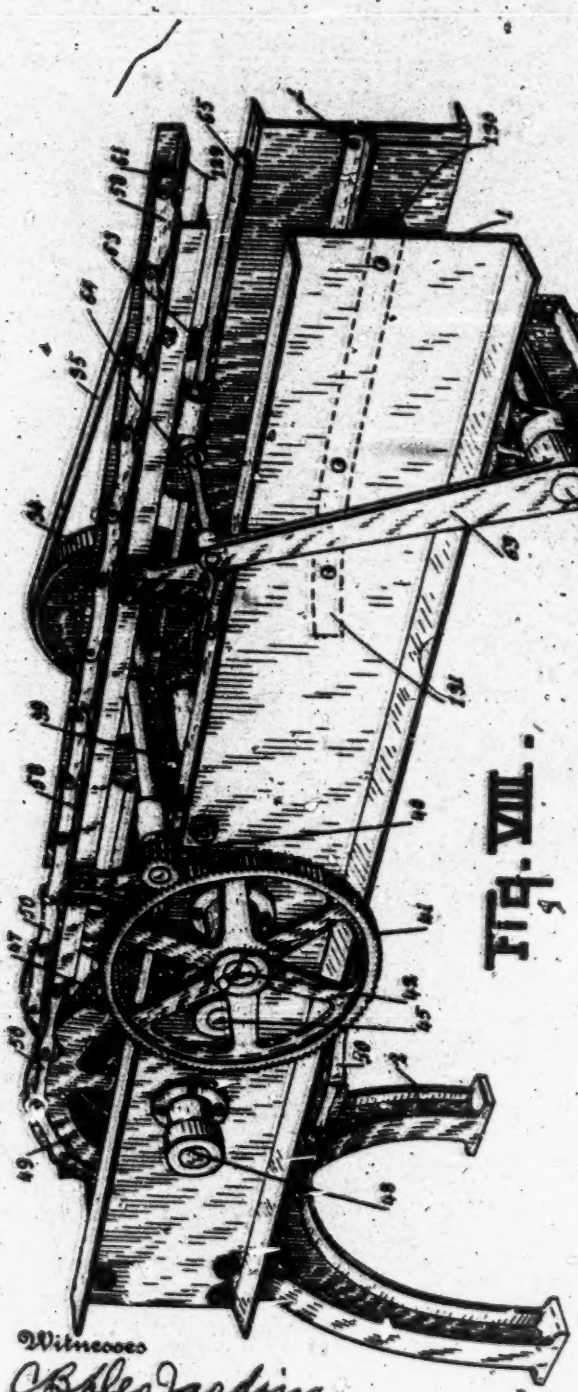

Fig. VII.

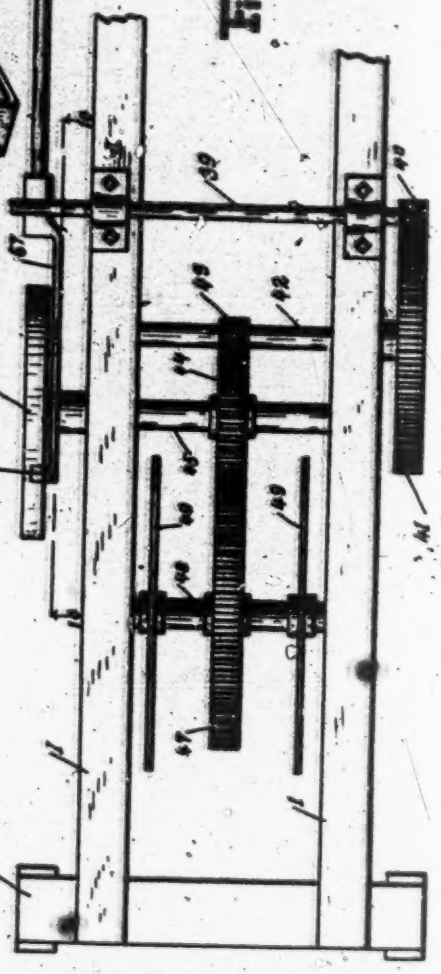

Fig. IX.

Witnesses
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MACHINE FOR MAKING BISCUITS OF SHREDDED CEREAL.

APPLICATION FILED JAN. 12, 1914.

1,102,614.

Patented July 7, 1914.

7 SHEETS—SHEET 4.

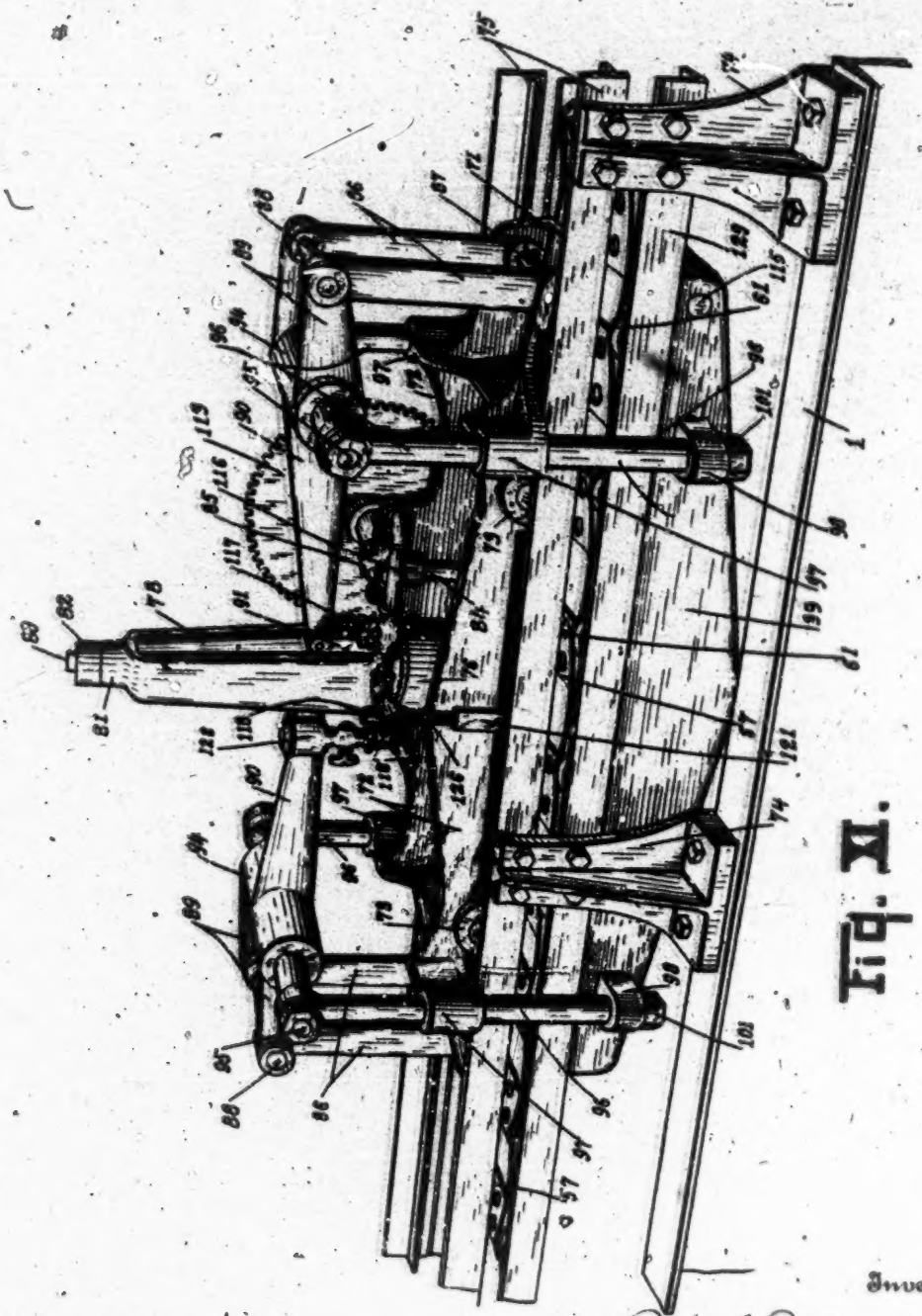

Fig. XI.

Witnesses
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MACHINE FOR MAKING BISCUITS OF SHREDDED CEREAL.

APPLICATION FILED JAN. 12, 1914.

1,102,614.

Patented July 7, 1914.

7 SHEETS—SHEET 5.

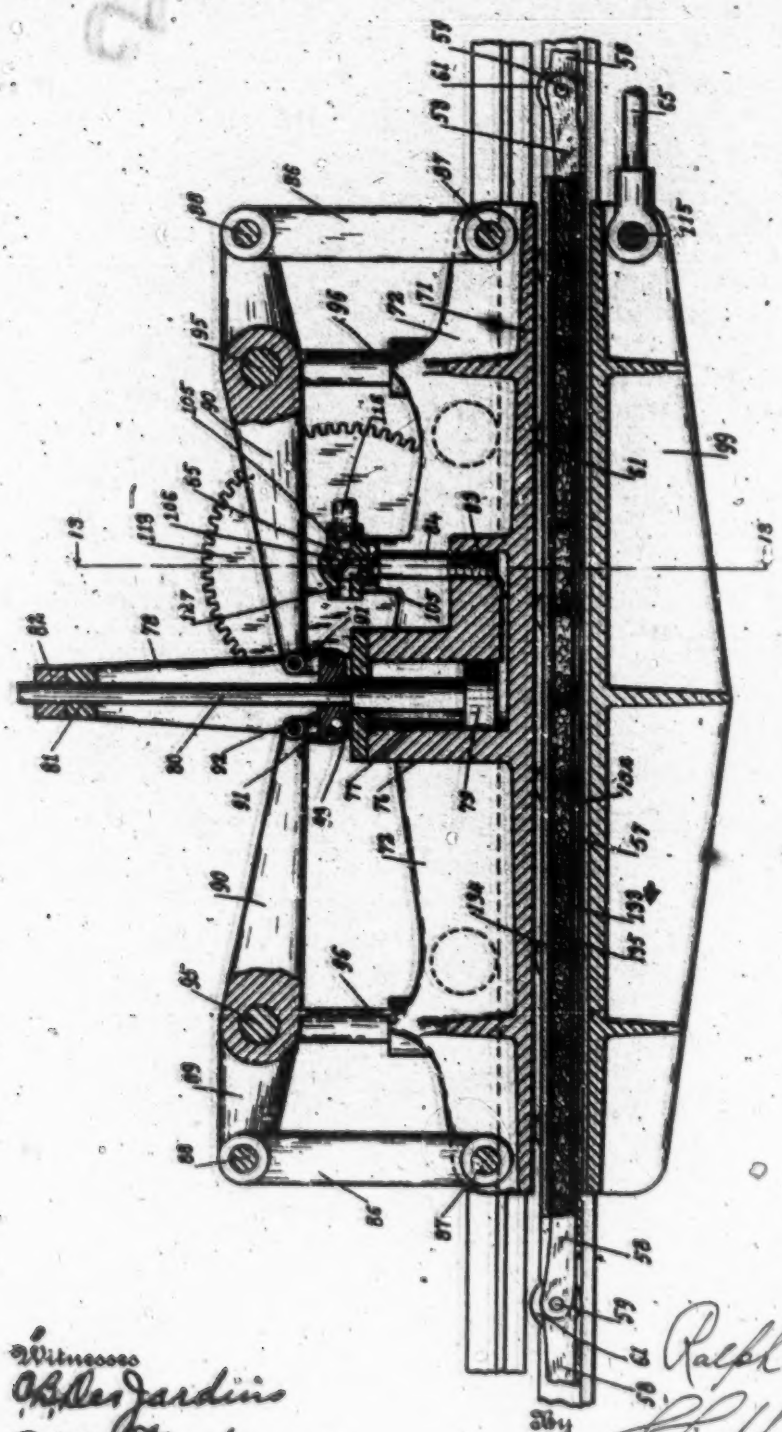

Fig. XI.

Witnesses
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MACHINE FOR MAKING BISCUITS OF SHREDDED CEREAL.

APPLICATION FILED JAN. 12, 1914.

1,102,614.

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7 SHEETS-SHEET 6.

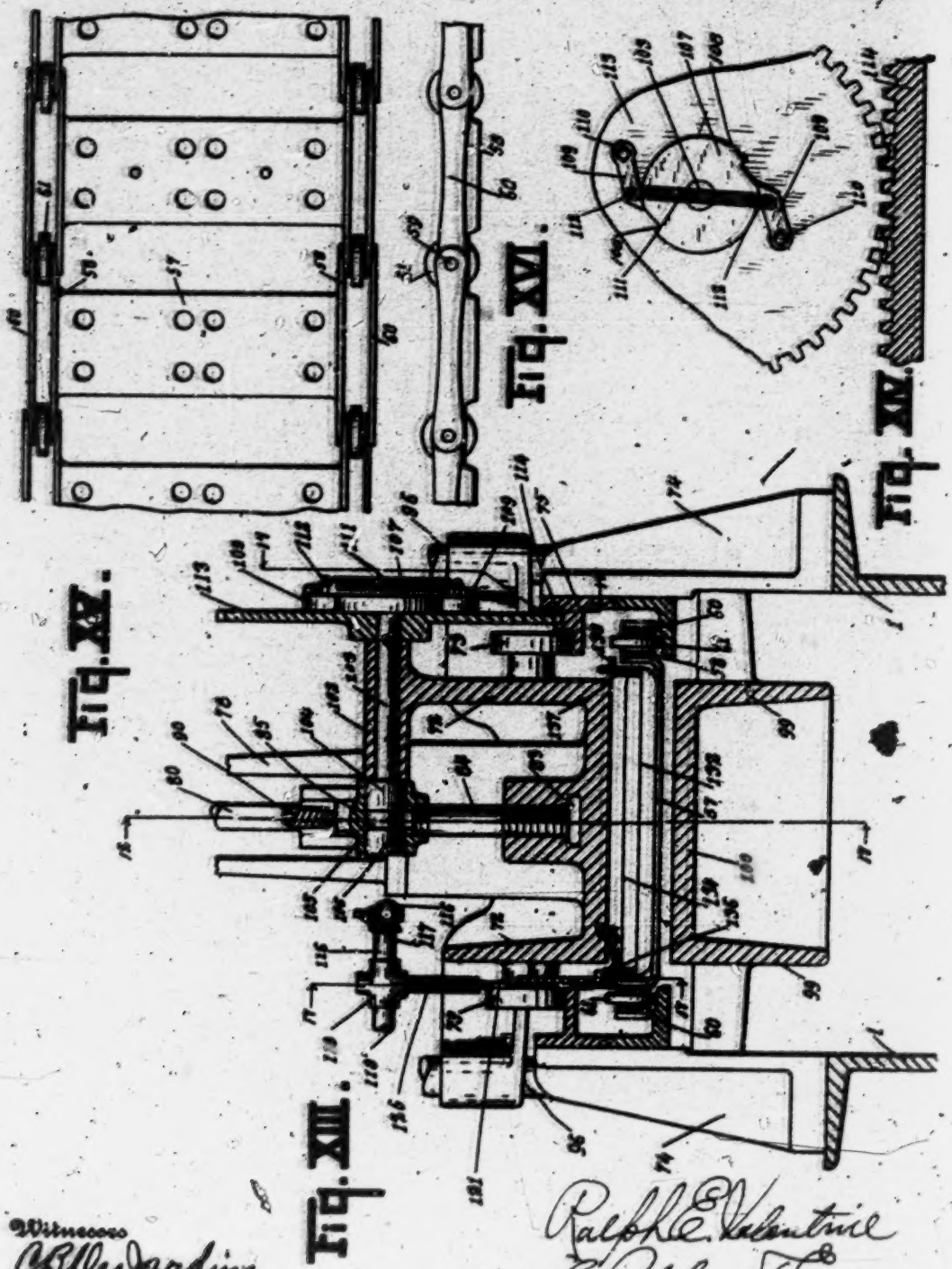

Fig. XV.

Fig. XVI.

Fig. XI.

Fig. XII.

Witnesses
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MACHINE FOR MAKING BISCUITS OF SHREDDED CEREAL.

APPLICATION FILED JAN. 13, 1914.

1,102,614.

Patented July 7, 1914.

7 SHEETS—SHEET 7.

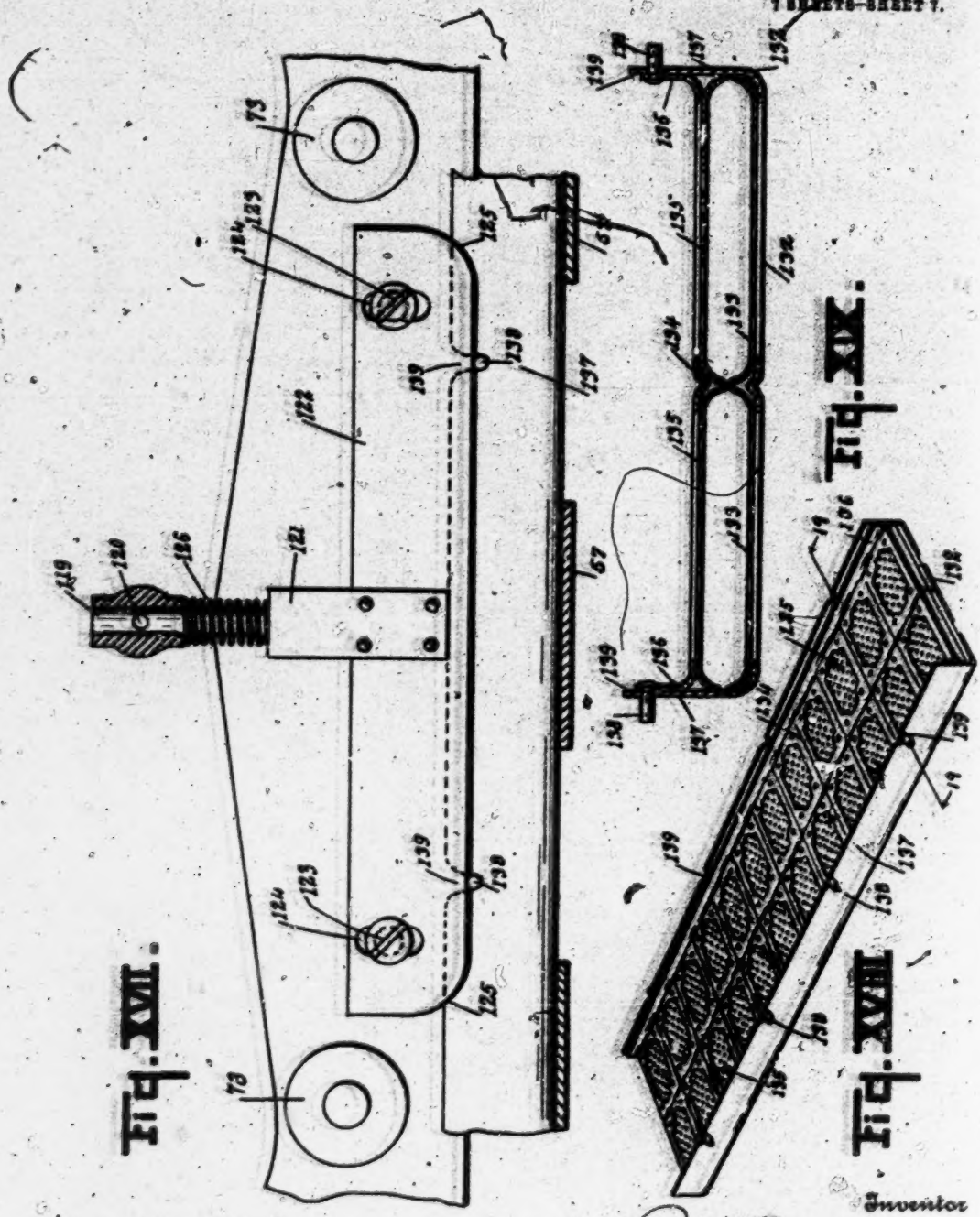

Fig. XVII.

Fig. XIX.

Fig. XVIII.

Witnesses
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UNITED STATES PATENT OFFICE.

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MACHINE FOR MAKING BISCUITS OF SHREDDED CEREAL.

1,102,614. Specification of Letters Patent. Patented July 7, 1914.

Application filed January 12, 1914. Serial No. 811,800.

To all whom it may concern:

Be it known that I, RALPH E. VALENTINE, a citizen of the United States, residing at Battle Creek, Michigan, have invented certain new and useful Improvements in Machines for Making Biscuit of Shredded Cereal, of which the following is a specification.

This invention relates to a new and improved machine for making biscuit of shredded cereal.

The objects of this invention are: First, to provide a machine for making shredded cereal biscuit which delivers layers of the shredded material to the baking pans and molds, and forces the covers thereon. Second, to provide in such a machine an improved automatic device for forcing the covers on the baking pans. Third, to provide in a machine of the type described, improved means for molding the biscuits whereby they are formed without waste. Fourth, to provide in a machine of the type described, means for preventing the operation of the molding means, when the pans and molds passing through the machine are not properly covered.

Further objects, and objects relating to details and economies of construction and operation will definitely appear from the detailed description to follow.

I accomplish the objects of my invention by the devices and means described in the following specification.

The invention is clearly defined and pointed out in the claims.

A structure which is a preferred embodiment of my invention is clearly illustrated in the accompanying drawing forming a part of this specification, in which:

Figure I is a side elevation of the machine, parts thereof being broken away. Fig. II is a sectional view on the line 2—2 of Fig. I, showing in detail one set of the shredding rolls and its connection with the motor. Fig. III is a sectional view on the line 3—3 of Fig. II, showing in detail the connection of a set of shredding rolls with the motor. Fig. IV is a sectional view on the line 4—4 of Fig. III. Fig. V is a top plan view of a set of shredding rolls, the chutes delivering to said rolls being omitted. Fig. VI is a sectional view on lines 6—6 of Figs. II and V, showing the shredding rolls in further detail. Fig. VII is a sectional view on the line 7—7 of Fig. VI, showing the engagement of the smooth and grooved rolls in detail. Fig. VII[A] is a sectional view showing both rolls grooved in accordance with the modified form illustrated in my Patent No. 831,909, of September 23, 1906, the same being sectional on line corresponding to the view of Fig. VII. Fig. VIII is a perspective view of the rear end of the machine. Fig. IX is a top plan view of the rear of the machine, the conveying belt and the guide track therefor being omitted. Fig. X is a sectional view on the line 10—10 of Fig. IX, showing in detail the cam wheel actuating the pitman rod. Fig. XI is a perspective view of the pneumatic device for forcing the covers on the baking pans. Fig. XII is a longitudinal sectional view through said pneumatic device taken on the line 12—12 of Fig. XIII. Fig. XIII is a transverse sectional view taken on the line 13—13 of Fig. XII. Fig. XIV is a sectional view on the line 14—14 of Fig. XIII, showing in detail the connection of the valve operating shaft. Fig. XV is a top plan view of a portion of the conveying belt. Fig. XVI is a view in side elevation of a portion of said belt. Fig. XVII is a sectional view on the line 17—17 of Fig. XIII, showing in detail the slide valve controlling the compressed air supply and the means for operating the same. Fig. XVIII is a perspective view of a baking pan and molds with the cover applied thereto. Fig. XIX is a sectional view through said baking pan on the line 19—19 of Fig. XVIII.

In the drawing, similar reference characters refer to similar parts throughout the several views and the sectional views are taken looking in the direction of the little arrows at the ends of the section lines.

Considering the numbered parts of the drawing, 1—1 are the frame members, which are supported on the base members 2—2 provided at suitable intervals. The machine is provided with a number of sets of shredding rolls, and as each set of rolls is identical, a description of one will suffice.

3—3 are supporting members secured to the top of the frame members 1—1, and having journaled therein the shaft 4 to

which the smooth roll 5 is secured. Gear 6 is secured on the outer end of the shaft 4. Links 7 are pivoted at 8 to the supporting members 3—3, and the shaft 9 is journaled in the upper ends of said links, and has secured thereto the grooved roll 10 which has a plurality of grooves 10', as shown in Fig. VII. Shaft 9 carries on its outer end the gear 11 which is in mesh with the gear 6. Set screws 12 are threaded into the upper part of the supporting members 3 and engage the tops of links 7 so as to regulate the engagement of the smooth and grooved rolls. Bracket 13 is secured to the supporting members 3 and carries the scraper 14 engaging the smooth roll 5, and held in adjusted position by means of the set screw 15. Set screw 16 is mounted in the upturned outer end of the bracket 14 and serves to regulate the engagement of the scraper with the smooth roll 5. The links 7 are provided with a similar bracket 17 carrying a scraper provided with a plurality of teeth 18 engaging in the grooves of the roll 10. This scraper is adjusted relative to the rolls by means of the set screw 20 carried by the outer upturned end of the bracket 17 and the scraper is held in adjusted position by means of the set screw 21.

To the inner end of the shaft 9 is secured the gear 22 which is in mesh with a gear 23, splined to the shaft 24, which is journaled in the supporting members 3. On the inner end of shaft 24 is mounted the gear 25 which is in mesh with a gear 26 driven by a motor 27. A disk 28 is splined to the inner end of the shaft 24 and carries a pin 29 engaging in the slot 30 in the gear 25. The motor 27 rests on a bracket 31, supported by the frame member 1 and a standard 32.

The material, preferably prepared in accordance with the process set forth in the application of John L. Kellogg, Serial No. 720,471, filed September 16, 1912, is fed to the shredding rolls through the chutes 23.

39 is a shaft suitably journaled on the frame members 1 and carries on its inner end the pulley 34 which is connected by the belt 35 with a motor 36, resting on a bracket 37, supported by the standard 38 and the frame 1. Shaft 39 carries on its outer end the gear 40 in mesh with the gear 41 on shaft 42, which is suitably journaled in the frame members. Gear 43 is secured to the center of shaft 42 and meshes with a gear 44 carried by shaft 45 which is also suitably journaled in the frame members 1. Shaft 45 carries on its inner end the cam wheel 46. Gear 44 is in mesh with a gear 47 on shaft 48, which is journaled in the frame members 1, and carries the sprocket wheels 49.

On the front end of the machine are provided the sprocket wheels 51, carried on a shaft 52, having its ends journaled in blocks 53 which are disposed in grooved ways 54, secured to the sides of the frame members 1. Adjusting screws 56 are disposed in lugs projecting from the frame members and engage the blocks 53. By this means the shaft 52 can be moved back and forth so as to regulate the tension on the carrying belt.

The conveying belt 50 passes over the sprocket wheels 51 and 49 and carries the pans and molds, to be filled with the shredded cereal, through the machine. This conveyer is made up of the cross members 57 provided at either end with the upstanding members 58 which are connected together by means of the pins 59. The outer ends of said pins are connected together by means of the links 60, and rollers 61 are journaled on said pins between the links 60 and the upstanding members 58, said rollers also serving to keep the links 60 spaced from the upstanding members 58.

Rock shaft 61 is journaled in a bearing 62 secured to the under side of the frame members 1, and upon the ends of this rock shaft are secured the lever arms 63. The upper ends of these lever arms are connected by means of a rod 64, to the center of which is adjustably secured the pitman rod 65. To the inner lever arm 63 the pitman 66 is connected. To the other end of the pitman rod 66 is secured the bar 67, provided with slot 68, through which the shaft 45 passes. The outer end of the bar 67 carries a pin 69 which engages in the cam slot 70 provided in the cam wheel 46. It will thus be seen, that for every revolution of the shaft 45 there is a complete reciprocation of the pitman 66, and this motion is multiplied and communicated to the pitman rod 65 by means of the lever arms 63. The pitman rod 65 is connected to the rear end of the pneumatic device, which I will now describe.

The device for pressing the covers on the baking pans comprises, the base plate 71, provided with the side members 72, on which are journaled the rollers 73 which run on the tracks 75, supported by the brackets 74 on the frame members 1. In the central part of the base plate is provided the housing 76 in which is the piston chamber 77. From the top of the housing 76 is supported the standard 78. The piston 79 moves in the piston chamber 77 and is provided with the piston rod 80, the upper end of which has a bearing 81 in the standard 78. A collar 82 is secured to the upper end of the piston rod to limit its downward movement. Housing 76 is also provided with an air passage 83 communicating with the bottom of the piston chamber and compressed air is supplied to said air passage through the pipe 84 and valve 85.

Links 86 are pivoted on the rods 87 secured at the ends of said base plate, and the upper ends of these links are pivoted on the rods 88 carried by the forked outer

ends of the levers 90. The inner ends of these levers are connected by means of links 91 with a collar 92 fitting around the piston rod 80 and resting on a shoulder 93 thereon. The levers 90 are provided with bosses 94 through which pass the rods 95, to the outer ends of which the rods 96 are secured. Rods 96 pass through lugs 97 provided on the side members 72 of the base plate and through lugs 98 provided on the side members 99 of the presser plate 100. The presser plate is held in position by means of the nuts 101 on the threaded lower ends of said rods 96.

In a supporting bracket 102, which is integral with one of the side members 72, is journaled a shaft 103 which carries on its inner end the turning plug 104 in the valve 85. This turning plug is provided with a pair of oppositely disposed slots 105, forming the narrowed portion 106 of said turning plug, which serves to open and close the valve 85'. On the outer end of said shaft 103 is secured the ratchet wheel 107, provided with the teeth 108. Pawls 109 are pivoted at 110 to the gear 113 which is journaled on the shaft 103. These pawls 109 engage the ratchet teeth 108 and are held resiliently in engagement therewith by means of the spring 111 secured at its ends to the pins 112 on the pawls 109. Gear 113 is in mesh with a rack 114 provided on the outer track 75. As a result the gear 113 will be given a rotary motion as the pneumatic device is moved back and forth. Pitman rod 65 is connected to the presser plate 100 at 115.

Compressed air is admitted to the valve 85 through the pipe 116, which is provided with a pet cock 117, and is connected with the main supply pipe 118' by the slide valve 118. The slide valve is provided with a valve rod 119 provided with a port 120 therethrough, through which the compressed air passes when said port is in alinement with the passage through the pipes 118' and 116. To the lower end of the valve rod 119 is secured the bar 121 which is fastened to the plate 122. Plate 122 is slidably connected to the side member 72 by means of screws 123 which pass through the slots 124 in plate 122. The ends of said plate are rounded at 125 so that they will ride up on the pin 138 carried by the covers of the baking pans. Spring 126 is interposed between the bar 121 and the base of the slide valve 118 and serves to hold the plate 122 normally down so that port 120 is out of alinement with the passage through the pipes 118' and 116. By this means the flow of compressed air is cut off except when the covered baking pans are passing through the machine.

127 is the exhaust head for permitting the escapement of air from the pistor chamber 77.

128 is an oil cup provided on the supply pipe 118' for oiling the valves.

Tracks 129 are suitably supported from brackets on the frame members 1 and upon these tracks the rollers 61 of the conveyer run as the conveyer passes through the machine. Tracks 130 are also provided, which are secured to the frame members 1 and upon which the rollers 61 of the conveyer travel as the belt is returning to front of the machine. The ends of these tracks are downwardly curved somewhat, as at 131, so that the conveyer will run upon them smoothly.

132 is a baking pan provided with the biscuit molds 133 secured thereto. 134 is the cover for said baking pan to which the molds are secured and which is provided with the upturned flanges 136 fitting snugly inside the upturned flanges 137 of the baking pan. The cover flanges are provided with pins 138 fitting in the notches 139 provided in the flanges of the pan. These pans are fully illustrated and described in my application, No. 673,214, filed January 24, 1912.

From the description of the parts given above the operation of this machine should be very readily understood. The material, which has preferably been prepared in accordance with the process set forth in the application of John L. Kellogg, No. 720,471, referred to above, is delivered by the chutes 33 to the shredding rolls 5 and 10. These rolls are geared to turn in opposite directions and act as squeeze rolls. Due to the grooved roll 10 the material is delivered from the rolls into the pans below, which are carried by the conveyer belt, in a shredded condition. Each set of shredding rolls delivers a layer of shredded material into the baking pan, and as many sets of rolls can be provided as desired, depending upon the number of layers of shreds which it is desired to incorporate into the biscuit. Each set of shredding rolls is driven by a separate electric motor. The scrapers 14 and 18 serve to keep the rolls clean. The baking pans are placed upon the conveyer before it reaches the first set of shredding rolls. After the pans carried by the conveyer leave the last set of shredding rolls, covers are placed thereon with the pins 138 engaging in the notches 139 of the pans. The sprocket wheels which move the conveyer are driven by the motor 36 which is connected to the pulley 34, the latter being connected by a train of gears with the sprocket wheels 49. The train of gears also serves to drive the shaft 45 carrying the cam wheel 46 and, due to the engagement of the pin 69 in the cam slot 70 carried by said cam wheel, a reciprocating movement is imparted to the pitman rod 66. This reciprocating movement is communicated to the

pitman rod 65 and multiplied by means of the lever arm 63. In this manner, the device for pressing the covers on the baking pans is given a reciprocating movement by the motor 36, the pulley 84 and the train of gears connected thereto. The gears are so proportioned and the pitman rod 66 is connected to the lever arm 63 at such a point that the device for pressing the covers on the pans is moved at the same rate as the conveyer which carries the pans through the machine. Due to the engagement of the gear 113 with the rack 114, carried by the fixed track 75, the gear 113 is given a rotary motion as the device is moved back and forth. When the device is being moved toward the front of the machine, that is, in a direction opposite to the movement of the conveyer, the pawls 109 ride over the surface of the ratchet wheel and no motion is communicated to the shaft 103. However, when the device is moved in the same direction as the moving conveyer, the pawls 109 engage the ratchet teeth 108 and turn the shaft 103 with the gear 113. This turns the plug 104 so as to admit air from the compressed air supply through the air passage 83 into the piston chamber. This lifts the piston 79 and forces upwardly the inner ends on the ends of links 86. The result of this movement is to lift the presser plate 100 by means of the rods 96 and force the same against the bottom of the conveyer belt so as to clamp the baking pans and their covers between the base plate 72, and the presser plate 100. This securely clamps the covers upon the pans. A further movement of the device causes the gear 113 to rotate so as to turn the plug and open the passage from the pipe 84 to the exhaust head 127 so as to relieve the pressure in the piston chamber and allow the piston 79 to drop. The weight of the presser plate 100 will cause it to drop and aid in returning the parts to their normal position. The slide valve 118 is provided so that the compressed air supply is automatically cut off except when covered baking pans are passing through the machine. This is due to the fact that the bottom edge of the plate 122 engages the pins 138 on the pan covers and lifts the valve rod 119 so as to bring the port 120 into alinement and admit compressed air to the pipe 116. If no pans are passing through the machine, or the pans which are passing through the machine do not have covers thereon, the plate 122 will not be lifted and the air will be cut off.

In Fig. I the device for pressing the covers on the baking pans is shown at the beginning of its stroke. As the device is drawn forward by the pitman rod 65 in time with the moving belt, the valve 85 opens so as to admit compressed air to the piston chamber to lift the piston. This lifts the presser plate against the bottom of the conveyer and clamps the covers on the pans. During the last part of this movement the valve is opened so as to relieve the pressure in the piston chamber and allow the parts to return to their normal position. When the device is ready to start on its return movement, the presser plate is free from the belt and the pans. As the device is moved backward to its first position, the pawls 109 ride on the surface of the ratchet wheel 107 and hence the shaft 103 is not rotated, and the valve is left in the position in which it was at the end of the forward stroke of the device. The device moves backward until it is in its original position when the operation is repeated. It will thus be seen that at each revolution of the cam wheel the device presses the cover on one baking pan and moves back into position to receive a new pan.

It is evident that while I have shown and described electric motors for driving the shredding rolls and the conveyer connected thereto, that other means of driving these parts might be used. Furthermore, while I have described this machine as adapted to treat material prepared in accordance with the process set forth in the application of John L. Kellogg, above referred to, it is evident that this machine may be used for making biscuits from any material requiring a similar treatment. The baking pans are delivered from the rear of the machine and are then placed in the oven for baking.

I show in Fig. VII[A] a modification of the grooving of the rolls which is available for use in a machine of this kind, in which both sets of rolls are grooved in accordance with my Patent No. 831,909, of Sept. 25, 1906.

I am aware that the particular embodiment here set forth, is susceptible of considerable variation without departing from the spirit of my invention, and I, therefore, do not wish to be restricted to the same. However, I have found that in actual practice this embodiment is to be preferred, and I desire to claim the same specifically as well as broadly as indicated by the appended claims.

Having thus described my invention, what I claim as new and desire to secure by Letters Patent, is:—

1. In a machine of the class described, the combination of a frame, sprocket wheels suitably journaled thereon, a conveyer belt carried by said sprocket wheels and adapted to carry baking pans through the machine, means for driving said sprocket wheels, a plurality of sets of shredding rolls journaled on said frame and adapted to deliver layers of shredded material to said baking pans, independent means for driving each set of shredding rolls, a device for pressing covers on said pans, a cam wheel, means for

driving the same operatively connected with said sprocket driving means, and a pitman rod connected to said device for reciprocating the same, reciprocatory motion being communicated to said pitman rod by means of the cam wheel, all coacting as specified.

2. In a machine of the class described, the combination of a frame, sprocket wheels suitably journaled thereon, a conveyer belt carried by said sprocket wheels and adapted to carry baking pans through the machine, means for driving said sprocket wheels, a plurality of sets of shredding rolls journaled on said frame and adapted to deliver layers of shredded material to said baking pans, means for driving said shredding rolls, a device for pressing covers on said pans, a cam wheel, means for driving the same, and a pitman rod connected to said device for reciprocating the same, reciprocatory motion being communicated to said pitman rod by the cam wheel, all coacting substantially as described for the purpose specified.

3. In a machine of the class described, the combination of a frame, sprocket wheels suitably journaled thereon, a conveyer belt carried by said sprocket wheels and adapted to carry baking pans through the machine, means for driving said sprocket wheels, a plurality of sets of shredding rolls journaled on said frame and adapted to deliver layers of shredded material to said baking pans, means for driving said shredding rolls, a device for pressing covers on said pans, and means for reciprocating said device, all coacting substantially as described for the purpose specified.

4. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt and provided with side members, rollers journaled on said side members, tracks secured to said frame on which said rollers travel, a housing provided on said base plate, a piston chamber in said housing, an air passage communicating with the bottom of said piston chamber, a piston reciprocating in said piston chamber and provided with a piston rod, a collar slidably mounted on said piston rod and resting on a shoulder thereon, links pivoted to the ends of said base plate, levers having forked outer ends pivoted to the upper ends of said links, the inner ends of said levers being pivotally connected to said collar, a presser plate disposed beneath said conveyer belt, rods pivotally connected to said levers and secured to said presser plate, lugs on the side members of said base plate through which said rods pass, a valve controlled by the forward movement of said device, for admitting compressed air to said air passage, means, adapted to be actuated by the covers on the baking pans, for admitting compressed air to said valve, and means for reciprocating said device.

5. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said baking pans, comprising a base plate carried above said conveyer belt and provided with side members, a housing provided on said base plate, a piston chamber in said housing, an air passage communicating with the bottom of said piston chamber, a piston reciprocating in said piston chamber and provided with a piston rod, a collar slidably mounted on said piston rod and resting on a shoulder thereon, links pivoted to the ends of said base plate, levers having forked outer ends pivoted to the upper ends of said links, the inner ends of said levers being pivotally connected to said collar, a presser plate disposed beneath said conveyer belt, rods pivotally connected to said levers and secured to said presser plate, lugs on the side members of said base plate through which said rods pass, a valve controlled by the forward movement of said device for admitting compressed air to said air passage, means, adapted to be actuated by the covers on said baking pans, for admitting compressed air to said valve and means for reciprocating said device, all coacting substantially as described for the purpose specified.

6. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt and provided with side members, a housing provided on said base plate, a piston chamber in said housing, an air passage communicating with the bottom of said piston chamber, a piston reciprocating in said piston chamber and provided with a piston rod, links pivoted to the ends of said base plate, levers having forked outer ends pivoted to the upper ends of said links, the inner ends of said levers being pivotally connected to said piston rod, a presser plate disposed beneath said conveyer belt, rods pivotally connected to said lever and secured to said presser plate, lugs on the side members of said base plate through which said rods pass, a valve controlled by the forward movement of said device for admitting compressed air to said air passage, means, adapted to be actuated by the covers on said baking pans, for admitting compressed air to said valve and means for reciprocating said device, all coacting substantially as described for the purpose specified.

7. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers

on said pans, comprising a base plate carried above said conveyer belt, a housing provided on said base plate, a piston chamber in said housing, an air passage communicating with the bottom of said piston chamber, a piston reciprocating in said piston chamber and provided with a piston rod, links pivoted to the ends of said base plate, levers having forked outer ends pivoted to the upper ends of said links, the inner ends of said levers being pivotally connected to said piston rod, a presser plate disposed beneath said conveyer belt, means connecting said presser plate with said levers, a valve controlled by the forward movement of said device for admitting compressed air to said air passage, means, adapted to be actuated by the covers on said baking pans, for admitting compressed air to said valve, and means for reciprocating said device, all coacting substantially as described for the purpose specified.

8. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, a housing provided on said base plate, a piston chamber in said housing, an air passage communicating with the bottom of said piston chamber, a piston reciprocating in said piston chamber, and provided with a piston rod, levers fulcrumed on the ends of said base plate, the inner ends of said levers being pivotally connected to said piston rod, a presser plate disposed beneath said conveyer belt, means connecting said levers with said presser plate, a valve controlled by the forward movement of said device for admitting compressed air to said air passage, means, adapted to be actuated by the covers on said baking pans, for admitting compressed air to said valve, and means for reciprocating said device, all coacting substantially as described for the purpose specified.

9. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, levers fulcrumed on the ends of said base plate, a presser plate disposed beneath said conveyer belt, means connecting said levers with said presser plate, means controlled by the forward movement of said device and the covers on said baking pans for lifting the inner ends of said levers, and means for reciprocating said device, all coacting substantially as described for the purpose specified.

10. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, a housing on said base plate, a piston chamber in said housing, a piston reciprocating in said piston chamber, a presser plate disposed beneath said conveyer belt, means operated by said piston for lifting said presser plate against said conveyer belt, a valve controlled by the forward movement of said device for admitting compressed air to said piston chamber, means, adapted to be actuated by the covers on said pans, for admitting compressed air to said valve and means for reciprocating said device, all coacting substantially as described for the purpose specified.

11. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, a housing on said base plate, a piston chamber in said housing, a presser plate disposed beneath said conveyer belt, means operated by said piston for lifting said presser plate against said conveyer belt, a valve for admitting compressed air to said piston chamber, a valve operating shaft suitably journaled on said base plate, a turning plug operating in said valve and carried on one end of said shaft, a ratchet wheel on the other end of said shaft, a gear rotatably mounted on said shaft and in mesh with a rack carried by the frame, pawls pivoted on said gear and engaging ratchet teeth on said ratchet wheel, a spring resiliently holding said pawls in engagement with said ratchet wheel, means adapted to be actuated by the covers on said baking pans, for admitting compressed air to said valve, and means for reciprocating said device, all coacting substantially as described for the purpose specified.

12. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, a housing on said base plate, a piston chamber in said housing, a piston reciprocating in said piston chamber, a presser plate disposed beneath said conveyer belt, means operated by said piston for lifting said presser plate against said conveyer belt, a valve for admitting compressed air to said piston chamber, a valve operating shaft suitably journaled on said base plate, a turning plug operating in said valve and carried on one end of said shaft, a ratchet wheel on the other end of said shaft, a gear rotatably mounted on said shaft and in mesh with a rack carried by the frame, means operatively connecting said ratchet wheel with said gear

during the forward movement of the device, means, adapted to be actuated by the covers on the baking pans, for admitting compressed air to said valve and means for reciprocating said device, all coacting substantially as described for the purpose specified.

13. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, a housing on said base plate, a piston chamber in said housing, a piston reciprocating in said piston chamber, a presser plate disposed beneath said conveyer belt, means operated by said piston for lifting said presser plate against said conveyer belt, a valve for admitting compressed air to said piston chamber, a suitably journaled valve operating shaft, a turning plug operating in said valve and carried on one end of said shaft, means whereby the forward movement of the device rotates said shaft, means, adapted to be actuated by the covers on said baking pans, for admitting compressed air to said valve, and means for reciprocating said device, all coacting substantially as described for the purpose specified.

14. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, a housing on said base plate, a piston chamber in said housing, a piston reciprocating in said piston chamber, a presser plate disposed beneath said conveyer belt, means operated by said piston for lifting said presser plate against said conveyer belt, a valve for admitting compressed air to said piston chamber, means whereby the forward movement of the device opens and closes said valve, means, adapted to be actuated by the covers on said baking pans, for admitting compressed air to said valve, and means for reciprocating said device, all coacting substantially as described for the purpose specified.

15. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, a housing on said base plate, a piston chamber in said housing, a piston reciprocating in said piston chamber, a presser plate disposed beneath said conveyer belt, means operated by said piston for lifting said presser plate against said conveyer belt, a valve for admitting compressed air to said piston chamber, means whereby the forward movement of the device opens and closes said valve, a pipe admitting compressed air to said valve, a slide valve in said pipe comprising a valve rod, a plate secured to the lower end of said rod and adapted to be engaged by pins on the pan covers to lift said rod, a port in said valve rod adapted to be brought into alinement with the passage through said pipe when said plate is lifted, a spring normally holding said rod with the port out of alinement with said passage, and means for reciprocating the device, all coacting substantially as described, for the purpose specified.

16. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, a housing on said base plate, a piston chamber in said housing, a piston reciprocating in said piston chamber, a presser plate disposed beneath said conveyer belt, means operated by said piston for lifting said presser plate against said conveyer belt, a valve admitting compressed air to said piston chamber, means whereby the forward movement of the device opens and closes said valve, a pipe admitting compressed air to said valve, a slide valve in said pipe comprising a valve rod, means on the lower end of said valve rod adapted to be engaged by pins on the pan covers to lift said rod, a port in said valve rod adapted to be brought into alinement with the passage through said pipe when said plate is lifted, and means for reciprocating said device, all coacting substantially as described for the purpose specified.

17. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, a housing on said base plate, a piston chamber in said housing, a piston reciprocating in said piston chamber, a presser plate disposed beneath said conveyer belt, means operated by said piston for lifting said presser plate against said conveyer belt, a valve admitting compressed air to said piston chamber, means, whereby the forward movement of the device, opens and closes said valve, means, adapted to be actuated by the covers on said baking pans for admitting compressed air to said valve, a pitman rod connected to said presser plate, lever arms journaled on said frame and connected to the other end of said pitman rod, a second pitman rod connected to one of said lever arms, a slotted bar on the other end of said pitman rod, a pin on the outer end of said bar, a cam wheel having a cam slot therein in which said pin engages, a shaft

on which said cam wheel is mounted, said shaft passing through the slot in said bar and means for driving said shaft, all coacting substantially as described for the purpose specified.

18. In a machine of the class described, the combination of a frame, a conveyer belt adapted to carry baking pans through the machine, and a device for pressing covers on said pans, comprising a base plate carried above said conveyer belt, a housing on said base plate, a piston chamber in said housing, a piston reciprocating in said piston chamber, a presser plate disposed beneath said conveyer belt, means operated by said piston for lifting said presser plate against said conveyer belt, a valve admitting compressed air to said piston chamber, means, whereby the forward movement of the device opens and closes said valve, means adapted to be actuated by the covers on said baking pans for admitting compressed air to said valve, a pitman rod connected to said presser plate, lever arms journaled on said frame and connected to the other end of said pitman rod, a second pitman rod connected to one of said lever arms, means for reciprocating said second pitman rod, all coacting substantially as described for the purpose specified.

In witness whereof, I have hereunto set my hand and seal in the presence of two witnesses.

RALPH E. VALENTINE. [L. S.]

Witnesses:
C. B. DES JARDINS,
G. B. THOMPSON.

UNITED STATES PATENT OFFICE.

JOHN L. KELLOGG, OF BATTLE CREEK, MICHIGAN, ASSIGNOR TO KELLOGG TOASTED CORN FLAKE CO., OF BATTLE CREEK, MICHIGAN.

PROCESS OF PREPARING SHREDDED CEREAL PRODUCTS.

1,159,045. Specification of Letters Patent. Patented Nov. 2, 1915.

No Drawing. Application filed September 16, 1913. Serial No. 790,471.

To all whom it may concern:

Be it known that I, JOHN L. KELLOGG, a citizen of the United States, residing at Battle Creek, Michigan, have invented certain new and useful Improvements in Process of Preparing Shredded Cereal Products, of which the following is a specification.

This invention relates to improvements in shredded cereal-products and the process of preparing same.

The objects of this invention are: First, to provide a superior shredded wheat or cereal food product in which the product has been thoroughly and completely cooked and aerated. Second, to provide an improved process of thus treating wheat or similar cereal.

My invention relates to and is particularly adapted for the treatment of whole wheat, but other grains may be similarly treated.

In the preferred method and process I take whole wheat and grind the same on a French bur stone to crush and not cut and destroy the texture. To a six hundred pound batch of such whole wheat unbolted flour, I add two hundred and fifty pounds of water in which I have previously thoroughly dissolved six per cent. of sugar and two per cent. of salt. I then mix the flour in this water with a rotary mixer very thoroughly for a period of ten minutes, or thereabout, until the mass is a very thick, heavy dough. This dough is delivered from the mixer and rolled out into a thick slab about two inches thick, and preferably into a layer about twenty-four inches wide and twelve inches long, the material passing under a suitable roller for the purpose. This heavy dough is then placed in covered pans and put in a steam retort, where it is subjected to steam heat for a period of about one and one half hours at fifteen pounds' pressure, which gives a temperature of about 250 degrees Fahr. The material thus cooked is taken from the pans and placed in wire racks where it is dried for a period of twenty-four hours in the open air. This dried and cooked dough is then passed through a rotary swing hammer breaker, which breaks the material up into cubes about one inch square. These lumps are then passed through a breaker or grinder which reduces to dimensions of about the size of a split pea.

The material thus reduced to the size of a pea is passed through a Hess drier, or similar drier, and a current of dry air is delivered through the same until the material is thoroughly air dried. The material in the air dried condition is then passed through shredding rollers and delivered in layers to suitable bake pans and is cut up into suitable biscuits, or any form that may be desired and suitably compressed and passed in the baking pans, suitably covered, to a suitable oven where the same is baked for thirty minutes at a temperature of from 450° to 500° Fahr. This thoroughly bakes the material, and it is then passed from the baking oven, removed from the bake pans and passed through a drying oven, where, for a period of one hour, a current of air at a temperature of from 250° to 300° Fahr. is caused to circulate over and through the biscuits or shredded material thus formed. The biscuit, when thus thoroughly cooked and dried, has much the appearance of the ordinary shredded wheat biscuit, the difference being that the material is thoroughly cooked and converted to dextrin, making a very digestible aerated bread or food, the other constituents not being destroyed but thoroughly cooked.

I desire to state that this process can be considerably varied. It is a requirement that the flour be whole wheat or whole grain flour, and that the same be ground by crushing, as distinguished from a cutting of the texture of the grain. The grain should be thoroughly treated and mixed and steamed, and thereafter reduced to granules, shredded, baked and dried in order to secure the best results. A fairly complete conversion of the starchy material to dextrin is accomplished without injury to the food values of the other constituents of the grain, and the whole is aerated and light and palatable.

Having thus described my invention, what I claim as new and desire to secure by Letters Patent is:

1. The process of preparing a shredded biscuit consisting in first grinding the grain by a crushing action, second, cooking the same in a suitable steam retort at about fifteen pounds' pressure, air drying the steamed mass for substantially twenty-four hours, reducing the dried mass to granules, air drying the granules in a current of air, subjecting the granules to the action of

shredding rollers, baking the material in covered pans in an oven at a temperature of from 400° to 500° Fahr., and removing from the pans and drying the same in an air current at a temperature of 250° to 300° Fahr.

2. The process of preparing a shredded biscuit consisting in first grinding the grain by a crushing action, second, cooking the same in a suitable steam retort at about fifteen pounds' pressure, air drying the steamed mass, reducing the dried mass to granules, air drying the granules, subjecting the granules to the action of shredding rollers, baking the material in covered pans in an oven at a temperature of from 400° to 500° Fahr., and removing from the pans and drying the same at a temperature of 250° to 300° Fahr.

In witness whereof, I have hereunto set my hand and seal in the presence of two witnesses.

JOHN L. KELLOGG. [L. S.]

Witnesses:

CHAS. M. MARBLE,

H. E. RALPH.

UNITED STATES PATENT OFFICE.

JOHN LEONARD KELLOGG, OF BATTLE CREEK, MICHIGAN, ASSIGNOR TO KELLOGG TOASTED CORN FLAKE COMPANY, OF BATTLE CREEK, MICHIGAN, A CORPORATION OF MICHIGAN.

MANUFACTURE OF BRAN FOOD.

1,189,130. Specification of Letters Patent. Patented June 27, 1916.

No Drawing. Application filed December 18, 1915. Serial No. 67,504.

To all whom it may concern:

Be it known that I, JOHN LEONARD KELLOGG, a citizen of the United States, residing in Battle Creek, in the county of Calhoun and State of Michigan, have invented a new and useful Improvement in the Manufacture of Bran Food, of which the following is a specification.

My invention relates to the manufacture of laxative food products from bran wholly or in combination with cereals or other healthful materials, and has for its principal object to provide bran food products of this nature in the form of loose shreds and also in the form of a shredded biscuit, which will be more digestible, palatable and appetizing than the bran foods commonly sold, and which can be eaten alone or in combination with any other cereal food, or with sugar and cream or other food elements like other cereal foods.

My invention consists of certain improvements in the process of preparing bran food products and also in bran food products, and in order that my invention may be fully understood, I shall first set forth in detail the mode in which I at present prefer to carry my invention into practice and then particularly point out in the claims the novel features of the improved process and product.

In carrying my invention into practice, I at present take the desired quantity of pure bran, preferably wheat bran, that has been thoroughly cleansed, thoroughly moisten the same and place it by preference in shallow pans. The pans I at present use are approximately 24 inches long by 12 inches wide and 6 inches deep. I then place the pans, by preference, in an ordinary steam retort and cook the bran at about 250° F. temperature for from thirty minutes to one hour.

Before or after the cooking process, I may mix with the bran any desired quantity from 5% to 50% of whole wheat or other gelatinous cereal flour or any other suitable starch-bearing material. After the bran, with or without the added starch-bearing material, is thus cooked, it is dried in the ordinary hot air drier, which leaves the cooked bran or mixture in a more or less lumpy condition. These lumps are then preferably pressed through a one-quarter inch wire mesh, so as to make the material into tiny lumps which may be about the size of a kernel of rice. These tiny lumps are then fed through shredding mills of the ordinary kind.

To make the product in the form of loose shreds, the shredding mills are preferably of such character as to make the separate shreds of varying curly and wavy ribbon-like form. To make the product in the form of biscuit, the shredding mills are of such a character as to make the separate shreds either in the same curly and wavy ribbon-like form, but preferably in the ordinary fine filamentary form.

In making the loose ribbon-like shreds, the elongated shreds are caught from the shredding mills, preferably on an ordinary conveyer belt and distributed into an ordinary flight oven, wherein they drop from one flight to another to the bottom where the shreds are finally toasted. These toasted bran shreds are then, by preference, broken into particles of crisp, short, curly and wavy ribbon-like form in which form the product is ready for the market, this form being shown in my pending application for patent filed May 17, 1915, Serial No. 28,586.

This product, owing to the described process of manufacture, is thoroughly cooked, is exceptionally palatable, digestible, appetizing and healthful, and owing to its attractive crisp, curly and wavy ribbon-like form has an exceptionally appetizing appearance.

In making the bran biscuit, the fine shreds, at present preferably used for this product, formed as above described by the shredding mills, are gathered, preferably on an endless belt and pressed into biscuit of any suitable form, which are baked in suitable ovens for about thirty minutes at a temperature of from about 450° to 500° F. A current of dried air is then by preference caused to circulate over and through the biscuits thus formed, thoroughly to dry the same, whereby the final product is formed ready for the market. These biscuits, owing to the described process of manufacture, possess an easy digestibility and are exceptionally palatable, appetizing and healthful.

It is evident that the process above described may be greatly varied in the charac-

ter of its performance and in the ingredients and appliances employed, without departing from the scope or spirit of my invention, which is defined by the following claims.

I claim as my invention:

1. A process of preparing a shredded bran food, during the performance of which the bran is moistened, cooked and dried, reduced to small particles, and the particles shredded and baked or toasted.

2. A process of preparing a shredded bran food, during the performance of which the bran is moistened, cooked and dried, and starch-bearing material added thereto, the mixture reduced to small particles, and the particles shredded and baked or toasted.

3. A process of preparing a shredded bran food, during the performance of which the bran is moistened, cooked and dried, and reduced to small particles, the small particles shredded into elongated ribbon-like shreds, and the ribbon-like shreds baked or toasted.

4. A process of preparing a shredded bran food, during the performance of which the bran is moistened, cooked and dried, and reduced to small particles, the small particles shredded, the shreds molded into biscuit form and the biscuits baked or toasted.

5. A shredded bran food consisting of a mass of separate shreds.

6. A shredded bran food consisting of a mass of separate curly shreds.

7. A shredded bran food consisting of a mass of separate wavy shreds.

8. A shredded bran food consisting of a mass of separate ribbon-like shreds.

9. A shredded bran biscuit consisting of separate shreds pressed together.

JOHN LEONARD KELLOGG.

UNITED STATES PATENT OFFICE.

JOHN L. KELLOGG, OF BATTLE CREEK, MICHIGAN, ASSIGNOR TO KELLOGG TOASTED CORN FLAKE COMPANY, OF BATTLE CREEK, MICHIGAN, A CORPORATION OF MICHIGAN.

MANUFACTURE OF SHREDDED-CEREAL BISCUIT.

1,197,297. Specification of Letters Patent. Patented Sept. 5, 1916.

No Drawing. Original application filed May 17, 1915, Serial No. 28,588. Divided and this application filed December 31, 1915. Serial No. 69,936.

To all whom it may concern:

Be it known that I, JOHN L. KELLOGG, a citizen of the United States, residing in Battle Creek, in the county of Calhoun and State of Michigan, have invented a new and useful Improvement in the Manufacture of Shredded-Cereal Biscuit, of which the following is a specification.

My invention relates to the manufacture of shredded cereal foods from grains, such as wheat, corn, oats, rye and malt, and has for its primary object to provide an improved method of introducing an artificial flavoring into the product, and to make a product having such improved flavoring, which has been thoroughly and completely cooked and aerated, and also having an exceptionally attractive and appetizing form and appearance.

Before my present invention shredded cereal foods such as shredded wheat and shredded wheat biscuit were usually manufactured from the grains without the use of flavoring, the grains being, in one process, boiled for about thirty (30) minutes or until partly cooked, allowed to temper for a few hours and then shredded. It was usually found impossible to cook any saccharine flavoring or salt into wheat, for example, without impairing the shredding qualities of the grain. Wheat, especially, has an outside coating of bran which is impossible to penetrate with a syrup, the syrup sticking to the outside of the berry. When the berry was shredded, it was found that the particles of wheat would not stick together and form a shred on account of the syrup producing an action which would not allow the carbo-hydrates of the grains to unite. I, therefore, conceived the idea of pulverizing the grain, such as wheat, corn, oats, rye or malt, into a fine flour, mixing therewith the flavoring material, such as sugar, malt extract, salt and water in sufficient quantities to give the flavor desired; mixing the whole into a stiff dough; and forming the same, by preference, into small individual slabs. These slabs were then cooked and dried and broken up into small particles. These particles were then in the preferred process air dried and placed in the shredding mills and reduced to shreds of, by preference, elongated, ribbon-like form. These elongated ribbon-like shreds from the shredding mills were cut up and pressed into biscuit form and baked in special ovens to form light biscuits consisting of the crisp, curly and wavy ribbon-like shreds interlaced and united.

In order that my invention may be fully understood, I shall first describe in detail the mode in which I carry the same into practice.

In the preparation of the ribbon shred cereal biscuit, I prefer first to pulverize the grain, which may be whole wheat, corn, oats, rye, malt or other suitable cereal, into a fine flour, preferably on a French bur stone so as to crush but not cut and destroy the texture. To, for example, six hundred pounds of such whole wheat unbolted flour, I add, by preference, two hundred and fifty pounds of water in which I have previously thoroughly dissolved six per cent. of sugar and two per cent. of salt. I then mix the flour in this solution with a rotary mixer very thoroughly for a period of about ten minutes until the mass is a thick, heavy dough. I then by preference break the dough through an ordinary dough breaker, and roll or mold it, preferably, into small individual slabs. In actual practice, I make these slabs about 12″ wide, 24″ long and 2″ or 3″ thick. These slabs are then cooked preferably by laying them in ordinary steel trays one on top of the other and placing the trays in an ordinary canner's steam retort and cooking them for about an hour and a half at about fifteen pounds steam pressure, which gives a temperature of about 250° F. After cooking, the slabs are by preference piled up in wire racks and allowed to dry in the atmosphere until quite dry. It generally takes from twenty-four to forty hours to accomplish this drying. These cooked and dried slabs are then, by preference, broken up by ordinary swing hammer mills into rough cubes about one inch square, and then by a breaker or a grinder into small particles about the size of a pea or grain of wheat. These particles are then, by preference, passed through a Hess drier or similar drier and a current of dry air delivered through the same until the material is deprived of all surplus moisture and reduced to the proper consistency for shredding. The dried particles are then placed, by preference, in shredding mills of the ordinary kind and shredded so as to form shreds of

elongated ribbon-like form. The elongated ribbon-like shreds, formed as above described by the shredding mills, are, by preference, gathered upon an endless belt from ten or more shreds, cut and pressed into biscuits and baked in suitable ovens for about thirty minutes at a temperature of from 450° to 500° F. A current of dried air is then, by preference, caused to circulate over and through the biscuits thus formed, thoroughly to dry the same, forming the final product, ready for the market. These biscuits owing to the attractive curly and wavy ribbon-like form of their loosely interlaced and united constituent shreds, present an exceptionally appetizing appearance to the eye and possess also the easy digestibility and a peculiarly palatable flavor imparted by this process of manufacture.

I claim as my invention:

1. A process of preparing a shredded cereal food biscuit, during the performance of which the cereal grain is pulverized and mixed with water to form a dough, the dough cooked, dried and broken into small particles, the particles shredded into elongated flat ribbons, the flat ribbons cut up into shorter pieces, the pieces pressed together into biscuit form, and the biscuits baked or toasted.

2. A process of preparing a shredded cereal biscuit during the performance of which small pieces of a cooked and dried cereal material are shredded into elongated flat ribbons, the elongated ribbons cut up into shorter pieces, the pieces pressed into biscuits, and the biscuits baked or toasted.

3. A shredded cereal food biscuit consisting of dried elongated flat ribbons cut up into shorter pieces and the pieces pressed together and baked or toasted.

JOHN L. KELLOGG.

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Dec. 2, 1930. J. L. KELLOGG 1,783,434

COMBINATION TOASTING AND SHREDDING OVEN

Filed Nov. 9, 1922 10 Sheets-Sheet 1

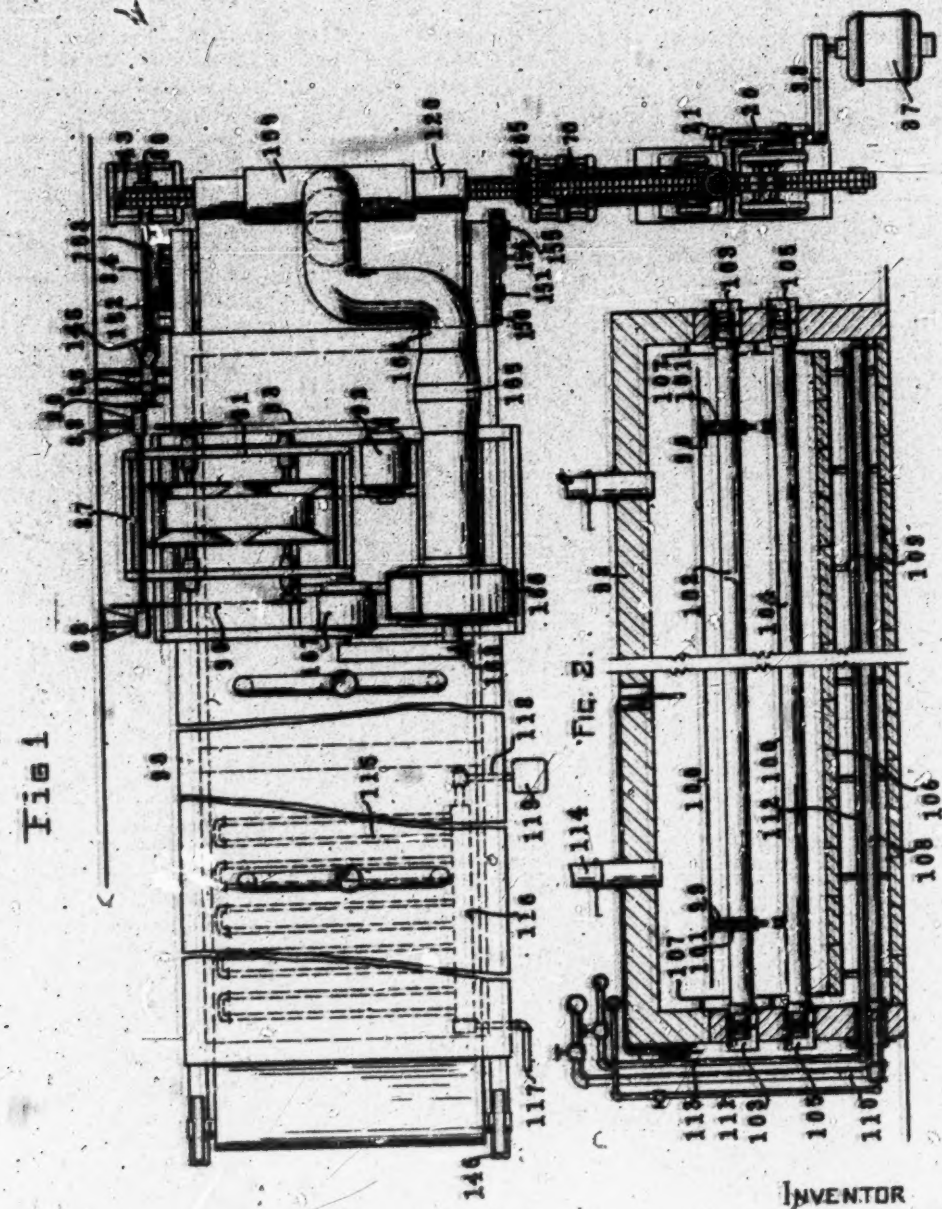

Fig 1

Fig. 2.

INVENTOR
John L. Kellogg
By Duell, Warfield & Duell
ATTORNEY

Dec. 2, 1930. J. L. KELLOGG 1,783,434

COMBINATION TOASTING AND SHREDDING OVEN

Filed Nov. 9, 1922 10 Sheets-Sheet 2

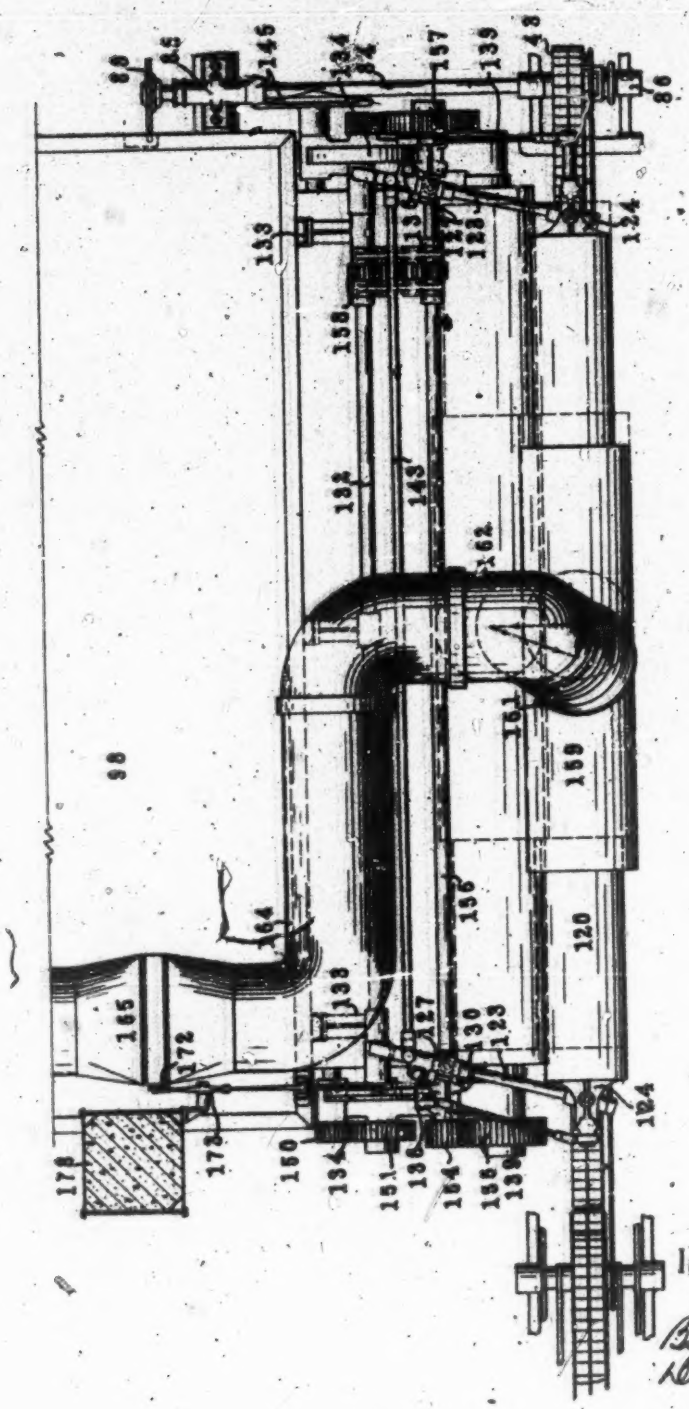

FIG. 3.

INVENTOR
John L. Kellogg
By
Duell, Warfield & Duell
ATTORNEY

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Dec. 2, 1930. J. L. KELLOGG 1,783,434

COMBINATION TOASTING AND SHREDDING OVEN

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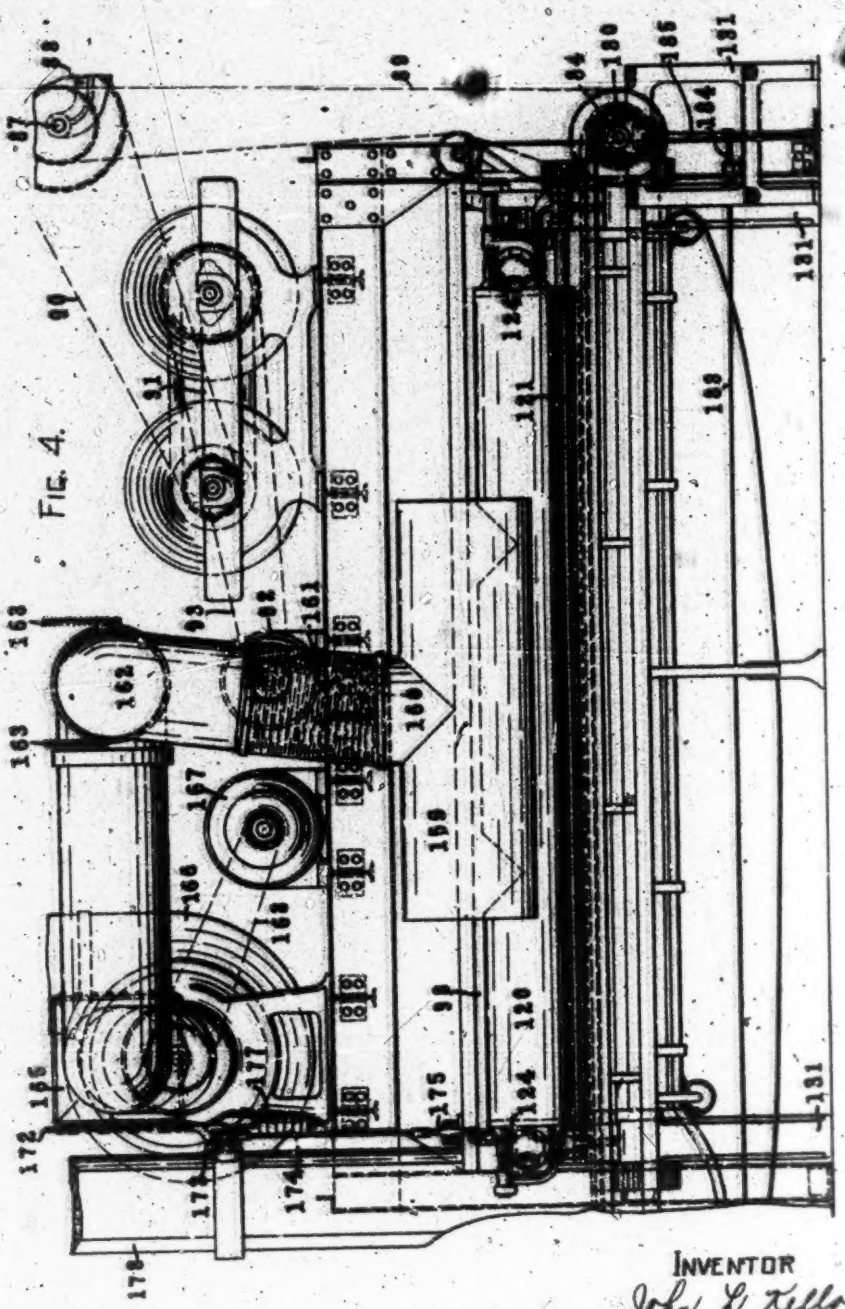

FIG. 4.

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COMBINATION TOASTING AND SHREDDING OVEN

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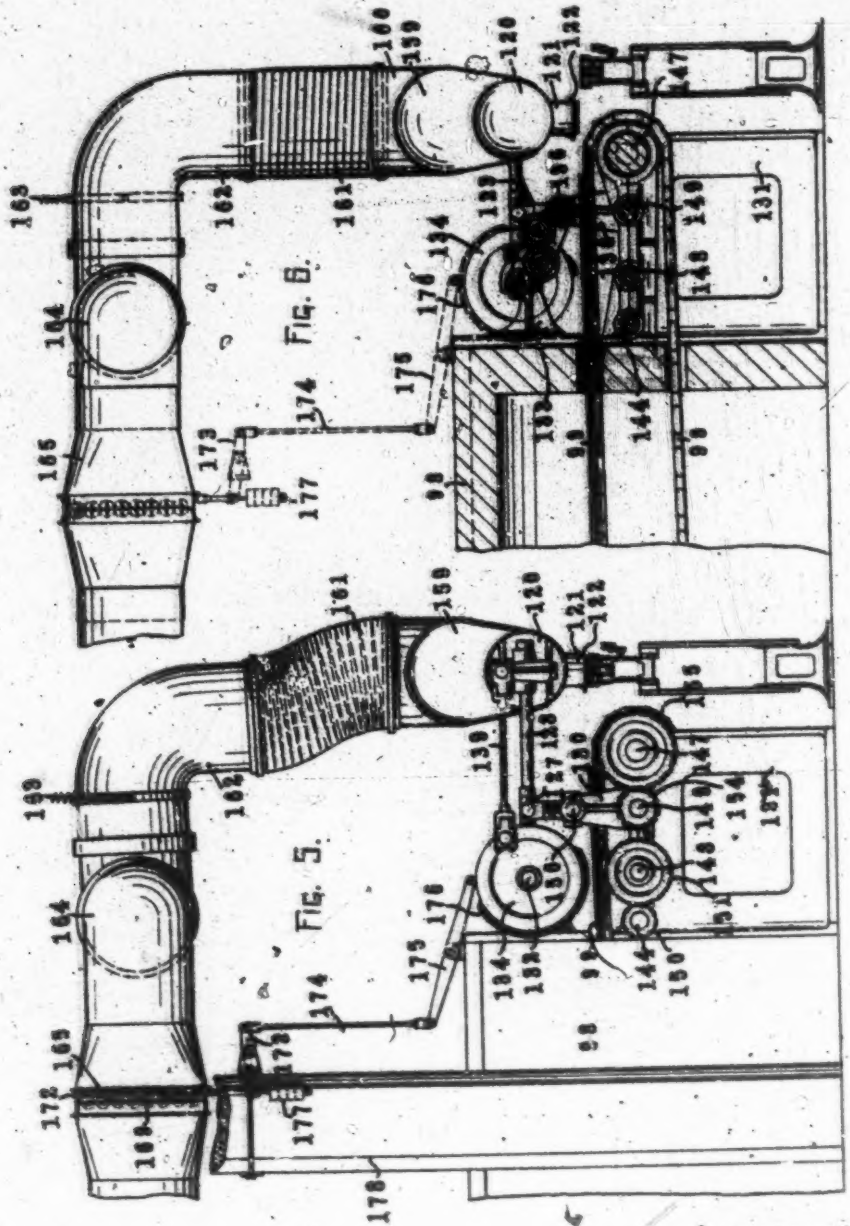

Fig. 6.

Fig. 5.

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COMBINATION TOASTING AND SHREDDING OVEN

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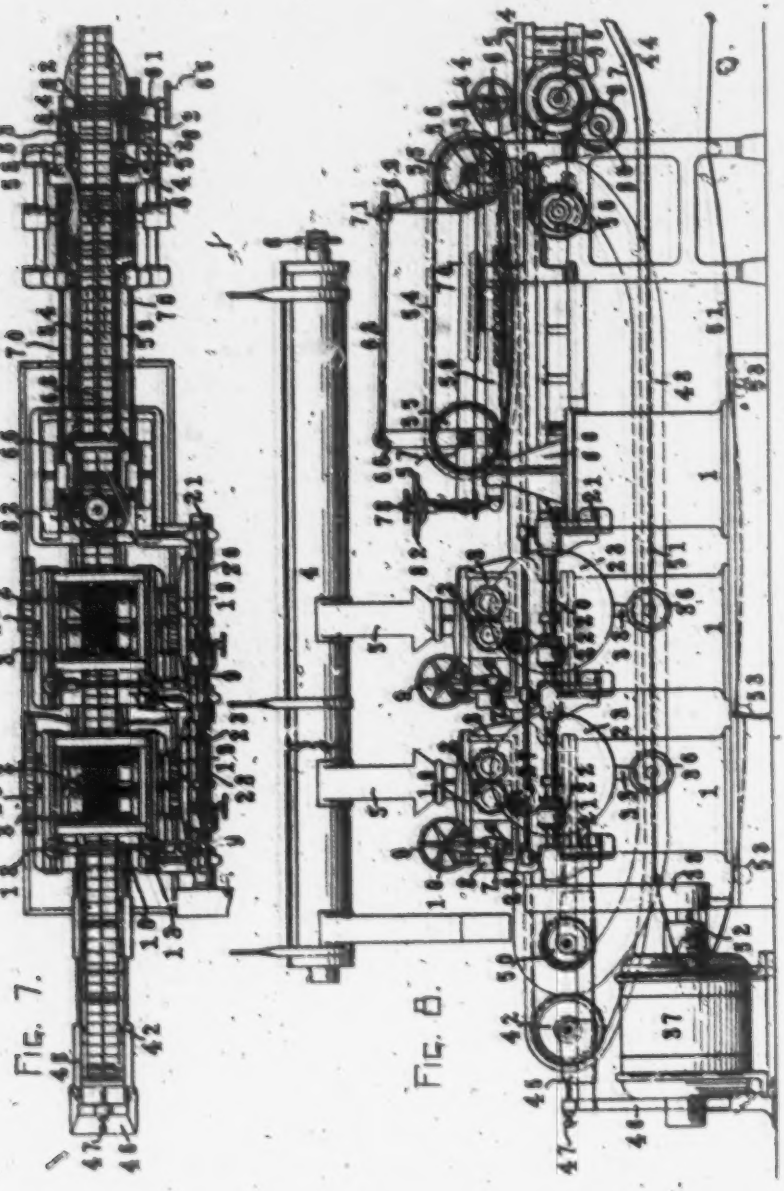

FIG. 7.

FIG. 8.

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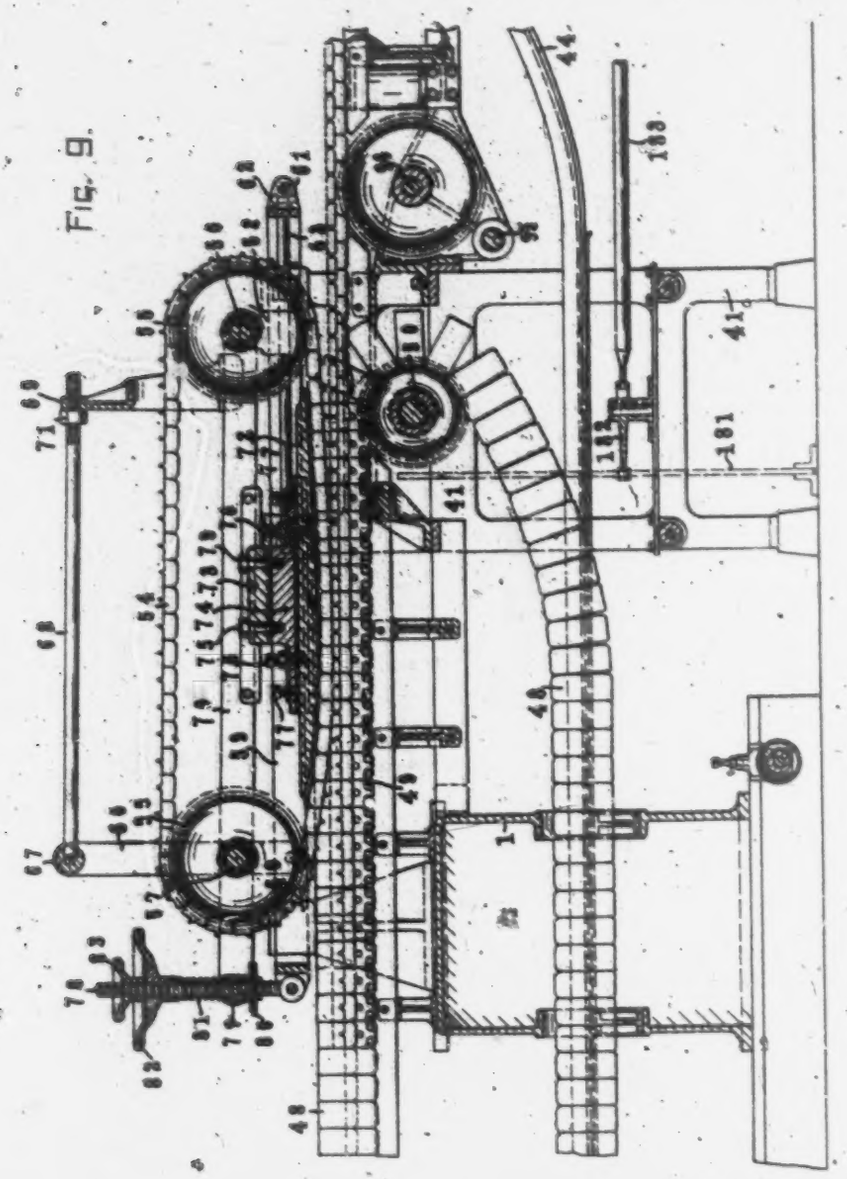
Fig. 9.



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COMBINATION TOASTING AND SHREDDING OVEN

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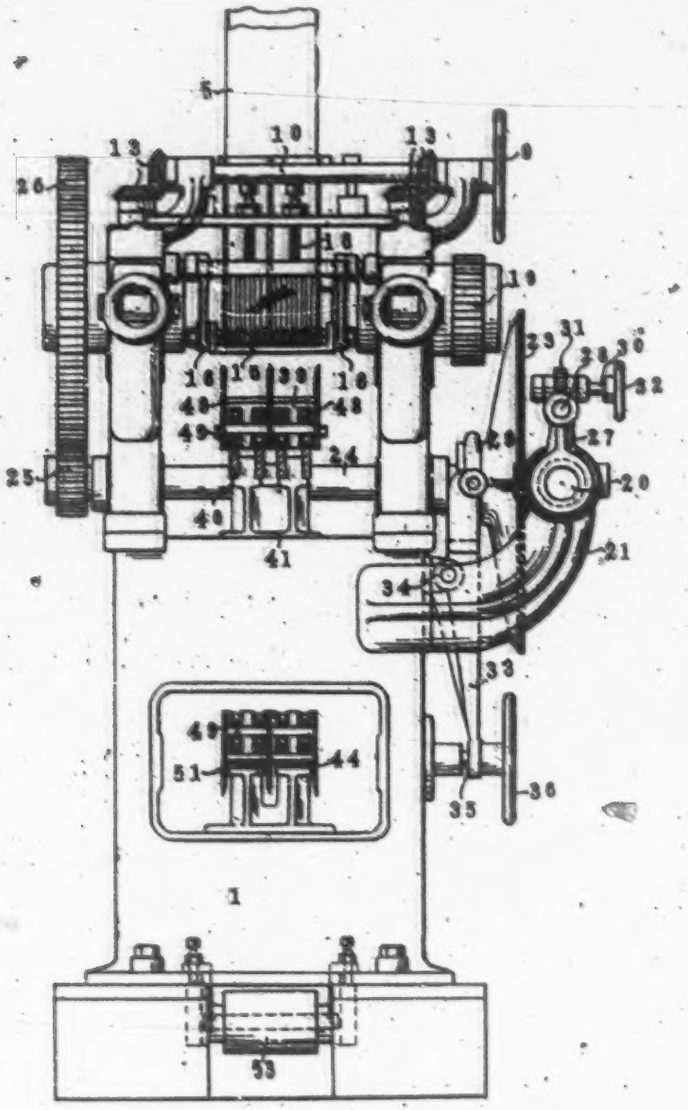

Fig. 10

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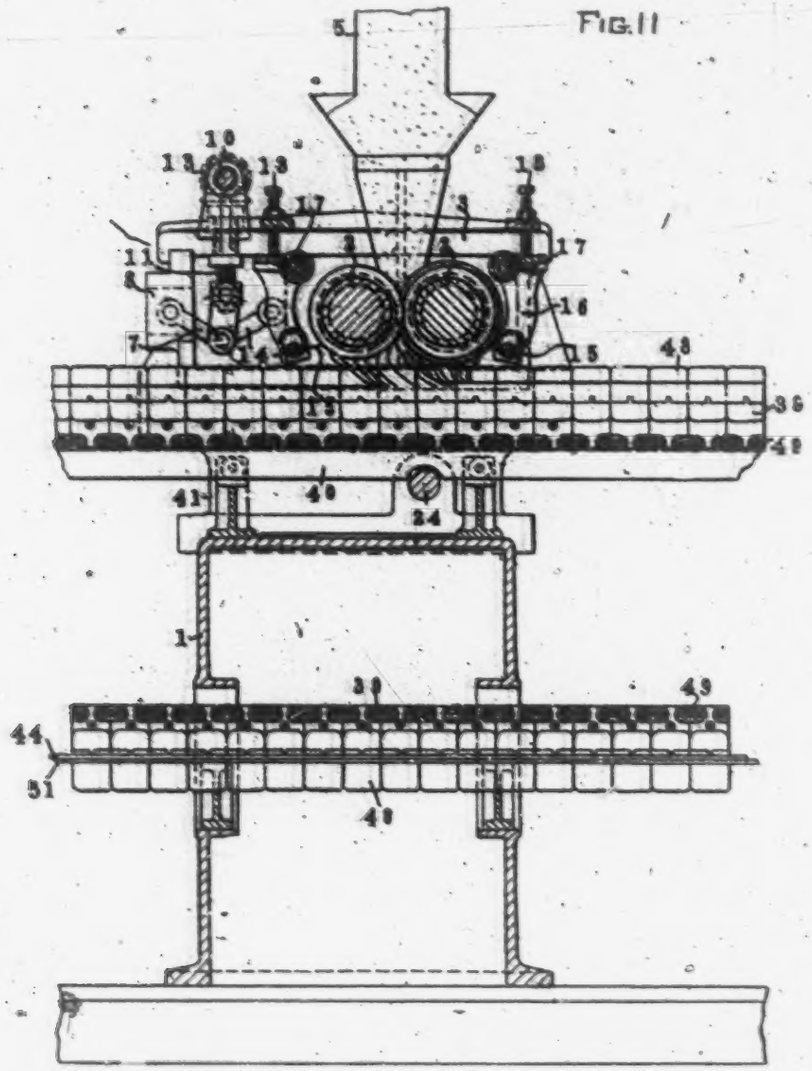
FIG. 11



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COMBINATION TOASTING AND SHREDDING OVEN

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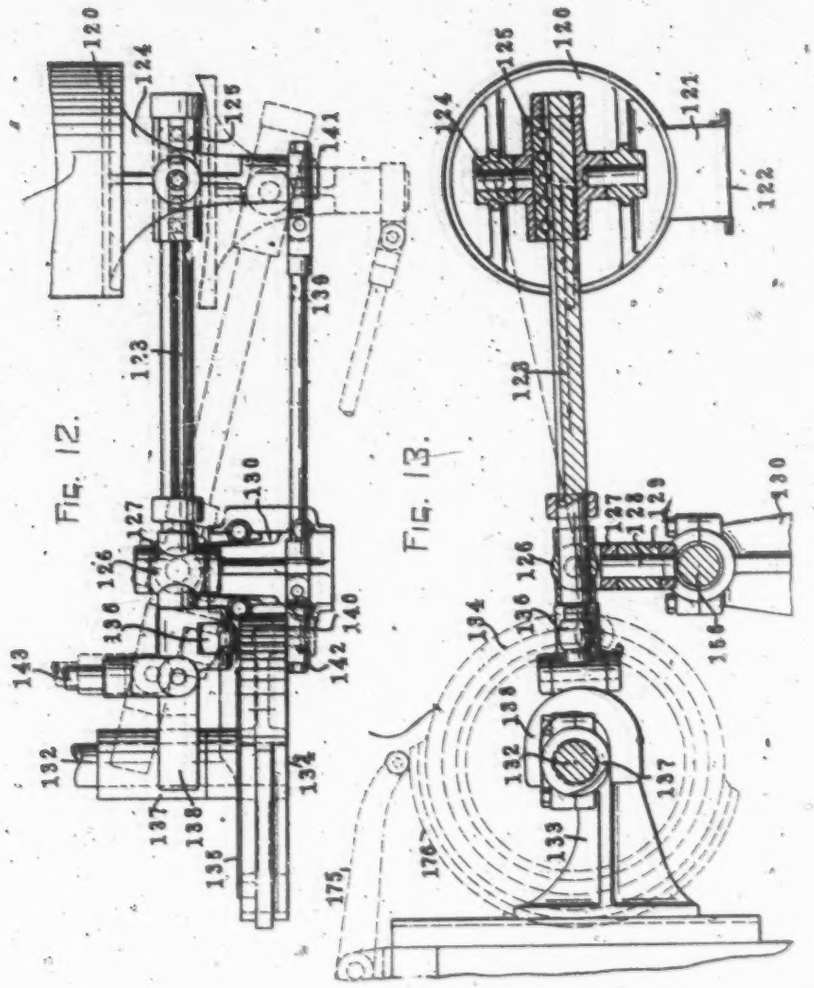

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COMBINATION TOASTING AND SHREDDING OVEN

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FIG 14

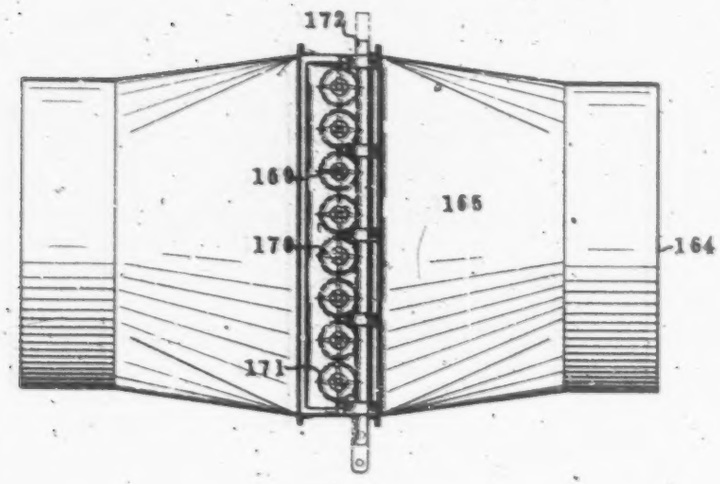
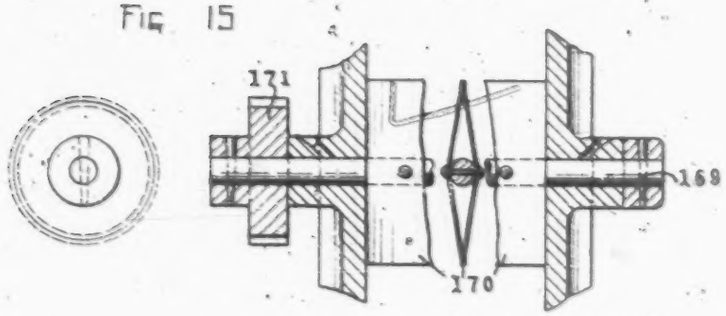


FIG 15



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UNITED STATES PATENT OFFICE

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COMBINATION TOASTING AND SHREDDING OVEN

Application filed November 8, 1922. Serial No. 599,578.

This invention relates to an improvement in a combination shredding machine and toasting oven, and with respect to its more specific features to mechanism for forming the shredded material into biscuits and for transferring the biscuits to the oven.

An object of the present invention is to provide in a unitary structure, mechanisms for shredding cereals, for forming the shredded cereal into biscuits, and for puffing and drying the biscuits.

Another object is to provide mechanism in the form of cooperating upper and lower mold sections movable over endless paths arranged to superpose the upper sections on the lower sections during a portion of their travel.

Another object is to provide means to form limiting walls at the opposite sides of the lower mold sections during the feeding of the material and the forming of the same into biscuits.

Another object is to provide means for coordinating the movement of the upper and lower sections to cause them to register during the superposing of the sections.

Another object is to provide mechanism for bodily moving the sections of one series to correct inaccuracies of register and timing.

Another object is to provide means controlled by the moving of the sections, to press them together when they are superposed thereby to separate the shreds of the material between the biscuits.

Another object is to provide molding mechanism, in the form of a series of molds, movable in succession past the shredding mechanism, and controlled to open and closed position by the movement of the molds.

Another object is to provide an oven, having one end arranged to puff the biscuits and the other end arranged to dry the biscuits, and having in connection therewith a conveyor for moving the formed biscuits through the oven.

Another object is to provide mechanism for transferring the biscuits from the forming means to the conveyor without interfering with the continuous movement of either the forming means or the conveyor.

Another object is to provide in the transferring mechanism a pick-up head moving during portions of its travel adjacent to the forming means and to the conveyor, and at the same speed, to transfer the biscuits from the forming means to the conveyor, wherein the pick-up mechanism is controlled by the movement of the said means.

Other objects will be in part obvious and in part pointed out hereinafter.

The invention accordingly consists in the features of construction, combinations of elements and arrangement of parts which will be exemplified in the construction hereinafter set forth, and the scope of the application of which will be indicated in the following claims.

In the accompanying drawings forming a part of this specification wherein similar reference characters refer to similar parts throughout the several views,

Figure 1 is a top plan view of the improved machine and oven,

Fig. 2 is a transverse vertical section through the oven at the puffing chamber,

Fig. 3 is a top plan view of the transferring mechanism,

Fig. 4 is a front elevation,

Fig. 5 is an end view with the parts in one position,

Fig. 6 is a similar view with the parts in another position and with parts in section,

Fig. 7 is a plan view of the shredding machine,

Fig. 8 is a front elevation,

Fig. 9 is a longitudinal vertical section through the biscuit forming mechanism,

Fig. 10 is an end view of the shredding machine with parts in section,

Fig. 11 is a longitudinal section through the shredding mechanism,

Fig. 12 is a detail in plan of one of the supporting arms for the transferring mechanism, and its connections,

Fig. 13 is a section on the line 13—13 of Fig. 12,

Fig. 14 is an enlarged side view of the controlling valves for the suction head, and

Fig. 15 is a detail sectional view of one of the valves.

In the present embodiment of the invention, a shredding mechanism is provided for shredding cereal, the said mechanism consisting of one or more shredding mills, which convert the material into shreds, and deliver the shreds to mechanism which forms them into biscuits. The mechanism for forming the shreds into biscuits is constituted by endless chains of upper and lower mold sections arranged to travel over endless paths and with the upper sections superposed on the lower sections during a part of their travel. The shredded material is fed into the lower sections, before the upper sections are superposed thereon, and mechanism is provided to form limiting walls at the opposite sides of the lower sections, during the filling thereof, and during the early part of their movement with the upper sections superposed. The oven, which is composed of two chambers, one of which is heated by gas, and is designed to puff the biscuits, the other being heated by steam, and designed to dry the biscuits, receives the formed biscuits, and bakes them. The biscuits are passed through the oven by a continuously moving conveyor, and transferring mechanism is provided for removing the biscuits from the forming mechanism and transferring them to the conveyor, arranged to travel between the forming mechanism and the conveyor, and to travel with said mechanism and conveyor when picking up the biscuits from the forming mechanism and depositing them on the conveyor.

Referring to Figures 1, 7, 8, 10 and 11, in which the shredding mechanism is more particularly shown, it will be noted that one or more shredding mills is provided, each of which is supported by a base 1, and each mill comprises a pair of annularly grooved rolls 2 journaled to rotate on parallel axes in a suitable casing 3, which is mounted on the base 1. The mills are arranged alongside each other, and they are supplied with a suitable cereal to be shredded, from a trough 4 which has discharge chutes 5 delivering to the respective mills, and the shredded material passes from between the rolls onto an endless chain of lower mold sections, to be presently described. The cereal is fed through the trough 4, by a screw conveyor, driven from a suitable source of power, by means of a sprocket wheel 6. The rolls 2 are adjustable toward and from each other, by means of toggle mechanism indicated at 7, arranged between the support of one roll and a fixed abutment 8 supported by the base 1. The toggle is operated by a hand wheel 9 on a shaft 10 journaled transversely of the casing 3, and connected to vertical screws 11 having threaded connection with the casing 3, by means of bevel gearing 13. The lower ends of the screws are connected to the toggles by links 14, and by moving the screws in the proper direction, the toggles may be bent or straightened, to move the adjacent roll 2 toward or from the other roll. The shredded material is removed from the grooves of the rolls by means of scraper plates 15 engaging the grooves, and supported by arms 16 pivoted at 17 to the casing 3. The scrapers are adjusted toward and from the rolls by means of set screws 18 threaded through the casing 3, and engaging the arms 16 to swing the lower ends of the arms toward and from the rolls, and each set screw has a lock nut for holding it in adjusted position. The rolls 2 have intermeshing gears 19, and they are driven from a drive shaft 20 journaled in brackets 21 on the base 1. The shaft has a friction roller 22, at each mill, which engages the face of a friction disc 23, secured to a shaft 24 journaled transversely of the casing 3, and has at the end remote from the friction disc a pinion 25 which meshes with a gear wheel 26 on the shaft of the adjacent roll 2. Each friction roller 22 is adjustable longitudinally of the shaft 20, to engage the adjacent disc 23 nearer to or farther from the center thereof, thereby to increase or diminish the speed of rotation of the rolls. The rollers are moved by means of forks 27 which engage annular grooves in the hubs of the rollers, and the forks are slidable on a rack shaft 28 supported above the shaft 20 in parallelism therewith. The bodies of the forks 27 have bearings 29 slidable on the rack shaft, and a shaft 30 is journaled in each bearing, transversely of the rack shaft. Each shaft 30 (see Fig. 10) has a pinion 31 meshing with the rack shaft, and a hand wheel 32 for rotating the shaft. By turning the wheel 32 in the proper direction, the fork may be slid longitudinally of the rack shaft, to move the roller 22 toward or from the center of the disc 23. The disc 23 may be moved away from the roller 22 to stop the operation of the adjacent mill, by means of a lever 33. Each of these levers is pivoted at 34 to the base 1 of the mill, and has a rotatable connection with the hub of the disc 23 at its upper end. The lower end has a bearing engaging a screw 35 extending outwardly from the base and having threaded thereon outside the bearing a handled screw 36. By turning the screw 36 in the proper direction, the disc may be moved out of contact with the friction roller, to stop the operation of the adjacent mill. The shaft 20 is driven by a suitable motor 37, in the present instance an electric motor, which is connected to the shaft by a belt 38.

The shredded material is fed to lower mold sections 39, which are linked together in an endless chain, the upper run of the chain being horizontal, and moving below the shredding mills. The upper run of the chain moves on guides 40 supported by the bases 1 and by a suitable framework 41 at the end

remote from the shredding mills. At the ends of the machine, the chain passes over sprocket wheels 42 and 43, one of which, 43, is driven in a manner to be presently described, and the lower run moves on a suitable guide 44 supported by the bases 1 and the frame 41. The shaft of the wheels 42 is supported in a carriage 45, which is slidable in an extension frame 46 at the end adjacent to the shredding mills, and the carriage is moved by means of set screws 47, which have lock nuts in connection therewith for holdling them in adjusted position. By moving the wheels 42, the tension of the chain may be adjusted.

While the shredded material is being deposited in the lower mold sections, means is provided to form a limiting wall at each side of the chain of molds, the wall moving with the molds. The wall in the present instance (see Fig. 11) is formed by side plates 48 which are connected in an endless chain by links 49. The chain carrying the side plates is mounted to move over an endless path, the upper run of which is below the upper run of the chain of lower mold sections. The arrangement is such that the chain 48—49 of side plates moves upon the guides 40, while the chain of mold sections moves on the chain 48—49, and the side plates are of sufficient length to extend well above the mold sections, as shown in Figures 9 and 11. The endless chain 48—49, is supported by rollers 50 journaled in the frames 41 and 46, and one of the rollers is driven in a manner to be presently described. The lower run of the chain 48—49 is supported by the guides 44 before mentioned, for supporting the lower run of the chain of mold sections. Referring to Figure 11, it will be seen that this guide extends through openings in the bases 1, and the upper run of an endless belt 51 of leather or the like moves upon the guide supporting the chains. The lower run of the chain of mold sections engages the leather belt, and the chain of side plates rests on the chain of mold sections. The belt 51 is supported at its ends by suitable rollers 52, and intermediate its ends on the lower run, by rollers 53. The belt 51 supports and moves with the mold sections, so that the said sections do not contact with the guides, but are supported in their movement thereover. The chain of side plates is shorter than the chain of mold sections, so that the side plates leave the mold sections after the compression of the material into biscuits. A series of upper mold sections 54 is linked together to form an endless chain, and this chain is supported by sprocket wheels 55, with its lower run adjacent to the upper run of the chain of lower sections. The respective wheels are secured on shafts 56 and 57, the shaft 56 being driven in a manner to be presently described, to drive the chain. The shaft 56 is journaled in bearings 58 supported on the side members of a frame 59, which is mounted to slide longitudinally of the chain of lower mold sections. The side members of the frame are slidable in bearing sleeves 60 supported by the frame 41 and the adjacent base 1. The frame is moved in the bearings by means of a shaft 61 journaled on the end of the frame remote from the shredding mills, and having bevel gear connections 62 with screw rods 63, which are threaded through nuts 64 on the inner faces of the bearings 58 adjacent to the shaft 61. The shaft 61 has a hand wheel 65, and by turning the wheel in the proper direction, the entire chain of upper mold sections may be adjusted longitudinally of the upper run of the chain of lower sections, to correct the setting of the chains should they get out of time or adjustment. The shaft 57 is journaled in arms 66 which are pivoted to the sides of the frame 59, and the upper ends of the arms are connected by a roller 67. A rod 68 engages this roller intermediate its ends, and the other end of the rod is threaded, and passes through a bearing in an arch 69 which connects a pair of links 70, whose ends, adjacent to the arch, are journaled on the shaft 56 before mentioned. A nut 71 is threaded onto the rod adjacent to the arch, and by turning the nut in the proper direction the shaft 57 may be moved toward or from the shaft 56, to tension the chain.

The links 70 before mentioned support a device for moving the lower run of the upper chain into close engagement with the upper run of the lower chain, thereby to mold the biscuits between the mold sections and the side plates, the side plates constituting the ends of the molds. The said device comprises a block 72 which is adjustably connected to a crossbar 73 supported by the links 70 before mentioned intermediate their ends. A hanger 74 is connected to the crossbar by screws 75, and the hanger is connected to the block by set screws 76 having lock nuts as shown. Other set screws 77 are threaded through the hanger into engagement with the block, and by means of the screws 76 and 77 the position of the block with respect to the hanger, may be varied. Means is also provided for adjusting the block with respect to the contacting runs of the chains, that is toward and from the guides 40. A threaded rod 78 is pivoted to the end member of the frame 59 adjacent to the shaft 57, and the rod passes through a bearing 79 connecting the forward ends of the links 70. A nut 80 is threaded onto the rod below the bearing, and a coil spring 81 encircles the rod above the bearing. The upper end of the spring is engaged by a hand wheel 82 threaded onto the rod, and a second wheel 83 is threaded onto the rod above the wheel 82. By means of the nut 80 the position of the adjacent end of the links, and the position of the presser block 72

with respect to the guides 40 may be varied. The spring 81 permits the presser block to yield upwardly in case a hard object should pass between the mold sections. The tension of the spring is adjusted by the hand wheels 82 and 83, the latter serving as a lock to lock the wheel 82 in adjusted position.

The operation of the above described mechanism is as follows—

The material shredded by the rolls 2 drops upon the lower mold sections, between the side plates, and as the mold sections travel, the side plates travel therewith, the sections eventually arriving at the position shown in Fig. 9. As the sections pass beneath the shaft 57, the upper mold sections begin to descend between the side plates, and the said sections are gradually moved toward the lower sections, until they engage therewith, beneath the lowest part of the presser block 72. The mold sections cooperate to cut the shreds connecting individual biscuits, the biscuits being formed between the upper and lower sections and the side plates. Referring to Fig. 9, it will be seen that four mold sections and two side plates cooperate for the forming of each biscuit. As the biscuits pass toward the shaft 56, the upper sections begin to lift away from the lower sections, and just before the biscuits pass beneath the shaft 56 the side plates begin to move around the wheels 50 and to move away from the mold sections. Beyond the shaft 56, the biscuits lie on the lower mold sections, in convenient position to be lifted therefrom and transferred to the oven.

The sprocket wheel 43 is mounted on a shaft 84 which is journaled in suitable bearings 85 and 86. A shaft 87 is journaled in bearings 88 at the end of the shaft 84 and in parallelism therewith, and the shafts 84 and 87 are connected by a chain and sprocket connection indicated at 89. The shaft 87 is connected by a sprocket connection indicated at 90 with a Reeves variable transmission indicated generally at 91, and driven by a motor 92, through a sprocket connection 93. The motor 92 drives the chain of lower mold sections through the variable transmission, and the chain of upper sections is driven by a sprocket connection 94 from a shaft 95 which is geared to a shaft 96 by gearing 97. The shaft 96 is journaled on the frame between the runs of the chain of lower mold sections, assists in supporting the upper run of the chain and is driven thereby.

The oven (see Figs. 1, 2, 4 and 6) consists of a casing 98 of suitable construction and material. An endless conveyor travels through the oven, whose long axis is at right angles to the direction of travel of the biscuit forming mechanism, constituted by the chains of upper and lower mold sections. The conveyor consists of chains 99 connected by transversely extending flights 100, of perforated material, and the chains are supported on the upper run of the conveyor intermediate the ends of the run by sprocket wheels 101, secured on pipe shafts 102 journaled in bearings 103 in the oven walls. At its ends the conveyor extends beyond the oven, and it is supported in a manner to be presently described. The lower run of the conveyor is supported by rollers 104 journaled in bearings 105 in the oven wall, and the body of the oven is separated from the combustion chamber by a housing 106, which is arranged below the rollers 104, and below the lower run of the conveyor, and which extends upwardly at each side wall in spaced relation, to near the top of the oven, as indicated at 107. The spaces between the extension 107 and the oven walls provide passages for distributing the heat from the combustion chamber into the top of the baking chamber, thus to bake the biscuits from the top down, utilizing the moving heated air, instead of radiant heat.

The combustion chamber is heated in that portion of the oven which is adjacent to the biscuit forming mechanism by a burner 108 of suitable construction, in the present instance a gas burner, the pipes of the burner being arranged beneath the housing 106, which is supported from the bottom of the oven by means of struts 109, the pipes of the burner being arranged between the struts. Gas is supplied to the burner by a supply pipe 110, and an air pipe 111 is provided for supplying the burner with air, the pipes 110 and 111 being valve controlled as shown. A lighter 112 extends the full width of the oven for lighting the burner 108, and the lighter is supplied with gas by a pipe 113, which is also valve controlled. The oven has suitable damper controlled vent flues 114 for removing the vapor and gases. The drying chamber of the oven, which is that portion remote from the biscuit forming mechanism, is heated by steamcoils 115, supplied from a header 116 which is connected with the coils and with a steam line 117. The header also has a drain pipe 118 leading to a steam trap 119. The drying chamber of the oven differs from the puffing chamber in its heating mechanism and in the ommission of the brick enclosing walls and the sheet metal extensions 107. The conveyor 99—100 moves continuously through the oven, delivering the completed biscuits at the end remote from the forming mechanism. The oven conveyor moves at right angles to the biscuit forming mechanism, which is also a conveyor, and transferring mechanism is provided for transferring the biscuits from the forming mechanism to the oven conveyor.

The said mechanism (see Figs. 3, 4, 5 and 6) includes a distributing pipe or chamber 120 having a pick-up nozzle or suction head 121 of rectangular outline, and covered on its open or bottom side by a screen 122 of fine

mesh. The area of the open side of the nozzle depends upon the number of biscuits which it is desired to transfer at one time, usually a gross being simultaneously picked up and moved to the flights of the oven conveyor. The head is supported by arms 123 at its ends, the arms being slidably and swingably connected with bracket arms 124 secured to the ends of the chamber 120, a pair of vertically spaced bracket arms being provided at each end of the chamber. Referring to Figs. 12 and 13, it will be noticed that the arm 123 slides through a sleeve 125, which is pivoted between the bracket arms 124 to swing on a vertical axis, and the arm is keyed to the sleeve to permit the sleeve to slide longitudinally thereof, but to prevent relative angular movement of sleeve and arm. Each arm 123 has a transverse bearing 126 intermediate its ends, which is received between arms of a yoke 127, and is pivotally connected thereto as shown. Each yoke has a depending pin 128, which is journaled in a bearing 129 supported by a bracket 130 upstanding from a frame 131 at the front of the oven casing. The arms 123 are thus mounted to swing in a horizontal plane, and in a vertical plane, and the swinging in both directions as well as the movement of the suction head on the arms, is controlled by cams on a shaft 132 journaled transversely on the front of the oven in brackets 133, and driven in a manner to be presently described. Cams 134 are secured to the shaft near its ends, each cam having a cam surface 135 on its inner face with which cooperates a roller 136 journaled on the adjacent end of the arm 123. When the roller engages the elevated surface of the cam, the arms are swung into the dotted line position of Fig. 12, carrying with them the suction head. In picking up biscuits from the forming means, the swinging movement of the arms above mentioned enables the suction head to travel with the forming mechanism during the picking up of the biscuits, and the arms are then swung in a vertical plane to slightly elevate the suction head, so that it will not interfere with the lines of oncoming biscuits. The vertical swinging is brought about by barrel cams 137 on the shaft 132, a cam 137 being arranged adjacent to each cam 134. The adjacent end of each arm 123 has a fork 138 at the cam 137, and the arms of the fork engage above and below the cam. The barrel cam has a depressed portion as shown in Fig. 13 which when the suction head is in position to pick up biscuits from the forming mechanism will register with the lower fork arm, and the suction head will be permitted to drop slightly to engage the biscuits, and will be immediately raised, to move the picked up biscuits far enough above the forming mechanism to prevent interference with the oncoming biscuits. The suction head is moved toward and from the oven, to deposit the picked up biscuits on the flights of the oven conveyor, by means of the cams 134. A crank arm 139 is arranged at each end of the suction head, each arm being pivoted at one end to the brackets 124, and at the other to a wrist pin 140 on the cam. The crank arms have bearings 141 and 142 which engage the bracket and wrist pin respectively, and the body of the crank arm is hinged to the bearings as shown in Fig. 12, to swing on vertical axes, so that there is no interference with the swinging movement of the suction head. The arms 123 are connected in rear of the brackets 130 and are constrained to swing together by a cross-rod 143, which is pivoted at its ends to the arms, adjacent to the forks 138. The shaft 132 is driven from the shaft 84 before mentioned. A shaft 144 is journaled in the framework 131 adjacent to the furnace wall, and the shaft is connected to the shaft 84 by bevel gearing 145. The ends of the oven conveyor which extend beyond the ends of the oven casing, are supported by sprocket wheels on shafts 146 and 147 respectively, the former being at the rear of the furnace, while the latter is at the front, being supported by the frame 131. Other shafts 148 and 149 are journaled in the frame between the shafts 144 and 147, the four shafts 144, 147, 148 and 149 being in the same horizontal plane. The shafts 144 and 148 are connected by gears 150 and 151, the former being on the shaft 144, while the latter is on the shaft 148. The shafts 148 and 149 are connected by gears 152 and 153, the former being on the shaft 148, while the latter is on the shaft 149. The shafts 149 and 147 are connected by gears 154 and 155, the former being on the shaft 149, while the latter is on the shaft 147. The shaft 156 is journaled in the brackets 130 before mentioned, directly above the shaft 149, and it carries a gear 157 meshing with the gear 155 on the shaft 147. A train of gears 158 connects the shaft 156 with the shaft 132. Thus both conveyors, the forming mechanism being in effect a conveyor, and the cam shaft for controlling the suction head, which is a transferring mechanism, are driven by the same motor 92.

The distribution chamber 120 has connected therewith a plenum chamber 159 having an inlet 160 which is connected by a flexible connection 161 with an elbow 162. The elbow which is supported by springs 163 communicates by means of a second elbow 164 with a valve casing 165, which in turn is connected with the inlet of a suction fan 166 supported on the furnace casing, and driven by a motor 167 through a belt connection 168. Within the valve casing (Figs. 5, 14 and 15) is arranged a series of valves, in the form of shutters arranged to overlap, to close communication through the chamber, or to be moved into parallelism, to open the chamber.

Each valve comprises a shaft 169 journaled in opposite walls of the casing, and having secured thereto within the casing a shutter leaf 170. In the present instance the shutter leaves are hollow bodies, diamond shaped in cross-section, the shaft extending through the body at the center thereof and being secured thereto. Each shaft is provided with a pinion 171 outside the casing, and all of the pinions are engaged by a rack bar 172 having guided movement on the side wall of the casing, as shown in Fig. 14. The lower end of the rack bar is linked to one end of a lever 173 pivoted intermediate its ends, and connected at its opposite end by a link 174 with one end of a cam lever 175 pivoted on the oven casing, and having at the opposite end from the link a friction roller engaging the periphery of the cam 134. This cam has on its periphery a cam surface or elevated portion 176, which when the suction head is above the forming mechanism will operate the lever 175 to open the valves in the valve casing, to connect the suction head with the exhausting mechanism. The valves will be held open by the cam, until the suction head is above the oven conveyor, when the roller passes off the elevated portion of the cam, and a counter-weight 177 returns the valves to closed position. The lever 173 is supported by a pillar 178 or other suitable support. The upper run of the chain or lower mold sections, which is of considerable length, is supported intermediate its ends by sprocket wheels 179 on the shaft 96 before mentioned, and in order to prevent disengagement of the chain from the sprocket wheels at this point, an electromagnet 18 is arranged below the chain, the pole of the magnet being directly beneath the chain.

The operation of the improved machine is as follows:—

A suitable cereal is fed to the shredding machine, and formed into shreds by the shredding rolls 2. The shreds are scraped from the rolls by the scrapers 15, and deposited on the upper run of the chain of lower mold sections 39, the side plates 48 at this time being in place at opposite sides of the chain, to hold the material from overflowing. As the mold sections move away from the shredding mills, they come beneath the upper mold sections 54, which are gradually superposed thereon, forming the shreds into biscuits with the cooperation of the side plates, and separating the adjacent biscuits from each other. When the upper mold sections lift from contact with the lower sections, the biscuits lying on the lower sections are moved along to the transferring mechanism 120. At regular intervals, the suction head 121 is moved above the chain of lower mold sections 39, and a plurality of biscuits is lifted from the chain. The suction head swings with the chain of mold sections during a portion of its travel, so that there is no interference with the oncoming biscuits, and as the biscuits held by the suction head are lifted above the level of the biscuits on the forming chain, the head is moved toward the oven conveyor, and the biscuits are dropped thereon. The air valves 170 are opened when the suction head engages the biscuits on the forming chain, to connect the head with the source of fluid pressure, and the valves are closed when the suction head is above the flights of the oven conveyor, so that the biscuits are dropped thereon. At the proper speed, the biscuits are moved through the puffing and drying ovens, and emerge from the end of the oven remote from the forming chain in finished condition. The movement of all of the parts is coordinated, so that they operate in the proper relation with respect to each other to continuously produce finished biscuits when in operation.

The shaft 87 may be connected to the shaft 84, or disconnected therefrom, by means of a clutch indicated at 180. The clutch is operated from the shredding mill end of the machine, by means of a handle 181 pivoted at its lower end to a fixed support, and connected intermediate its ends to one end of a lever 182, pivoted on the frame 41. The other end of the lever 182 is connected by a link 183, with one end of a lever 184 pivoted on the frame 131. The other end of the lever 184 is pivoted to the body of a fork 185, whose arms engage the clutch and the body of the fork is pivoted to a fixed support. By means of the handle 181, the clutch may be operated to connect or disconnect the shafts 84 and 87.

As many changes could be made in the above construction and many apparently widely different embodiments of this invention could be made without departing from the scope thereof, it is intended that all matter contained in the above description or shown in the accompanying drawings shall be interpreted as illustrative and not in a limiting sense.

It is also to be understood that the language used in the following claims is intended to cover all of the generic and specific features of the invention herein described, and all statements of the scope of the invention, which, as a matter of language, might be said to fall therebetween.

Having described my invention, what I claim as new and desire to secure by Letters Patent is:—

1. In a machine of the class described, in combination, shredding mechanism, moving means to receive the shredded material and mold it into biscuits comprising upper and lower mold sections cooperating with each other to mold said material by pressure, the pressure being applied solely by said sections, an oven, a conveyor for transporting the biscuits through the oven, and means for transferring the biscuits from the molding means

intermediate the ends of the range of travel of said moving means to the conveyor.

2. In a machine of the class described, in combination, shredding mechanism, means for removing shredded material from said mechanism, means for forming biscuits from said material, comprising endless chains of upper and lower mold sections having runs thereof adjacent to which said material is delivered, means for supporting and moving each chain, adjustable means for coordinating the movement of the chains to cause the sections of one chain to register with those of the other on the adjacent runs, means for imparting relative movement toward and from each other to the adjacent runs, and means for bodily moving one chain at will to correct the adjustment of the chains.

3. In a machine of the class described, in combination, mechanism for forming biscuits including an endless chain of bottom mold sections, and a second endless chain of substantially flat plates forming walls at opposite sides only of the mold sections during the filling thereof.

4. In a machine of the class described, in combination, mechanism for forming biscuits, including an endless chain of bottom mold sections, shredding mechanism delivering to the sections, and means comprising an endless chain of substantially flat plates cooperating with said sections to form walls solely at the sides of the chain to prevent overflow of the shredded material, and to assist in molding the material during travel of the sections.

5. In a machine of the class described, in combination, mechanism for forming biscuits, including an endless chain of mold sections, a second chain composed of flat side plates, and means for moving the chains to cause the first chain to ride upon the second chain between the plates during a portion of the travel of the sections.

6. In a machine of the class described, in combination, mechanism for forming biscuits, including lower mold sections, and upper mold sections, each section being formed of a plurality of parts, means for moving the upper and lower sections over endless paths with the upper sections above the lower sections during a portion of their travel, means comprising flat plates movable in endless paths, to form mold completing walls at opposite sides of the lower sections during the early portion of their travel adjacent to the upper sections, means to retain said walls in position until the biscuit is formed and means controlled by the movement of the upper sections for pressing them toward the lower sections.

7. In a machine of the class described, in combination, upper and lower mold sections, means for moving the sections over endless paths with the upper sections above the lower sections during a portion of their travel, means for feeding material to the lower sections prior to their arrival below the upper sections, mold completing side walls for said mold sections movable independently of said mold sections, and means to position said walls at opposite sides of the lower sections while they are being filled and during the early portion of their travel beneath the upper sections.

8. In a machine of the class described, in combination, cooperating top, bottom and side mold sections for forming biscuits, means for moving the sections over endless paths with the sections adjacent during a portion of their travel, means controlled by the movement of the sections for gradually moving them together during the said portion of their travel, and adjustable means for coordinating the movement of the top and bottom sections to cause them to register when they are moved together, and means to vary the tension on said top mold sections.

9. In a machine of the class described, in combination, upper and lower mold sections, means for moving the sections over endless paths with the upper sections above the lower sections during a portion of their travel, and manually adjustable means controlled by the movement of the sections for gradually moving the sections into contact during the said portion of their travel, and a frame in which said upper mold sections are mounted, and means to vary the position of said frame thereby to vary the position of said upper sections relative to said lower sections.

10. In a machine of the class described, in combination, molds for forming the biscuits including upper and lower sections concave from side to side and adapted to contact at their opposite sides, and side plates engaging the ends only of the sections to close and complete the molds.

11. In a machine of the class described, in combination, molds for forming biscuits composed of upper and lower sections mounted to move over endless paths with the upper sections above the lower sections during a portion of their travel, said sections being concave from front to rear, and means moving with the sections when they are superposed and engaging the opposite sides only thereof to close and complete the molds.

12. In a machine of the class described, in combination, molds for forming biscuits composed of upper and lower sections mounted to move over endless paths with the upper sections above the lower sections during a portion of their travel, said sections being concave from front to rear, means controlled by the movement of the sections for moving them into contact while the upper sections are above the lower sections, and means moving with the sections during the said portion

of their travel and engaging opposite sides only of the sections to close and complete the ends of the molds.

13. In a machine of the class described, in combination, shredding mechanism, a series of molds formed of sections, said molds being divided intermediate their ends, means for moving the molds past the shredding mechanism in succession, and means controlled by the movement of the molds for successively assembling the sections to form open containers for receiving material and to afterwards close the molds to mold the material into biscuits.

14. In a machine of the class described, in combination, shredding mechanism, a series of molds formed of sections, said molds being divided intermediate their ends, means for moving the molds past the shredding mechanism in succession, and means controlled by the movement of the sections for successively assembling the sections to form open containers and closed molds, and for afterwards disassembling the sections to expose the molded biscuits.

15. In a machine of the class described, in combination, shredding mechanism, a series of molds formed of sections, said molds being divided intermediate their ends, means for moving the molds past the shredding mechanism in succession, means controlled by the movement of the sections for successively assembling the sections to form open containers and closed molds, and for afterwards disassembling the sections to expose the molded biscuits, and means for removing the biscuits.

16. In a machine of the class described, in combination, shredding mechanism, a series of molds formed of sections, said molds being divided intermediate their ends, means for moving the molds past the shredding mechanism in succession, means controlled by the movement of the sections for successively assembling the sections to form open containers and closed molds and for afterwards disassembling the sections to expose the molded biscuits, an oven, and means for removing the biscuits and transporting them through the oven.

17. In a machine of the class described, in combination, shredding mechanism, molding mechanism and an oven, a conveyor for said molding mechanism, and a conveyor for said oven, said conveyors, movable continuously in directions at substantially right angles to each other, and means movable with each conveyor over a portion of its travel and at substantially the same speed for transferring the articles from the mold conveyor to the oven conveyor.

18. In a machine of the class described, in combination, shredding mechanism, molding mechanism, and an oven, a conveyor for said molding mechanism and a conveyor for said oven, said conveyors movable continuously in directions transverse to each other, means movable along the line of travel of the mold conveyor during a portion of its movement and along the line of travel of the oven conveyor during a subsequent portion of its movement, for picking up articles from the mold conveyor and transferring the articles to the oven conveyor.

19. In a machine of the class described, in combination, shredding mechanism, molding mechanism, and an oven, a conveyor for said molding mechanism and a conveyor for said oven, said conveyors movable continuously in directions transverse to each other, and means independent of said conveyors for picking up articles from the mold conveyor and transferring the articles to the oven conveyor, said means movable with the first conveyor during a portion of its travel.

20. In a machine of the class described, in combination, shredding mechanism, molding mechanism, and an oven, a conveyor for said molding mechanism and a conveyor for said oven, said conveyor movable continuously in directions transverse to each other, and means for picking up the articles from the mold conveyor and transferring the articles to the oven conveyor, said means movable with the first conveyor during a portion of its travel, and toward and from the conveyor to pick up and transfer the articles.

21. In a machine of the class described, in combination, shredding mechanism, molding mechanism, and an oven, a conveyor for said molding mechanism and a conveyor for said oven, said conveyors movable continuously in directions transverse to each other, means for picking up articles from the mold conveyor and transferring the articles to the oven conveyor, including a pick-up device, and means for moving the said device in the direction of movement of one of the conveyers during a portion of its travel and at the same speed.

22. In a machine of the class described, in combination, shredding mechanism, molding mechanism, and an oven, a conveyor for said molding mechanism and a conveyor for said oven, said conveyors movable continuously in directions transverse to each other, means for picking up articles from the mold conveyor and transferring the articles to the oven conveyor, including a suction head movable between the conveyors, means for moving the head in the direction of travel of the first conveyor during the picking up of the articles, and means synchronized with the movement of the head between the conveyors for controlling the suction.

23. In a machine of the class described, in combination, shredding mechanism, molding mechanism, and an oven, a conveyor for said molding mechanism and a conveyor for said oven, said conveyors, adapted to travel at right angles to each other, and means for

picking up articles from the mold conveyor, transferring same laterally thereof, and depositing them on the oven conveyor.

24. In a machine of the class described, in combination, shredding mechanism, molding mechanism, and an oven, a conveyor for said molding mechanism, and a conveyor for said oven, said conveyors, adapted to travel at right angles to each other, means for picking up articles from the mold conveyor and depositing them on the oven conveyor, including a pick-up device movable between the conveyors for the articles, and means for moving the said device in the direction of travel of the first conveyor and at the same speed.

25. In a machine of the class described, in combination, molding mechanism, including a conveyor therefor, baking mechanism including an oven and a conveyor therefor, a pick-up device, arms for supporting the device, means for swinging the arms laterally, and means for moving the device longitudinally of the arms, whereby said device will cooperate with each of said conveyors in turn.

26. In a machine of the class described, in combination, molding mechanism, including a conveyor therefor, baking mechanism including an oven and a conveyor therefor, a pick-up device, arms for supporting the device, means for swinging the arms laterally, means for moving the device longitudinally of the arms, and means for swinging the arms vertically to raise and lower the device, whereby said device will cooperate with each of said conveyors in turn.

27. In a machine of the class described, in combination, molding mechanism, including a conveyor therefor, baking mechanism including an oven and a conveyor therefor, a pick-up device including a suction head, arms for supporting the head, means for swinging the arms laterally and vertically, and means for moving the head longitudinally of the arms, whereby said device will cooperate with each of said conveyors in turn.

28. In a machine of the class described, in combination, molding mechanism, including a conveyor therefor, baking mechanism including an oven and a conveyor therefor, a pick-up device including a suction head, arms for supporting the head, means for swinging the arms laterally and vertically, means for moving the head longitudinally of the arms, and means controlled in coordination with the movement of the arms for controlling the pressure in the head, whereby said device will cooperate with each of said conveyors in turn.

29. In a machine of the class described, in combination, molding mechanism, including a conveyor therefor, baking mechanism including an oven and a conveyor therefor, a pick-up device, arms pivoted intermediate their ends for supporting the device, a plurality of means for swinging the arms in horizontal and vertical planes, and for sliding the device on the arms, and means for coordinating the operations of the several means, whereby said device will cooperate with each of said conveyors in turn.

30. In a machine of the class described, in combination, shredding mechanism, means for molding the shredded material into biscuits, comprising a chain of upper mold sections, a chain of lower mold sections, and a chain of end mold plates, each mold being formed by adjacent ends of the upper mold sections, adjacent ends of the lower mold sections and said plates.

31. In a machine of the class described, in combination, shredding mechanism, means for molding the shredded material into biscuits, comprising a chain of upper mold sections each having a transverse abutment intermediate its ends, a chain of lower mold sections each having a transverse abutment intermediate its ends, and a chain of end mold plates, each mold being formed by adjacent ends of the upper mold sections, adjacent ends of the lower mold sections and said plates, the molds extending from the abutments of one set of sections to the abutments of the adjacent set.

32. In a machine of the class described, in combination, a series of molds each composed of a plurality of upper mold sections, a plurality of lower mold sections, and a plurality of end plates, and means for supporting and moving the corresponding sections of all of the molds over endless paths lying adjacent during a portion of their travel, and means controlled by the movement of the sections for assembling the sections during a portion of such travel, and for afterwards dis-assembling the sections to expose the molded biscuit.

33. In a machine of the class described, in combination, molding mechanism comprising a series of sectional molds, the sections of which move in endless paths, each mold being formed from eight parts, comprising two upper sections, two lower sections, and two plates at each end of said upper and lower sections.

34. In a machine of the class described, in combination, molding mechanism comprising a series of upper mold sections, a series of lower mold sections, and a series of end mold sections, said sections being movable through endless paths, the molds being formed by the cooperation of adjacent halves of the upper mold sections with adjacent halves of the lower mold sections.

35. In a machine of the class described, in combination, shredding mechanism, a series of molds formed of a plurality of sections, means for moving a portion of the molds past the shredding mechanism in succession, and means controlled by the movement of the molds for successively assembling the sections to form open containers for receiv-

ing material and to afterwards close the molds to mold the material into biscuits, said sections each forming a portion of two adjacent molds.

36. In a machine of the class described, in combination, means for forming biscuits, comprising lower mold sections to which the shreds are delivered, upper mold sections, means for moving the sections along converging paths, and means for coordinating the movement of the sections to cause the upper sections to register with the lower sections during a portion of their travel, comprising a frame in which said upper mold sections are mounted and an adjusting member effective to move said frame and all of said upper mold sections longitudinally of said lower mold sections.

37. In a machine of the class described in combination, means for forming biscuits, comprising lower mold sections to which the shreds are delivered, a chain of upper mold sections, means for moving the sections along converging paths, means for coordinating the movement of the sections to cause the chain of upper sections to register with the lower sections during a portion of their travel, comprising a frame in which said chain of upper mold sections are mounted and an adjusting member effective to move said frame and all of said upper mold sections longitudinally of said lower mold sections, and means to vary the tension on said chain.

38. In a machine of the class described, in combination, means for forming biscuits, comprising lower mold sections to which the shreds are delivered, upper mold sections, means for moving the sections along converging paths, means for coordinating the movement of the sections to cause the upper sections to register with the lower sections during a portion of their travel, comprising a frame in which said upper mold sections are mounted and an adjusting member effective to move said frame and all of said upper mold sections longitudinally of said lower mold sections, and means for imparting relative movement to the sections toward and from each other when they are in register.

39. In a machine of the class described, in combination, means for forming biscuits, comprising lower mold sections, to which the shreds are delivered, a chain of upper mold sections, means for moving the sections along converging paths, means for coordinating the movement of the sections to cause the chain of upper sections to register with the lower sections during a portion of their travel, comprising a frame in which said chain of upper mold sections is mounted and an adjusting member effective to move said frame and all of said upper mold sections longitudinally of said lower mold sections, means for imparting relative movement to the sections toward and from each other when they are in register, and means to vary the tension on said chain.

40. In a machine of the class described, in combination, means for forming biscuits comprising chains of upper and lower mold sections, means for moving the chains of sections over endless paths with the upper section above the lower section during a portion of their travel, and means for coordinating the movement of the sections to cause the sections to register when they are adjacent, comprising a frame in which said upper mold sections are mounted and an adjusting member effective to move said frame and all of said upper mold sections longitudinally of said chain of lower mold sections, and means for imparting relative movement of the sections toward and from each other when they are in register.

41. In a machine of the class described, in combination, means for forming biscuits comprising chains of upper and lower mold sections, means for moving the chains of sections over endless paths with the upper section above the lower section during a portion of their travel, means for coordinating the movement of the sections to cause the sections to register when they are adjacent, comprising a frame in which said upper mold sections are mounted and an adjusting member effective to move said frame and all of said upper mold sections longitudinally of said chain of lower mold sections, means for imparting relative movement to the sections toward and from each other when they are in register, and means to vary the tension of said upper chain.

42. In a machine of the class described, in combination, means for forming biscuits, comprising chains of upper and lower mold sections, means for moving the chains of sections over endless paths with the upper section above the lower section during a portion of their travel, means for coordinating the movement of the sections to cause the sections to register when they are adjacent, comprising a frame in which said upper mold sections are mounted and an adjusting member effective to move said frame and all of said upper mold sections longitudinally of said chain of lower mold sections, and means for imparting relative movement from and toward each other to the adjacent runs.

43. In a machine of the class described, in combination, means for forming biscuits, comprising chains of upper and lower mold sections, means for moving the chains of sections over endless paths with the upper section above the lower section during a portion of their travel, means for coordinating the movement of the sections to cause the sections to register when they are adjacent, comprising a frame in which said upper mold sections are mounted and an adjusting member effective to move said frame and all of said upper

mold sections longitudinally of said chain of lower mold sections, means for imparting relative movement from and toward each other to the adjacent runs, and means to vary the tension of said upper chain.

In testimony whereof I affix my signature

JOHN LEONARD KELLOGG.

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O. A. HANFORD.

PACKAGING MACHINE.

APPLICATION FILED JAN. 13, 1913.

1,091,509.

Patented Mar. 31, 1914.

5 SHEETS—SHEET 1.

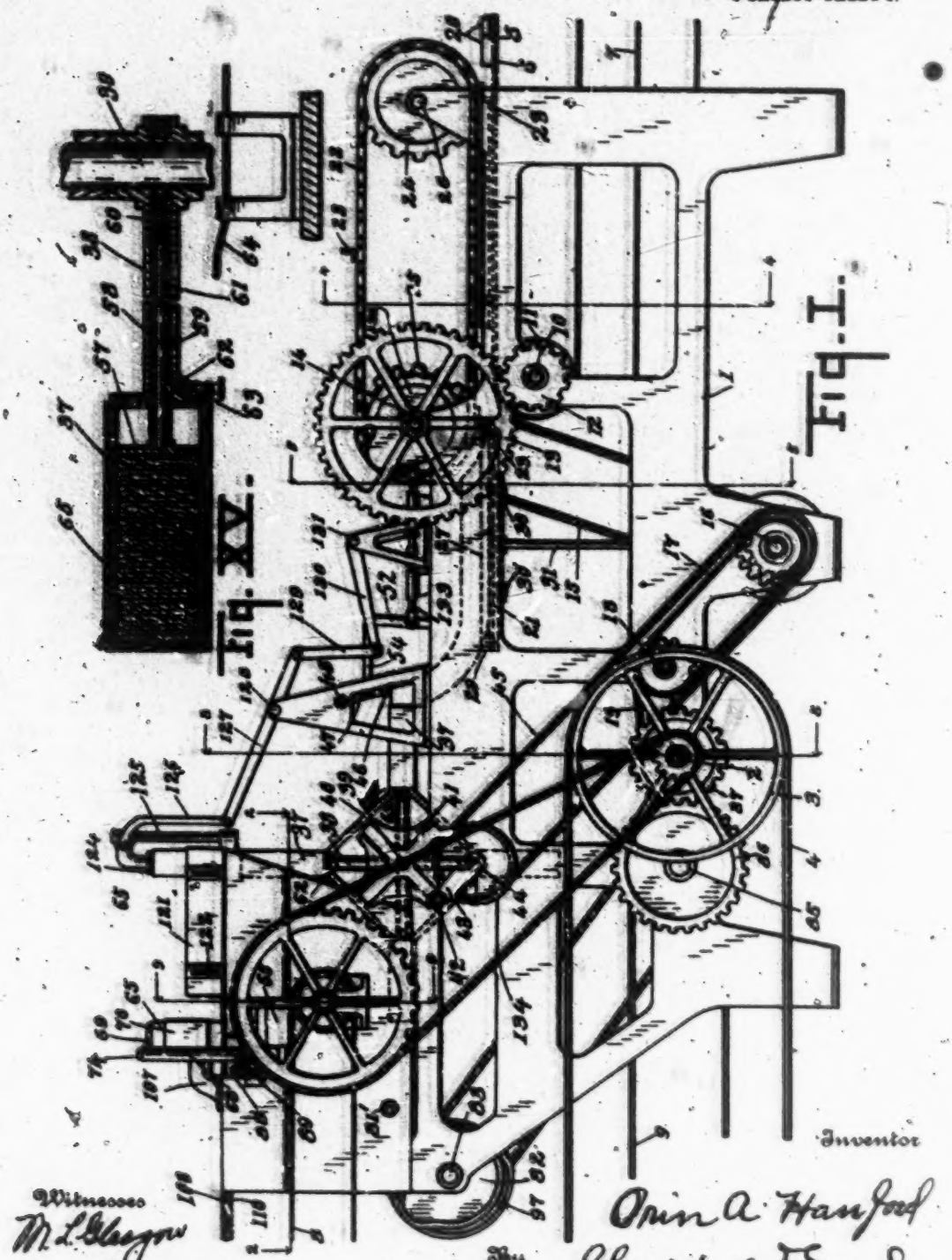

Fig. I.

Fig. XV.

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6 SHEETS—SHEET 3.

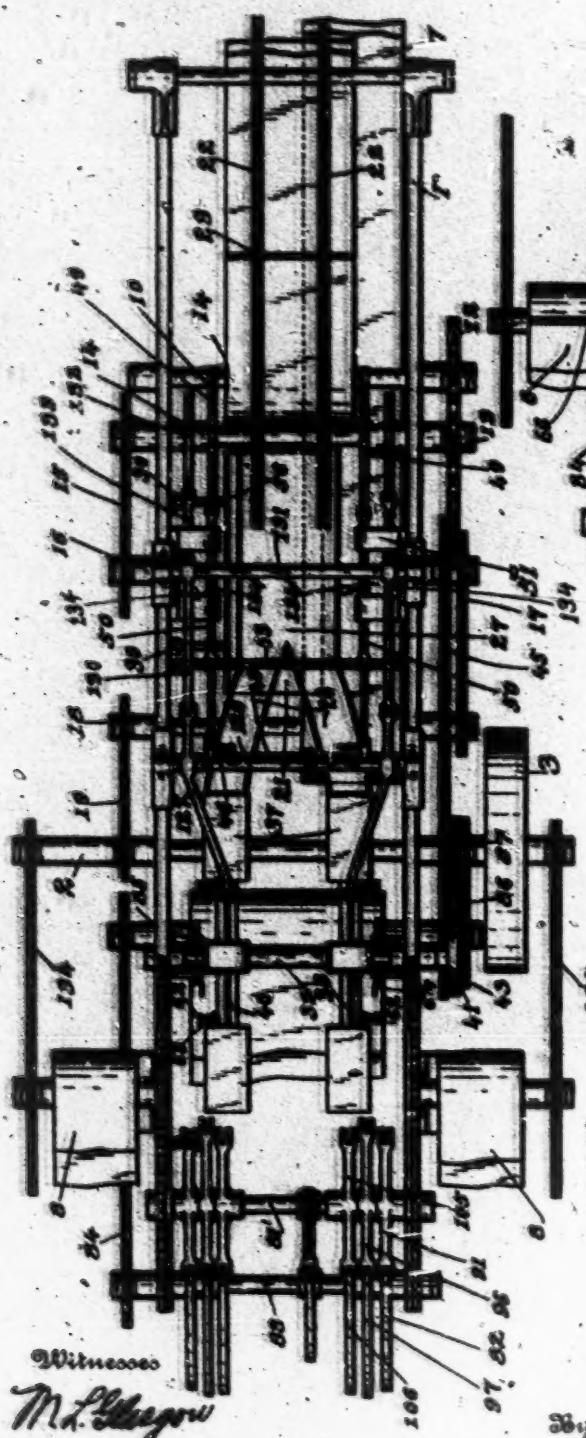

Fig. III.

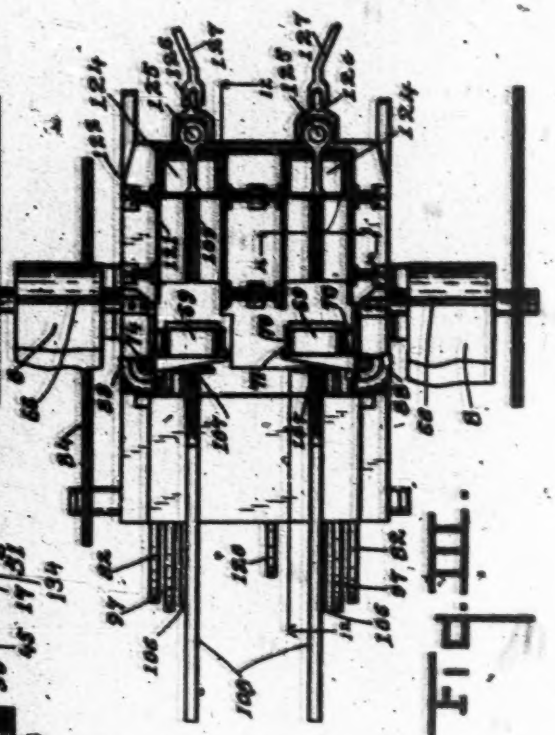

Fig. II.

Fig. XIV.

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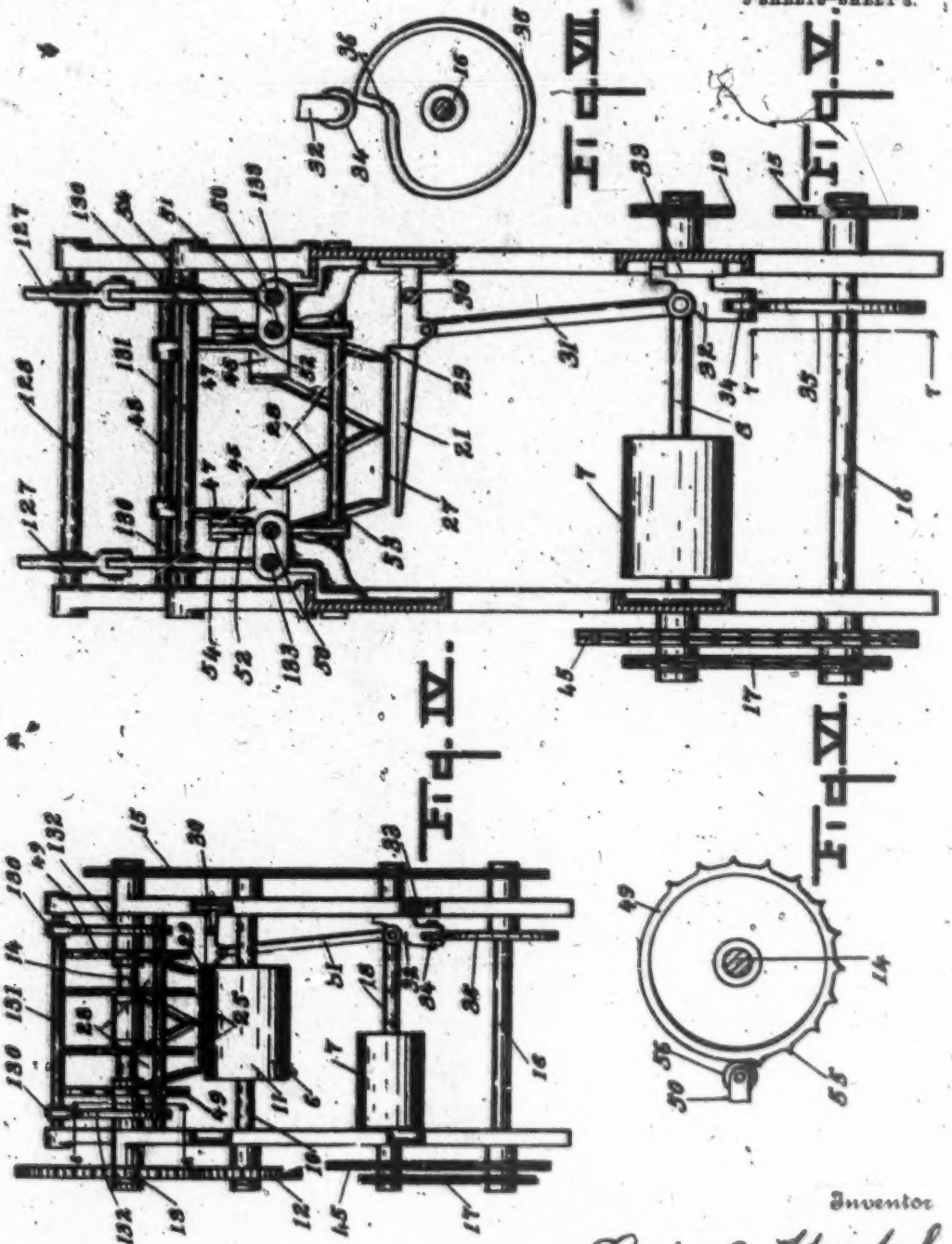

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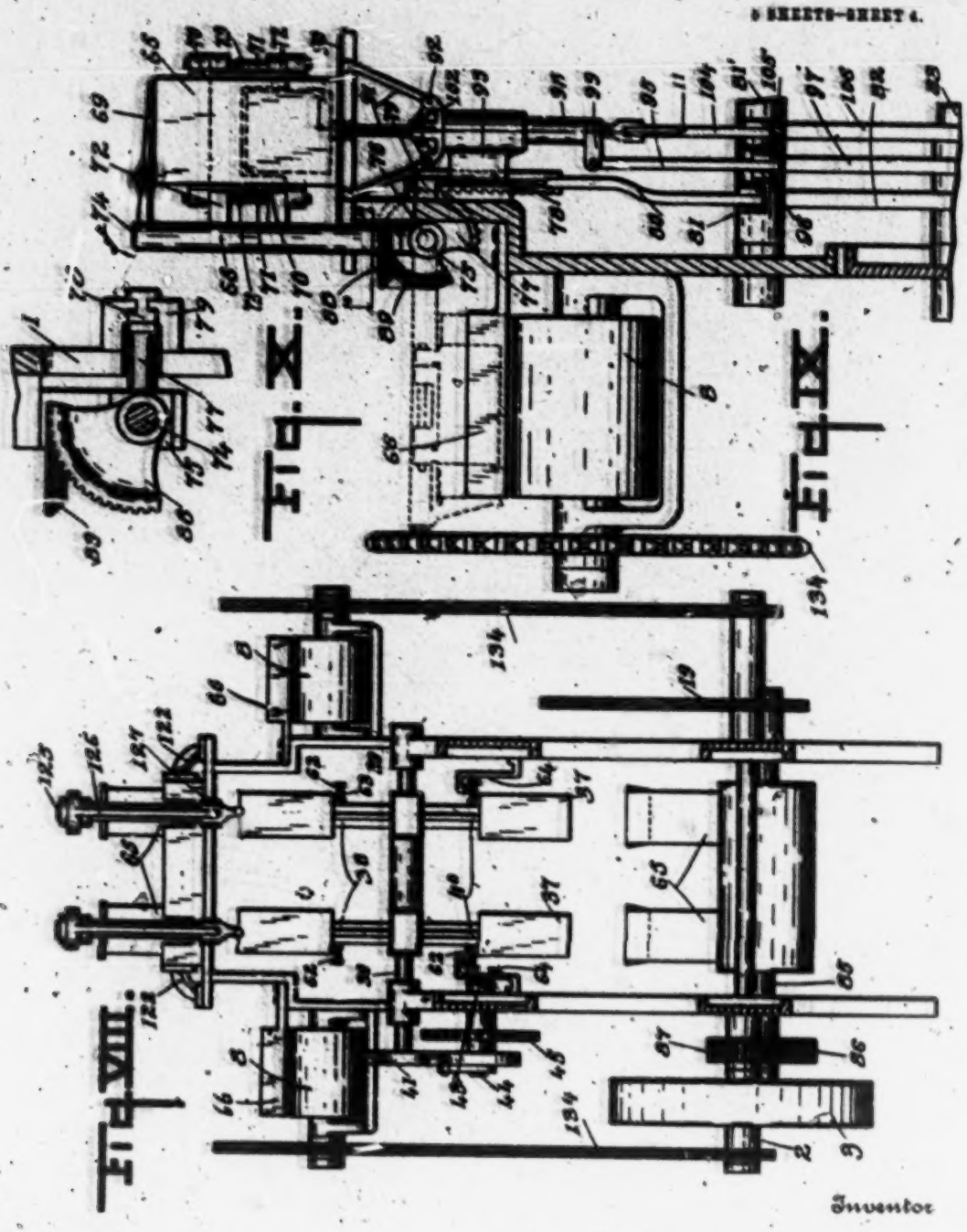
5 SHEETS-SHEET 4.



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PACKAGING MACHINE.

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6 SHEETS—SHEET 4.

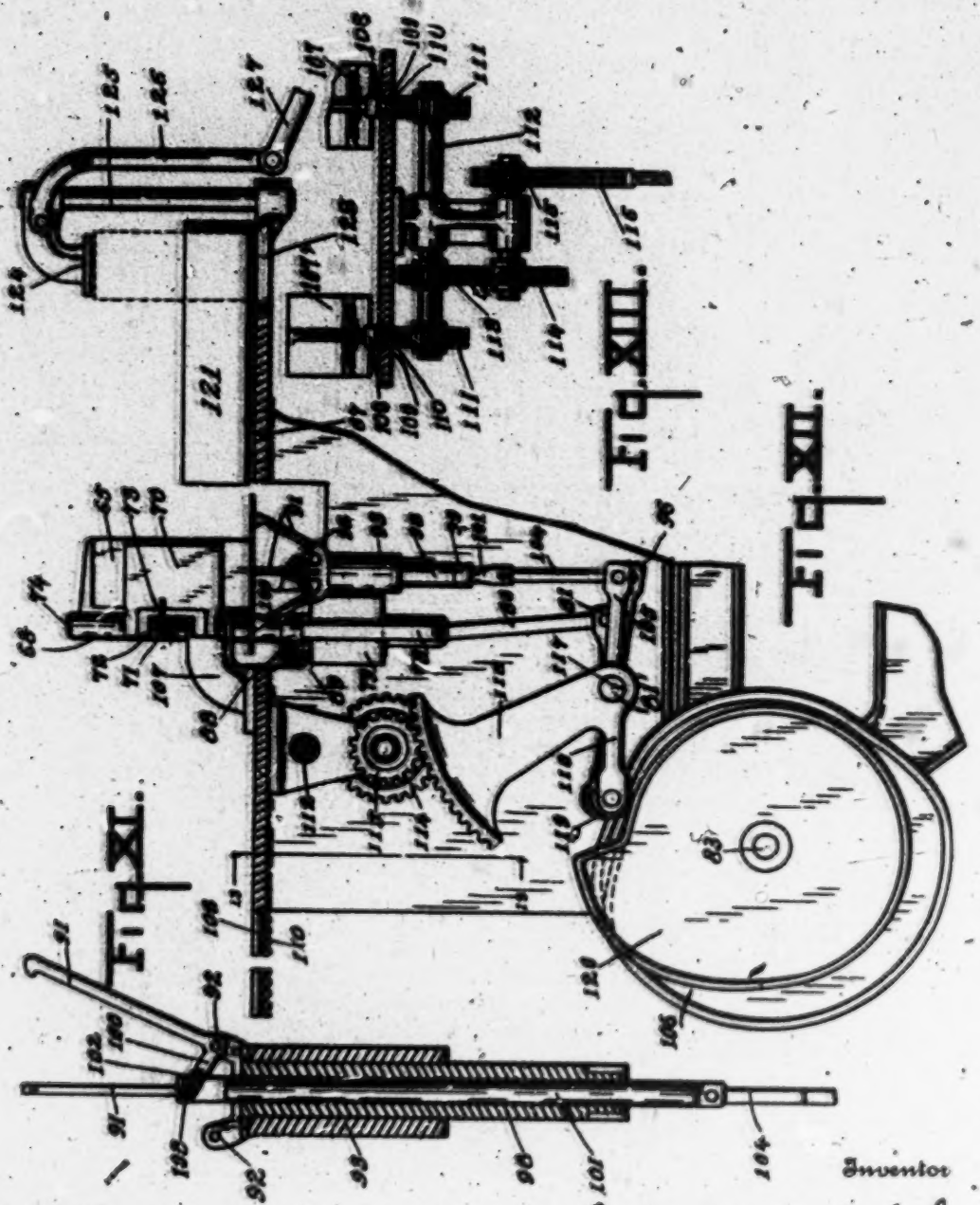

Fig. XII.

Fig. XIII.

Fig. XI.

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UNITED STATES PATENT OFFICE.

ORIN A. HANFORD, OF ROCHESTER, NEW YORK, ASSIGNOR TO JOHN L. KELLOGG, OF BATTLE CREEK, MICHIGAN.

PACKAGING-MACHINE.

1,091,509. Specification of Letters Patent. Patented Mar. 31, 1914.

Application filed January 13, 1913. Serial No. 741,792.

To all whom it may concern:

Be it known that I, ORIN A. HANFORD, a citizen of the United States, residing at Rochester, New York, have invented certain new and useful Improvements in Packaging-Machines, of which the following is a specification.

This invention relates to improvements in packaging machines.

The main objects of this invention are, first, to provide an improved packaging machine by which articles of the character of shredded wheat biscuits or other articles of a more or less friable nature may be effectively packed without injury thereto. Second, to provide an improved packaging machine which is automatic in its operations and of large capacity. Third, to provide in a structure of the class described, improved carton feeding means. Fourth, to provide in a structure of the class described, an improved means for filling and discharging the filled cartons. Fourth, to provide an apparatus of the class described, which is comparatively simple in structure and not likely to get out of repair.

Further objects, and objects relating to structural details, will definitely appear from the detailed description to follow.

I accomplish the objects of my invention by the devices and means described in the following specification.

The invention is clearly defined and pointed out in the claims.

A structure which is a preferred embodiment of my invention is clearly illustrated in the accompanying drawing forming a part of this specification, in which:

Figure I is a side elevation of a structure embodying the features of my invention, the outer ends of the several conveyers being broken away. Fig. II is a plan view partially in horizontal section, on a line corresponding to line 2—2 of Fig. I. Fig. III is a detail plan view of the carton feeding mechanism, the parts removed by the sectioning in Fig. II being here shown. Fig. IV is a transverse vertical section on a line corresponding to line 4—4 of Fig. I, showing details of the article feeding mechanism. Fig. V is a vertical transverse section on a line corresponding to line 5—5 of Fig. I, showing further details of the article feeding mechanism. Fig. VI is a detail vertical section on a line corresponding to line 6—6 of Fig. IV, showing the packer actuating cam 49. Fig. VII is a detail vertical section on a line corresponding to line 7—7 of Fig. V showing the table actuating cam 35. Fig. VIII is a detail vertical transverse section on a line corresponding to line 8—8 of Fig. I, showing features of the holders and cartons feeding mechanism. Fig. IX is a detail vertical transverse section on a line corresponding to line 9—9 of Fig. I, showing details of the carton feeding mechanism. Fig. X is a detail horizontal section on a line corresponding to line 10—10 of Fig. IX. Fig. XI is a detail vertical section on a line corresponding to line 11—11 of Fig. IX, showing details of the carton flap spreading mechanism. Fig. XII is a detail vertical longitudinal section on a line corresponding to the broken line 12—12 of Fig. III, showing further details of the carton feeding mechanism. Fig. XIII is a detail vertical transverse section on a line corresponding to line 13—13 of Fig. XII. Fig. XIV is a detail vertical transverse section on a line corresponding to line 14—14 of Fig. III showing details of the carton feed table. Fig. XV is a detail section on a line corresponding to line 15—15 of Fig. I, showing details of the packing mechanism and the means for discharging the cartons.

In the drawing similar reference characters refer to similar parts throughout the several views, and the sectional views are taken looking in the direction of the little arrows at the ends of the section lines.

Referring to the drawing, the frame 1 is shown mainly in conventional form and may be of any desired construction to properly support the parts and their driving connections.

The driving shaft 2 is driven by the pulley 3 and the driving belt 4. The articles to be packaged are conveyed to the machine on trays 5 by the conveyer or feed belt 6. The trays are returned or discharged from the machine by the conveyer 7. The empty cartons are carried into the machine by the conveyers 8 while the filled cartons are carried from or discharged from the machine by the conveyer 9. The outer ends of these conveyers are not illustrated as the means for delivering the filled trays to the conveyers 6 or the unsealed cartons to the conveyers 8 or for handling the filled cartons form no part of this invention. In practice, the filled

cartons are preferably delivered to the conveyers 8 from a suitable bottom sealer and from the conveyer 9 to a top sealer.

The conveyer 6 is driven by the shaft 10 provided with a suitable roller or pulley 11. The shaft 10 is connected by the gears 12 and 13 to a shaft 14. The shaft 14 is connected by the sprocket chain 15 to a shaft 16 disposed toward the bottom of the frame. The shaft 16 is connected by the sprocket chain 17 to a shaft 18 extending across the frame. The shaft 18 is in turn connected on the opposite side of the machine by the sprocket chain 19 to the driving shaft 2. The several sprocket wheels are not designated by numerals as their arrangement will be readily understood. Other parts are driven through this connection as will appear as the description proceeds.

The trays 5 are provided with flanges 20 on their longitudinal edges. The trays are delivered from the feed conveyer 6 onto the table 21 by a mechanism consisting of the sprocket chains 22 having flight-like pusher bars 23 mounted thereon. The sprocket chains 22 are supported to travel above and parallel with the inner end of the conveyer 6 by means of sprocket wheels 24 and 25 carried by a shaft 26 and the shaft 14 respectively, the sprockets 25 being the driving sprockets. As the flights or pushers 23 are carried along by the sprocket chains, they engage the rear ends of the trays 5 and push them from the inner end of the conveyer 6 onto the table 21. As the trays are pushed onto this table, the biscuits or other articles to be packaged, carried by the trays, are picked up by the scoop or pick-up 27 which is disposed above the table and in proper spaced relation thereto, so that the tray passes under the scoop and the articles onto it. The structure illustrated, is designed for simultaneously filling two series of cartons.

The scoop is provided with diverging chutes 28 at its rear end. See Figs. II, IV, and V. The scoop is flanged at its edges to retain and guide the articles thereon. The structure illustrated, is especially designed for the packaging of shredded cereal biscuits which are placed on the trays in two rows. The trays are in practice preferably baking trays so that the biscuits are packaged direct from the ovens without handling. The flights or pushers 23 engaging the rear ends of the trays, serve to support the biscuits as well as to carry the trays along so that the biscuits are delivered onto the scoop as described.

The table 21 is provided with a guide flange 29 at one side. This table 21 is pivoted at 30 and is supported in its operative position by means of the link 31 mounted on the slide 32. This slide 32 travels in the vertical slide-way 33 as shown in Fig. V. As the structural details of this slide and slide-way are not a part of this invention they are not here shown. The slide 32 is provided with a roller 34 traveling on the cam 35 on the shaft 16. As the cam revolves, the roller 34 drops into the low point 36 of the cam, allowing the table to tilt or swing down on its pivot, discharging the empty tray onto the tray return conveyer 7. This operation is timed and the cam is shaped so that the table is swung up to operative position to receive the succeeding tray. The articles are delivered from the chutes 28 into the holders or packing receptacles 37. These holders or receptacles 37 are carried by arms 38 radially mounted on the shaft 39, the structure illustrated being provided with a double series of four holders each.

The arms 38 carrying the holders, are connected by braces 40. See Fig. I. The shaft 39 is driven intermittently through a Geneva stop gear 41 on the shaft 39 and the coacting gear 42 and arm 43 on the shaft 44. The shaft 44 is connected by the sprocket chain 45 to the shaft 16 which is driven through the connections previously pointed out. As the details of the driving connections for the shaft 44 to the holder carrying shaft 39 do not form a part of this present invention, I do not describe the same with further detail herein, the object of this type of driving connection being to drive the shaft 39 with a step by step movement properly timed to bring the holders 37 into position to receive the articles as they are delivered from the chutes 28.

The articles are delivered from the chutes 28 into the holders by the packers 46 supported on the arms 47 on the rock shaft 48 extending across the frame above the chutes. The packers 46 are actuated from the cams 49 on the shaft 14. The cams 49 act upon the reciprocating rods 50 supported in suitable bearings in the brackets 51. The rods 50 are connected to levers 52 on the shaft 53, the levers being connected by the links 54 to the arms 47 of the packers. The cams 49 are provided with a plurality of cam projections 55, (see Fig. VI), there being twelve of these projections on the cams of structure illustrated, so that each package contains twelve articles. The rods 50 are provided with rollers 56 traveling on the cams.

To support the articles in proper position as they are being packed in the holders 37, and also to eject them into the cartons and the cartons from the holders, I provide the holders with plungers 57 supported by the stems 58 reciprocating in suitable sleeves 59 within the holder carrying arms 38. The plungers are yieldingly supported by the coiled springs 60 arranged within the sleeves. The plungers are provided with racks 61 with which the pawls 62 coact. See

Fig. XV. These pawls 62 are provided with actuating springs 63. As the articles are packed into the holders by the packers 46, the plungers are forced inwardly against the tension of the springs 60 and are retained by the pawls until released by the pawl trips 64 which are positioned to act after the cartons have been slipped over the holders so that the articles are delivered into the cartons. This step in the cycle of operations of the machine will be again referred to in its proper sequence.

The shaft 39, is, as stated, actuated with a step by step movement, each step being a quarter revolution of the shaft. From the filling position, the holders are actuated to a vertical position to receive the cartons 65 which are slipped over the holders.

The cartons are, as stated, conveyed to the machine by the conveyers 8, the cartons being arranged on the conveyers on their sides with their open ends facing inwardly. The conveyers 8 are driven through the sprocket chains 134 connecting them to the shaft 2. The cartons are carried by the conveyers 8 against the stops 66. From these conveyers 8 the cartons 65 are delivered or shifted onto the feed table 67 which projects forwardly so that the holders 37 swing under its forward end when they are brought to the vertical position from their filling position.

The carton shifter members 68 are provided with fixed fingers 69 at their outer ends adapted to engage the outer ends of the cartons and pivoted plate-like clamping fingers 70 adapted to engage opposite sides thereof. The clamping fingers or plates 70 are mounted on the pivots 71 on the arm 72 on the member 68. Springs 73 support the clamping fingers 70. The member 68 is arranged upon a spindle 74 carried by an oscillating member 75 mounted on the shaft 76. The oscillating member 75 is provided with a segment 77 which is actuated by the rack 78 arranged in a vertically disposed slide bearing member 79, see Fig. IX. The rack 78 is connected by the link 80 to the lever 81 mounted on the shaft 81′ extending transversely across the frame. The lever 81 is actuated by the cam 82 on the shaft 83. This shaft 83 is connected by the sprocket chain 84 to the shaft 85 which is connected by the gears 86 and 87 to the driving shaft 2, the sprocket chain being arranged on one side of the frame and the gears on the opposite. This driving connection for the oscillating member 75 swings it from a horizontal position shown by dotted lines in Fig. IX, to the vertical position shown therein.

To rock the member 68 from its carton engaging or picking up position as shown by dotted lines in Fig. IX, to its delivery position, as shown by full lines, it is provided with a segmental gear 88 coacting with a fixed segmental rack 89. It will be obvious that with the segment 88 in engagement with the rack, when the member is swung from its vertical to its horizontal position or vice versa, it is oscillated. The cartons are inverted by this shifter and carried into position to be delivered onto the table 67. To effectively deliver the cartons to the table the flaps 90 thereof are spread out to a horizontal position, as shown in Fig. IX. The flap spreading or opening fingers 91 are pivoted at 92 on the vertically adjustable member 98. This member 98 is mounted for vertical movement in the bracket 93. The member 98 is connected by the link 95 to the lever 96 mounted on the shaft 81′, the lever being actuated by a cam 97 on the shaft 83. The member 98 is connected to the link 95 by means of the clip 99 on the lower end of member 98. To spread and collapse the fingers, the inwardly projecting arms 100 thereof are connected to the rod 101 reciprocating in the member 98. See Fig. XI. The arms 100 are slotted at 102 to engage pins 103 on the reciprocating rod 101. The rod 101 is connected by the link 104 to the lever 105 on the shaft 81′ actuated by the cam 106 on the shaft 83. By thus arranging the parts, the spreader is first actuated to carry the spreader fingers up within the flaps by the upward movement of the member 98 which is accomplished through the connection described. The fingers are then spread by the upward movement of the rod 101 which is accomplished through its connection described, the movements being properly timed through their driving connections. The cartons are pushed from this position shown in Fig. XII, that is, after the flaps have been spread or bent to a horizontal position onto the table 67. The feed members 107 by which this is accomplished are carried by the slides 108 arranged in suitable ways 109 provided therefor in the table. See Figs. XII, XIII, and XIV. These slides 108 are provided with racks 110 on their under sides, which are driven through the pinions 111 on the shaft 112 arranged below the table. The shaft 112 is driven through the train of gears 113, 114, 115, and the oscillating segment 116 which meshes with the gear 115. The segment 116 is pivoted at 117 on shaft 81′. The segment is provided with an arm 118 having a roller 119 thereon traveling on the cam 120. The table 67 is provided with guides 121 for the cartons, the guides being supported on overhanging arms 122 so that the lower edges of the guides 121 are spaced from the table to permit the flaps to project under the guides. The table 67 is provided with openings 123 at its forward end to which the cartons are delivered through the holders 37.

I have described only one shifter mecha-

nism, one flap spreader mechanism, and one carton feeder, as the other is a duplicate mechanism. The operating connections for the shifter and flap spreader mechanism are duplicate. The two feed or pusher members 107 are actuated through the single cam 120.

The cartons are supported in position above the openings 122 in the feed table by their flaps. From this position, they are pushed through the opening and over the holders 37 by the members 124 mounted to reciprocate on the vertical rods 125 carried by the table 67.

The delivery members 124 are connected by the links 126 to the levers 127 mounted on the transverse shaft 128. These levers are in turn connected by the links 129 to the bent levers 130 mounted on the transverse shaft 131. The bent levers 130 are actuated from the cams 132 acting on the rods 133 arranged to reciprocate in suitable bearings in the brackets 51. The springs 134' on the rods 50 return the packer fingers. The springs 134 on the rods 133 return the plungers to their initial position. As stated, the holders 37 are swung under the openings 122 in the feed table in which position the cartons are pushed over the holders by the members 124. The cartons are then carried by the holders around to the lower position above the delivery conveyer 9 in which position, the trips 64 act upon the pawls 63 releasing the plungers 57 so that the articles in the holders are pushed out or ejected into the cartons which are simultaneously pushed off the holders and onto the conveyer 9. The next actuation brings the emptied holder into position to receive the articles. This completes the cycle of movements of the machine, which are the delivery of articles to be packaged on suitable trays as 5 on the conveyer 6; the transfer of the trays from the conveyer 6 onto the table 21 during which time the articles are picked up from the trays by the scoop 27 and pushed along thereon up the chutes 28 to the packers 46; the discharge of the empty trays from the table 21 onto the return conveyer 7; the delivery of the empty cartons on the conveyers 8, shifting therefrom to the feed table and spreading the flaps and feeding the cartons to the members 124 by which they are pushed onto the holders; the discharge of the charged holders into the cartons as the same are pushed from the holders and the delivery of the filled cartons from the machine by the conveyer 9.

My improved packaging machine is entirely automatic in its operation. The cartons are effectively delivered so that they are not distorted or injured and articles such as described are effectively packaged without injury thereto.

I have illustrated and described my improvements with considerable detail in the embodiment illustrated. I have not attempted to illustrate or describe various modifications which I contemplate as being possible and practical as such modifications will undoubtedly be readily understood by those skilled in the art to which this invention relates. I desire, however, to be understood as claiming my improvements specifically in the form illustrated as well as broadly within the scope of the appended claims.

Having thus described my invention, what I claim is new and desire to secure by Letters Patent is:

1. In a structure of the class described, the combination with a delivery chute; a shaft; holders open at their outer ends and disposed radially on said shaft; means for rotating said shaft with a step by step movement whereby the holders are successively brought to a horizontal position at the rear end of said chute; a packer oscillating above the rear end of said chute to push the articles into said holders; plungers within said holders; springs by which said plungers are yieldingly supported, said plungers being provided with ratchet bars; pawls coacting therewith whereby said plungers are retained in their depressed position as the holders are filled; means for feeding cartons arranged to deliver the cartons over the holders when the holders are in their upright position; and means for tripping said pawls when the holders are in their inverted position whereby the articles are ejected from the holders into the cartons as the cartons slip from the holders to the delivery conveyer.

2. In a structure of the class described, the combination with a delivery chute; a shaft; holders open at their outer ends and disposed radially on said shaft; means for rotating said shaft with a step by step movement whereby the holders are sucessively brought to a horizontal position at the rear end of said chute; a packer oscillating above the rear end of said chute to push the articles into said holders; and means for feeding cartons arranged to deliver the cartons over the holders when the holders are in their upright position, the articles dropping from the holders into the cartons as the cartons slip from the holders while in an inverted position, all coacting for the purpose specified.

3. In a structure of the class described, the combination of a feed mechanism; a shaft; holders open at their outer ends and radially disposed on said shaft; means for rotating said shaft with a step by step movement whereby the holders are successively brought to filling position; plungers within said holders; springs by which said plungers are yieldingly supported, said plungers being provided with ratchet bars; pawls coacting therewith whereby said plungers are

retained in their depressed position as the holders are filled; means for feeding cartons arranged to deliver the cartons over the holders when the holders are in their upright position; a delivery conveyer disposed below said shaft; and means for tripping said plunger pawls when the holders are in their inverted position above said delivery conveyer whereby the material is ejected from the holders into the cartons as the cartons slip from the holders.

4. In a structure of the class described, the combination of a shaft; holders open at their outer ends and radially disposed on said shaft; means for rotating said shaft with a step by step movement whereby the holders are successively brought to filling position; a feed mechanism adapted to deliver to the holders while the holders are in their filling position; spring actuated plungers within said holders; detents for said plungers; means for feeding cartons arranged to deliver the cartons over the holders when the holders are in their upright position and means for releasing said plunger detents, all coacting for the purpose specified.

5. In a structure of the class described, the combination with the feeding means comprising a delivery chute; a shaft; holders open at their outer ends and radially disposed on said shaft; means for rotating said shaft with a step by step movement whereby the holders are successively brought to a horizontal position at the end of said chute; a packer oscillating above the rear end of said chute to push the material into said holders; plungers within said holders; springs by which said plungers are yieldingly supported, said plungers being provided with ratchet bars; pawls coacting therewith whereby said plungers are retained in their depressed position as the holders are filled; means for feeding cartons arranged to deliver the cartons over the holders after they are filled; and means for tripping said pawls whereby the material is ejected from the holders into the cartons.

6. In a structure of the class described, the combination with the feeding means comprising a delivery chute; a shaft; holders open at their outer ends and radially disposed on said shaft; means for rotating said shaft with a step by step movement whereby the holders are successively brought to a horizontal position at the end of said chute; a packer oscillating above the rear end of said chute to push the material into said holders; and means for feeding cartons arranged to deliver the cartons over the holders after they are filled.

7. In a structure of the class described, the combination of holders open at their outer ends; a holder filling means; means for actuating said holders with a step by step movement whereby they are successively brought to filling position; plungers within said holders; springs by which said plungers are yieldingly supported, said plungers being provided with ratchet bars; pawls coacting therewith whereby said plungers are retained in their depressed position as the holders are filled; a carton feed means arranged to deliver cartons over the holders after the holders are filled; and means for tripping said plunger pawls whereby the material is ejected from the holders into the cartons as the cartons are removed from the holders.

8. In a structure of the class described, the combination of holders open at their outer ends; a holder filling means; means for actuating said holders with a step by step movement whereby they are successively brought to filling position; spring actuated plungers within said holders; detents for said plungers; a carton feed means arranged to deliver cartons over the holders after the holders are filled, and means for tripping said plunger detents, all coacting for the purpose specified.

9. In a structure of the class described, the combination of holders open at their outer ends; a holder filling means; means for actuating said holders with a step by step movement whereby they are successively brought to filling position; spring plungers within said holders, said plungers being depressed and retained in their depressed positions as the holders are filled, means for delivering cartons over the holders after the holders are filled; and means for releasing said plungers whereby the material is ejected from the holders into the cartons as the cartons are removed from the holders.

10. In a structure of the class described, the combination of a carton feed conveyer; a carton stop above said conveyer; a shifter member provided with a fixed finger at its outer end adapted to engage the ends of the cartons and pivoted clamping fingers adapted to engage their sides; an oscillating shifter member support having a spindle for said shifter member; a segment on said support; a reciprocating rack coacting with said segment; a segment on said shifter member; and a fixed rack coacting therewith whereby the shifter member is oscillated on its spindle as the spindle is oscillated to and from its horizontal and vertical positions.

11. In a structure of the class described, the combination of a feed table; a carton feed conveyer arranged at the side of said table, the cartons being delivered by said conveyer on their sides with their open ends toward the table; a shifter member provided with carton engaging fingers; an oscillating shifter member; means for oscillating said

shifter member on its support as the support is oscillated to and from its horizontal and vertical positions; a flap spreader comprising a vertically reciprocating finger member, fingers pivotally mounted thereon to swing radially, said fingers being provided with inwardly projecting slotted arms; a reciprocating rod having pins thereon engaging said slotted arms of said fingers; means for reciprocating said finger member and said rod timed so that the finger member is actuated to introduce the fingers between the flaps and the rod actuated whereby the flaps are spread to a horizontal position; and a reciprocating feed member adapted to push the cartons from the shifter member to the table.

12. In a structure of the class described, the combination of a feed table; a carton feed conveyer arranged at the side of said table, the cartons being delivered by said conveyer on their sides with their open ends toward the table; a shifter member provided with carton engaging fingers, an oscillating shifter member support; means for oscillating said shifter member on its support as the support is oscillated to and from its horizontal and vertical positions; and a reciprocating feed member adapted to push the cartons from the shifter member to the table.

13. In a structure of the class described, the combination of a feed table having a delivery opening therein; a carton feed mechanism comprising means for supporting the cartons in an inverted position; a flap spreader comprising a vertically reciprocating finger member, fingers pivotally mounted thereon to swing radially; reciprocating rod connected to said fingers; means for reciprocating said finger member and said rod timed so that the finger member is actuated to introduce the fingers into the flaps and the fingers spread to swing the flaps to a horizontal position; a reciprocating feed member adapted to push the cartons from said supporting member across the table to delivery position; carton guides supported in a spaced relation to the feed table to permit the flaps to project thereunder as the cartons travel along on the table to delivery position said cartons being supported in delivery position above the delivery opening by their flaps; carton holders actuated with a step by step movement to bring them under the delivery opening of the table; and a vertically reciprocating member for delivering the cartons from the table to the holders.

14. In a structure of the class described, the combination of a feed table having a delivery opening therein; a carton feed mechanism comprising means for supporting the cartons in an inverted position; a flap spreader, a reciprocating feed member adapted to push the cartons from said supporting member across the table to delivery position; carton guides supported in a spaced relation to the feed table to permit the flaps to project thereunder as the cartons travel along on the table to delivery position, said cartons being supported in delivery position above the delivery opening by their flaps; carton holders actuated with a step by step movement to bring them under the delivery opening of the table; and a vertically reciprocating member for delivering the cartons from the table to the holders.

15. In a structure of the class described, the combination of a feed table having a delivery opening therein; a carton feed mechanism comprising means for supporting the cartons in an inverted position; a flap spreader comprising a vertically reciprocating finger member, fingers pivotally mounted thereon to swing radially; a reciprocating rod connected to said fingers; means for reciprocating said finger member and said rod timed so that the finger member is actuated to introduce the fingers into the flaps and the fingers spread to swing the flaps to a horizontal position; a reciprocating feed member adapted to push the cartons from said supporting member across the table to delivery position; said cartons being supported in delivery position above the delivery opening by their flaps; carton holders actuated with a step by step movement to bring them under the delivery opening of the table; and a vertically reciprocating member for delivering the cartons from the table to the holders.

16. In a structure of the class described, the combination of a feed table having a delivery opening therein; a carton feed mechanism comprising means for supporting the cartons in an inverted position; a flap spreader; a reciprocating feed member adapted to push the cartons from said supporting member across the table to delivery position, said cartons being supported in delivery position above the delivery opening by their flaps; carton holders actuated with a step by step movement to bring them under the delivery opening of the table; and a vertically reciprocating member for delivering the cartons from the table to the holders.

17. In a structure of the class described, the combination of a feed table; a carton feed conveyer arranged at the side of said table, the cartons being delivered by said conveyer on their sides with their open ends toward the table; a shifter member provided with carton engaging fingers; an oscillating shifter member support; means for oscillating said shifter member on its support as the support is oscillated to and from its horizontal and vertical positions; a flap spreader and a reciprocating feed member adapted to push the cartons from the shifter member to the table.

18. In a structure of the class described,

the combination of a feed table; a carton feed conveyer arranged at the side of said table, the cartons being delivered by said conveyer on their sides with their open ends toward the table; a shifter member provided with carton engaging fingers; an oscillating shifter member support; and means for oscillating said shifter member on its support as the support is oscillated to and from its horizontal and vertical positions.

19. In a structure of the class described, the combination of a feed table; a carton feed conveyer; a shifter member provided with carton engaging fingers; means for actuating said member to pick up the cartons from the feed conveyer and support them in an inverted position; a flap spreader adapted to spread the flaps to a horizontal position while supported by said shifter member; a feed member adapted to push the cartons from the shifter member across the table to delivery position; guides supported in a spaced relation to the table to permit the flaps to project thereunder as the cartons are pushed to delivery position; carton holders; and a member for delivering cartons from the table to the holder.

20. In a structure of the class described, the combination of a feed table; a carton feed conveyer; a shifter member provided with carton engaging fingers; means for actuating said member to pick up the cartons from the feed conveyer and support them in an inverted position; a flap spreader adapted to spread the flaps to a horizontal position while supported by said shifter member; and a feed member adapted to push the cartons from the shifter member to the table.

21. In a structure of the class described, comprising a table means for supporting the cartons in an inverted position; a flap spreader comprising a vertically reciprocating finger member, fingers pivotally mounted thereon to swing radially, said fingers being provided with inwardly projecting slotted arms; a reciprocating rod having pins thereon engaging said slotted arms of said fingers; means for reciprocating said finger member and said rod timed so that the finger member is actuated to introduce the fingers between the flaps and the fingers spread to swing the flaps to a horizontal position; and a reciprocating feed member adapted to push the cartons from said supporting member to the table.

22. In a structure of the class described, the combination of a feed table having a delivery opening therein; a carton feed mechanism comprising means for supporting the cartons in an inverted position; a flap spreader adapted to spread the flaps to a horizontal position while the cartons are so supported; a feed member adapted to push the cartons from the said supporting means across the table to delivery position; guides supported in a spaced relation to the table to permit the flaps to project thereunder as the cartons are pushed to delivery position, the cartons being supported in delivery position by their flaps; and a reciprocating member for delivering the cartons.

23. In a structure of the class described, the combination of a feed table having a delivery opening therein; a carton feed mechanism comprising means for supporting the cartons in an inverted position; a flap spreader adapted to spread the flaps to a horizontal position while the cartons are so supported; a feed member adapted to push the cartons from the said supporting means across the table to delivery position; and a reciprocating member for delivering the cartons.

24. In a structure of the class described, the combination of a feed table, a carton feed mechanism comprising means for supporting the cartons in an inverted position; a flap spreader adapted to spread the flaps to a horizontal position while the cartons are so supported; and a feed member adapted to deliver the cartons from said supporting means to the table.

In witness whereof, I have hereunto set my hand and seal in the presence of two witnesses.

ORIN A. HANFORD. [L. S.]

Witnesses:
HERBERT L. LARZELERE,
CARL F. SCHMIDT.

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R. E. VALENTINE.

BAKING PAN AND MOLD FOR BISCUITS.

APPLICATION FILED JAN. 24, 1912.

1,124,363.

Patented Jan. 12, 1915.

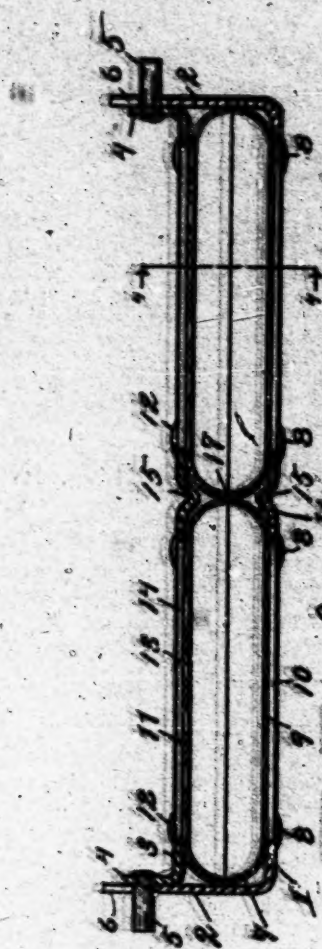

Fig. II.

Fig. IV.

Fig. V.

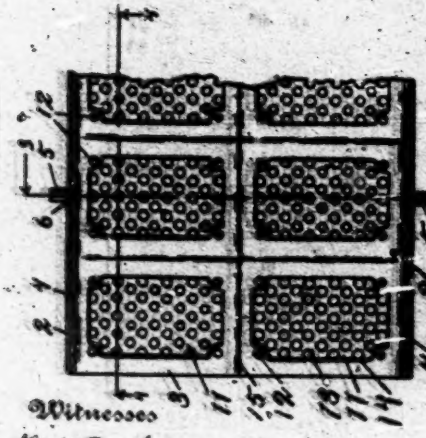

Fig. III.

Fig. I.

Witnesses

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UNITED STATES PATENT OFFICE.

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BAKING-PAN AND MOLD FOR BISCUITS.

1,124,363. Specification of Letters Patent. Patented Jan. 12, 1915.

Application filed January 24, 1912. Serial No. 673,214.

To all whom it may concern:

Be it known that I, RALPH E. VALENTINE, a citizen of the United States, residing at Battle Creek, Michigan, have invented certain new and useful Improvements in Baking-Pans and Molds for Biscuits, of which the following is a specification.

This invention relates to improvements in baking pans and molds for biscuits, particularly biscuits like shredded wheat or biscuits made from flaked cereals and the like.

The objects of this invention are: first, to provide a baking tray or mold in which the biscuits are cut and molded and retained in the forms during the baking process and with means for securing even baking without scorching or excessive browning of the edges of the biscuits. Second, to provide improved means of insuring register of the parts together so that the biscuits will be molded accurately without waste of material, the mass of which is distributed within the pan.

Further objects, and objects relating to details and economies of construction and operation will definitely appear from the detailed description to follow.

I accomplish the objects of my invention by the devices and means described in the following specification. The invention is clearly defined and pointed out in the claims.

A structure constituting the preferred embodiment of my invention is fully illustrated in the accompanying drawing, forming a part of this specification, in which:

Figure I is a perspective view of a pan and mold embodying the features of my invention. Fig. II is a detail plan view of one end thereof. Fig. III is an enlarged detail sectional view taken on a line corresponding to line 3—3 of Figs. I, II, and IV, showing details of the pan part and the devices for clamping and securing the registering of the mold whereby the biscuits are properly cut from the material introduced into this pan or tray. Fig. IV is a detail longitudinal sectional view taken on a line corresponding to line 4—4 of Figs. II and III. Fig. V is an enlarged detail sectional view through the sides or edges of adjacent molds and the pan showing the form of the cutting edges and the protection of the molds from undue heat.

In the drawing, the sectional views are taken looking in the direction of the little arrows at the ends of the section lines, and similar numerals of reference refer to similar parts throughout the several views.

Referring to the numbered parts of the drawing, the tray 1 has vertical side flanges 2. The tray cover 3 is similarly formed with upturned vertical flanges 4 that fit closely between the side flanges 2 of the tray. Laterally extending register pins 5—5 are disposed at intervals on the side flanges 4 and fit into registering notches 6 in the vertical flanges 2 of the tray 1.

Disposed in the tray 1 are half biscuit molds 7, which are rectangular in form and are secured in place by rivets 8, (see particularly Figs. III, IV and V). These bottom molds are perforated to permit the ready escape of moisture and the penetration of heat and are disposed over apertures 10 in the tray so that there is only a thin layer of perforated sheet metal incasing the under side of the biscuit, which allows the heat to penetrate very readily and evenly brown the biscuit.

Exactly corresponding half molds 11 are secured to the under side of the tray cover 3 by suitable rivets 12—12. These upper half molds are perforated at 13, and the tray cover 3 is apertured at 14 so that there is but a thin layer of perforated sheet metal embracing the top side of the biscuit, which allows the heat to penetrate and brown at that point as well.

The precise form of the cutting edges 17 of the molds appears in Fig. V where it will be noted that the cutting edges of the molds are beveled on the inside and that the cutting edges of adjacent molds substantially coincide and the cut off dough or shredded or flaked mass is forced within the mold.

The tray 1 and the tray cover 3 are creased at 15—15 between the biscuit molds to strengthen the frame work and also to effectively locate and support the biscuit molds which are attached to the said tray and its cover and form an inclosed air space 16 between the molds. By this arrangement, the molds also serve as cutters for the dough or material which is to be molded and baked and by distributing a mass of material, such as shredded wheat or flakes in the tray and

then inserting the cover 3 and forcing it to place, owing to the registering means, the damp dough will be cut off and there will be no wastage to take care of, the entire mass being properly formed into biscuits within the various molds.

The biscuits can be entirely baked in these molds as they can very readily aerate, or, if desired, after the same have become partially baked and set, the cover can be removed and the material be allowed to expand freely. It is very desirable, however, to preserve the biscuits exactly in form, and the correct amount of dough or prepared material is distributed in the tray 1 before the cover is shut down to cut the same and confine it within the molds. Where the biscuits are baked within the molds, undue browning of the thin edges is avoided by the inclosed air space 16.

Having thus described my invention, I desire to state that I have produced my improved baking pans and molds in the preferred form. However, I realize that they can be considerably modified in details and secure very satisfactory results without departing from my invention.

I desire to claim the invention specifically as illustrated, and also broadly as pointed out in the claims appended hereto.

Having thus described my invention, what I claim as new and desire to secure by Letters Patent is:

1. The combination in a baking pan and mold, of a tray with vertical flanged sides, with register notches therein, with apertures in the bottom thereof for receiving individual molds, a tray cover corresponding thereto with upturned flanged sides fitting within the tray sides with laterally extending register pins corresponding to the notches in the tray sides, also with apertures corresponding to those in the tray, half molds of perforated metal with their cutting edges in proximity to each other, rectangular in form entirely filling the said tray, with cutting edges beveled on the inner side of the upper edge, suitably disposed over apertures therein and secured thereto, and corresponding half molds of perforated metal on the under side of the tray cover suitably disposed beneath apertures in the said tray cover and secured thereto, the said tray and cover being suitably creased between said molds to reinforce and strengthen the same and form confined air spaces therebetween: all coacting substantially as described and for the purpose specified.

2. The combination in a baking pan and mold, of a tray with vertical flanged sides, with register notches therein, with apertures in the bottom thereof for receiving individual molds, a tray cover corresponding thereto with upturned flanged sides fitting within the tray sides with laterally extending register pins corresponding to the notches in the tray sides, also with apertures corresponding to those in the tray, half molds of perforated metal provided with cutting edges in proximity to each other, rectangular in form entirely filling the said tray, suitably disposed over apertures therein and secured thereto, and corresponding half molds of perforated metal on the under side of the tray cover suitably disposed beneath apertures in the said tray cover and secured thereto, the said tray and cover being suitably creased between said molds to reinforce and strengthen the same, all coacting substantially as described and for the purpose specified.

3. The combination in a baking pan and mold, of a tray with vertical flanged sides with register notches therein, with apertures in the bottom thereof for receiving individual molds, a tray cover corresponding thereto with upturned flanged sides fitting within the tray sides with laterally extending register pins corresponding to the notches in the tray sides, also with apertures corresponding to those in the tray, half molds of metal provided with cutting edges in proximity to each other, rectangular in form entirely filling the said tray and secured thereto, and corresponding half molds of metal on the under side of the tray cover suitably disposed beneath said tray cover and secured thereto, all coacting substantially as described and for the purpose specified.

4. The combination in a baking pan and mold, of a tray with vertical flanged sides with register devices, and with apertures in the bottom thereof for receiving individual molds, a tray cover corresponding thereto with upturned flanged sides fitting within the tray sides with register devices, also with apertures corresponding to those in the tray, half molds of metal provided with cutting edges in proximity to each other, rectangular in form entirely filling the said tray and secured thereto, and corresponding half molds of metal on the under side of the tray cover suitably disposed beneath said tray cover and secured thereto, all coacting substantially as described and for the purpose specified.

5. The combination in a baking pan and mold, of a tray with a series of half molds therein provided with suitable registering devices, and with cutting edges in proximity to each other, the said half molds entirely filling the said tray, and a tray cover with half molds secured to the under side thereof, corresponding to the tray with its half molds, provided with coöperating registering devices, as specified.

6. The combination in a baking pan and mold, of a tray with a series of half molds

therein entirely filling the said tray, and provided with cutting edges in proximity to each other; and a tray cover with half molds secured to the under side thereof, corresponding to the tray with its half molds, as specified.

In witness whereof, I have hereunto set my hand and seal in the presence of two witnesses.

RALPH E. VALENTINE. [L. S.]

Witnesses:
FRANK J. HEATH,
FRANK A. FOSTER.

418

R. E. VALENTINE.

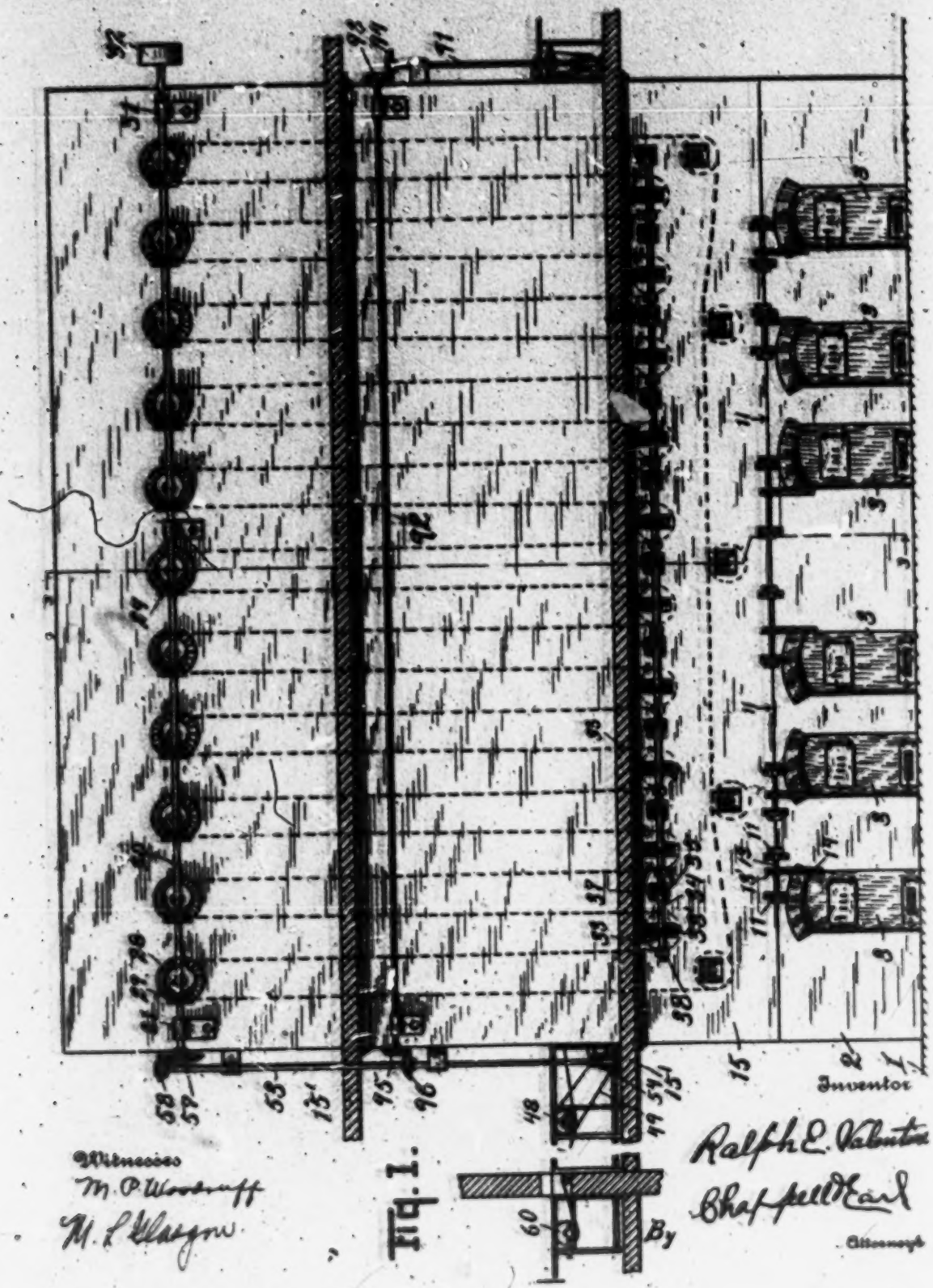
OVEN.

APPLICATION FILED JAN. 24, 1912.

1,143,151.

Patented June 15, 1915.

6 SHEETS—SHEET 1.



Witnesses
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M. L. Glasgow

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Fig. 1.

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OVEN.

APPLICATION FILED JAN. 24, 1912.

1,143,151.

Patented June 15, 1915.

6 SHEETS—SHEET 2.

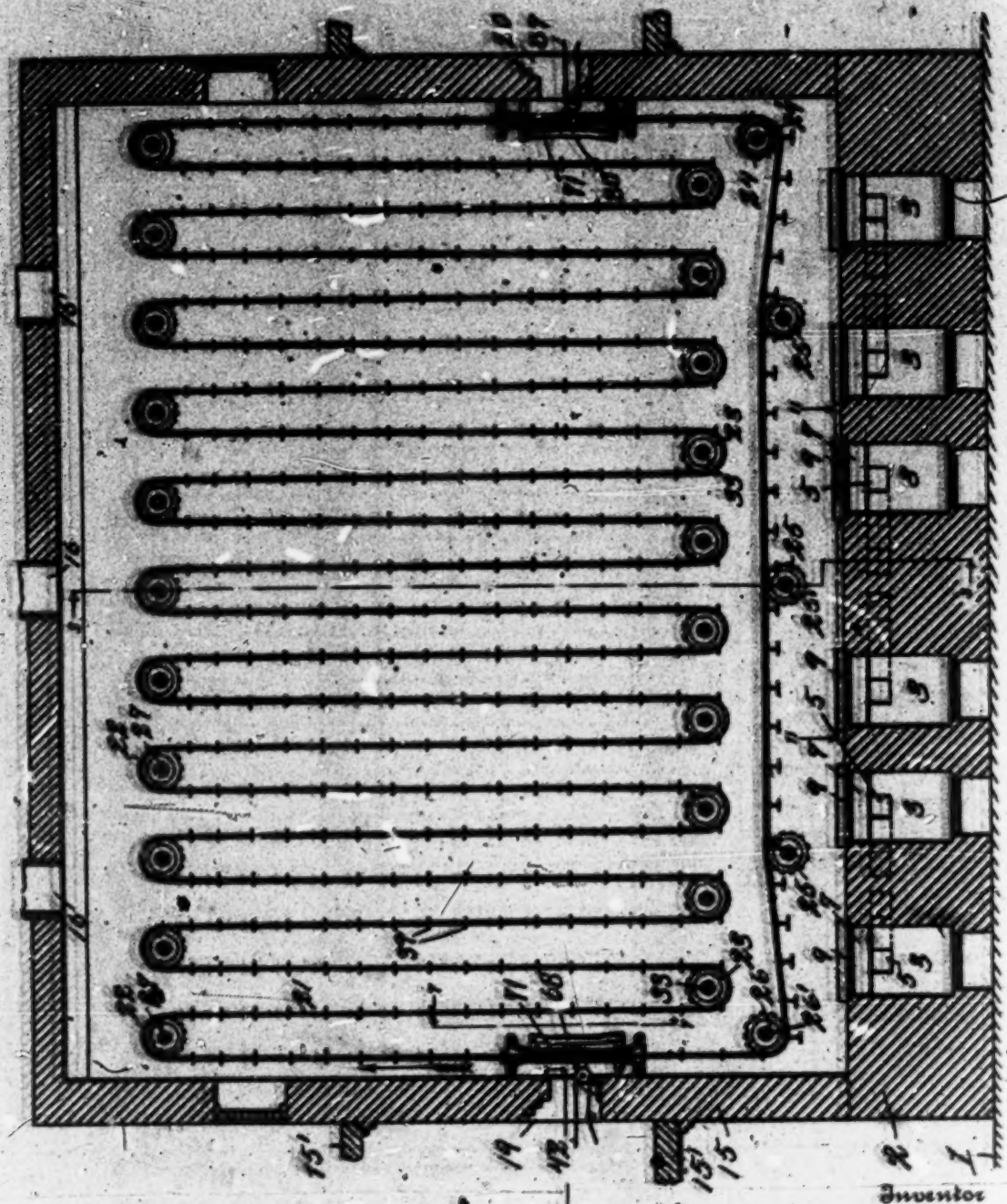

Fig. II.

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422

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OVEN.

APPLICATION FILED JAN. 24, 1912.

1,148,151.

Patented June 15, 1915.

3 SHEETS—SHEET 3.

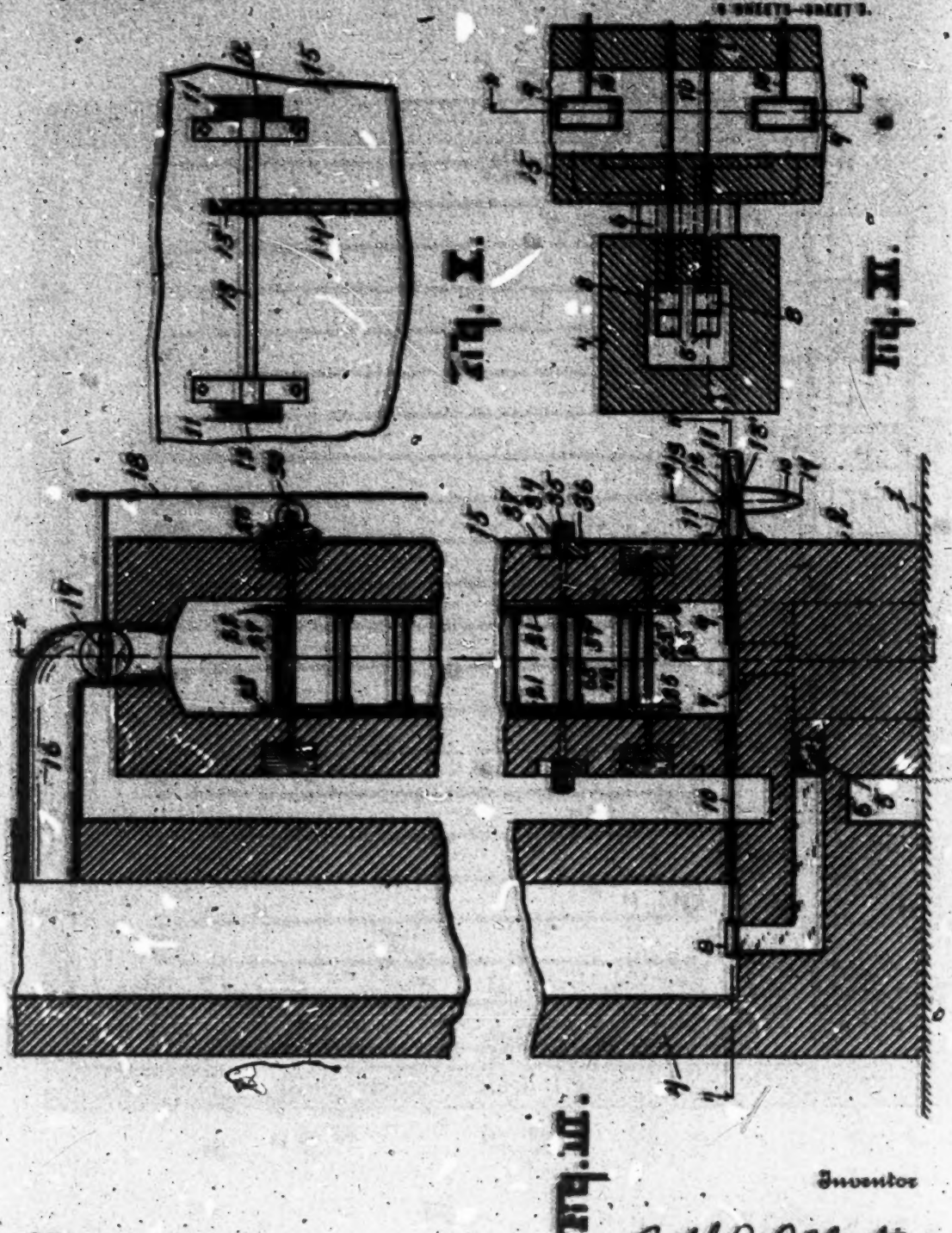

Fig. 3.

Witnesses

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424

R. E. VALENTINE.

OVEN.

APPLICATION FILED JAN. 24, 1912.

1,143,161.

Patented June 15, 1915.

6 SHEETS—SHEET 4.

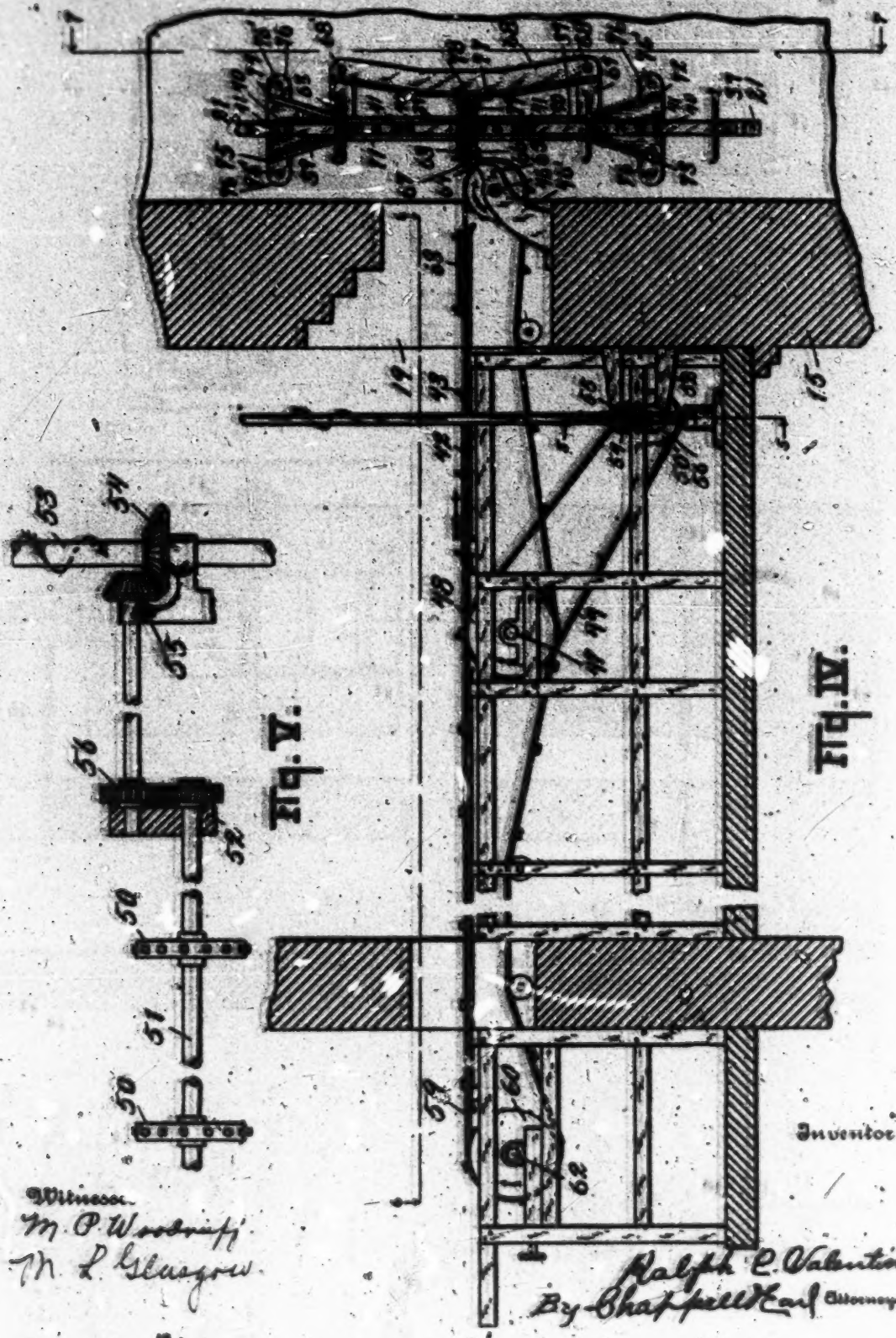

Fig. V.

Fig. IV.

Witnesses.
M. P. Woodruff
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426

R. E. VALENTINE.

OVEN.

APPLICATION FILED JAN. 24, 1912.

1,143,151.

Patented June 15, 1915.

6 SHEETS—SHEET 5.

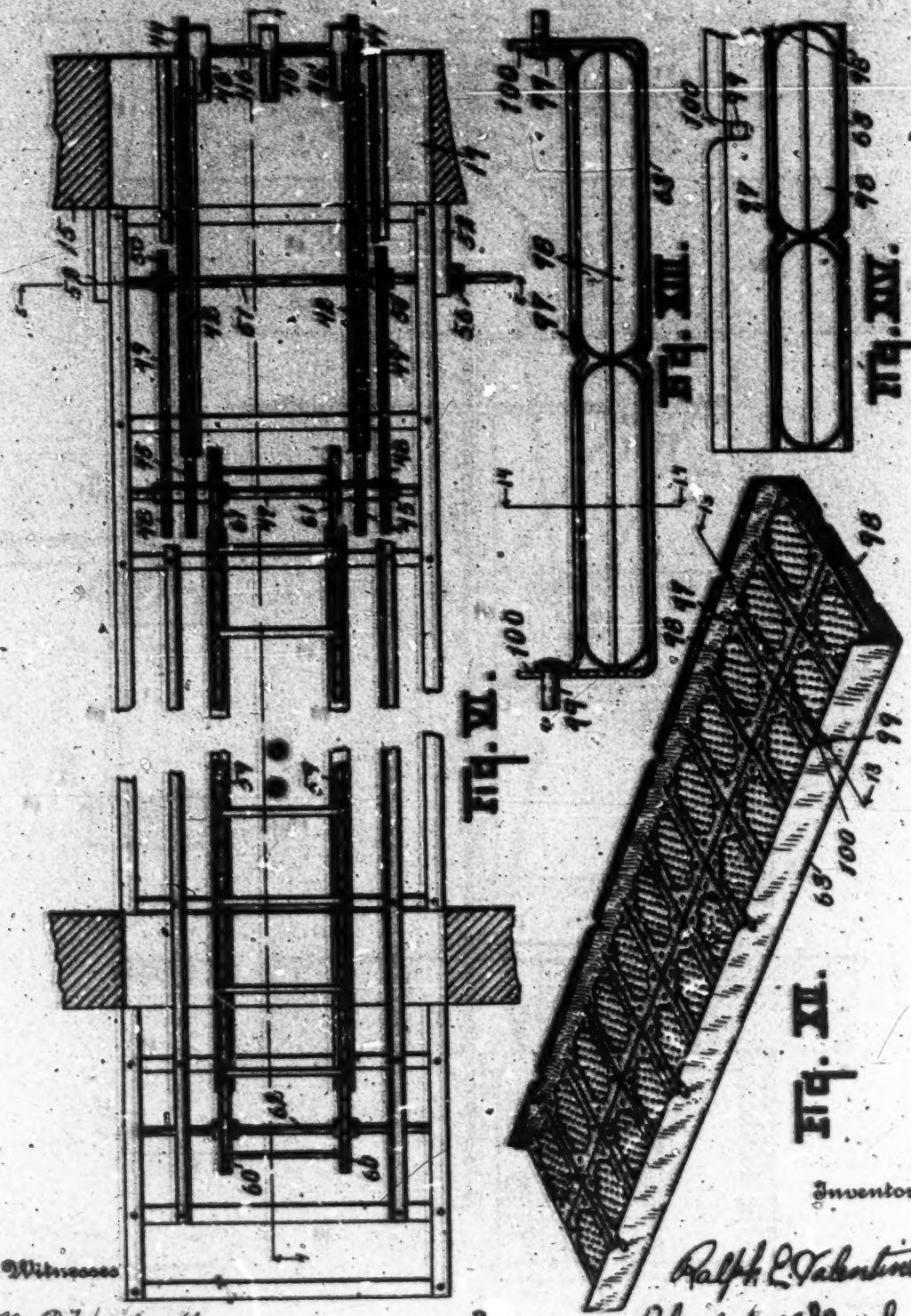

Fig. XI.

Fig. IX.

Fig. X.

Fig. XII.

Witnesses

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428

R. E. VALENTINE.

OVEN.

APPLICATION FILED JAN. 24, 1912.

1,143,151.

Patented June 15, 1915.

6 SHEETS—SHEET 6.

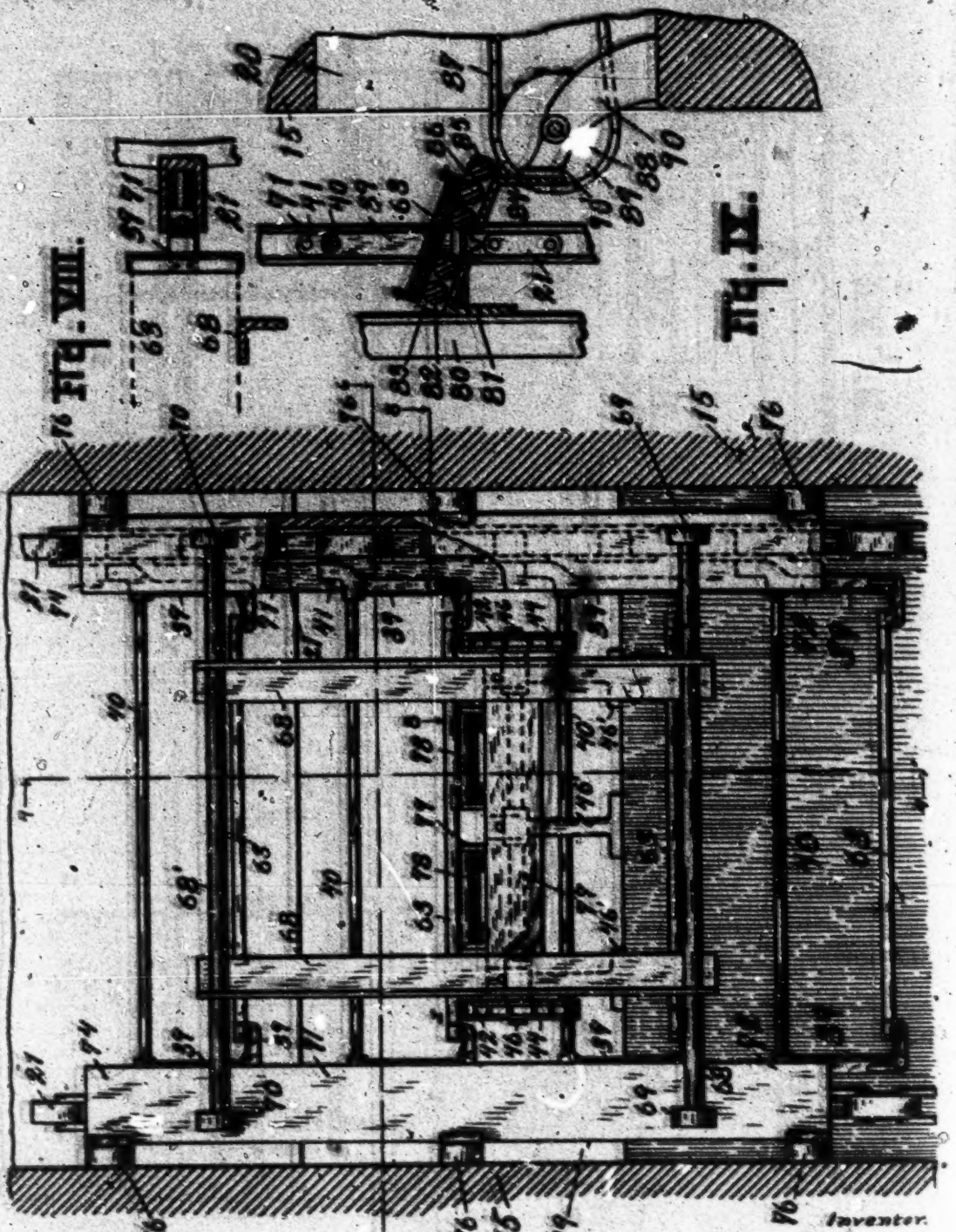

Fig. VIII.

Fig. IX.

Fig. VII.

Witnesses
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M. L. Glaszgow

Inventor
Ralph E. Valentine
By Chappell Hazel
Attorneys

UNITED STATES PATENT OFFICE.

RALPH E. VALENTINE, OF BATTLE CREEK, MICHIGAN, ASSIGNOR TO KELLOGG TOASTED CORN FLAKE COMPANY, OF BATTLE CREEK, MICHIGAN.

OVEN.

1,143,151. Specification of Letters Patent. Patented June 15, 1915.

Application filed January 24, 1913. Serial No. 743,218.

To all whom it may concern:

Be it known that I, RALPH E. VALENTINE, a citizen of the United States, residing at Battle Creek, Michigan, have invented certain new and useful Improvements in Ovens, of which the following is a specification.

This invention relates to improvements in ovens.

It relates to ovens particularly designed for the baking of shredded wheat biscuits or flake cereal biscuits, although the oven is admirably adapted to a great variety of uses.

The objects of the invention are first, to provide an improved construction of oven in which the heat can be effectively regulated and controlled and the heating can be done with great economy by direct circulation of the products of combustion from the furnace; second, to provide an improved pan support and conveyer means for such an oven; third, to provide improved feeding devices for delivering the bake pans to such an oven; fourth, to provide improved discharge devices for discharging the contents from such an oven.

Further objects, and objects relating to details and economies of construction and operation will definitely appear from the detailed description to follow.

I accomplish the objects of my invention by the devices and means described in the following specification.

The invention is clearly defined and pointed out in the claims.

A structure constituting a preferred embodiment of my invention is fully illustrated in the accompanying drawing, forming a part of this specification, in which:

Figure I is a side elevation view of an oven embodying the features of my invention. Fig. II is a vertical longitudinal detail sectional elevation through such an oven taken on a line corresponding to line 2—2 of Figs. III and XI. Fig. III is a detail transverse sectional elevation partially in broken section, taken on a line corresponding to line 3—3 of Figs. I, II and XI. Fig. IV is an enlarged detail view of the feeding mechanism for delivering the bake pans to the oven, the wall portions and certain of the shafts being taken in section, on a line corresponding to line 4—4 of Figs. VI and VII, the main machine parts in this connection being shown in full lines. Fig. V is an enlarged detail sectional view taken on a line corresponding to line 5—5 of Figs. IV and VI, showing the details of the driving means of the feed mechanism. Fig. VI is an enlarged detail plan view in broken section of the feed mechanism leading to the oven, the same being taken on a line corresponding to line 6—6 of Figs. II, IV and VII. Fig. VII is an enlarged detail sectional view on a line corresponding to line 7—7 of Figs. II and IV of the feed mechanism at that point. Fig. VIII is a detail sectional view on line 8—8 of Fig. VII, showing the chain guides and other related stops and supports. Fig. IX is an enlarged detail longitudinal vertical sectional view through the delivery or discharge portion of the oven apparatus, showing how the pans are automatically discharged. Fig. X is an enlarged detail sectional view on a line corresponding to line 10—10 of Fig. III, showing the damper regulating means for controlling the flues to the chimneys and to the oven. Fig. XI is a detail sectional plan view on a line corresponding to line 11—11 of Figs. I, II and III, showing the damper means for controlling the flues and the relations thereof and of the flues the one to the other. Fig. XII is an enlarged detail perspective view of one of the pans which is handled by this improved oven. Fig. XIII is an enlarged detail transverse sectional view on line 13—13 of Fig. XII, showing the means of coupling these parts together. Fig. XIV is a detail transverse sectional view on line 14—14 of Fig. XIII, showing details of the pan, its cover and molds contained therein.

In the drawing all of the sectional views are taken looking in the direction of the little arrows at the ends of the section lines and similar numerals of reference refer to similar parts throughout the several views.

Referring to the numbered parts of the drawing, my improved oven structure is supported on a suitable foundation 1, and is made up of a base 2 which contains a series of furnaces 3—3—3, six in number, coupled in pairs, of any usual or desired construction, the same being here illustrated in conventional form. A series of chimneys 4, three in number, are placed back of the furnaces, and the furnaces are connected thereto by flues 5, one chimney serving for two of the furnaces, as clearly appears from a consideration of Figs. I, III and XI. A

flue connection 6 is between the body of the furnace and the base of the chimney 4. A flue 7 leads directly up from the furnace to the oven above to deliver the hot products of combustion directly thereto.

A damper 8 controls the flue 5 in the chimney, and a damper 9 controls the flue 7 which leads from each furnace up to the oven above. Horizontal rods 10 extending through suitable apertures in the walls of the furnace and chimney connect to these dampers for controlling the same. A rack 11 connected to each rod 10 is controlled by the action of a pinion 12, which pinions are carried in pairs on a common shaft 12 suitably supported on brackets outside each furnace, the same being controlled by a hand chain 14 on a sprocket wheel 13' within easy reach of the operator.

The oven 15 is of considerable height, extending in the present instance through three stories of a building, the floors of which 15' 15' are indicated in Figs. I and II. The oven 15 rests upon base part 2, and embraces the flues 7 of the various furnaces, which furnaces deliver their heated products of combustion directly up into the same. Flues 16—16, six in number, are provided at the top of the oven and connect to the chimneys 4 above the oven.

Dampers 17 are provided in the flues 16 and are controlled by suitable chain connections 18 extending through the floor below. An inlet opening or door 19 leads into the oven, at a convenient height from the second floor 15', and a discharge door or opening 20 is at the opposite side.

Within the furnace is an endless conveyer 21 made up of pairs of sprocket chains extending in loops over driven sprocket wheels 22 supported on suitable shafts 27 that extend out into bearings at each side of the oven toward its top. The conveyer 21 loops under sprocket wheels 23 disposed in pairs at each end of shafts 33 at the bottom. The conveyers pass down at the discharge side of the oven. Idle sprocket wheels 24 on shaft 24' and pairs of wheels 25—25—25 supported on idle shafts 25' are disposed in the lower part of the oven to support and guide the conveyer on its return to the feeding point and idle sprocket wheels 26 supported on shaft 26'. The direction of rotation is indicated by the arrow at the left of Fig. II, being up on the intake side of the oven and down on the discharge side.

The transverse shafts 27 are each provided with bevel gears 28 which are driven by the intermeshing bevel gears 29. The gears 29 are carried on the longitudinal driving shaft 30 which is supported on suitable boxing 31—31 at intervals along the side of the oven, and are driven by the pulley 32 or by any suitable means as a chain and wheel.

Tension is maintained on the conveyer by supporting the transverse shafts 33 on pivoted arms 34, the same being pivoted at 35, and weights 38 at the opposite end preserve the required tension. There is an arm and weight for each downwardly depending loop of the conveyer, and the shafts 33 play in slots 33' at the sides of the oven, whereby an even tension is preserved upon the conveyer throughout its travel.

Carriers 39 on each chain are connected together by cross bars 40, and are pivoted at 41 41 between the chains of conveyer 21 which are in pairs for carrying these pivoted carriers. The bottom cross portions of these carriers are slightly upturned to afford a retaining means for the bake pans that are delivered thereto. An endless conveyer 42 with projection attachments 43 on certain of the links serves to carry and deliver the bake pans 63 (see Fig. IV) to the carriers 39 of the conveyer 21. The endless conveyer 42 is carried by a pair of sprocket wheels 44—44 at one end and sprockets 45—45 at the opposite end. The sprocket wheels 44 are supported on a shaft 46 which is carried in suitably projecting brackets 46' 46' in proper position to deliver the bake pans to the carrier 21 within the oven. The sprocket wheels 45 45 are supported on the shaft 47 which is supported in suitable bearings.

The shaft 47 is driven by sprocket chains 49 over the sprocket wheel 48 from the sprocket wheel 50, which is supported on the shaft 51. A pair of these chains serves to drive these parts perfectly even to deliver the bake pans in perfectly square position into the oven. The shaft 51 is supported in suitable bearing brackets 52 52 at each side thereof. See particularly Figs. IV, V and VI. The shaft 51 is driven by the gears 56 which are driven by suitable connections from the bevel gear 55 which is driven by bevel gear 54 on the vertical shaft 53. The vertical shaft 53 is driven by the gear 58 which intermeshes with the bevel gear 57 on the main driving shaft 30.

An auxiliary endless conveyer 59 is made up of a pair of sprocket chains carried on sprocket wheels 60 at one end and on sprocket wheels 61 at the opposite end. The sprocket wheels 61 are supported on the shaft 47 already described. The sprocket wheels 60—60 are supported on the shaft 62. This conveyer is driven by the same connection that drives the conveyer 42. This auxiliary conveyer comprises wooden slats and is very light, as it is not required to withstand the high degree of heat to which the main conveyer is subjected in delivering the pans to the oven.

The bake pans 63 are carried by the conveyers 59 and 42 and delivered into the oven by passing onto a set of rollers 64,

which are supported on an extension 65 of the brackets 46.

An angle bar 66 serves as a support for cross bars 67 which carry the series of the said rollers 64 (see particularly Fig. IV).

Within the oven are upright guide and stop bars 68 made of angle bars which are joined together by suitable transverse bars 68' disposed therethrough at top and bottom, being secured to pairs of arms 69 at the bottom and to the pairs of arms 70 at the top. These arms extend from bottom and top respectively of the guide bars 71. The guide bars 71 are provided with side flanges which diverge at 72—73 at the bottom to receive the upwardly traveling chain, and also diverge at 74—75 at the top to permit the chain to be passed freely up and yet be properly retained at the receiving point to insure correct engagement of each carrier with the pans as they are successively delivered.

Laterally projecting ears 76 serve as a securing means for attaching these guide bars or plates 71 to the sides of the oven, three pairs of these being provided for each of the said guide bars 71. Stop bars 68 are coupled together by an angle bar 77, which carries the cross bars 79 which extend forwardly toward the cross bars 66 in which are journaled the rollers 78. A gap is left between the two sets of rollers for the passage of the cross bars 40 which couple the carrier sides together. It will thus be seen that the chain of the carriers may pass upwardly between the sets of rollers 64—78 and pick up by their projecting ends the pans 63 which are delivered thereto by the conveyer 42, as before described.

As the carriers are pivoted and hang down, they serve to carry the pans 63 through the oven up and down from front to rear until they come to the discharge opening 20.

At the discharge opening 20, the delivery apparatus is substantially duplicated, except that the rollers are on an incline downwardly and outwardly for discharging the bake pans out of the oven. The guides 71 are at each side and secured in the same way,—see particularly Fig. IX. An angle guide bar 80 corresponds to the guiding stop bar 68 and to this is secured a horizontal bar 81 corresponding to bar 77 on which are supported the discharge rollers 82 on the inclined cross bars 83. A corresponding bar 89 is on the opposite side and carries rollers 85 on the inclined cross bars 86, which are separated from the inclined cross bars 83 to permit the carriers to descend between the same. When the carrier descends, the bake pans 63 come into contact with the inclined rollers and are discharged downwardly and outwardly to a suitable conveyer 87. The carrier 87 is carried on the shaft 88 which supports the sprocket wheels 89 which carry the chains constituting the same. Brackets 90 with journal bearings support the shaft 88. The cross angle bar 84 is secured to extensions 90' of these brackets 90.

The carrier 87 is driven in precisely the same manner as the carrier which feeds the pans to the oven except it conveys from the oven and it is thought not to be necessary to detail these parts. The vertical shaft 91 is driven from the horizontal shaft 92 by the intermeshing bevel gears 93—94, the shaft 92 being driven by the bevel gear 95 from the bevel gear 96 on the vertical shaft 53 (see particularly Fig. I for these details).

The pans 63 are specially constructed and provided with covers 97, and the pans 63 carry half molds 98 and the covers 97 also carry half of the molds 8'. These parts register together by the fitting of the cover within the pan, and projecting pins 99 on the cover engage the notches 100 on the upwardly turned flanges at the sides of the bake pan to secure the longitudinal register, the flanges fitting the one within the other to insure the fitting in the opposite direction. These bake pans are made the subject matter of my copending patent application filed on even date herewith, Patent No. 1,124,363, and will not be described in detail at this point.

My improved oven I desire to state and its various devices are capable of great modification without departing from my invention. I believe the specific form in which I have shown the different parts and their combinations to be preferable to any other, and desire to claim the same specifically. I desire, however, to claim the invention broadly, as pointed out in the appended claims. The pans may be delivered into this oven by the hands of an operative, although that would be a tedious process and would involve considerable risk and waste over the method of delivering the same by the conveyer. Also an operative might, by proper devices, withdraw the pans from the oven when they are delivered at that point, but the devices which I have made use of are automatic and of the highest utility, resulting in great saving of labor and insuring high speed in the operation of the oven, which is made of such capacity that the chain conveyer therein has a comparatively rapid movement.

I desire to state that the same devices might be made use of in ovens otherwise heated, but I believe they are especially well adapted to the particular oven which I have shown, and I desire to claim the same in combination therewith.

Having thus described my invention, what I claim as new and desire to secure by Letters Patent is:

1. In an oven apparatus, the combination of a suitable oven; a suitable endless con-

veyer disposed within the said oven and moving upward at the intake side and downward at the discharge side; suspended carriers thereon, the ends of each of which are connected by a suitable rod and which are provided with depending engaging portions to engage and convey a pan; a divided support with suitable rollers disposed at the intake side of said oven in the ascending path of said conveyer, one portion disposed without the said conveyer and the other portion disposed and supported within the said conveyer; feed conveyer means for delivering bake pans to the said support timed to cooperate therewith whereby said pans will be picked up by the rising carriers; and discharge devices for the said oven disposed at the discharge side in the descending part of said conveyer comprising a divided support, one portion of which is disposed without the said conveyer and the other portion of which is disposed within the same, the said parts being inclined outwardly to automatically discharge the bake pans from the descending conveyer, all coacting substantially as described and for the purpose specified.

2. In an oven apparatus, the combination of a suitable oven; a suitable endless conveyer disposed within the said oven and moving upward at the intake side and downward at the discharge side; suspended carriers thereon, the ends of each of which are connected by a suitable rod and which are provided with depending engaging portions to engage and convey a pan; and discharge devices for said oven provided with suitable pan engaging rollers, all coacting substantially as described and for the purpose specified.

3. In an oven apparatus, the combination of a suitable oven; a suitable endless conveyer disposed within the said oven and moving upward at the intake side and downward at the discharge side; suspended carriers thereon, the ends of each of which are connected by a suitable rod and which are provided with depending engaging portions to engage and convey a pan.

4. The combination with an oven of an endless conveyer made up of sprocket chains with carriers secured thereto; rods connecting said carriers, driving sprocket wheels in the upper part of said oven for conveying the same, over which the endless conveyer is looped; idle sprocket wheels carried on shafts extending transversely of said oven, levers pivoted to the walls of said oven in which said shafts are journaled, and suitable weights disposed on the ends of said levers whereby the slack from said conveyer is taken up; suitable guides for the said conveyer chains disposed at each side of the oven at the intake and discharge side thereof, with suitable feed and discharge devices associated therewith, all coacting substantially as described and for the purpose specified.

5. In an oven apparatus, the combination of suitable conveyer chains, pan engaging supports carried by said chains, rods connecting opposite pan engaging supports; suitable guides therefor; supports projecting within the oven for supporting pans to be engaged by the said carriers; and endless conveyers for delivering pans to the said support to be taken up successively by the said conveyers so that the same can be fed one at a time automatically; and suitable spacing devices for distributing the pans in such position whereby they will be taken up by the said conveyer one at a time.

6. In an oven apparatus, the combination of a suitable oven provided with intake and discharge openings therein, an endless conveyer disposed within the said oven and moving upward at the intake side and downward at the discharge side thereof, said conveyer comprising a pair of carrier chains, pan engaging members carried by said chains and connected by rods, a support carried by the wall of the oven, a set of rollers carried by said support adjacent the intake opening of said oven, a second support carried by the wall of the oven, and a second set of rollers carried by said second support in line with the first set of rollers, feed conveyer mechanism carrying baking pans to said supports whereby they will be picked up by the rising pan engaging members, said conveyer mechanism being disposed in alinement with said rollers so as to deliver the pans directly thereon, and driving means for said endless carrier, all coacting substantially as described for the purpose specified.

7. In an oven apparatus, the combination of a suitable oven provided with intake and discharge openings, an endless conveyer disposed within the said oven and moving upward at the intake side and downward at the discharge side thereof, said conveyer comprising a pair of carrier chains, pan engaging members carried by said chains, rods connecting said pan engaging members, a divided support carried by the wall of the oven adjacent the intake opening therein, said divided support being provided with suitable rollers, a feed conveyer in line with said rollers for delivering pans thereto whereby they will be picked up by the rising pan engaging members, said rollers being spaced apart to permit the rods carried by the carrier chains to pass therebetween, and means for driving said endless conveyer, all coacting substantially as described for the purpose specified.

8. In an oven apparatus, the combination of a suitable oven provided with intake and discharge openings, an endless conveyer disposed within the said oven and moving up-

ward at the intake side and downward at the discharge side thereof; said endless conveyer comprising a pair of carrier chains, pan engaging members carried by said carrier chains, rods connecting said pan engaging members, a divided support carried by the walls of said oven adjacent the discharge opening therein, rollers carried by said divided support in position to be engaged by the descending pans, said rollers being spaced apart to permit the rods carried by said carrier chains to pass therebetween, said support being inclined downwardly toward the discharge opening, conveyer means in line with said rollers for receiving and carrying away the pans discharged therefrom, and driving means for said endless conveyer, all coacting substantially as described for the purpose specified.

In witness whereof, I have hereunto set my hand and seal in the presence of two witnesses.

RALPH E. VALENTINE. [L. S.]

Witnesses:

FRANK E. FENN,

CHAS. M. MARBLE.

DEFENDANT'S EXHIBIT NO. 245.

Book of Miscellaneous Patents Issued to Others Than the Plaintiff or Defendant.

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No.			Page
782,109,	to	M. E. Cooley, Dated February 7, 1905	437
820,899,	to	W. E. Williams, Dated May 15, 1906	441
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438

No. 782,109. PATENTED FEB. 7, 1905.

M. E. COOLEY.

SHREDDING MACHINE.

APPLICATION FILED MAY 11, 1903.

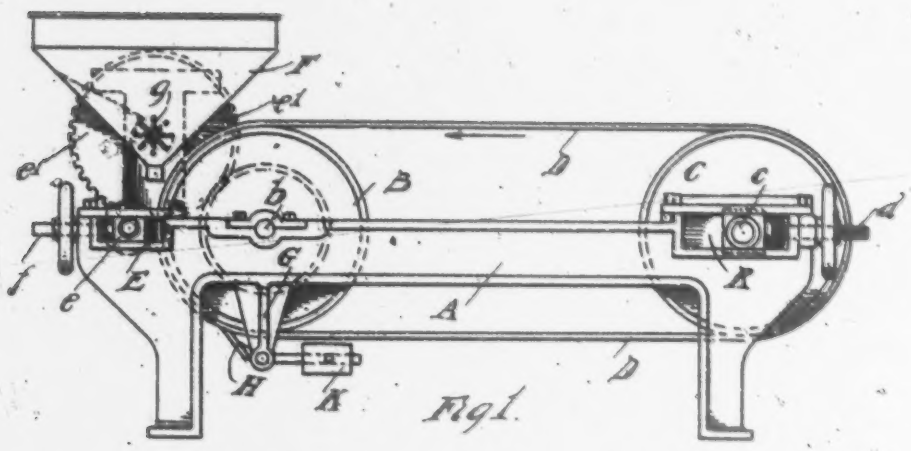

Fig 1.

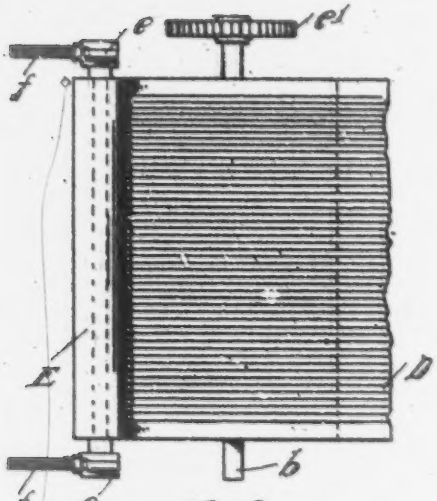

Fig 2

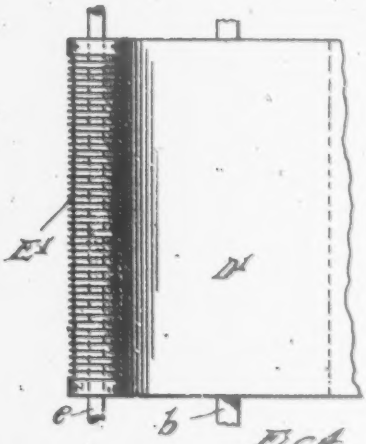

Fig 4.

Fig 3.

Fig 5.

WITNESSES

T. G. Kenney

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INVENTOR

Mortimer E. Cooley

By

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Attorneys.

No. 782,109. Patented February 7, 1905.

UNITED STATES PATENT OFFICE.

MORTIMER E. COOLEY, OF ANN ARBOR, MICHIGAN, ASSIGNOR OF ONE-HALF TO G. FRANK ALLMENDINGER, OF ANN ARBOR, MICHIGAN.

SHREDDING-MACHINE.

SPECIFICATION forming part of Letters Patent No. 782,109, dated February 7, 1905.

Application filed May 11, 1903. Serial No. 156,560.

To all whom it may concern:

Be it known that I, MORTIMER E. COOLEY, a citizen of the United States, residing at Ann Arbor, county of Washtenaw, State of Michigan, have invented a certain new and useful Improvement in Shredding-Machines; and I declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it pertains to make and use the same, reference being had to the accompanying drawings, which form a part of this specification.

This invention relates to shredding-machines, and has for its object a machine intended to produce shreds or thin strips of dough that are adapted to be afterward used in constructing what are known as "shredded-wheat" biscuits.

In the drawings, Figure 1 is a side elevation. Fig. 2 is a plan of the front end of the belt and of the pressure-roll. Fig. 3 is a cross-section of the belt. Fig. 4 shows a smooth belt with grooved pressure-roll. Fig. 5 shows a grooved belt with the corrugations made separate from the main body of the belt.

A indicates a frame on which there are mounted two rolls B and C on shafts *b* and *c*. These rolls are both smooth and are similar to large broad belt-wheels. Around them is stretched a belt D, preferably of steel, like that used for band-saws. The belt D is provided with grooves which run lengthwise of it on the external side thereof—that is, on the side which does not come in contact with the rolls B and C. A pressure-roll E, of smooth material, is held in suitable adjustable boxes *e* on the frame A, and a feed-hopper F is mounted above the tangential point of the belt D and the pressure-roll E. Brackets G support a stripper-comb H, that is held pivotally to the bracket and is held in engagement against the belt D by a weight K. One of the rolls, as the roll C, is adjustable with respect to the other and is provided with means for both adjusting and tramming it. For this purpose the boxing in which the shaft *c* engages slides in a guide R, that forms part of the frame A and is actuated in its sliding motion by a screw *d*. The boxing *e* of the pressure-roll E is arranged to be adjusted by the same character of adjustment by screw *f*.

In the mouth of the hopper F is a force-feed wheel *g* on the shaft of the main driving-wheel *c'*. The main driving-wheel *c'* meshes with a gear-wheel on the shaft of the roll B.

Instead of a plain roll E and a corrugated belt D a grooved roll E' is used in connection with a smooth belt D'. The belt D' is constructed with a smooth body K and with attached strips *j j*, such construction being used to overcome difficulties of construction of the tempered-steel belt D.

What I claim is—

1. In a shredding-machine, the combination of parallel rollers, means for varying the distance between them, a flexible belt traveling on said rollers, said belt being grooved longitudinally and externally, and a pressure-roll engaging against the belt and a stripper engaging against the belt, substantially as described.

2. In a shredding-machine, the combination of an endless belt grooved longitudinally and externally thereof, means for carrying it, means for actuating it, and a pressure-roll whose axis is transverse to said belt, engaging closely against the high parts of the surface thereof, substantially as described.

3. In a shredding-machine, the combination of a belt grooved longitudinally and externally, rolls on which the belt is carried, means for adjusting the rolls, a pressure-roll engaging against the belt, and a stripper engaging against the belt, substantially as described.

4. The combination of a belt grooved longitudinally and externally, means for supporting and actuating the belt, a pressure-roll engaging against the belt, a feeding device, and a stripper engaging against the belt, substantially as described.

In testimony whereof I sign this specification in the presence of two witnesses.

MORTIMER E. COOLEY.

Witnesses:
JAMES H. WADE,
GEORGE D. WILLCOX.

No. 820,899. PATENTED MAY 15, 1906.

W. E. WILLIAMS.

SHREDDED WHEAT BISCUIT.

APPLICATION FILED OCT. 4, 1904.

Fig. 1

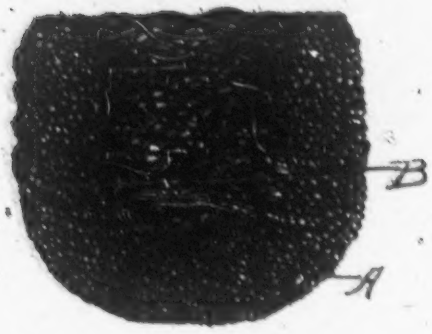


Fig. 2

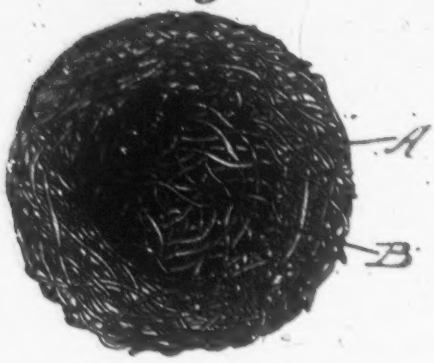
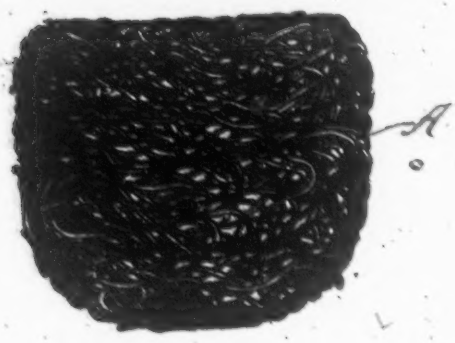


Fig. 3



Witnesses
J. H. Angell
D. M. Browne.

Inventor
William E. Williams,
by Wallace Brune,
Atty.

UNITED STATES PATENT OFFICE.

WILLIAM ERASTUS WILLIAMS, OF CHICAGO, ILLINOIS.

SHREDDED-WHEAT BISCUIT.

No. 820,899. Specification of Letters Patent. Patented May 15, 1906.

Application filed October 4, 1904. Serial No. 227,147.

To all whom it may concern:

Be it known that I, WILLIAM ERASTUS WILLIAMS, a citizen of the United States of America, and a resident of Chicago, county of Cook, and State of Illinois, have invented certain new and useful Improvements in Shredded-Wheat Biscuits, of which the following is a specification.

The object of my invention is to provide a biscuit of pleasing appearance that shall have many advantages over biscuits heretofore in use. With this end in view, suitable food materials are converted into filamentary form and then made into cup-shaped biscuits.

In the accompanying drawings, Figure 1 is an axial section of such a cup-shaped biscuit. Fig. 2 is a top plan view of the same biscuit. Fig. 3 shows the biscuit in side view.

Any suitable material may be used, but cereals, and preferably whole wheat, corn, barley, rye, or oats, or some blending of them, is employed.

Whatever the material the filaments are assembled in the form of a cup A, preferably having all its walls of approximately the same thickness, which may be varied as desired, and, as appears from the drawings, the filaments are so arranged that although they interlace by passing toward and away from the interior of the cup the general course of nearly all of them is around the cup in various directions, the result being that the structure has a peculiar nest-like appearance while an axial section shows principally filament ends.

The biscuit described may be formed in any suitable manner, for example, by gently forcing into a suitable cavity or mold the desired quantity of more or less interlaced fibers having for the most part the same general direction, the fibers being given a somewhat annular direction, either beforehand or while they are passing into the cup. In the latter case the cup may be rotated or the fibers themselves may be carried in the desired direction.

The size and form of the cup are such that it approximately fits the dishes in which such foods are ordinarily served, and obviously cream and sugar or the like may be placed in the cavity B, whence the sponge-like biscuit absorbs them.

This biscuit entirely eliminates the evils incident to pouring cream upon the convex surface of biscuit whose ends or some filaments of them often project beyond the margin of the containing dish. It has advantages also in that its comparatively thin shell is readily broken down with a spoon or fork and in that meats, fruits, eggs, jellies, and many other articles of food may be very conveniently served in the cup and thus a great variety of appetizing and healthful dishes may be quickly formed with this biscuit as a basis.

The biscuit being merely a thin shell in comparison with the ordinary biscuit, it is quickly and evenly baked and its exposed surface is relatively so large that nearly all the filaments of the whole mass of the biscuit is made brown and brittle, either originally or when slight dampness has lessened the very desirable crispness.

The biscuit being of such a light filamentary character has the quality of tenderness or crispness without the use of any leavening or shortening material and because it contains no such foreign material it readily takes on the flavor of even delicately-flavored foods placed within it.

What I claim is—

1. A cup-shaped biscuit made up of interlaced cereal filaments whose general courses are around the cup in various directions, forming a nest-like structure.

2. A cup-shaped biscuit having its walls made up of interlaced cereal filaments forming a nest-like structure with a rounded edge the general course of which is approximately followed by the filaments visable at that edge.

Signed at Chicago the 28th day of September, 1904.

WILLIAM ERASTUS WILLIAMS.

Witnesses:

ROBT. C. BORN,

CECIL BRONSON.

446

No. 878,262. PATENTED FEB. 4, 1908.

W. E. WILLIAMS.

SHREDDING MACHINE.

APPLICATION FILED OCT. 4, 1904.

2 SHEETS—SHEET 1.

Fig. 1

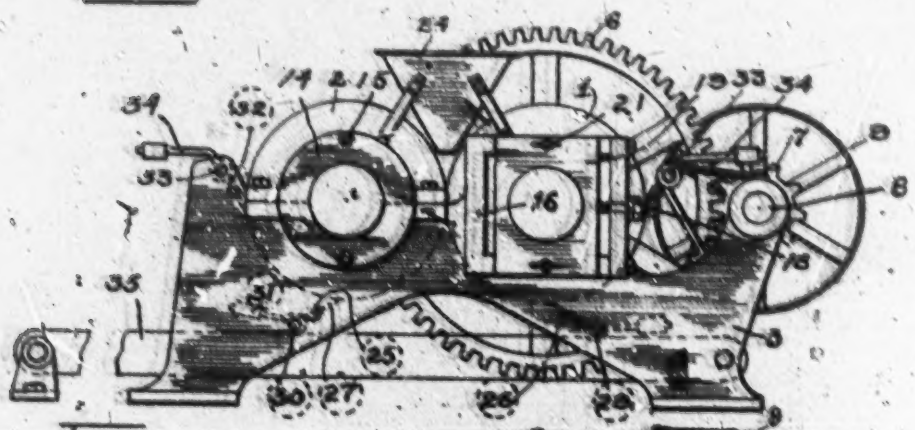
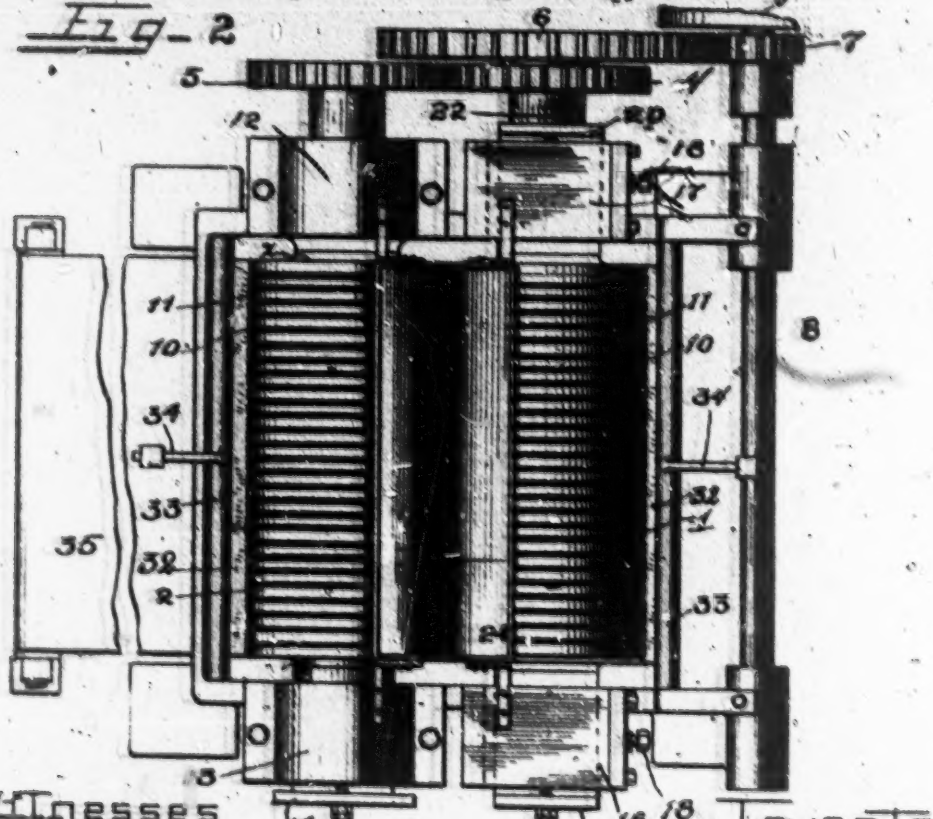


Fig. 2



Witnesses
J. H. Angell
D. M. Breslin.

Inventor
William E. Williams
by Wallace Brownell Atty.

No. 878,262. PATENTED FEB. 4, 1908.

W. E. WILLIAMS.

SHREDDING MACHINE.

APPLICATION FILED OCT. 4, 1904.

2 SHEETS—SHEET 2.

Fig. 3

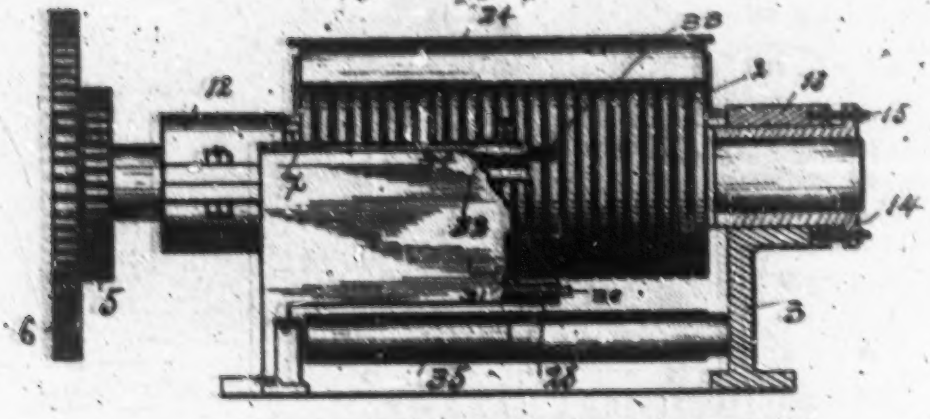


Fig. 4

Fig. 5

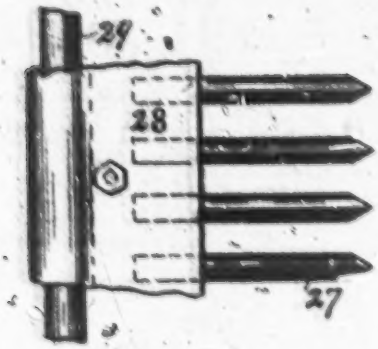
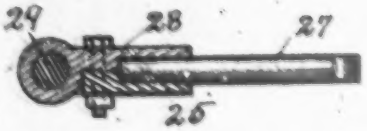


Fig. 6



Witnesses

S. M. Prescott.

L. L. Eaton.

Inventor

William E. Williams

by Watson Coleman Atty

UNITED STATES PATENT OFFICE.

WILLIAM ERASTUS WILLIAMS, OF CHICAGO, ILLINOIS.

SHREDDING-MACHINE.

No. 878,962. Specification of Letters Patent. Patented Feb. 4, 1908.

Application filed October 4, 1904. Serial No. 227,148.

To all whom it may concern:

Be it known that I, WILLIAM ERASTUS WILLIAMS, a citizen of the United States of America, and a resident of Chicago, county of Cook, and State of Illinois, have invented certain new and useful Improvements in Shredding-Machines, of which the following is a specification.

The object of this invention is to provide an improved machine for shredding cereals and the like for making shredded wheat biscuits and similar products.

In the accompanying drawings, Figure 1 shows my machine in side elevation. Fig. 2 shows the same in plan view. Fig. 3 is a view partly in section, looking from the left in Figs. 1 and 2. Fig. 4 is a detail view showing in longitudinal section a part of two shredding rollers in normal contact. Figs. 5 and 6 are, respectively, plan and sectional views of portions of certain scrapers.

In this machine, a pair of grooved rolls, 1, 2, are revolubly mounted, in contact, in a frame 3 and connected by gears 4, 5, driven from any suitable source of power by means of a belt pulley 9, shaft 8, pinion 7 and gear 6. The rolls are both provided with many circumferential, V-shaped grooves 10 so spaced as to leave between successive grooves an intact portion of the roller perhaps twice as wide as the grooves themselves, and each groove of each roller is located opposite an intact portion of the companion roller.

At one end of the roll 2, the roll shaft is mounted in a fixed bearing 12 against which a hub-like projection, *x*, of the roll bears, while at the opposite end of the roll the shaft is borne by a sleeve 14, flanged at its outer end, adjustably mounted in a bearing 13, and normally made to hold the opposite end of the roller in contact with the bearing 12 by means of screws 15 which draw its flange toward the bearing 13 in which the screws work, and thus make it possible to compensate wear.

It is desirable that the companion roll, 1, should be adjustable longitudinally, to secure accurate registry between the grooves of one roll and the spaces between the grooves of the other roll, and also that it should be adjustable laterally and provided with means for pressing it toward the roll 2. With these objects in view, the shaft of this roll is mounted, at both ends of the roll, in sleeves 19, 20, similar to the sleeve 14, already described, and like it pressed against the corresponding ends of the roller by screws, which in this case are designated by the numerals 21, 22, respectively. The bearings 16, 17, corresponding to the bearing 13, are in this case made wider than the sleeves which lie in them and these sleeves are adjusted laterally by screws 18, the flanges of the sleeves being slotted, as shown, to allow the sleeves to move laterally although the bolts or screws 21, 22 remain fixed.

The material to be shredded is placed in a hopper 24 whence it falls between the rolls, and as the latter are in contact, as nearly as may be, the material normally passes only in the grooves, from which it is removed by scrapers 25, 26 consisting of spring fingers 27 clamped in rocking bars 28, supported on rods 29, 30 and provided with counterweights 31 holding the spring fingers up to their work. If owing to imperfect contact material should pass between the cylindrical surfaces of the rollers, such material will be split into thin narrow ribbons by the spring fingers and will be removed by similar scrapers 32 mounted upon rods 33 and yieldingly held against the rollers by counterweights 34. The material on leaving the rolls falls upon a belt conveyer 35 driven in any suitable manner. It is to be observed that this arrangement of grooves permits nearly as many shreds as would be formed were one roller provided with closely contiguous grooves and yet gives a large body of metal between consecutive grooves. The rolls are thus much more durable and metal may be used that would otherwise be unsuitable.

What I claim is—

1. In a shredding machine, the combination with a pair of parallel, osculating coacting rolls each having a series of circumferential grooves registering with ungrooved portions of the companion roll, of means for removing material from the grooves.

2. In a shredding machine a set of grooved rolls having alternate grooves and flat spaces, mounted in such manner that the grooves of one are opposite the spaces of the other and provided with adjustments for the rolls to secure a nicety of adjustment of the spaces, and means for removing the material from the grooves.

3. In a shredding machine a set of rolls provided with alternate grooves and flat spaces, with means for adjusting the rolls

to and from each other, and means for adjusting them longitudinally, and provided with scrapers for scaping the material from the rolls.

4. In a shredding machine, a set of rolls provided with alternate circumferential grooves and flat spaces with means for adjusting the rolls together and longitudinally, with scrapers composed of individual fingers for scraping the grooves, and with flat scrapers for scraping the spaces substantially as shown.

Signed at Chicago this 28th day of September 1904.

WILLIAM ERASTUS WILLIAMS.

Witnesses:
ROBT. C. BORN,
CECIL BRONSON.

No. 896,964. PATENTED AUG. 25, 1908.

W. E. WILLIAMS.

BISCUIT BAKING APPLIANCE.

APPLICATION FILED JUNE 30, 1908.

Fig. 1.

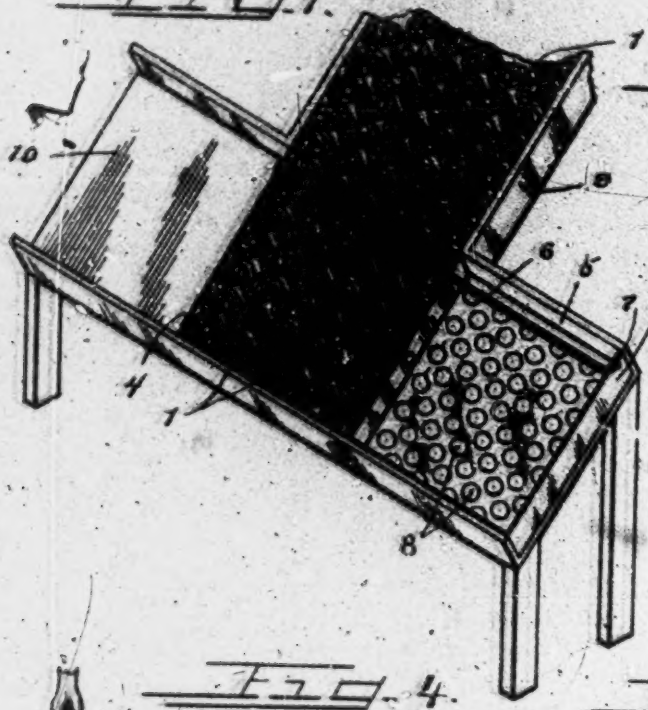


Fig. 2.

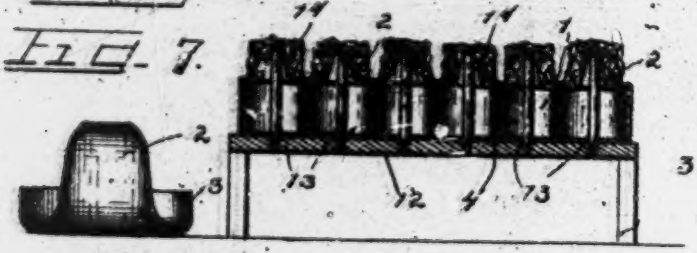
Fig. 4.

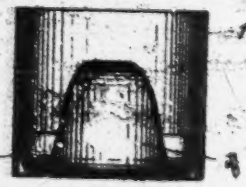
Fig. 3.

Fig. 5.

Fig. 6.

Fig. 7.





Witnesses

J. H. Angell

D. Whitehead

Inventor

W. E. Williams,

by Wallace Greene, Atty.

UNITED STATES PATENT OFFICE.

WILLIAM ERASTUS WILLIAMS, OF CHICAGO, ILLINOIS.

BISCUIT-BAKING APPLIANCE.

No. 896,964. Specification of Letters Patent. Patented Aug. 25, 1908.

Application filed June 30, 1905. Serial No. 267,788.

To all whom it may concern:

Be it known that I, WILLIAM ERASTUS WILLIAMS, a citizen of the United States, residing at Chicago, county of Cook, State of Illinois, have invented a new and useful Improvement in Biscuit-Baking Appliances, of which the following is a specification.

The object of the invention is to provide convenient devices for use in the commercial manufacture of biscuits and particularly of biscuits of shredded cereals having a cup-like form. In making such biscuits, it has been a very difficult matter to form a cup-like mass that is neither too loose in texture nor too compact and that is not crushed down at any point but is uniformly light and open throughout. Obviously a slight pressure upon soft uncooked filaments destroys this practically indispensable characteristic. So when the material has been cooked it is very fragile and it has been very difficult to remove it from the cup in which it is baked without injuring its filaments. To avoid these difficulties and provide for charging and discharging the cups perfectly, rapidly and certainly are among the more specific objects of the invention. The desired ends are attained by providing novel cups to be used in a set in a novel pan.

In the accompanying drawings, Figure 1 is a perspective view illustrating the manner of using the novel cups and pans, preparatory to putting the same in the oven. Fig. 2 is a plan view of one of the baking cups. Fig. 3 is a vertical section of a baking pan filled with such cups. Fig. 4 illustrates the manner of using the novel pan when the cups are all to be removed bodily therefrom. Fig. 5 is a vertical section of one of the baking cups. Fig. 6 shows the method of removing the baked product from a set of the cups by taking advantage of their peculiar construction. Fig. 7 is a vertical section of the removable bottom of one of the baking cups.

The tables and special devices for using the pans and cups are without novelty herein claimed and are shown only to make clear the nature and objects of the invention.

In these figures, 1 represents the cylindrical body of a metal baking cup and 2 a bottom for the cup, made to slide easily into and out of the same and having the form of an inverted cup provided with central perforations 16 and also perforations 15 in its upwardly curved flange 3, of approximately semicircular cross-section. The highest part of the bottom is materially below the plane of the upper edge of the body, so that when the cup is filled the material takes a cup-like form and is not a mass having a central opening. When these cups are filled they are placed in pans 4 adapted to hold somewhat closely a definite number. Each pan lacks one side wall, so that a set of cups may slide together into and out of the pan, and is provided with a bail 6 pivoted to the sides of the pan at some distance from its open side in position to swing down into the plane of the missing side and obstruct the movement of the cups, and to swing upward when desired, above the plane of the cups which may slide in beneath it in filling the pan, and to serve also as a handle when the cups are to slide out of the pan, these uses being illustrated in Figs. 1 and 4. When a set of cups is secured in the pan, each occupies a fixed position, and centrally beneath each is an aperture 8, and, thereby the pan may be pressed down upon a set of pins (Fig. 6), which thus raise the loose bottoms simultaneously lifting the biscuits out of the bodies of the cups and holding them in position for conveniently removing the baked product. The perforations in the loose bottoms not only allow circulation of air but permit drawing the filaments into the cup by atmospheric suction, which is necessary if they are to be evenly and compactly distributed without crushing.

What I claim is:

1. A baking cup having an upwardly removable bottom projecting upward, centrally, to form an inverted cup of materially less height than the lateral walls, and provided with a series of central perforations and a series of perforations near its margin.

2. The combination with a baking pan provided with a series of perforations in its bottom, of a set of baking cups having upwardly removable bottoms registering with said perforations, respectively.

WILLIAM ERASTUS WILLIAMS.

Witnesses:
W. A. SHEAHAN,
W. F. DUNHAM.

No. 897,182. PATENTED AUG. 25, 1908.

W. E. WILLIAMS.

SHREDDED WHEAT BISCUIT.

APPLICATION FILED JAN. 20, 1908.

Fig. 1

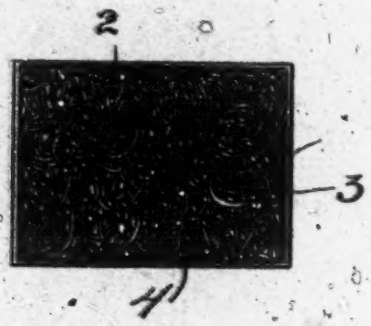
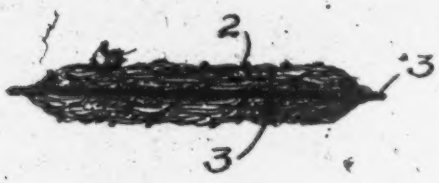


Fig. 2



Witnesses
J. H. Angell.
J. F. LaBarr

Inventor
William E. Williams.
by Wallace & Towne, Atty.

UNITED STATES PATENT OFFICE.

WILLIAM ERASTUS WILLIAMS, OF CHICAGO, ILLINOIS.

SHREDDED-WHEAT BISCUIT.

No. 897,182. Specification of Letters Patent. Patented Aug. 25, 1908.

Application filed January 29, 1908. Serial No. 413,260.

To all whom it may concern:

Be it known that I, WILLIAM E. WILLIAMS, a citizen of the United States, residing at Chicago, county of Cook, State of Illinois, have invented new and useful Improvements in Shredded-Wheat Biscuits, of which the following is a specification.

The object of my invention is to produce a preferably flat shredded wheat biscuit which, instead of being compact, dense and harsh, as some have been made in order that they may bear handling and shipping, shall be of loose or open texture, crisp, and fragile and yet capable of withstanding the rough treatment just mentioned. Children, especially, almost invariably dislike the compact biscuits mentioned, while they are usually especially fond of the fragile products made in accordance with this invention.

In the accompanying drawings: Figure 1 is a plan view of one form of the novel biscuit. Fig. 2 is an edge view of the same.

The body 2 of the biscuit consists of a preferably flat mass of variously curved, overlapped and interlaced cereal shreds, and surrounding this body is a narrow, relatively thin, continuous strip 3, 4 of the same material as the shreds and integrally connected along its inner edge with the central mass of shreds, from which it is in fact usually formed as hereinafter stated. The strips form a sort of frame, preferably in the medial plane of the biscuit, as shown, and when the biscuit is baked this strip or rib though brittle becomes rigid enough to support and protect the more fragile shreds.

The biscuits may be formed in any suitable way, but I prefer to make them by first forming a relatively wide, flat sheet of open texture made up of variously curved, interlaced and overlapped shreds in a more or less plastic condition, and then compressing narrow bands, of the material forming the sheet, along intersecting lines, preferably at right angles, and dividing these bands longitudinally. In those portions of the fibrous sheet which are compressed to form the bands, the shreds lose their individuality and become a thin, practically homogeneous ribbon. The sheet is thus divided into biscuits like that shown in the drawings, each consisting of a comparatively loose or open mass entirely surrounded by an integral, narrow, thin, relatively compact and dense projecting rib or frame which when dried or baked protects the body, although it forms but a small fraction of the entire biscuit.

What I claim is:

1. A biscuit composed of a mass of loosely interlaced and overlapped shreds integrally united around its entire margin by a narrow compact mass of the same material.

2. An approximately flat biscuit composed of a body of curved, interlaced and overlapped shreds, forming a loose or open mass, integrally connected on all sides with a narrow compact frame, of the same material, in the medial plane of the biscuit, protecting the same in handling and during transportation.

In witness hereof I have hereunto subscribed my name on this 24th day of January, 1908, in the presence of two subscribing witnesses.

WILLIAM ERASTUS WILLIAMS.

Witnesses:
J. A. LA BREE,
R. ROPER.

460

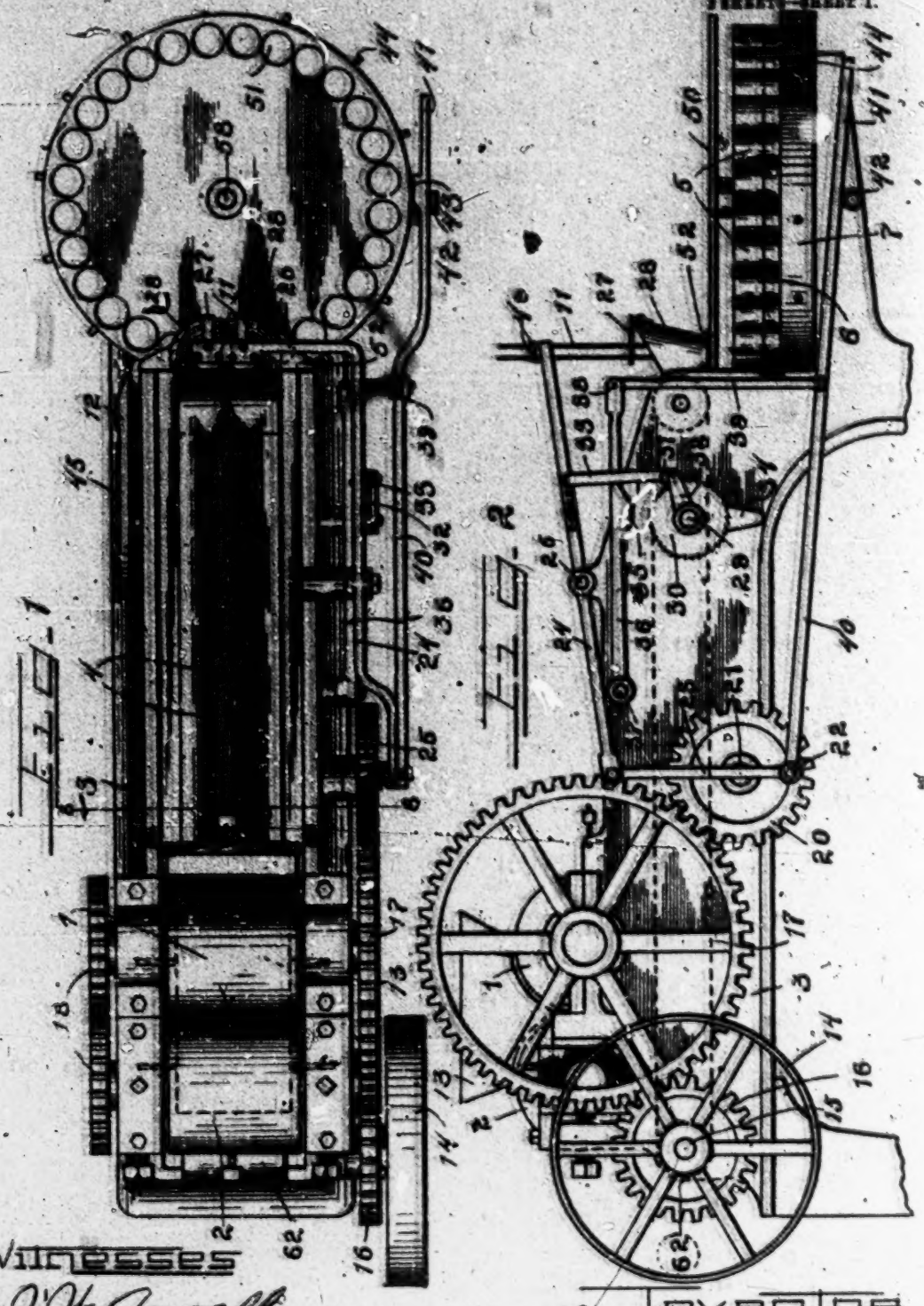
W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISCUITS.

APPLICATION FILED JUNE 23, 1905. RENEWED MAR. 16, 1909.

931,243. Patented Aug. 17, 1909.

3 SHEETS—SHEET 1.



Witnesses

J. H. Angell

M. Whitehead

Inventor

W. E. Williams

by Wallace & Mercer

Atty.

462

W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISCUITS.

APPLICATION FILED JUNE 30, 1908. RENEWED MAR. 18, 1909.

931,248. Patented Aug. 17, 1909.

2 SHEETS—SHEET 2.

Fig. 3

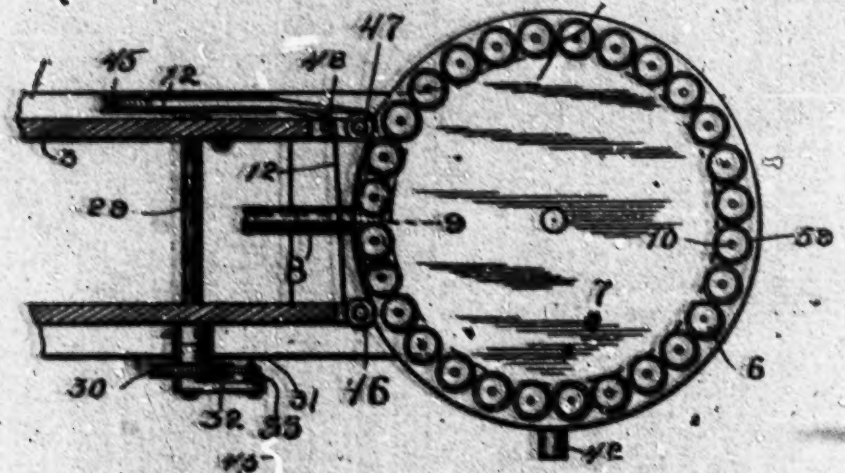


Fig. 4

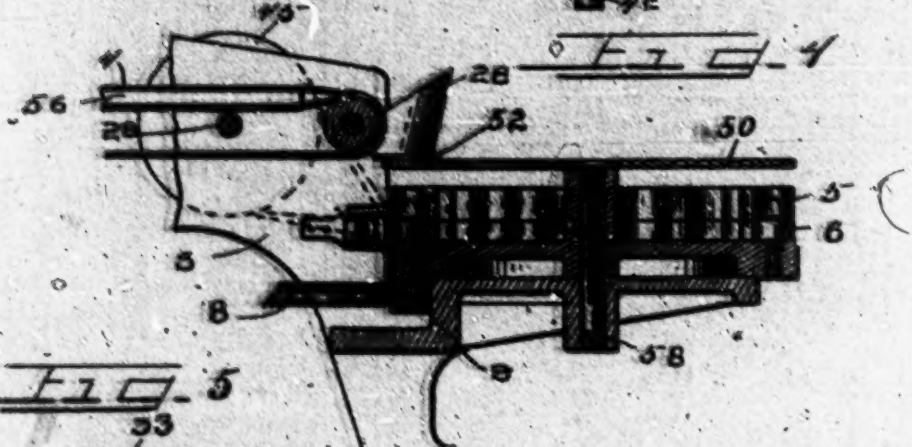


Fig. 5

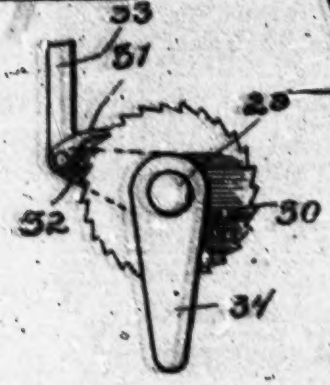


Fig. 6

Fig. 7

Witnesses

J. W. Angell

Inventor

W. E. Williams,

by Wallace Brown

Atty

464

W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISQUITS.

APPLICATION FILED JUNE 30, 1906. RENEWED MAR. 18, 1909.

931,243. Patented Aug. 17, 1909.

3 SHEETS—SHEET 3.

Fig. 8

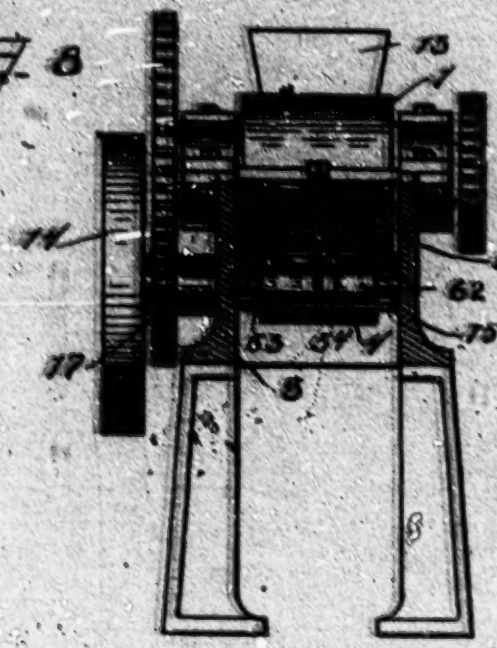


Fig. 10

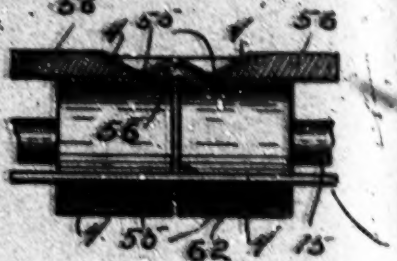


Fig. 9

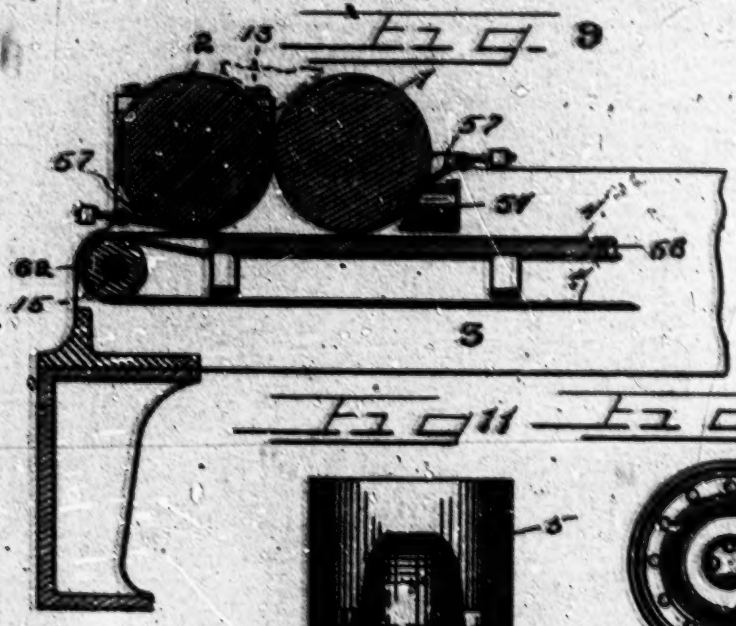


Fig. 11

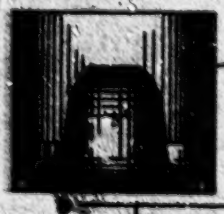


Fig. 12

Witnesses

J. H. Angell

Inventor

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by Wallace & Mann Atty

UNITED STATES PATENT OFFICE.

WILLIAM ERASTUS WILLIAMS, OF CHICAGO, ILLINOIS.

MACHINE FOR MAKING SHREDDED-WHEAT BISCUITS.

No. 911,245. Specification of Letters Patent. Patented Aug. 17, 1909.

Application filed June 30, 1905, Serial No. 267,737. Renewed March 18, 1909. Serial No. 484,270.

To all whom it may concern:

Be it known that I, WILLIAM ERASTUS WILLIAMS, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented a new and useful Improvement in Machines for Making Shredded-Wheat Biscuits, of which the following is a specification.

The object of my invention is to provide a desirable machine for making shredded wheat or other biscuits, and the invention consists in the devices set forth in the claims.

Reference will be had to the accompanying drawing in which—

Figure 1 is a plan view of the machine. Fig. 2 is a side elevation of the machine. Fig. 3 is a plan detail of the delivery end of the machine. Fig. 4 is a side sectional detail of the front end of the machine. Fig. 5 is a detail of parts of the timing device. Figs. 6 and 7 are details of the cup spindles. Fig. 8 is a sectional elevation on line 8—8 of Fig. 1. Fig. 9 is a vertical sectional detail through the shredding rolls. Fig. 10 is a transverse sectional detail showing the guides for the carrier belts. Figs. 11 and 12 are views of the baking cups.

I provide a shredding device of any suitable construction which I show in the drawing as made of rolls 1 and 2 mounted upon any suitable frame 3. The shreds are delivered upon shred carriers of any suitable construction, but I prefer to use the belts 4 which deliver the shreds into baking cups or forms 5 which are carried upon spindles 6 mounted to revolve in a carrier wheel 7 having a vertical axis 38 in the frame. An air suction is produced by any suitable means of exhaust (not shown) and is connected by a pipe 8 to a chamber 9 which is connected by cavities 10 and 63 through the spindles 6 to the inside of cups 5 to suck the shreds down into the cups when the cups are in position to be filled. The chamber 9 extends only under the cups that are being filled and the lower side of the wheel 7 fits as a cover over the top of chamber 9. In addition to the suction to place the shreds into the cups, I provide sets of tampers or packers 11 which reciprocate vertically, pushing the shreds into place in the cups as the shreds are delivered by the belts 4. The spindles 6 are made to revolve intermittently by a belt 12 while they are being filled. The carrier wheel 7 is made to move intermittently allowing a period of rest sufficient to fill the cups. Thus the wheat or the suitable prepared stock from which the shreds are to be made is placed in the hopper 13 and the rolls convert it into shreds which are formed into shape in the cups 5 which are removed by hand, or other suitable means and fresh cups supplied in a similar manner.

The machine is driven by a belt wheel 14 driving a shaft 15 carrying a pinion 16 which drives a spur gear 17 on the shaft of one of the rolls and the rolls are geared together by gears 18. The pulleys 62 on shaft 15 drive the belts 4 much faster than the lineal rate of delivery of the shreds whereby the shreds assume a straighter position on the belts and are discharged with impact into the forms.

The mechanism for moving the carrier wheel 7 the packers and the cup spindles 6 is driven by the gear 20 on shaft 21 on which there is a crank 22 which is connected by a link 23 to a walking beam 24, having an axis 25 on the frame of the machine. Walking beam 24 is provided with an arm 26 having apertures which carry the packers, the lower ends of which are guided by perforated blocks 27, which are supported by the curved hoppers or guide way 28, which directs the shreds into the cups as the shreds are delivered by belts 4. A shaft 29 and the fixtures thereon act as a timing device and it extends across the machine and is driven intermittently by ratchet 30 and pawl 31 carried by an arm 32 moved by a link 33 connected to walking beam 24. The shaft 29 carries a block 34 which when in an upward position engages a block 35 on an arm 36 pivoted at one end 37 to the frame of the machine and at the other end 38 connected to a link 39 connected to a bar 40 which is connected to crank 22. The bar 40 reciprocates horizontally with every stroke of the crank. And its outer end 41 rides freely upon roller 42 at all times save only when block 34 engages block 35 which engagement lifts the end 41 of bar 40 and causes the block 43 on bar 40 at its next stroke to engage one of the pins 44 on wheel 7 and move the wheel or carrier two spaces or two cups bringing two empty cups under the discharge of the belts and removing the two filled ones. Thus the timing of filling the cups is determined by the rate of revolution of the shaft 29 carrying its block 34, this may be varied by causing the pawl 31 to engage more or less teeth of the ratchet at a stroke which is accomplished

by moving the connection of the arm 33 into different holes in walking beam 24 giving more or less stroke to pawl arm 32. The shaft 29 carries a belt wheel 45 which drives belt 12 which is trained around suitable guide rollers 46, 47, and 48 bringing the belt 12 into engagement with the head block of cup spindles 6 thereby causing them and the cups mounted thereon to move at each intermittent movement of ratchet or timing shaft 29, which movement takes place while the packing pokers are above the cups 5, thereby not disturbing the shreds in the cups by the revolution of the cups. The pokers 11 slide loosely in their supports and go down by gravity thereby adjusting themselves to the mass of shreds as they accumulate. Weights 49 are provided to give proper thrust to the pokers. Above the cup spindles on the carrier wheel 7 there is a cutting disk 50 provided with apertures 51 over the cup spindles.

Mounted to slide on the top of cutting disk 50 there is fixed plate 52 to which the curved hoppers 28 are attached. The plate 52 and disk 50 act as a shear to cut off the shreds at each movement of the carrier with the cups. The cups 5 are perforated at the bottom to provide a connection to the suction chamber 9 through the cavities 10 and 63 of spindles 6. Whereby the suction can act on the shreds as they fall into the cups. Instead of suction I may use an air blast from above but I prefer to use the suction. Below the rolls 1 and 2 there are provided guide or deflecting plates 53 and 54 for directing the falling shreds upon the center of carrier belts 4. The belts 4 are made of two thicknesses, one on top of the other and the upper or outer one is the thinner and more flexible of the two and they are connected together by rivets 55 along a central line. Along the upper or carrying side of the belts there are provided guide boards 56, which extend inward between the parts of the belt causing the upper layer to assume the shape of a trough thereby holding the shreds in place on the belt and preventing thus displacement as they are carried along.

The rolls are provided with suitable adjustments to hold them in position to each other and also with suitable scrapers 57 to strip the shreds off them. The cups 5 are the subject of another patent and they are made in two pieces, the outer or shell piece sits over the top of the spindle 6 on to the shoulder 59, while the cone piece rests on the surface 60. Thus the cups are held upon the spindles, yet may easily be removed as there is clearance between the top of the cups and the under side of plate 50.

In place of the rolls for producing the shreds I may use any suitable shredding device or provide a suitable source of supply of the shreds in any manner.

What I claim is:—

1. The combination with devices for producing cereal shreds or filaments, of a series of laterally closed independent cups or forms, means for bringing said forms successively into position, and automatic means for filling each form with an independent mass of loose shreds from said devices while in such position.

2. The combination with a suitable form, of means for feeding long cereal shreds into said form, to fill the same gradually, and means for rotating the form upon its own axis during such feeding, whereby the long shreds are wound spirally in the form.

3. The combination with a series of suitable forms, of automatic means for bringing said forms successively, to rest in position for filling, means for rotating each form upon its own axis while so at rest, and means for delivering long cereal shreds in the form while it is so rotating; whereby each form of the series is filled with a nest-like body of spirally wound shreds.

4. The combination with a series of suitable forms, of automatic means for bringing the forms to rest successively in a predetermined position, means for rotating each form upon its own axis while it is in such position, means for continuously delivering cereal shreds in each form during such rotation, and means for cutting off the supply of shreds when the form is filled to the proper extent.

5. The combination with a suitable form, of means for progressively feeding cereal shreds into said form, and means for producing an air current through the form during such feeding, to gently urge the individual shreds toward proper position.

6. The combination with a suitable form, of means for progressively delivering in said form loose cereal shreds, and a packer arranged for gently pressing the shreds during such delivery.

7. The combination with a suitable form, of means for progressively delivering loose cereal shreds in said form, a packer arranged for gently pressing the shreds into place during such delivery and means for rotating the form while it is being filled.

8. Means for bringing cereal shreds from a source of supply, forms for receiving the shreds, packers for packing the shreds in the forms, and means for revolving the forms, and means for moving the forms in relation to the source of supply.

9. Means for bringing cereal shreds from a source of supply, forms for receiving the shreds, packers for packing the shreds in the forms, means for revolving the forms, means for moving the forms in relation to the source of supply, means for cutting off the shreds in the forms from the source of supply.

10. The method of forming biscuits of cereal shreds which consists of aggregating loose shreds and giving the mass a desired shape by gently pressing the shreds into a suitable form by means of a current of air.

11. The method of forming biscuits of cereal shreds which consists in progressively introducing the shreds into a suitable form and meantime creating an air current through the gradually increasing mass.

12. Means for supplying shreds, forms for receiving the shreds, an air current to place the shreds in the forms and packers to pack the shreds in the forms.

13. Means for supplying shreds, forms for receiving the shreds, an air current, and mechanical packers for placing the shreds in the forms, and means for revolving the forms.

14. Means for supplying shreds, forms for receiving the shreds, an air current and mechanical packers to place the shreds in the forms and means for moving the forms in relation to the source of supply.

15. Means for supplying shreds, forms for receiving the shreds, an air current and mechanical packers for placing the shreds into the forms and means for cutting off the source of supply from the shreds in the forms.

16. Means for supplying shreds, forms for receiving the shreds, an air current and mechanical packers for placing the shreds in the forms, means for moving the forms in relation to the source of supply, means for cutting off the shreds from the source of supply.

17. Means for supplying shreds, forms for receiving the shreds, an air current and mechanical packers for placing the shreds in the forms, means for revolving the forms in relation to the source of supply, means for cutting off the shreds in the forms from the source of supply.

18. Means for supplying shreds, forms for receiving the shreds, a guideway or hopper for directing the shreds into the forms, packers and an air current for placing the shreds in the forms.

19. Means for supplying shreds, forms for receiving the shreds, from the source of supply, a guideway or hopper for directing the shreds into the forms, means for packing the shreds in the forms and means for revolving the forms, and means for moving the forms in relation to the source of supply.

20. Means for supplying shreds, forms for receiving the shreds, a movable carrier for the forms, means for revolving the forms while on the carrier and means for packing the shreds in the forms on the carrier.

21. Means for supplying shreds, forms for receiving the shreds, a movable carrier for the forms, means for revolving the forms on the carrier, means for packing the shreds in the forms and means for cutting off the shreds from the source of supply.

22. A shredding device, a carrier for the shreds, forms for receiving the shreds from the carrier, said carrier moving faster than the shredding device, delivering the shreds drawn out in lines and when free from the shredder moving with impact thereby aiding in their packing in the forms.

23. A source of supply of the shreds, forms for receiving the shreds, the said forms mounted upon revolving spindles, said spindles mounted on a movable carrier, means for the revolving the spindles intermittently.

24. An apparatus of the class described, the combination with a suitable form having apertures in its walls, of means for delivering cereal shreds in the form, and means for simultaneously passing an air current through said aperturs, substantially as set forth.

25. The combination with a suitable form having aperturs in its walls, of means for delivering cereal shreds in said form, and means for withdrawing air from the space around the exterior of the form, substantially as set forth.

26. The combination with a rotary carrier, of a series of forms revolubly mounted in the carrier, means for rotating the carrier step by step, means for rotating certain of said forms while the carrier is at rest, means for progressively delivering cereal shreds to the rotating forms, and means for continuously urging the entering shreds toward the form walls, substantially as set forth.

Signed at Chicago June 12th 1905.

WILLIAM ERASTUS WILLIAMS.

Witnesses:
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470

W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISCUITS.

APPLICATION FILED JAN. 29, 1908.

949,013. Patented Feb. 15, 1910.

6 SHEETS—SHEET 1.

Fig. 1

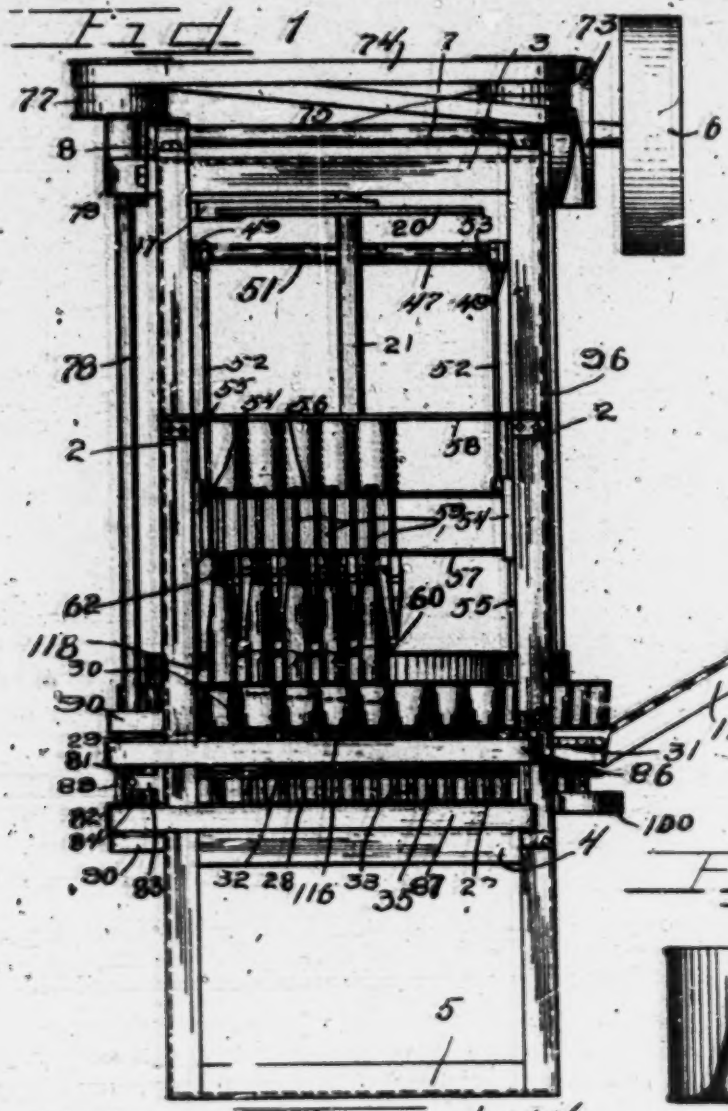

Fig. 17

Fig. 14

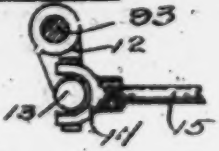

Fig. 15

Witnesses

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472

W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISCUITS.

APPLICATION FILED JAN. 20, 1906.

949,013. Patented Feb. 15, 1910.

6 SHEETS—SHEET 2

Fig. 2.

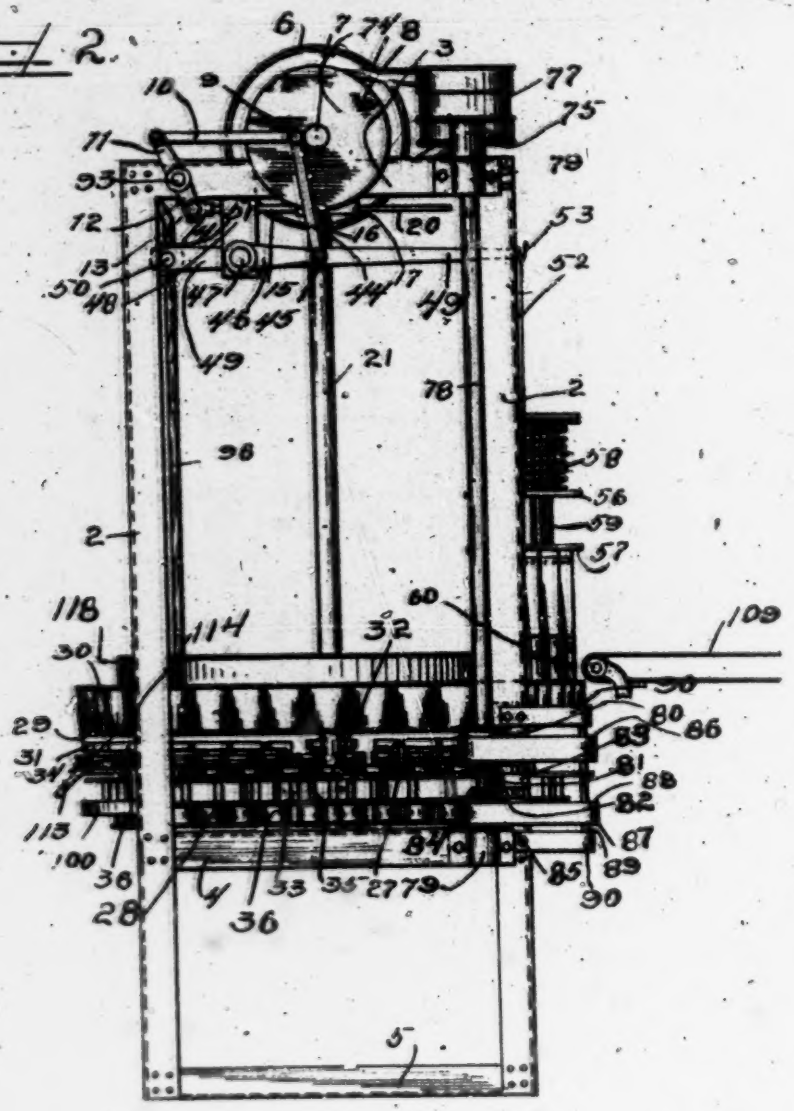
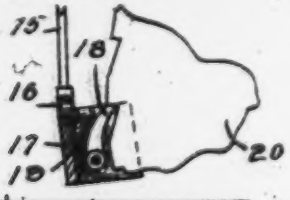


Fig. 13.



Witnesses

J. H. Angell.

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474

W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISCUITS.

APPLICATION FILED JAN. 29, 1909.

949,013. Patented Feb. 15, 1910.

6 SHEETS—SHEET 3.

Fig. 3

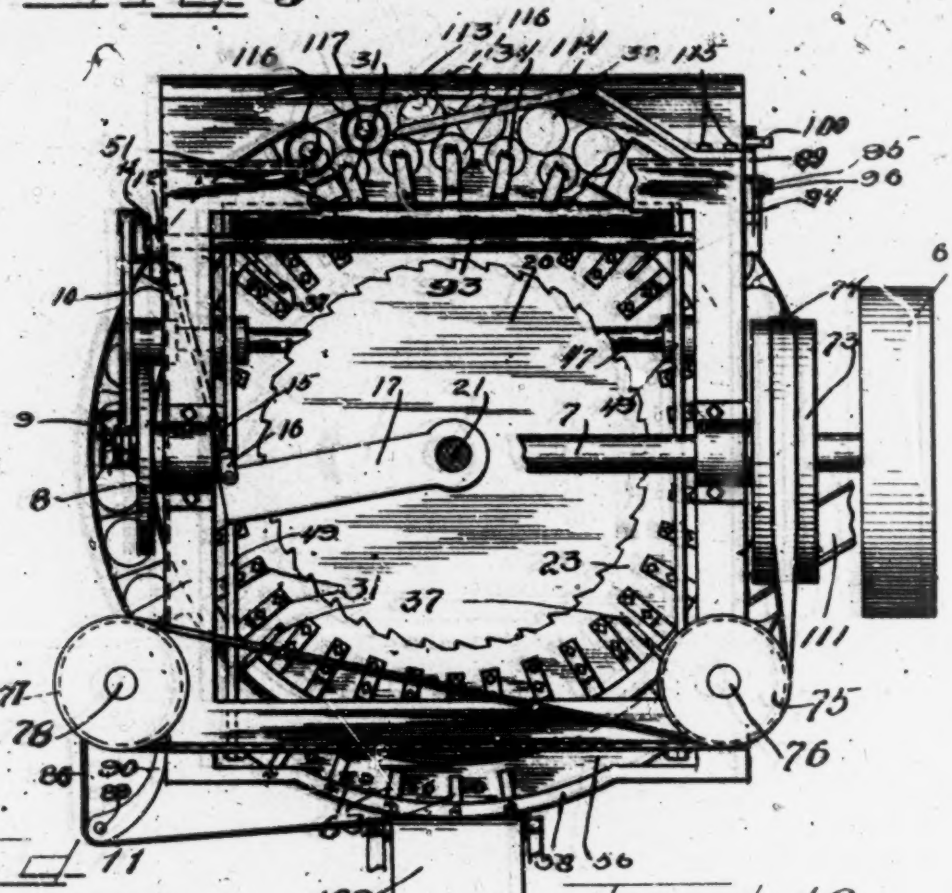


Fig. 11

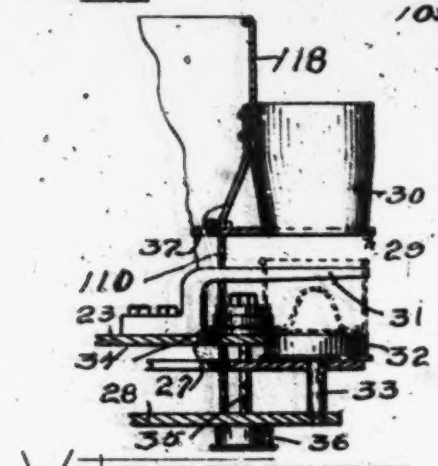
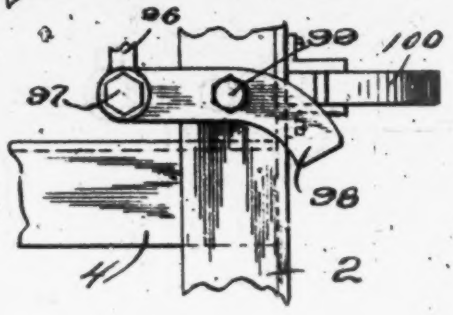


Fig. 12



Witnesses

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W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISCUITS.

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6 SHEETS—SHEET 4.

Fig. 4

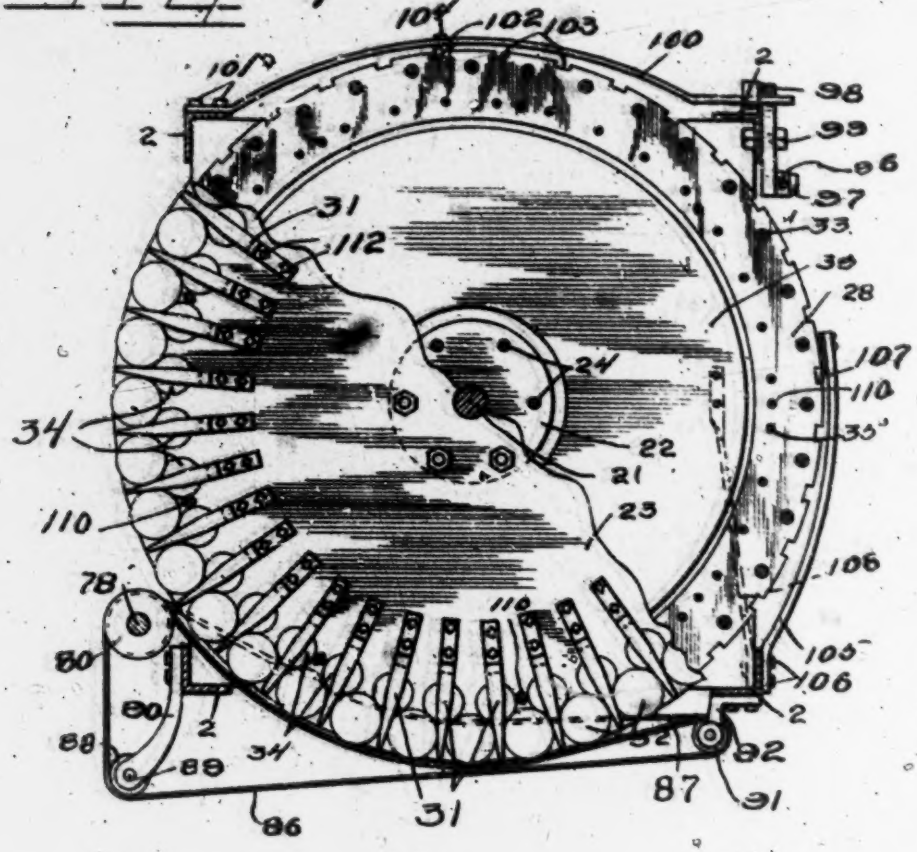
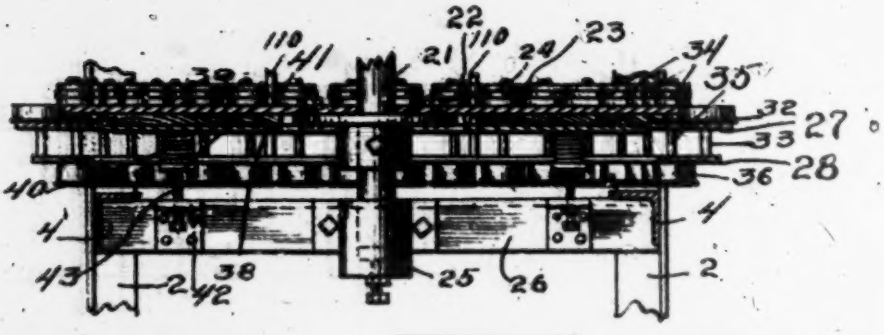


Fig. 5



Witnesses

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478

W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISCUITS.

APPLICATION FILED JAN. 29, 1906.

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6 SHEETS—SHEET 5.

Fig. 6

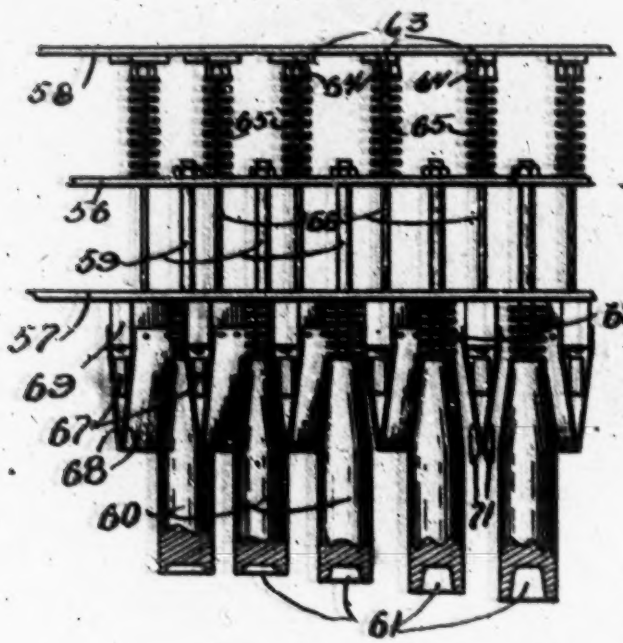


Fig. 7

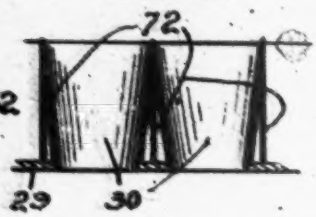


Fig. 8

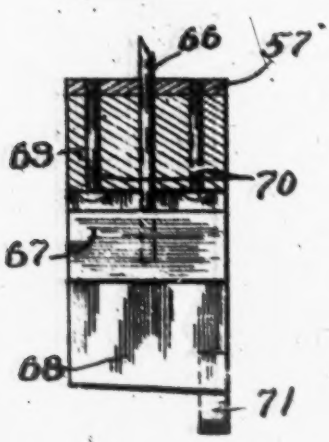
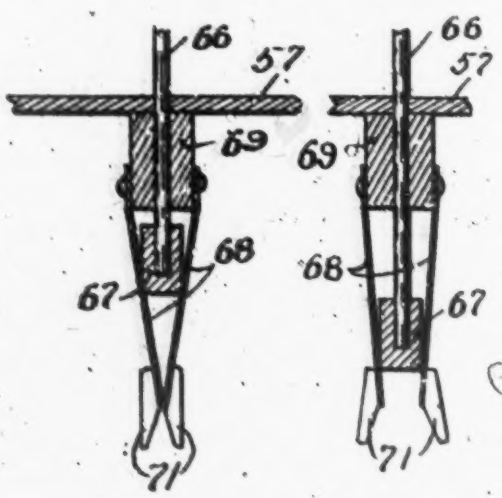


Fig. 9. Fig. 16



Witnesses

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480

W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISCUITS.

APPLICATION FILED JAN. 20, 1908.

949,013. Patented Feb. 15, 1910.

6 SHEETS—SHEET 6.

Fig. 18

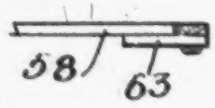
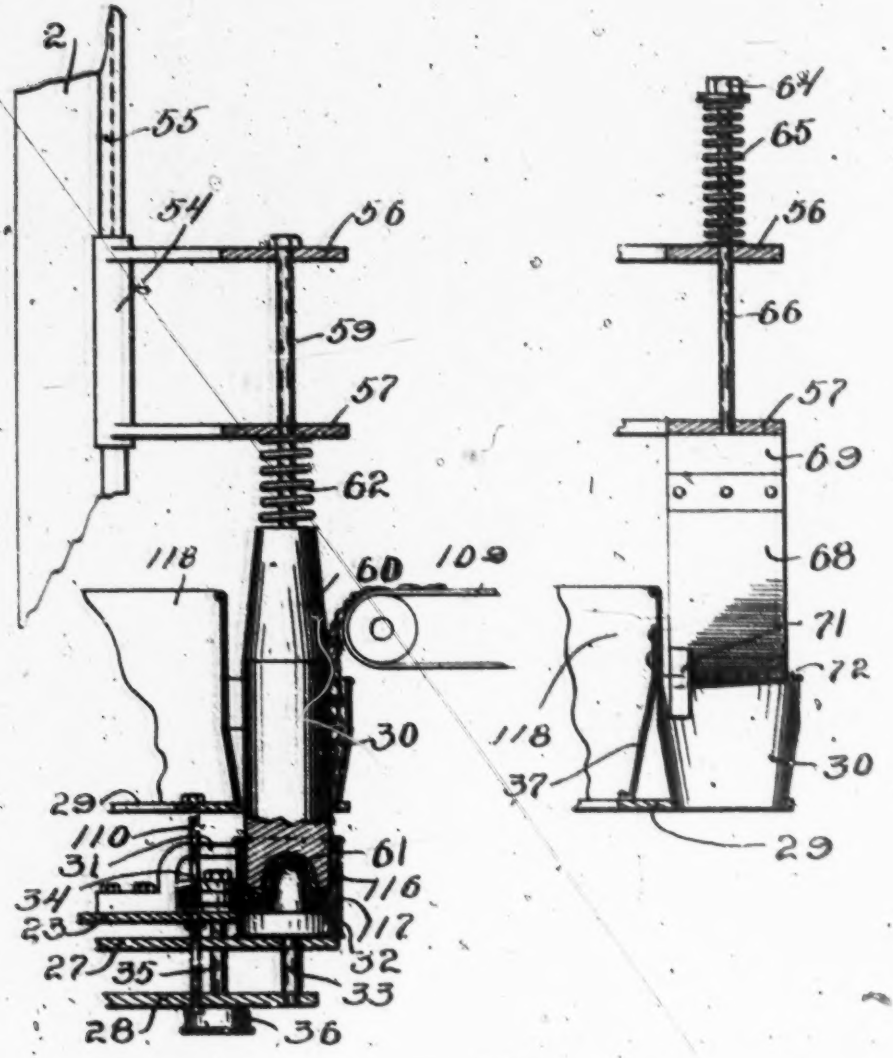


Fig. 10



Witnesses

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J. M. LaRue

Inventor

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by Macleod Hanna

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UNITED STATES PATENT OFFICE.

WILLIAM ERASTUS WILLIAMS, OF CHICAGO, ILLINOIS.

MACHINE FOR MAKING SHREDDED-WHEAT BISCUITS.

949,013. Specification of Letters Patent. Patented Feb. 15, 1910.

Application filed January 29, 1908. Serial No. 413,879.

To all whom it may concern:

Be it known that I, WILLIAM ERASTUS WILLIAMS, a citizen of the United States, residing at Chicago, in the county of Cook and the State of Illinois, have invented a new and useful Improvement in Machines for Making Shredded-Wheat Biscuits, of which the following is a specification.

This invention has for its object to make automatically a cup shaped biscuit or a round biscuit out of any shredded or fibrous material such as shredded wheat, grain, codfish or any other suitable material.

Reference will be had to the accompanying drawings in which:

Figure 1 is a vertical elevation of the machine on the side at which it receives the material that it operates upon to form the cup-shaped biscuits. Fig. 2 is a vertical elevation corresponding to the left side of Fig. 1. Fig. 3 is a top plan view with certain parts broken away to show those below. Fig. 4, is a plan sectional view with parts broken away as will be understood by reference to the corresponding parts in Figs. 1 and 2. Fig. 5 is a vertical sectional detail of certain parts of the base of the machine. Fig. 6 is a vertical detail of the packing plungers. Fig. 7 is a vertical detail of the receiving hoppers for the shreds. Fig. 8 is a sectional detail of one of the cutting plungers. Fig. 9 is a view similar to that of Fig. 8 but at right angles thereto. Fig. 10 is a vertical sectional view through the axis of the delivery belt. Fig. 11, on the same sheet with Fig. 3, is a vertical sectional detail. Fig. 12 (Sheet 3) is a vertical detail of the locking mechanism. Fig. 13 (Sheet 2) is a plan detail of the ratchet movement that drives parts of the mechanism. Figs. 14 and 15 on Sheet 1 are details that will be described later. Fig. 16 is a detail of the cutting plungers. Fig. 17 is a sectional view of the cups or forms. Fig. 18 is a detail view of a certain cross bar and blocks shown also in Figs. 3 and 6.

The machine is provided with a suitable frame made of members of angle section, 2, 3, 4, 5, and 26.

Fig. 17 is a cup or form into which the shreds are placed by the machine and which holds them till they are baked or dried and thereby set sufficiently to keep the shape given them by the form. This cup or form 116 is provided with a cone shaped central projection 117 in its bottom, around and over which the shreds are placed by the machine in an interlacing manner extending upward, downward and obliquely of the cone shaped bottom and at the same time in a general direction around the cup and also inward and outward from the center toward the rim whereby the biscuit thus formed is bound together and yet the shreds are not packed tightly but left open and interstitial. The cups 116 are usually made of tin and are supplied to the machine from a magazine not shown, by a chute 111 and the function of the machine is chiefly to handle these cups and pack the material therein which material is delivered to the machine by the moving carrier belt 109 coming from a shredding machine or other suitable source of supply of the shreds. The shreds lying, as nearly as practicable, lengthwise of the carrier belt are discharged endwise into the hoppers 30 of the machine which hoppers 30 are arranged in a ring supported on a ring shaped disk 29 forming a part of a wheel carried on a vertical shaft 21. The hoppers 30 are spaced apart in the ring the right distance to suit the size of the cups 116 whereby the wheel carrying the hoppers 30 may receive a continuous line of cups 116 from the chute 111 and hold the cups 116 apart from each other by fingers 31 which are fastened by screws 112 to a plate 23 which is the main plate or body of the wheel and to which many other parts are fastened, which plate is fixed by screws 24 to a flange, 22, Fig. 4 fixed to shaft 21 supported in a step bearing 25 on cross member 26 of frame. The cups 116 are thus carried around by the wheel underneath the delivery of the carrier belt 109 and while underneath the said delivery receive a sufficient quantity of shreds to form the biscuits desired and are finally discharged by an arm 114 fixed by screws 115 to the frame 2 of the machine. A guide plate 113 directs the discharged cups into any suitable receiving device. The cups 116 are revolved during the time that they receive the shreds in order to interlace the shreds and to do this revolving there are provided rotating disks 32 upon which the cups 116 set as they are carried around by the wheel. These disks are seated in cavities in plate 23, and are supported by spindles 33 journaled in a lower disk ring 28 and also supported in an upper disk ring 27, both of which rings, 27 and 28, are fixed by studs 110 to plate 23. At the back of disks 32 and

above the plate 23 there are rollers 34 so arranged as to location that they engage the cups 116 as they set concentrically upon disks 32 and these rollers 34 are fixed upon shafts 35, journaled in plates 23, 27 and 28, and carrying drive pulleys 36 which are driven by a belt 37. A belt 86 engages the disks 32 and the cups 116 themselves so that the cups are engaged on the bottom and at 3 points on their sides by driving members so that they revolve during the time that they receive the shreds.

The shreds of grain are light and are usually long sometimes almost continuous strings, so that they do not drop readily into the cups 116 but must be forced down into place, and this is accomplished by a series of plungers or packers 60 mounted upon a vertically reciprocating cross head composed of the plates 56 and 57 connected together by members 54 which engage the guides 55 fastened to frame 2. The wheel which carries the cups is given an intermittent movement which permits the plungers 60 to descend into the cups 116 and force the shreds down out of the hoppers 30 into the cups or forms in the proper form desired and the ends of the plungers 60 are provided with cavities 61, which are so shaped as to give the proper form to the shreds in the cups at each stage of the filling of the same, the delivery belt 109 being wide enough to deliver into several hoppers 30 and cups 116 simultaneously and as the wheel moves by impulses the distance of one full space of a cup at a time each cup will receive several impacts of the plungers while being filled and some of the plungers are located beyond the points of delivery of the shreds to the cups to give a finish to the shape of the shreds in the cup which shreds are then properly biscuits. The plungers 60 are made round or cylindrical and engage the shreds on all sides of the central cone of the cup, at the same time preventing the drawing up of the shreds over the top of the cone on one side while they are being pushed down on the other side.

Since the shreds are often continuous strings and the supply on the carrier 109 is endless the shreds will extend over the top of one hopper 30 into that of its neighbor owing to the moving of the wheel carrying the hoppers past the points of delivery of the shreds to them. And to cut these shreds clear from hopper to hopper there are provided cutting walls 72 between the hoppers 30 and coacting therewith there are reciprocating cutting plungers composed of the cutting plates 68 fastened to blocks 69 which are fastened by screws 70 to plate 57 of cross head before mentioned that carries the packing plungers 60. The plates 68 on the descent of the cross head embrace each side wall 72 of hoppers 30 and thereby cut and force down into hoppers any shreds that hang over the division walls 72 of the hoppers.

In the cutting of the shreds by the plungers as described some shreds will stick to the plates 68 and be lifted up as the plungers rise and to free these shreds there are provided the blocks 67 mounted upon rods 66 which slide through the plates 56 and 57 and terminate in a nut or cap 64 against which a spring 65 resting on plate 56 keeps blocks 67 in an upper position at all times save only when the cross head is at its upward limit of travel when the nuts or caps 64 engage fixed blocks 63 mounted upon a fixed cross bar 58 and thereby the blocks 67 are forced downward between plates 68 spreading them apart and stripping the shreds off their ends. (See Fig. 16.) On the return downward of the plungers the springs 65 withdraw blocks 67 to a normal position as shown in Fig. 9.

The inside lower corners of plates 68 of cutting plungers are provided with guide blocks 71 which insures proper registry of the cutting plungers with the cutting walls 72 of the hoppers to allow slight variations in the registry of the hoppers at each impulse of movement of the wheel carrying them.

The plungers or packers 60 are mounted upon rods 59 sliding in plates 56 and 57 of the cross head and springs 62 acting between the plungers 60 and plate 57 provide for an elastic contact with the shreds in the cups 116, preventing too great a mashing of the shreds in the cups and also insures against breaking the parts in the event of a derangement of the timing of the machine.

The machine is driven by a belt wheel 6 driving a shaft 7 which carries a crank plate 8 carrying a wrist pin 9 connected by a rod 10, to an arm 11, mounted upon a rocker shaft 93 supported by boxes fixed to frame 2 and rocker shaft 93 carries an arm 12 provided with a wrist pin 13 carrying a universal joint 14 connected by a rod 15 to a joint 16 on a rocker arm 17 journaled on vertical shaft 21 (on which is mounted the cup carrier wheel) and provided with a pawl 18 held by a spring 19 into contact with ratchet teeth of a large ratchet 20 whereby on each revolution of the belt wheel an impulse equaling the distance of one cup on the carrier wheel is given the cup carrying wheel and its parts. The impulses given the cup carrying wheel are quick and jerky and to insure close registration of the hoppers and cups with the packing and cutting plungers there is provided a locking catch or stop 102 (Fig. 4) fixed at 104 to a spring arm 100 screwed at 101 to frame 2 and this catch or stop 102 engages notches 103 in ring 28 and is released therefrom at the beginning of each movement of carrier

wheel by a cam block 98 (see Fig. 12), mounted upon a pin 99 and connected at 97 to a rod 96 connected to a wrist pin 95 in an arm 94 fixed on rocker shaft 93. Whereby at the back stroke of pawl arm 17 the catch 102 is released from the notches 103 in plate 28 of the carrier wheel then on the forward movement of arm 17 during which the carrier wheel is moving the catch 102 is allowed to come into engagement with notches 103 in time to prevent the movement of the wheel carrying it too far. Backlash is prevented by another spring catch 107 on arm 105 fixed at 106 to frame 2 and this catch is disengaged by the movement of the wheel itself.

The shock of stopping the carrier wheel is lessened by means of a friction disk brake 38 having friction blocks 39 placed up against the under side of the wheel plate 23 and held in elastic adjustment thereto by the springs 40 resting on blocks 41 and screws 43 in blocks 42 (see Figs. 4 and 5), and the disk is held against rotation by arms 108 shown only in dotted lines in Fig. 4. Thus by the above disk brake the wheel is prevented from too free a movement thereby saving some of the shock of stopping it.

The cross head carrying packing plungers and cutting plungers is vibrated by the former mentioned wrist pin 9 connected by a link 44 to a wrist pin 45 of an arm 46 connected to a rocker shaft 47 mounted in suitable bearings 48 fixed to frame of machine and rocker shaft 47 carries arms 49 connected at 53 to rods 52 connected to the cross head before mentioned. Consequently on each impulse of the cup carrying wheel the plungers descend to pack the material and cut it at the division walls of the hoppers. The plunger cross head is counter balanced on the rocker shaft 47 by a weight 51 fastened at 50 to arms 49.

Motion is given to the belts 86 and 87 by means of the belt wheel 73 engaging and driving the belt 74 which is trained around two guide pulleys 75 on a shaft 76 over a pulley 77 on a vertical shaft 78 which is supported in bearings 79 and carries a fixed pulley 85 on its lower end and also a bevel gear 84 which gear engages a gear 82 mounted upon a stud 83 and running idle thereon and engaging a gear 81 fixed to a pulley 80 which is loosely mounted on shaft 78 whereby shaft 78 drives pulley 85 in one direction and pulley 80 in an opposite direction.

The belt 86 before mentioned passes around pulley 80 and then over an idler 88 on a stud 89 in brackets 90, then around a pulley 91 supported by brackets 92 and then back along the carrier wheel rim engaging the tin cups or forms 116 and disks 32 and thereby rotating them back to and around the pulley 80 as described. The belt 87 passes around the pulley 85, then over an idler 88 on stud 89 before mentioned, then around another idler supported in brackets 92 before mentioned and then back in contact with and rotating pulleys 36 thereby rotating rollers 34 and thence back to pulley 84 as mentioned. Thus as the carrier wheel presents the cups to be filled with shreds to form biscuits it brings the cups into contact with the belts as above described which revolve the cups all the time that they are receiving the shreds.

The hoppers 30 are connected to back flange plate 118 held down to ring 29 by rods 37 and this plate 118 prevents the discharge of the shreds from the delivery belt 109 beyond the hopper 30.

What I claim is:

1. In a machine of the class described, the combination of movable forms or molds in which the biscuits are molded, a carrier for the forms, devices for revolving the forms while in the carrier, a source of supply of the shreds delivering to the forms or molds, hoppers directing the shreds from the source of supply into the forms or molds, circular packing plungers for forcing the shreds into the forms, cutting devices for cutting the shreds between the hoppers and forms, packing plungers for giving shape to the biscuits after the required mass of shreds has been delivered to the forms, and discharging devices for discharging the forms containing the biscuits from the carrier.

2. In a machine of the class described, the combination of movable forms or molds in which the biscuits are molded, a carrier for the forms, devices for revolving the forms while in the carrier, a source of supply of the shreds delivering to the forms or molds, hoppers directing the shreds from the source of supply into the forms of molds, packing plungers for forcing the shreds into the forms, cutting devices for cutting the shreds between the hoppers and forms, packing plungers for giving shape to the biscuits after the required mass of shreds have been delivered to the forms, and discharging devices for discharging the forms containing the biscuits from the carrier.

3. The combination of forms for the biscuits to be made, a carrier for the forms, devices for automatically delivering the forms to the carrier, devices for giving the carrier an intermittent motion, a source of supply for the shreds, devices engaging the forms on the bottom and two sides to revolve them during the filling, reciprocating packing plungers for packing the shreds in the forms, reciprocating cutting plungers for cutting the shreds from the source of supply, and devices for removing the forms from the carrier.

4. The combination of molds for receiving the shreds, a carrier for the molds, hoppers mounted to move in time with the car-

rier for directing the shreds into the molds, reciprocating packing plungers passing down through the hoppers and packing the material into the molds, reciprocating cutting plungers for cutting the shreds between the molds, and discharging devices for removing the molds from the carrier.

The combination of a mold carrier, hoppers mounted to move with the carrier, and division walls between the molds adapted to coact with a reciprocating plunger in cutting the shreds between the molds.

6. The combination of, a mold carrier, a series of hoppers adapted to move with the carrier and direct the supply of shreds to the molds, division walls between the hoppers adapted to coact with a reciprocating cutting plunger for cutting the shreds between the hoppers, and reciprocating plungers forcing the material into the molds simultaneously with the cutting of the shreds between the molds.

7. The combination of a carrier holding molds or pockets into which the shreds are deposited, division walls between the molds on the carrier, means for packing the material into the molds of the carrier, and reciprocating cutting plungers cutting the material at the division walls between the molds and means for revolving the molds.

8. The combination of a carrier wheel having pockets or receptacles for receiving material to be handled, devices for moving the carrier wheel intermittingly, locking devices for locking the wheel in exact registration at each impulse of movement, reciprocating packing plungers engaging the material in the pockets at each impulse of the wheel, and cutting devices for cutting the material between the pockets at the time that the wheel is at rest.

9. The combination of, a carrier for forms, said carrier provided with a seat for each form, each seat adapted to revolve and carry the form with it, rolls mounted adjacent to the seat and adapted to engage the form on the seat and assist in revolving the same, a source of supply for the material and means for moving the carrier with the forms across the source of supply.

10. The combination, of a carrier for forms, seats upon the carrier for holding the forms, said seats adapted to be revolved, rollers engaging the forms on the seats, and belts for revolving the rollers and forms.

11. The combination of a carrier for forms, seats upon the carrier for holding the forms and adapted to be revolved, rollers adapted to revolve the forms upon the carrier, belts for driving the rollers, seats and the forms, and reciprocating packing plungers for packing the material in the forms while the same are upon the seats.

12. The combination of a carrier carrying forms across a source of supply of material, reciprocating packing plungers packing the material while it is coming from the source of supply and reciprocating cutting plungers for cutting the material between the forms, said packing and cutting plungers mounted upon the same moving cross head substantially as shown.

13. The combination of, a seat for holding a form, two rollers located above the seat and adjacent thereto whereby the said rollers may act upon a form located upon the seat, a belt passing on one side of the seat and engaging the seat and form located thereon and thereby holding the form back against the rollers, pulleys on the shafts of the rollers, a belt for driving the pulleys, and means for driving the belts.

14. The combination of a seat for holding a form, two rollers located above the seat and adjacent thereto whereby the said rollers may act upon a form located upon the seat, a belt passing on one side of the seat and engaging the seat and form located thereon and thereby holding the form back against the rollers, pulleys on the shafts of the rollers and a belt for driving the pulleys, means for driving the belts, and reciprocating packing plungers for packing the material in the forms.

15. The combination of a seat for holding a form, two rollers located above the seat and adjacent thereto whereby the said rollers may act upon a form located upon the seat, a belt passing on one side of the seat and engaging the seat and form located thereon and thereby holding the form back against the rollers, pulleys on the shafts of the rollers and a belt for driving the pulleys, means for driving the belts, reciprocating packing plungers for packing the material in the forms, and reciprocating cutting plungers for cutting the material between the forms.

16. The combination of a seat for holding a form, two rollers located above the seat and adjacent thereto whereby the said rollers may act upon a form located upon the seat, a belt passing on one side of the seat and engaging the seat and form located thereon and thereby holding the form back against the rollers, pulleys on the shafts of the rollers and a belt for driving the pulleys, means for driving the belts, reciprocating packing plungers for packing the material in the forms, reciprocating cutting plungers for cutting the material between the forms, and an ejecting device for removing the forms from the carrier.

17. The combination of a carrier for carrying movable forms across or past a point of delivery of the shreds, seats upon the carrier for holding movable forms, said seats adapted to revolve and hold a single form, fingers moving with the carrier and separating the forms from each other, rollers

mounted adjacent to the seats one for each form but located on a line between the seats and forms and of such diameter that each roller is adapted to engage two forms one on each adjacent seat, and means for revolving the seats and the rollers and thereby the forms.

18. The combination of a carrier for carrying movable forms across or past a point of delivery of the shreds, seats upon the carrier for holding movable forms, said seats adapted to revolve and hold a single form, fingers moving with the carrier and separating the forms from each other, rollers mounted adjacent to the seats one for each form but located on a line between the seats and forms and of such diameter that each roller is adapted to engage two forms one on each adjacent seat, means for revolving the seats and the rollers and thereby the forms, and means for packing the material in the forms and for cutting it between the forms.

19. The combination of a carrier for carrying movable forms across or past a point of delivery of the shreds, seats upon the carrier for holding movable forms, said seats adapted to revolve and hold a single form, fingers moving with the carrier and separating the forms from each other, rollers mounted adjacent to the seats one for each form, but located on a line between the seats and forms and of such diameter that each roller is adapted to engage two forms one on each adjacent seat, means for revolving the seats and the rollers and thereby the forms, means for packing the material in the forms and for cutting it between the forms, and means for ejecting the forms from the carrier.

20. The combination of a carrier carrying forms that are to give shape to the biscuits, seats carried with the carrier for holding the forms, means for revolving the seats and forms, fingers moving with the carrier for separating the forms from each other, hoppers moving with the carrier for directing the material into the forms, and reciprocating packing plungers for packing the material into the forms.

21. The combination of a carrier carrying forms that are to give shape to the biscuits seats carried with the carrier for holding the forms, means for revolving the seats and forms, fingers moving with the carrier for separating the forms from each other, hoppers moving with the carrier for directing the material into the forms, reciprocating packing plungers for packing the material into the forms, and reciprocating cutting plungers for cutting the material between the forms.

22. The combination of a carrier carrying forms that are to give shape to the biscuits, seats carried with the carrier for holding the forms, means for revolving the seats and forms, fingers moving with the carrier for separating the forms from each other, hoppers moving with the carrier for directing the material into the forms, reciprocating packing plungers for packing the material into the forms, reciprocating cutting plungers for cutting the material between the forms, and devices for ejecting the filled forms from the machine.

23. The combination of a carrier carrying forms that are to give shape to the biscuits, seats carried with the carrier for holding the forms, means for revolving the seats and forms, fingers moving with the carrier for separating the forms from each other, hoppers moving with the carrier for directing the material into the forms, reciprocating packing plungers for packing the material into the forms, reciprocating cutting plungers for cutting the material between the forms, devices for ejecting the filled forms from the machine, with means for giving the carrier an intermittent motion.

24. The combination of a carrier carrying forms, that are to give shape to the biscuits, seats carried with the carrier for holding the forms, means for revolving the seats and forms, fingers moving with the carrier for separating the forms from each other, hoppers moving with the carrier for directing the material into the forms, reciprocating packing plungers for packing the material into the forms, reciprocating cutting plungers for cutting the material between the forms, devices for ejecting the filled forms from the machine, with means for giving the carrier an intermittent motion, said revolving means for the seats and forms revolving the same all the time that the forms are filling.

25. The combination of a carrier carrying forms to be filled across a source of supply of the shreds, hoppers located above the source of supply, division walls between the hoppers, and reciprocating cutting plungers composed of two members adapted to embrace the division wall on each side simultaneously and thereby strip the material from each side of the division wall.

26. The combination of a carrier carrying forms to be filled across a source of supply of the shreds, hoppers located above the source of supply, division walls between the hoppers, reciprocating cutting plungers composed of two members adapted to embrace the division wall on each simultaneously and thereby strip the material from each side of the division wall, and reciprocating packing plungers acting on the material simultaneously with the cutting.

27. The combination of a carrier carrying forms to be filled across a source of supply of the shreds, hoppers located above the source of supply division walls between the hoppers, reciprocating cutting plungers com-

posed of two members adapted to embrace the division wall on each side simultaneously and thereby strip the material from each side of the division wall, and guide blocks located on the plates of the cutting plungers whereby close registration with the division walls of the hoppers is secured.

28. The combination of a carrier carrying forms to be filled across a source of supply of the shreds, hoppers located above the source of supply division walls between the hoppers, reciprocating cutting plungers composed of two members adapted to embrace the division wall on each side simultaneously and thereby strip the material from each side of the division wall, and a stripper block for stripping the material from the plungers when the same retreat from the cutting.

29. The combination of forms to be filled, a source of supply for filling the material into the forms, a reciprocating cutting plunger for cutting the material between the forms, and a stripper for stripping the material from the cutting plunger which stripper is held normally out of action by a spring but is actuated positively at the upward limit of the plunger.

30. The combination of forms for receiving the material, a source of supply of the material, plungers for packing the material into the forms mounted in a manner to apply an elastic impact to the material, and plungers for cutting the material between the forms.

31. The combination of forms for receiving the material, a source of supply of the material, plungers for packing the material into the forms mounted in a manner to apply an elastic impact to the material, plungers for cutting the material between the forms, and hoppers for directing the material to the forms.

32. The combination of forms for receiving the material, a source of supply of the material, plungers for packing the material into the forms mounted in a manner to apply an elastic impact to the material, plungers for cutting the material between the forms, hoppers for directing the material to the forms, and means for revolving the forms.

33. The combination of forms for receiving the material, a source of supply of the material, plungers for packing the material into the forms mounted in a manner to apply an elastic impact to the material, plungers for cutting the material between the forms, hoppers for directing the material to the forms, and means for revolving the forms, said packing plungers made cylindrical and engaging the material on all sides of the form at the same time.

34. The combination of forms for receiving the shreds, a carrier for the forms, means for revolving the forms, packing plungers for packing the material in the forms, said plungers mounted to give an elastic impact to the material in the forms, said plungers made cylindrical in form, whereby they act on all sides of the material simultaneously.

35. The combination of forms for receiving the shreds, a carrier for the forms, means for revolving the forms, packing plungers for packing the material in the forms, said plungers mounted to give an elastic impact to the material in the forms, said plungers made cylindrical in form whereby they act on all sides of the material simultaneously, and reciprocating cutting devices for cutting the material between the forms.

36. The combination of forms for receiving the shreds, a carrier for the forms, means for revolving the forms, packing plungers for packing the material in the forms, said plungers mounted to give an elastic impact to the material in the forms, said plungers made cylindrical in form whereby they act on all sides of the material simultaneously, reciprocating cutting devices for cutting the material between the forms, with devices for discharging the forms from the carrier.

37. The combination of a carrier carrying forms to be filled, a source of supply of material, devices for giving the carrier an intermittent motion, devices for locking the carrier at each impulse of motion with a brake for preventing excess movement of the carrier.

38. The combination of a carrier wheel for carrying forms to be filled, a source of supply of shreds, a ratchet movement for moving the wheel, a locking device for preventing excess movement of the wheel, reciprocating plungers for packing the material in the forms, and reciprocating cutting plungers for cutting the material between the forms.

39. The combination of a carrier wheel for carrying forms to be filled, a source of supply of shreds a ratchet movement for moving the wheel, a locking device for preventing excess movement of the wheel, reciprocating plungers for packing the material in the forms, reciprocating cutting plungers for cutting the material between the forms, and a discharging device for removing the forms from the carrier.

40. The combination of a vertical shaft, a carrier for forms carried by the vertical shaft, a horizontal shaft to which is applied the source of power, a ratchet wheel on the vertical shaft and a pawl moved by the horizontal shaft for moving the ratchet and vertical shaft and carrier, and cutting plungers mounted upon the vibrating cross head.

41. The combination of a vertical shaft, [illegible]

a carrier for forms carried by the vertical shaft, a horizontal shaft to which power is applied, a ratchet wheel on the vertical shaft and a pawl moved by the horizontal shaft for moving the ratchet and vertical shaft and carrier, cutting plungers mounted upon the vibrating cross head, and means for revolving the forms carried by the carrier.

42. The combination of a vertical shaft, a carrier for forms carried by the vertical shaft, a horizontal shaft to which power is applied, a ratchet wheel on the vertical shaft and a pawl moved by the horizontal shaft for moving the ratchet and vertical shaft and carrier, cutting plungers mounted upon the vibrating cross head, and a secondary vertical shaft actuated from the horizontal shaft for revolving the forms carried by the carrier.

43. The combination of a vertical shaft, a carrier for forms carried by the vertical shaft, a power driven horizontal shaft, a ratchet wheel on the vertical shaft and a pawl moved by the horizontal shaft for moving the ratchet and vertical shaft and carrier, cutting plungers mounted upon the vibrating cross head, a secondary vertical shaft actuated from the horizontal shaft for revolving the forms carried by the carrier, and pulleys and belts driven from the secondary shaft for revolving the forms.

44. The combination of a vertical shaft, a carrier for forms carried and moved by the shaft, fingers division walls or pockets on the carrier for separating the forms, means for giving the vertical shaft and carrier an intermittent motion, means for locking the same at determined point, a source of supply for the material to be filled into the forms, and means for cutting the material between the forms.

45. The combination of a vertical shaft, a carrier for forms carried and moved by the shaft, fingers division walls or pockets on the carrier for separating the forms, means for giving the vertical shaft and carrier an intermittent motion, means for locking the same at determined points, a source of supply for the material to be filled into the forms, means for cutting the material between the forms, and means for ejecting the forms from the carrier.

46. The combination of a vertical shaft, a carrier for forms carried and moved by the shaft, fingers division walls or pockets on the carrier for separating the forms, means for giving the vertical shaft and carrier an intermittent motion, means for locking the same at determined points, a source of supply for the material to be filled into the forms, means for cutting the material between the forms and means for revolving the forms while being filled.

47. The combination of a vertical shaft, a carrier for forms carried and moved by the shaft, fingers division walls or pockets on the carrier for separating the forms, means for giving the vertical shaft and carrier an intermittent motion, means for locking the same at determined point, a source of supply for the material to be filled into the forms, means for cutting the material between the forms, means for revolving the forms while being filled, and means for ejecting the forms from the carrier.

48. The combination of a carrier for carrying movable forms a source of supply for the forms, a source of supply for the material to be filled into the carrier forms, means for revolving the forms, while receiving the material, said revolving means actuating the forms during a part only of the time that said forms are in the carrier and said revolving means composed of belts that are automatically engaged and disengaged by the movement of the carrier, with a fixed arm discharging the forms automatically by the movement of the carrier when the same arrives at a given point of its carriage.

49. The combination of a carrier wheel for forms, actuated and carried, by a vertical shaft, a horizontal driving shaft connected to drive the vertical shaft and wheel through the medium of a ratchet and pawl movement, a rocker shaft driven by the horizontal shaft for driving the ratchet and pawl movement of the vertical shaft, locking devices connected to the rocker shaft for locking and unlocking the carrier wheel as driven by the ratchet movement.

50. The combination of a carrier wheel for forms actuated and carried by a vertical shaft, a horizontal driving shaft connected to drive the vertical shaft and wheel through the medium of a ratchet and pawl movement, a rocker shaft driven by the horizontal shaft for driving the ratchet and pawl movement of the vertical shaft, locking devices connected to the rocker shaft for locking and unlocking the carrier wheel as driven by the ratchet movement, and a secondary rocker shaft driven from the horizontal shaft for actuating a reciprocating cross head carrying packing plungers adapted to engage the material in the forms carried by the carrier.

51. The combination of a horizontal carrier for forms, composed of a wheel, a vertical shaft mounted in a suitable frame for carrying the wheel, hoppers mounted upon the wheel and moving therewith, revolving seats mounted below the hoppers and carried with the wheel, and a belt mounted to engage a section of said wheel's periphery and revolve the forms by the movement of the belt, said belt engaging successively the forms as the same are brought in contact with it by the movement of the wheel.

52. The combination of a horizontal car-

rier for forms composed of a wheel a vertical shaft mounted in a suitable frame for carrying the wheel, hoppers mounted upon the wheel and moving therewith, revolving seats mounted below the hoppers and carried with the wheel a belt mounted to engage a section of said wheel's periphery and revolve the forms by the movement of the belt, said belt engaging successively the forms as the same are brought in contact with it by the movement of the wheel, and a discharge mechanism for discharging the forms from the wheel by the movement of the wheel.

53. The combination of a horizontal carrier for forms composed of a wheel, a vertical shaft mounted in a suitable frame for carrying the wheel, hoppers mounted upon the wheel and moving therewith, revolving seats mounted below the hoppers and carried with the wheel a belt mounted to engage a section of said wheel's periphery and revolve the forms by the movement of the belt, said belt engaging successively the forms as the same are brought in contact with it by the movement of the wheel, and reciprocating packing plungers packing the material out of the hoppers into the forms.

54. The combination of a horizontal carrier for forms composed of a wheel, a vertical shaft mounted in a suitable frame for carrying the wheel, hoppers mounted upon the wheel and moving therewith, revolving seats mounted below the hoppers and carried with the wheel a belt mounted to engage a section of said wheel's periphery and revolve the forms by the movement of the belt, said belt engaging successively the forms as the same are brought in contact with it by the movement of the wheel, reciprocating packing plungers packing the material out of the hoppers into the forms, and reciprocating cutting plungers for cutting the material between the forms.

55. The combination of a horizontal carrier for forms composed of a wheel, a vertical shaft mounted in a suitable frame for carrying the wheel, hoppers mounted upon the wheel and moving therewith, revolving seats mounted below the hoppers and carried with the wheel a belt mounted to engage a section of said wheel's periphery and revolve the forms by the movement of the belt, said belt engaging successively the forms as the same are brought in contact with it by the movement of the wheel, reciprocating packing plungers packing the material out of the hoppers into the forms, and reciprocating cutting plungers for cutting the material between the forms.

In witness whereof I have hereunto signed my name on this 23rd day of January, 1908.

WILLIAM BRASTUS WILLIAMS.

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MACHINE AND METHOD FOR MANUFACTURING SHREDDED WHEAT CUP BISCUITS.

APPLICATION FILED SEPT. 17, 1909.

991,584. Patented May 9, 1911.

Fig 1

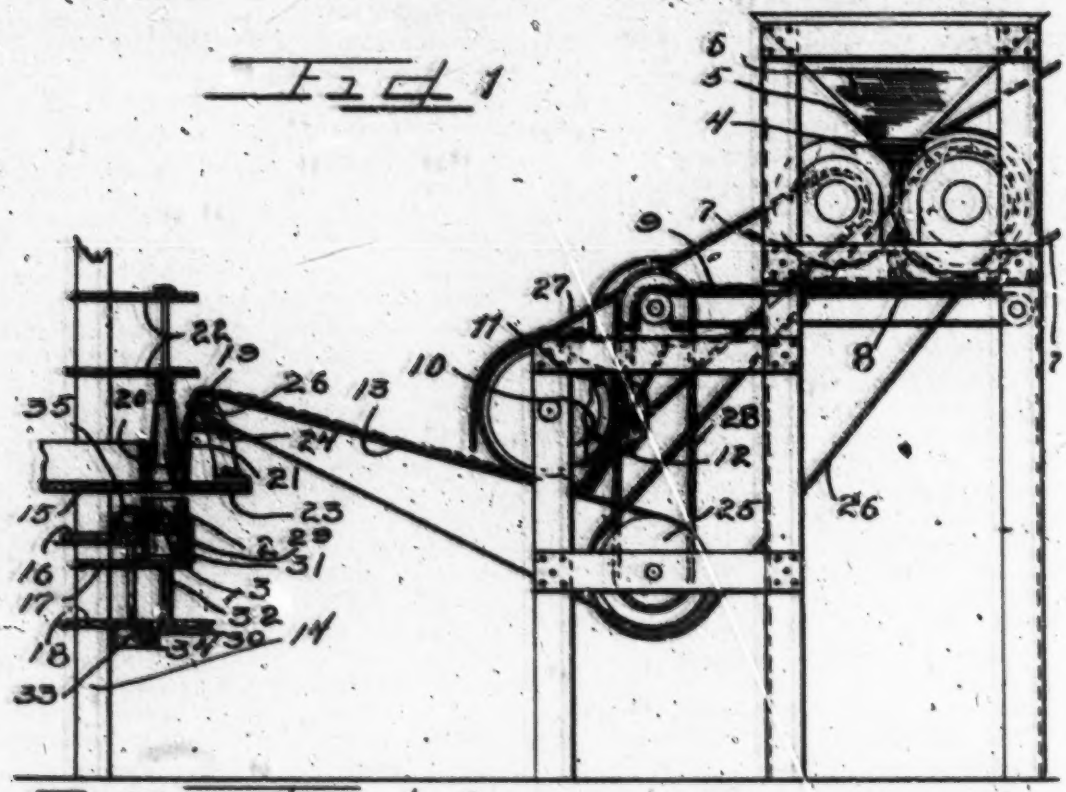
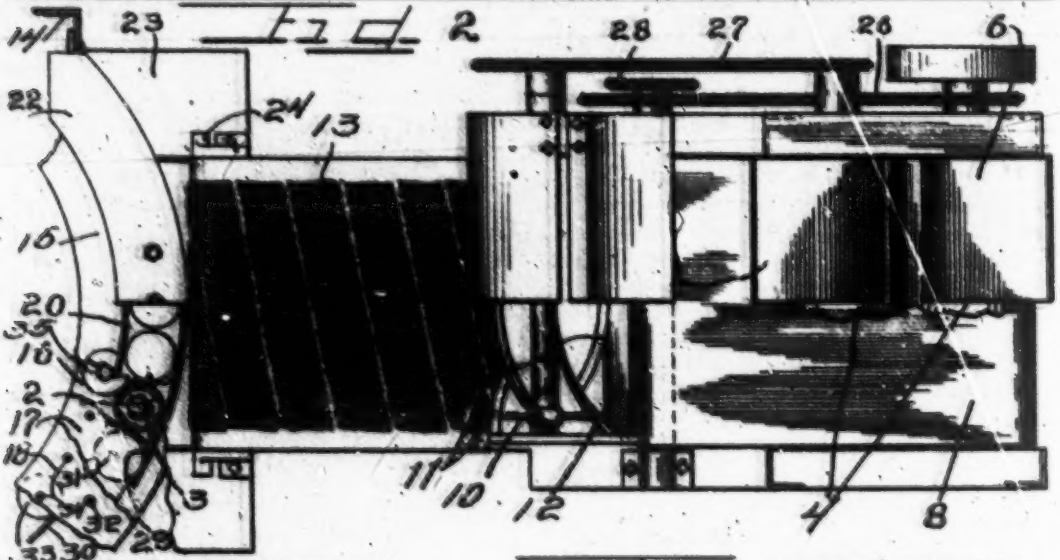


Fig 2



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WILLIAM ERASTUS WILLIAMS, OF CHICAGO, ILLINOIS.

MACHINE AND METHOD FOR MANUFACTURING SHREDDED-WHEAT CUP-BISCUITS.

991,584. Specification of Letters Patent. Patented May 9, 1911.

Application filed September 17, 1908. Serial No. 453,459.

To all whom it may concern:

Be it known that I, WILLIAM ERASTUS WILLIAMS, a citizen of the United States, residing at Chicago, county of Cook, and State of Illinois, have invented a new and useful Improvement in a Machine and Method of Manufacturing Shredded-Wheat Cup-Biscuits, of which the following is a specification.

The object of my invention is to provide a machine and method whereby the shredded wheat cup biscuits may be made more uniform in size than has been heretofore possible with the machinery and methods heretofore known.

It has been difficult by machinery to make shredded wheat into the form of a cup shaped biscuit and get all the cups or biscuits of substantially the same size and density and when the cups so vary it is impossible to bake them on a commercial scale without burning the light weight ones before the heavy ones are fully baked and this causes a serious loss.

The shreds of wheat or other suitable material come from the shredding machine in a ribbon or mat of long threads that adhere together more or less irregularly and in separating the quantity for the different cups the interlacing of the shreds draws a larger portion from the delivery mechanism at some intervals than at others, thus producing the trouble. Further it is desirable that the cup biscuits be of even density on all sides of the rim as if one side is light it will burn on that side in baking. The long shreds hang together so that it is difficult by machinery to get them arranged evenly on all sides of the cup or baking forms to insure an even density of wall for the cup. But with the machinery and method here shown I overcome all the difficulties mentioned.

Reference will be had to the accompanying drawing in which:

Figure 1, is a side elevation of the machinery. Fig. 2 is a plan view with parts omitted for clearness of illustration.

In the drawing 2 indicates a baking form for a cup shaped biscuit which is a tin cup provided with a conical central projection 3 around which on the inside of the cup the shreds are disposed and held while being baked and the baking sets the shreds in form so that when they are discharged from the tin cups they retain the cup shape. This baking cup or form is shown and described in some former applications of mine in relation to this art.

4 indicates a pair of shredding rolls which produce shreds of the prepared grain 5 delivered to the machine from hopper 6. Instead of grain this material may be of any suitable form or composition. In place of the rolls there may be used any suitable shredding or threading device.

The material is removed from the rolls by the scrapers 7 and it falls in more or less long continuous shreds onto the carrier belt 8 which delivers them continuously in a mat or ribbon 9 to a rotary cutting device 10 provided with spiral cutting blades 11 working against a stationary knife 12 which cut the shreds into short lengths which then fall upon a carrier belt 13 which carries the cut material to the cup forming machine 14. This cup forming machine or cupping machine is the subject of another application already on file. This cupping machine consists of a carrier for the tin cups or forms of any suitable construction but I prefer to use a wheel here shown in section and constructed of plates, 15, 16, 17 and 18 secured together and mounted upon an axis not shown in the drawing and the wheel or carrier carries the tin cup forms past the delivery end 19 of the carrier belt 13.

Fixed to and moving with the form carrier there are a series of hoppers 20 which direct the discharge of the material as delivered by belt 13 into the tin cups or forms. Packing plungers 21 carried on a cross head 22 actuated to reciprocate in any suitable manner are provided to pack the material as it is delivered into the forms, or cups 2. The cups or forms 2 are revolved while being filled with the shreds by means of traveling belts 29 and 30. Belt 29 comes in contact with the cup or form itself and also with a series of disks 31 upon which forms 2 rest. Disks 31 are mounted upon spindles 32 revolving in apertures in the plates of the wheel or carrier. Belt 30 revolves rollers 33 on spindles 34 carrying rollers 35 which come into contact with the cups or forms 2 and assist in revolving them while the same are being filled. Any suitable means may be employed for driving these belts and any suitable means may be employed for revolving the cups or forms 2 while being filled. The stationary plate 23 supports the bearings 24 for the roller 26 over which the car-

rier belt 13 passes at the cupping machine but any suitable means of support for these parts may be used. Belt 13 passes over roller 25 and is driven thereby and roller 25 is driven by a chain 26 from the shredding rolls. The cutting device 10 is driven by a chain 27 from one of the shredding rolls. The carrier belt 8 is driven by chain 28 from the shaft of roller 25. Any suitable means may be used to drive these several mechanisms.

The operation is as follows: The material is reduced to webs or ribbons of shreds by the rolls and these webs or ribbons are then cut into short lengths or disconnected sections by the cutting device and it is then packed into the forms and while therein baked or dried sufficiently to retain the shape assumed in the forms. The separated and as it were disconnected shreds can thus be made to fill the cups or forms in approximate uniform degree of density and yet there is a sufficient degree of interlacing of the shreds to cause the cup biscuit to hang together when it is baked.

My invention is adapted to be used with any suitable cereal product and is not limited to wheat shreds although at the present time I prefer to use the wheat shreds but do not limit my invention to wheat.

While I have described a cup shaped shredded biscuit as being made by the method and machinery described herein, the same method and machinery is exactly adapted to make a round biscuit and other suitable shapes. Therefore, I have not limited myself to cup shape in the claims hereof.

What I claim is:

1. The combination with means for forming a ribbon-like mass of approximately parallel shreds, of means for dividing the shreds into short lengths, and means for rearranging the short shreds in biscuits of suitable form and giving them a multiplicity of widely divergent directions.

2. The method of making shredded biscuits which consists in forming the material into a mat of long moist shreds, dividing the mat into short lengths, rearranging the short shreds of the sections among themselves and forming the shreds of neighboring sections into a mass of new shape, and removing the moisture from the mass.

3. The method of making shredded biscuits which consists in forming the material into long moist shreds, dividing the shreds into short lengths, re-arranging the short shreds among themselves giving them new relative directions and forming them into masses of new shape and volume, and baking the masses.

4. The combination with devices for shredding material and delivering the shreds in a continuous mat, of means for cutting the mat into short sections, biscuit forms, and means for rearranging the short shreds by relative longitudinal and other displacements, in said forms.

5. The combination with shredding devices, of means for dividing the shreds delivered thereby into short lengths, means for rearranging and combining shreds of neighboring sections into which the shreds are divided to form masses of new shape, and means for condensing the new masses during their formation.

6. The combination of, means for forming material into shreds, means for cutting the shreds into short lengths, means for placing the cut shreds in forms, means for packing the shreds in the forms, means for revolving the forms.

7. A source of supply of the shreds, a revolving cutter for cutting the shreds into short lengths as they come from the source of supply, means for depositing the shreds in forms, means for revolving the forms while the shreds are being deposited, and means for packing the shreds into the forms.

8. The combination with a source of supply for shreds, of a carrier removing a continuous mass of shreds from said source, means for dividing said mass transversely into short lengths, forms adapted to receive and re-shape masses of the short shreds, means for recombining the short shreds of the masses in said forms and readjusting them relatively by longitudinal and other movement, and means for gently compacting the shreds as they are received in the forms.

9. The method of making shredded cereal biscuits which consists in forming the material into a ribbon-like mass of approximately parallel shreds, dividing the mass transversely into segments not materially longer than the diameter of the desired biscuits, and re-arranging the shred segments in biscuits having their constituent shreds non-parallel and running in various wide-divergent directions.

In witness whereof, I have hereunto subscribed my name in the city of Chicago, on this 3rd day of September, 1908, in the presence of two subscribing witnesses.

WILLIAM ERASTUS WILLIAMS.

Witnesses:
W. O. Brewster,
John Grant.

W. E. WILLIAMS.

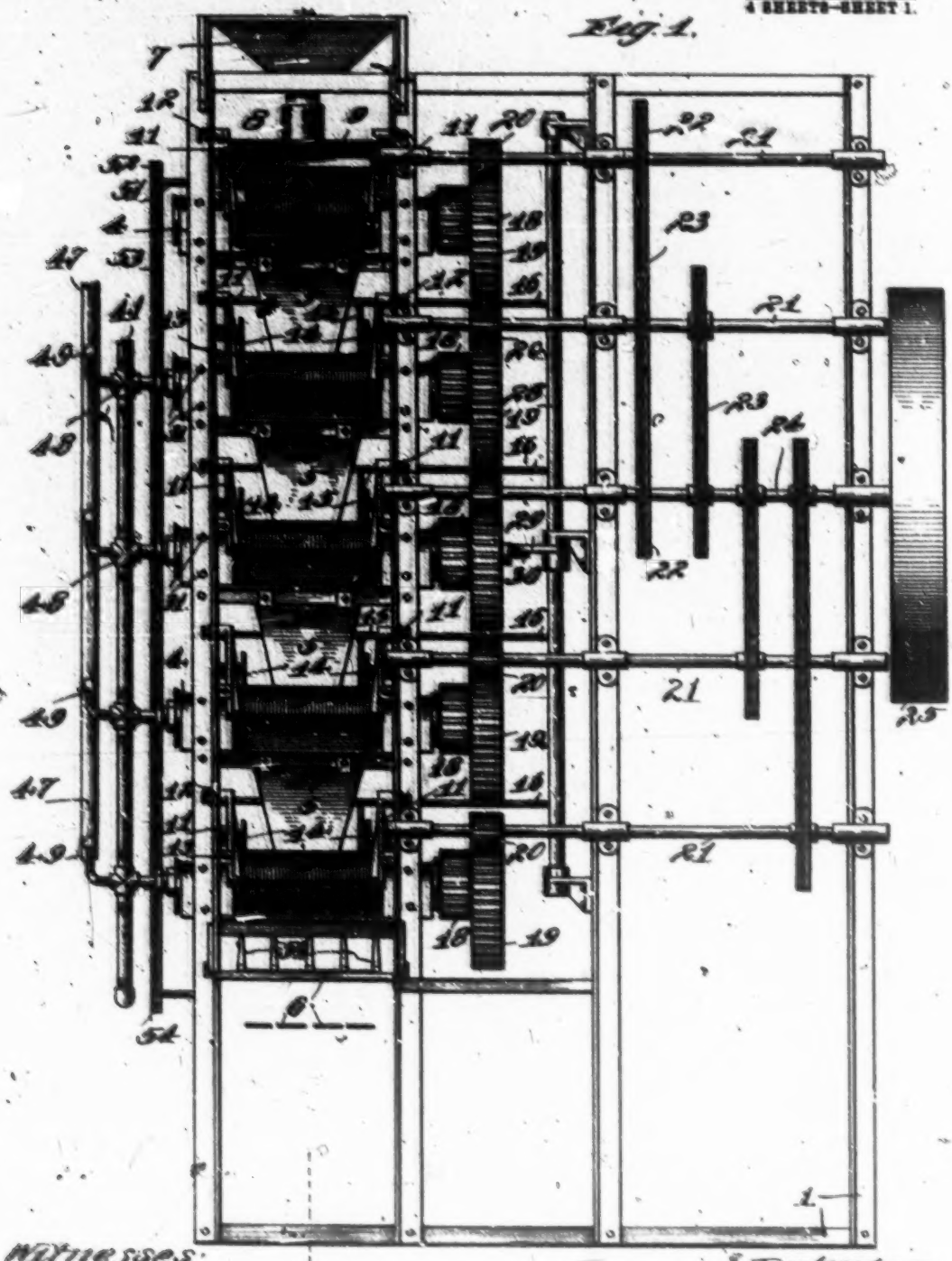
MACHINE FOR CONVERTING FOOD MATERIALS INTO SHREDS OR FIBERS.

APPLICATION FILED OCT. 1, 1907.

1,024,168. Patented Apr. 23, 1912.

4 SHEETS—SHEET 1.

Fig. 1.



Witnesses:
O. A. Pankenmire
R. Craig Greene

Inventor:
William E. Williams,
by Walter H. Greene
Atty

496

W. E. WILLIAMS.

MACHINE FOR CONVERTING FOOD MATERIALS INTO SHREDS OR FIBERS.

APPLICATION FILED OCT. 1, 1907.

1,024,168.

Patented Apr. 23, 1912.

4 SHEETS—SHEET 2.

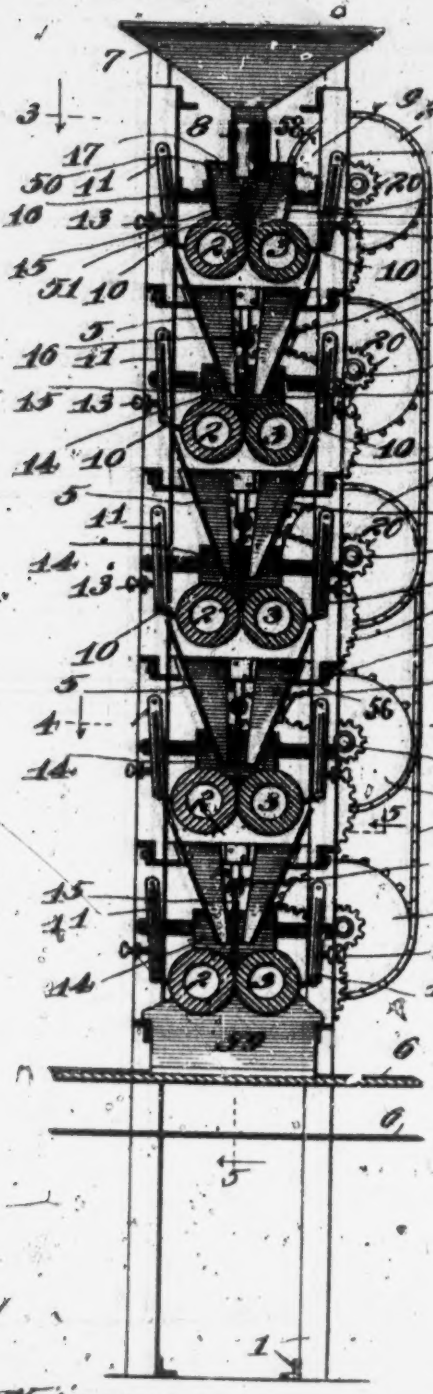


Fig. 2.

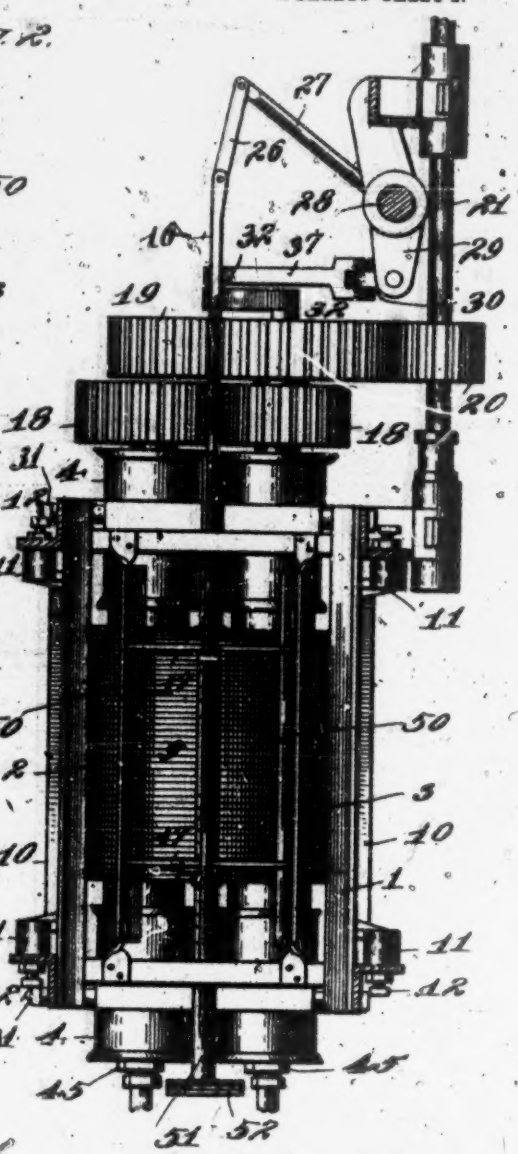


Fig. 3.

Witnesses:
G. A. Vandenschmidt
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498

W. E. WILLIAMS.

MACHINE FOR CONVERTING FOOD MATERIALS INTO SHREDS OR FIBERS.

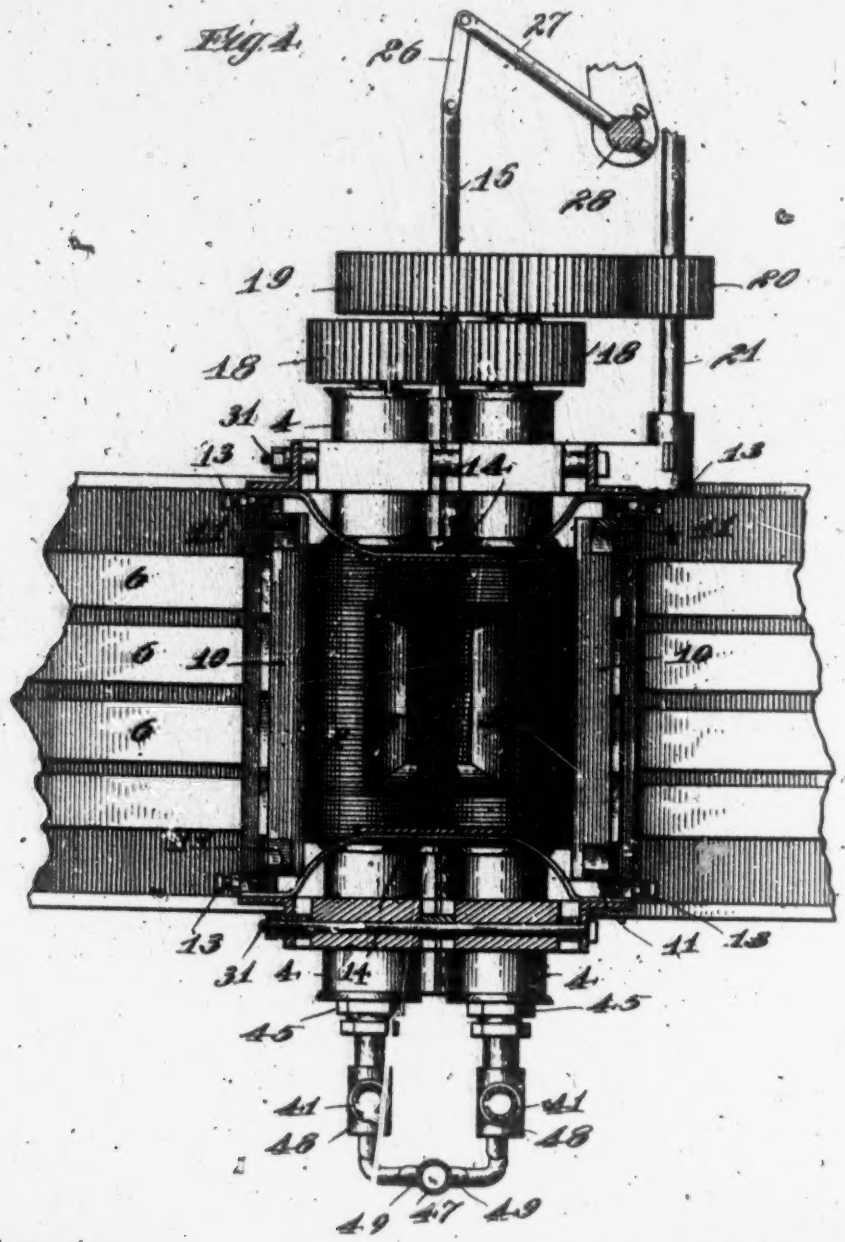
APPLICATION FILED OCT. 1, 1907.

1,024,168.

Patented Apr. 23, 1912.

4 SHEETS—SHEET 3.

Fig 4.



Witnesses:

W. A. Paulenschmidt

R. Craig Greene

Inventor:

William E. Williams,

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500

W. E. WILLIAMS.

MACHINE FOR CONVERTING FOOD MATERIALS INTO SHREDS OR FIBERS.

APPLICATION FILED OCT. 1, 1907.

1,024,168.

Patented Apr. 23, 1912.

4 SHEETS—SHEET 4.

Fig. 5.

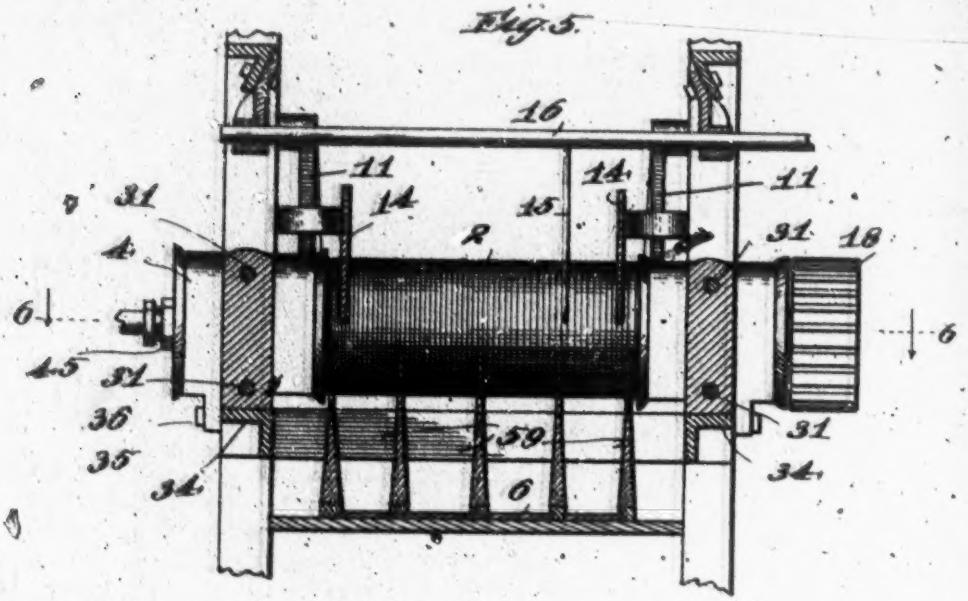

Fig 6.

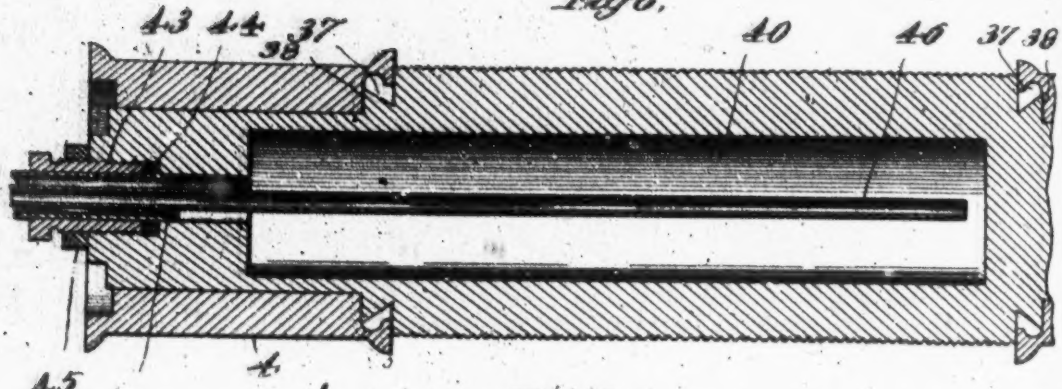

Fig 7

Fig. 8.

Witnesses.

J. A. Bauerschmidt

R. Craig Greene

Inventor

William E. Williams

By

Wallace Greene

Atty.

UNITED STATES PATENT OFFICE.

WILLIAM E. WILLIAMS, OF CHICAGO, ILLINOIS.

MACHINE FOR CONVERTING FOOD MATERIALS INTO SHREDS OR FIBERS.

1,024,168. Specification of Letters Patent. Patented Apr. 23, 1912.

Application filed October 1, 1907. Serial No. 395,347.

To all whom it may concern:

Be it known that I, WILLIAM E. WILLIAMS, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented certain new and useful Improvements in Machines for Converting Food Materials into Shreds or Fibers, of which the following is a specification, reference being had therein to the accompanying drawing.

My invention relates to machines for converting cereal grains, dough, or other suitable materials into shreds, fibers, or filaments, and the general object is to produce a filamentary product differing in character from any that have been produced by other machinery.

In the accompanying drawings, Figure 1 is a side elevation of the machine. Fig. 2 is a sectional end elevation of the same apparatus. Figs. 3, 4, 5 are sections on the lines 3—3, 4—4, 5—5, respectively, of Fig. 2. Fig. 6 is a horizontal section through a certain roll and its bearings. Fig. 7 is an enlarged sectional view showing two grooved rolls in contact. Fig. 8 is a sectional detail showing a scraper in contact with its roll.

In general terms, the apparatus consists of grooved rolls arranged to co-act in pairs, one pair above another, in the same plane, each pair receiving material from the next pair above, and the lowest pair delivering the product to a conveyer, and the apparatus including driving, feeding, guiding, roll-cooling, product-dividing, and various adjusting devices.

In the several figures, 1 represents a suitable upright frame in which are mounted, one above the other in the same plane, five pairs of hollow, circumferentially grooved rolls 2, 3, connected by gears 18 to rotate with equal circumferential speed. All the rolls 3 have upon their shafts, respectively, equal gears 19, and these are driven by equal pinions 20, one of which is mounted on a main shaft 24 driven in this instance by a power pulley 25, while the others are mounted on parallel counter shafts 21 driven from said power shaft by sprocket wheels 22 and chain bolts 23. Each roll is provided with a series of circumferential V-shaped grooves 39 (Fig. 7) a little narrower than the space between them and the grooves of each roll being opposite the ungrooved spaces on the companion roll, as shown. At each end, beyond the grooves just mentioned, the rolls are turned down to form circumferential recesses 37, and beyond these are further turned down to form cylindrical bearing portions having at their inner ends shoulders 38. These bearing portions fit in bearing blocks 4 against which the shoulders abut and which are provided at their inner ends with circumferential recesses to co-act with the recesses 37 and prevent oil from passing to the grooved portions of the rolls. The blocks 4 for the two roll shafts are independently formed and mounted in the frame, one at least being slidable, with a block between them and are connected and drawn together by bolts 31 (Fig. 4). The rolls of each pair are in close contact so that practically no material, other than such as may lie in the grooves, can pass between them, and hence when they are once properly adjusted in contact the blocks are rarely moved laterally although obviously adjustment may be readily made. The bearings are further provided with lugs 35 and bolts 36 which secure them to the frame member 34 and permit slight endwise adjustments in the manner just mentioned.

In operation the rollers may become somewhat heated, and the heat being objectionable when certain materials are used I provide for water-cooling the rolls. To that end they are each provided with an internal cavity 40 (Fig. 6) to which water is supplied by a pipe 41 connected with a thimble 42 working in the end of the roll in a gland consisting of the threaded sleeve 43, packing 44 and lock-nut 45. The water entering through the thimble passes out through a smaller axial pipe 46 leading through a suitable fitting or coupling 48 to a discharge pipe 47. Parts of the pipe 41 and part of each pipe 46, near their entrance at 49 to the pipe 47, are flexible so that adjustments or other slight movements of the rolls require no adjustment of the pipes.

The material or stock is placed in a hopper 7, above the upper rolls, whence it falls through a preferably flexible spout 8 into second hopper 9 closely fitting upon the upper rolls and having ends 17 adjustable toward and from the middle of the rolls to

vary the length of the hopper and effective length of the rolls, thereby controlling the amount of material which passes through the first set of rolls, and which should vary with varying materials. The sides 50 of the hopper (Fig. 3) are fixed to the frame and its ends are carried upon right threaded and left threaded portions of a screw 51 mounted in the frame and rotated by a chain bolt 53 passing over a sprocket wheel 52 upon the shaft 51 and a sprocket wheel 54, the adjusting power being applied by the operator.

As the material falls from each set of rolls to the next, it is guided to the middle portion of the rolls by oppositely faced converging spouts 5 and is spread along the rolls by a bar 15 fixed to a horizontal reciprocating rod 16 (Fig. 3) connected by a link 26 to an arm 27 projecting from a vertical shaft 28 which is rocked back and forth by the shaft of the roller 3 acting through a crank 32, pitman 37, and link 30 pivotally connected to an arm 29 projecting from the rock-shaft. The material thus distributed along the rolls is prevented from falling from their ends by fenders or plates 14, supported from the frame a little beyond the path of the agitating or spreading bar. As the spouts 5 need frequent cleaning, they are fixed in place by clips 56 secured to the frame by thumb-screws 57 and are thus readily removed and replaced. Any material that may adhere to any of the rolls is removed by one of several scrapers 10 fixed to arms 11 pivoted at 12 to the frame and adjusted by thumb screws 13.

Below the lower rolls are fixed parallel dividing blades or partitions 59 laterally grooved at the bottom so that they may overhang the edges of parallel conveyer belts 6 and at their upper sides having sharp knife edges to fit around the lower sides of the rolls. The material is thus divided part falling on each belt, and owing to its being compelled to adjust itself at a little distance from the edges of the belts it is practically prevented from afterward falling therefrom.

What I claim:

1. In apparatus of the class described, the combination with a pair of shredding rolls, of a second pair of shredding rolls delivering shreds, in the bight of the first pair, and means for arranging, delivered shreds across the grooves of the rolls first mentioned.

2. In a machine of the class described, the combination with pairs of co-acting shredding rolls mounted one pair above another in the same plane and one roll of each pair having circumferential grooves spanned by ungrooved portions of its companion, of a hopper above the first pair, spouts for directing shreds from each pair to the succeeding pair, and agitator arms arranged to move back and forth longitudinally above each pair of rolls below the first to distribute the shreds across the grooves.

3. The combination with a series of pairs of co-acting shredding rolls, a feeding hopper, and a receiving hopper, all mounted one above the other approximately in the same vertical plane, of a reciprocating distributing device moving above the central portion of the bight of the upper rolls, and means for limiting the distribution to a predetermined central portion of the rolls.

4. In a cereal shredding machine, the combination with parallel pairs of shredding rolls, one pair above another, of a hopper above the first pair and delivering thereto, spouts for guiding the shreds from each pair to the central portion of the next lower pair, agitators arranged to move back and forth from end to end of the effective portion of the rolls which receive shreds, and adjustable fenders near the ends, respectively of the path of each agitator.

5. In a machine of the class described, the combination with a series of sets of rolls mounted above one another, of agitators, for the different sets, respectively, a shaft extending along the different sets and actuating all of them, and a crank mounted above the axis of one set and arranged to drive the agitator shaft, substantially as shown.

6. In a machine of the class described, a combination with a series of sets of grooved rolls mounted above one another, whereby the material of one set passes to the next set, of a hopper for delivering the material to the first set, converging spouts for directing the material from one set to the other set, whereby there may be an accumulation of material at each set of rolls, longitudinally moving devices above each set for intermingling the material before it passes through and is drawn out by the rolls, and fenders limiting the displacement by said devices substantially as shown and described.

7. In a cereal shredding machine, the combination of pairs of shredding rollers one pair above another in the same plane, a hopper delivering material to be shredded to the first pair of rolls, two part converging spouts for massing the shreds received from above and delivering them to the central portion of the succeeding pair of rolls, and an arm arranged to reciprocate along the rolls between the parts of the spout, intermingling the shreds and distributing them across the grooves of the rollers.

8. In a machine of the class described, the combination with grooved rolls arranged to receive stock above, convert it into shreds or filaments, and deliver it below, and sharp edged partitions arranged to separate the product into distinct lots as it leaves the lower rolls.

9. In a machine of the class described, the combination with grooved rolls arranged to

form and deliver sheets or filaments of material, of parallel knife-edged dividing partitions fitting against the delivery side of the rolls, and a conveyer belt parallel to said partitions and having its lateral margins extending under the lower sides of the same, substantially as set forth.

In testimony whereof I affix my signature in presence of two witnesses.

WILLIAM E. WILLIAMS.

Witnesses:
R. ROPER,
H. CROON.

506

W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISCUITS OR SIMILAR ARTICLES.

APPLICATION FILED APR. 13, 1908.

1,062,627.

Patented May 27, 1913.

2 SHEETS—SHEET 1.

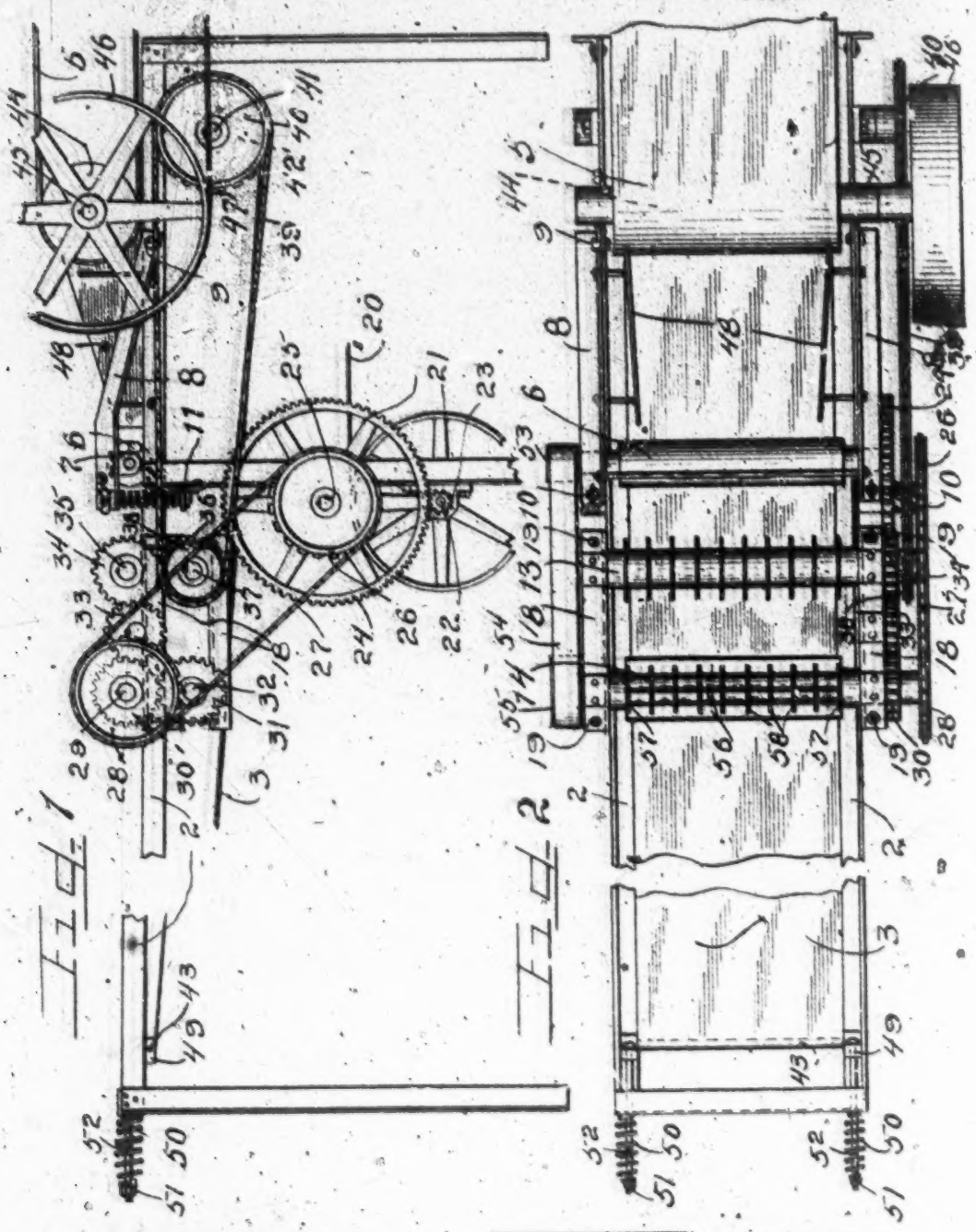

FIG. 1

FIG. 2

Witnesses

J. H. Angell

John Grant

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by Wallace & Greene

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508

W. E. WILLIAMS.

MACHINE FOR MAKING SHREDDED WHEAT BISCUITS OR SIMILAR ARTICLES.

APPLICATION FILED APR. 13, 1903.

1,062,627.

Patented May 27, 1913.

2 SHEETS—SHEET 2.

Fig 3

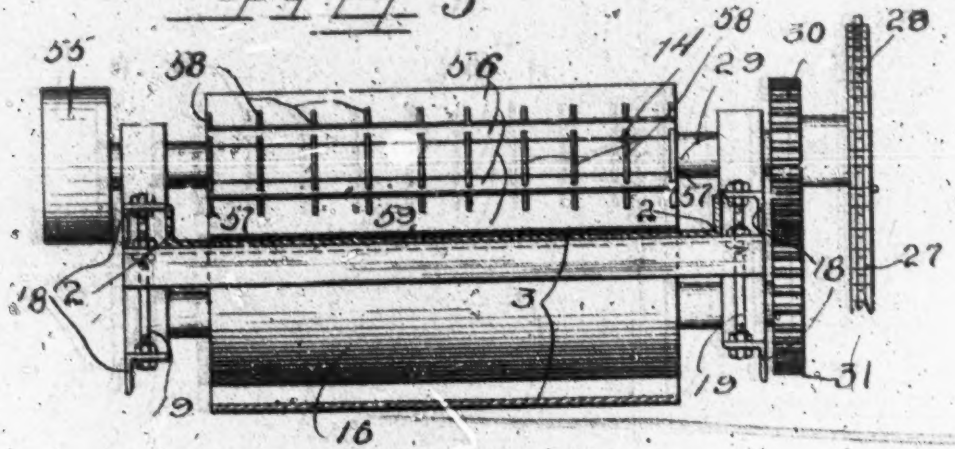


Fig 4

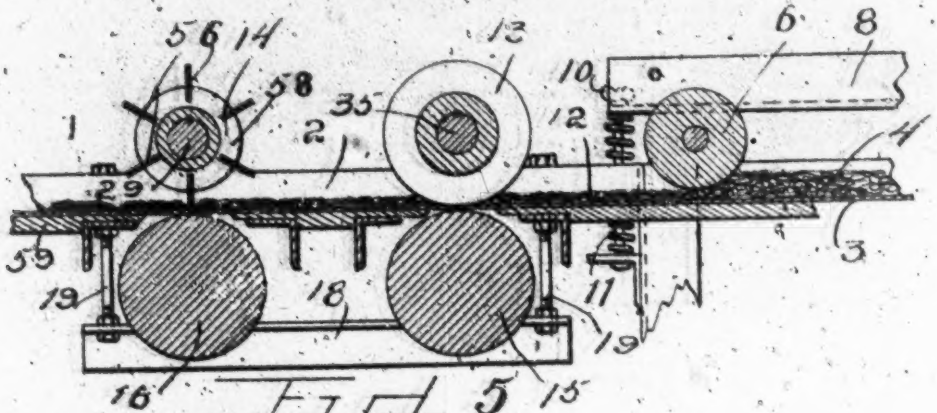
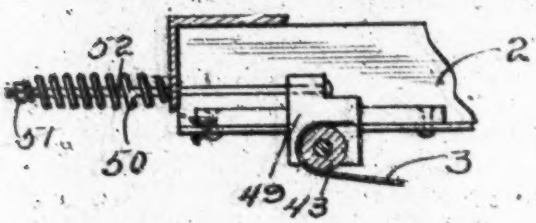


Fig 5



Witnesses

J. H. Angell.

John Grant

Inventor

William E. Williams.

by Wallace & Prince

Atty.

UNITED STATES PATENT OFFICE.

WILLIAM ERASTUS WILLIAMS, OF CHICAGO, ILLINOIS.

MACHINE FOR MAKING SHREDDED-WHEAT BISCUITS OR SIMILAR ARTICLES.

1,062,627. Specification of Letters Patent. Patented May 27, 1913.

Application filed April 13, 1906. Serial No. 311,813.

To all whom it may concern:

Be it known that I, WILLIAM ERASTUS WILLIAMS, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented a new and useful Improvement in Machines for Making Shredded-Wheat Biscuits or Similar Articles, of which the following is a specification.

The object of my invention is to convert shreds or filaments of wheat or other food stuffs into biscuits or cakes in a rapid, simple, cheap, and desirable way, whereby any desired degree of packing down or matting of the shreds may be secured.

Reference will be had to the accompanying drawings in which:

Figure 1 is a side elevation of the machine. Fig. 2 is a plan view. Fig. 3 is an end section on line 3—3 of Fig. 2. Fig. 4 is a longitudinal vertical sectional view showing the material in process of operation. Fig. 5 is a detail of the belt tightener.

In the drawing 2 designates the frame of the machine which is here shown as made of angle pieces of metal.

3 indicates a traveling carrier belt made of any suitable material or it may be any suitable carrier. This carrier 3 receives the shredded or filamented or other material as it comes from any suitable source of supply in a continuous uniform deposit 4. This source of supply is here shown as an additional carrier belt 5 coming from the shredding machines. The deposit 4 of the shreds passes underneath a roller 6 which pushes the deposit down to any desired thickness or hardness. The roller 6 is carried in bearings 7 carried upon a frame 8 pivoted at 9 to the frame of the machine and is adjusted downward by thumb-screws 10, and is held upward by springs 11. After passing roller 6 the deposit is crushed or matted down into a mat 12 the desired thickness for the biscuit or cracker and the mat then passes underneath a slitting roller 13 which cuts the mat into strips longitudinally. And these strips then pass underneath a cross cutting roller 14 which cuts them transversely and the biscuits or crackers are then taken up by a "peeler" and they pass off automatically on to suitable pans arranged to receive them. Underneath each cutting roller 13 and 14 there is arranged an abutting roller 15 and 16 to receive the thrust of the cutting and the carrier 3 passes between the rollers along with the material to be cut. The cutting rollers 13 and 14 are mounted in bearings mounted upon bars 18 adjustable to the frame by studs 19 and the rolls 15 and 16 are similarly mounted.

The machine is driven from any suitable source of power by a belt 20 on a wheel 21 on a shaft 22 mounted on posts of frame 2 and carrying a pinion 23 engaging a gear wheel 24 mounted on a shaft 25 which also carries a sprocket 26 driving a chain 27 driving a sprocket 28 on shaft 29 of transverse cutting roll 14. A gear 30 on shaft 29 engages a gear 31 on shaft 32 which is the shaft of roll 16 whereby abutting roll 16 is made to travel in time with its cutter roll 14. An idle gear 33 engages gear 30 and is driven thereby and it engages 34 on shaft 35 which is the shaft of slitting roll 13 whereby, slitting roll 13 is positively driven. Gear 34 engages and drives gear 36 on shaft 37 whereby roll 15 is driven. A sprocket 38 on shaft 37 drives a chain 39 which drives a sprocket 40 on shaft 41 of roller 42 over which carrier belt 3 travels and whereby it is driven. The source of supply belt 5 passes over a roller 44 on a shaft 45 driven by a belt wheel 46 driven by a belt 47 from any suitable source of power. Fenders 48 are mounted at the sides of belt or carrier 3 to direct the discharge from belt 5 upon belt 3 within definite side limits which saves waste of the material acted upon. Carrier 3 passes over a small roller 43 at its outer end which roller is mounted in bearings 49 mounted to slide longitudinally in the frame and held by springs 50 to exert an elastic stretch or take up to carrier belt 3. Springs 50 are adjusted by nuts 51 on rods 52 secured to the bearings 49. Compression roller 6 is driven by a belt wheel 53 driven by a belt 54 driven by a wheel 55 on shaft 29 of roller 14. All of the revolving parts are what are termed live rolls which insure a positive action and does not distort the material acted upon which is a desideratum.

Underneath carrier belt 3 there are provided plates or tables 59, which support the carrier underneath the compression roller and also at other points save only where the cutting rollers require apertures for their admission to contact with the carrier belt.

The cutting roller 14 is made of longitudinal slats 56 secured at their ends to disks 57, and supported at frequent intervals by intermediate disks 58 which con-

struction allows cutter blades to be used and yet produce a rigid cutter roller and one cheaply constructed.

The web or mat of material is very fragile and is also more or less sticky and cannot be cut properly by the ordinary mechanisms used in the bakers' art. The separate cutting roller arranged to act on the mat at different points insures against the mat curling up and following the cutter or from being distorted as is the case when ordinary cutting means are used.

What I claim is:

1. In apparatus of the class described, the combination with a table provided with narrow transverse slots, of an endless belt arranged to have one of its folds travel along the surface of the table over said slots, vertically adjustable rollers arranged to rotate in said slots, respectively, below the belt, cutting rollers mounted above the belt in registry with the rollers below the belt, respectively, to divide into separate masses the material passing on the belt, and means for delivering a continuous mass of shreds upon the belt.

2. In a machine of the class described the combination of a longitudinal frame supporting sections of a table or flat plates, a carrier belt moving over these tables or plate apertures in these tables or plates, cutting rollers mounted at these apertures to act on the material on the carrier, with a compression roll mounted to act upon the material of the carrier at a point where the carrier is supported by a plate or table.

In witness whereof I have hereunto subscribed my name at the city of Chicago, on this 16th day of March, 1908, in the presence of two subscribing witnesses.

WILLIAM ERASTUS WILLIAMS.

Witnesses:
R. ROPER,
JOHN T. GRANT.

UNITED STATES PATENT OFFICE.

ASHLEY V. BLACK, OF ST. LOUIS, MISSOURI, ASSIGNOR TO GRAIN PRODUCTS COMPANY, OF ST. LOUIS, MISSOURI, A CORPORATION OF DELAWARE.

FOOD PRODUCT.

1,210,589. Specification of Letters Patent. Patented Jan. 2, 1917.

No Drawing. Application filed August 13, 1916. Serial No. 115,208.

To all whom it may concern:

Be it known that I, ASHLEY V. BLACK, a citizen of the United States, residing at the city of St. Louis, State of Missouri, have invented a certain new and useful Food Product, of which the following is a specification.

This invention relates to a certain new and useful food product.

Bran, and especially wheat bran, has, as is commonly known, great laxative properties, but is, of and by itself, unpalatable and of little or no food value; but I have found that by intimately associating or mixing with the bran certain constituents of agreeable taste and of known food value, I may provide and furnish to the consuming public at relatively low cost a very palatable and nutritious food product possessing and retaining all the laxative effect or property of bran. And my present invention resides in the production and provision of such a food product having bran as one of its essential ingredients.

In Letters Patent No. 1186768, of June 13, 1916, there is described a food product comprising, as its elements, bran and an edible syrup mixed or combined with a previously cooked flour, such as cracker meal. In my present food product, however, I use and combine or mix the bran and edible syrup with what is commercially known as shredded cereal, that is to say, a cereal, such as wheat, corn, or rice, steam cooked in substantially the whole grain, then shredded, and the shreds then baked, shredded cereal being exceedingly nutritious and easily digested, and being substantially different physically from a previously cooked flour, such as cracker meal.

My present food product hence includes, as essential elements or constituents, bran, preferably wheat bran, a shredded cereal, preferably wheat, either in the form of shreds or in the form of ground shreds, and an edible syrup, these several ingredients or constituents being combined or mixed, to obtain the best results, in the proportions approximately of thirty-seven and one-half per cent. bran, twenty-five per cent. shredded cereal, and thirty-seven and one-half per cent. edible syrup.

In producing my present food product, and in providing first the edible syrup, I mix together in a suitable receptacle strained honey and a sweet syrup, such as molasses, cane syrup, maple syrup, or the like, in approximately equal parts. I then preferably heat this syrup-mixture until the same is of relatively thin consistency, so that it will pour easily. I then, also in a suitable receptacle or mechanical mixer, commingle the bran with, say, approximately half the shredded cereal, then pour into the mixer the relatively thin, hot syrup, and then thoroughly and intimately mix the syrup with the bran and shredded cereal. I then add to the mass in the mixer the remainder or other half of the shredded cereal, and then again mix the several ingredients intimately together, the syrup, in addition to contributing food value and a pleasant sweet taste to the finished product, serving also as a binder for the bran and shredded cereal, the bran being preferably in the form of flakes and the shredded cereal being, as stated, either in the form of shreds or in the form of ground shreds. The mass or mixture is now ready for toasting or baking, but, that the finished product may be conveniently handled and supplied to consumers, I first mold or otherwise form the mass into suitable individual cakes or biscuits. Accordingly, suitable relatively small or individual molds preferably of somewhat rectangular form or shape being provided and at hand, the same are respectively filled with the described thoroughly mixed and combined ingredients, the material in each mold being suitably compactly pressed therein. The several molds so filled are now reversely placed upon a suitable preferably metal toasting surface, the molds duly removed, and the several so formed cakes or biscuits with their supporting toasting surface placed within a suitable oven, under the heat of which, at approximately 300° F., the several cakes or biscuits are permitted to remain a suitable length of time, approximately thirty minutes, the several cakes or biscuits being thereby baked or toasted, thoroughly sterilized, and relatively hardened. On being removed from the oven, the several food-cakes or biscuits are suitably cooled and are then ready for consumption, my new food-cakes or biscuits being preferably packed and wrapped for shipment in suitable containers, cartons, or the like.

My new food cakes or biscuits are very pleasant to the taste, exceedingly nutritious

and nourishing, and of high laxative value and easily digested, and, further, may be manufactured and produced and supplied to consumers at relatively low cost.

Having thus described my invention, what I claim and desire to secure by Letters Patent is:

1. As a new article of manufacture, the edible biscuit or cake herein described, the same being composed only of bran, a shredded cereal, and a syrup, intimately mixed together and compactly molded into cake or biscuit form.

2. A manufactured toasted food product composed of bran, a shredded cereal, and an edible syrup.

3. A manufactured toasted food product composed of bran, shredded wheat, and an edible syrup.

4. A manufactured toasted food product composed of bran, shredded wheat, honey, and molasses.

5. A manufactured toasted food product composed of bran, shredded wheat, and an edible syrup, all intimately mixed together in the proportions approximately of thirty-seven and one-half per cent. bran, twenty-five per cent. shredded wheat, and thirty-seven and one-half per cent. edible syrup.

In testimony whereof, I have signed my name to this specification.

ASHLEY V. BLACK.

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W. E. WILLIAMS.

METHOD OF MARKING ARTICLES OF THE SHREDDED CEREAL BISCUIT TYPE.

APPLICATION FILED FEB. 21, 1918.

1,263,009. Patented Apr. 16, 1918.

Fig. 1.

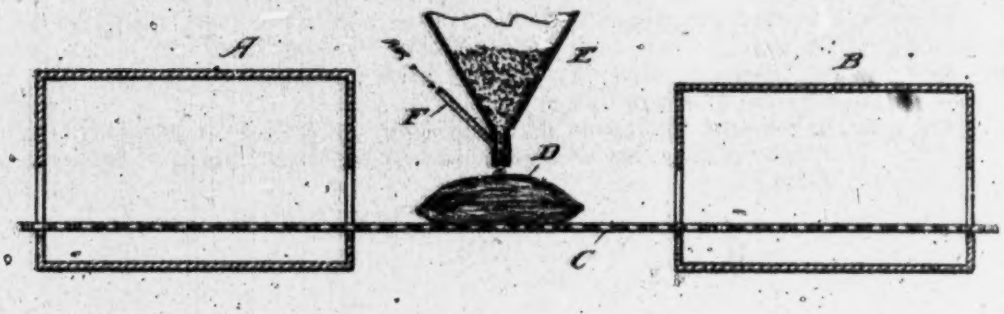

Fig. 2.

Fig. 3.

WITNESS
A. J. Sauser.

INVENTOR.
William E. Williams
BY
Brumbaugh & Graves,
ATTORNEYS.

UNITED STATES PATENT OFFICE.

WILLIAM ERASTUS WILLIAMS, OF CHICAGO, ILLINOIS.

METHOD OF MARKING ARTICLES OF THE SHREDDED-CEREAL-BISCUIT TYPE.

1,263,009. Specification of Letters Patent. Patented Apr. 16, 1918.

Application filed February 21, 1918. Serial No. 218,482.

To all whom it may concern:

Be it known that I, WILLIAM E. WILLIAMS, a citizen of the United States, and resident of Chicago, in the county of Cook and State of Illinois, have invented certain new and useful Improvements in Methods of Marking Articles of the Shredded-Cereal-Biscuit Type, of which the following is a specification, reference being had therein to the accompanying drawing.

Heretofore it has been usual to mark articles of the shredded cereal type by inclosing them in wrappings bearing desired indicia, but when served such articles have been without distinguishing marks. It is common to mark small cakes, crackers and the like by imprinting marks directly upon the material, but practically this method is not available for shredded articles, especially since it is undesirable to disturb the shreds greatly either before or after baking.

The object of this invention is to provide a method of applying to articles of this type indicia which no one will remove or wish to remove before eating the product. This object is reached by treating the shreds lying within a well defined area of the article's surface with or by an agent which will cause them to contrast with the adjacent area, either the treated or the non-treated shreds serving as the mark. This agent may vary in character. A blast of hot air imparts to shreds upon which it is directed a toast-brown color; heat from a branding implement brought into proximity to the article will produce the same change; an air blast, hot or otherwise, may carry any suitable coating or staining matter; such matter may be applied without the aid of an air blast; or the shreds may be slightly crinkled or otherwise mechanically changed in appearance to form a mark.

In the accompanying drawings, apparatus by which the method may be carried out is shown diagrammatically, and the articles formed and marked are also shown, both apparatus and articles being illustrative of the many possible forms which may result from the use of the method.

In these drawings,

Figure 1 is a vertical section of apparatus which may be used.

Fig. 2 shows in perspective an article marked by the use of such apparatus.

Fig. 3 is a similar view suggesting a slightly different marking.

In these figures, A represents a baking chamber, B a drying chamber, C a carrier passing through both chambers, D a shredded biscuit resting on the carrier between the two chambers, E a hopper which may contain any suitable coating or staining agent such as will not interfere with edibility, and F a tube for delivering a blast of hot or cold air downwardly through the hopper's discharge opening. If the biscuit be slowly advanced directly below the discharge opening while coating or coloring or color changing matter is being delivered by the blast, it will be provided with a band G differing in color or shade from the shreds of the surrounding surface. If the amount of material discharged be small and be a powder which will adhere to the hot shreds, the shreds will become of a more or less grayish shade varying with the powder used, as shown at H. If the blast be hot and if nothing be placed in the hopper, the shreds passing under the discharge opening will be made more or less deeply brown, as suggested at I.

The direction of the mark will obviously depend upon the position of the article upon the conveyer.

It is also evident that the biscuit may be at rest while the mark is being applied or may move with the applying device. In the latter case the mark will have the contour of the nozzle or applying device, whether that be the contour of a letter of the alphabet or otherwise but when the article and the applying device do not move relatively during the application of the mark, the marking action should be intermittent or should continue, for any given area to be changed, only during a very brief interval so as to form a spot-like change in appearance rather than a long band. It is also plain that marking heat may be applied by means other than an air blast, and also obvious that the bands shown may be areas made conspicuous by changing the appearance of the shreds outside the limits of the bands instead of within those limits.

What I claim is:

1. The method of causing articles of the shredded cereal type to bear distinguishing indicia which consists in treating the shreds

in a part of the article's surface area by an agent causing the shreds in such area to contrast with those of adjacent parts of the surface area.

2. The method of marking articles of the shredded cereal type which consists in treating the surface shreds of a part of the article's surface with a blast adapted to cause the treated shreds to contrast in appearance with the non-treated shreds.

3. The method of marking shredded cereal biscuits which consists in blowing upon the shreds of a part of the article's surface adherent matter changing their appearance.

4. The method of marking shredded wheat biscuits which consists in changing the appearance of the shreds of a portion of the surface, without disturbing the shreds, while leaving adjacent portions unchanged.

In testimony whereof I hereunto affix my signature.

WILLIAM ERASTUS WILLIAMS.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.:*
THIRD JUDICIAL CIRCUIT,

I, WM. P. ROWLAND, clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of record (Volume V, Exhibits) in the case of National Biscuit Company, Plaintiff-Appellant v. Kellogg Company, Defendant-Appellee, No. 5801, on file, and now remaining among the records of said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this eleventh day of August, in the year of our (Seal) Lord one thousand nine hundred and thirty-seven, and of the Independence of the United States the one hundred and sixty-second.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

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Supreme Court of the United States

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Supreme Court of the United States,

OCTOBER TERM 1937.

No. 396.

KELLOGG COMPANY,
Petitioner-Appellee-Defendant,

against

NATIONAL BISCUIT COMPANY,
Respondent-Appellant-Plaintiff.

PETITION BY KELLOGG COMPANY, DEFENDANT BELOW, FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petition of Kellogg Company, defendant-appellee below, and herein referred to as defendant, respectfully shows:

STATEMENT OF THE CASE.

A. Preliminary.

This case has been heard twice by the Circuit Court of Appeals of the Third Circuit, with diametrically opposite results. The proceeding was in equity in the District Court of the United States for the District of Delaware, brought by National Biscuit Company, as plaintiff, against petitioner, the Kellogg Company, as defendant. It sought to restrain the Kellogg Company from manufacturing the ordinary, formerly patented shredded wheat biscuit illustrated in expired design patent No. 24,688 (R. V. 5, p. 62), and from using the term "shredded wheat" and the picture of the biscuit as applied thereto (Complaint, R. V. I, pp. 5-25).

District Judge Nields, after trial, dismissed the bill, because the forty-one patents originally granted to the plain-

tiff's predecessor for shredded wheat, the design patent on the form of the biscuit and the machinery and process for making it, having expired before the Kellogg Company began to sell its product, defendant was entitled to manufacture shredded wheat in the usual form and to display pictures of it in defendant's advertising. The District Court also held that because the name "shredded wheat" was a term applied by the patentee to the patent-expired product and was otherwise descriptive it was incapable of exclusive appropriation as a trademark (R. V. I, p. 225).

The District Court also found as a fact that the Kellogg Company had unmistakably distinguished its manufacture and that no deception of the public resulted from what defendant did. There was, therefore, no unfair competition. (R. V. I, pp. 204-227). The cartons in issue appear at V. I, pp. 205-219.

On appeal, the Circuit Court of Appeals affirmed the decree of the District Court in a *per curiam* opinion (R. V. III-A, p. 2069).

Thereafter the Court granted a rehearing, again heard full argument from new counsel for the plaintiff, indicated that counsel for the defendant need not argue at length, and thereupon did the unusual thing of handing down an elaborate opinion completely reversing its first opinion, granting all the prayers of plaintiff's bill of complaint and even going far beyond plaintiff's final or modified prayers.*

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* On the original hearing in the Court of Appeals, the Court questioned the plaintiff's counsel concerning its power to enjoin the defendant from all competition whether fair or unfair, and plaintiff's counsel conceded that the Court had power to restrain only unfair competition; in short, defendant's right to manufacture was admitted to be indisputable. This oral concession was embodied in plaintiff's brief entitled "Appellant's Brief on Rehearing", at page 34:

> "We confidently submit that the decree of the District Court, dismissing the Bill, should be reversed and the case remanded to that court, with instructions to enter a decree for the complainant: . . .
> 2. That the defendant be enjoined from manufacturing or selling or offering for sale Whole Wheat Biscuit in substantially the form and shape of the plaintiff's biscuit, unless each such biscuit be banded or marked in such a distinctive manner as to state clearly that it is a product of the defendant and not of the plaintiff."

Defendant accepted plaintiff's concession, and did not argue the same, stating at page 5 of its brief on rehearing:

> "2. Plaintiff's belated concession of defendant's indubitable right to make the patent-expired biscuit, necessarily concedes defendant's equally indubitable right to call it by its patent-expired name."

e Court in its second decision directed the District Court enjoin the defendant perpetually from using the words redded wheat as a trade name and from offering its oduct for sale in the form and shape of plaintiff's (R. V. -A, pp. 2083-2093). The Court did this without finding new or different facts and without considering any horities which had not been before it on the earlier ument.

The first decision of the Circuit Court of Appeals, like t of the District Court, was based on the doctrine of dedi- ion of form and description to the public by patent expi- ions as expressed by *Singer* v. *June*, 163 U. S. 169. The ond decision can hardly be characterized as less than an empt to reverse the doctrine of *Singer* v. *June*, in a case in ich the plaintiff, by threats of trademark suits, drove the endant off the market in 1922, not to return until 1927. The urt's second decision held that because plaintiff thus had oyed approximately five years' exclusive occupation of market, the case had ceased to be a patent expiration case l had become the same as though no patents had ever been nted. And yet the Court, in effect, revives the expired ents and makes them perpetual. If this ruling stands, doctrine of dedication of name and form by patent- iration will have ceased to exist.

The nearest attempt at a similar result that we have n able to find was by the same Court and was frustrated this Court in *William Warner & Co.* v. *Eli Lilly & Co.*, U. S. 526. The Court of Appeals, there, instead of re- aining the undeniably unfair acts of the defendant, ght to penalize the entire public by setting up in plain- a perpetual monopoly of the right to combine cocoa l quinine. This Court granted certiorari and unani- usly reversed that attempt to use the law of trademarks a means of setting up a revolutionary system of per- ual monopolies in publicly owned rights by judicial leg- ation.

B. Statement of the Facts.

I. The Plaintiff's Claim.

1. This suit was brought in the United States District Court for the District of Delaware on the claim of National Biscuit Company, plaintiff, that its exclusively owned trademarks consisted of (a) the shape, form or appearance of the well known and formerly patented, rectangular shredded wheat biscuit, a shape and form necessarily resulting from expired machine patents, (b) of the words "shredded wheat", applied to any cereal product and (c) of the representation or pictorial description of the biscuit, and that defendant had infringed these three trademarks (a) by making a smaller and darker biscuit than plaintiff's and packed in distinctive cartons, (b) by calling its product "Kellogg's Shredded Whole Wheat Biscuit" and (c) by illustrating its biscuit on its clearly differentiated packages.

The suit also alleged that the same three acts, (a), (b) and (c) above, constituted unfair competition. No unfairness otherwise was charged. No claim was made that defendant's product, as packed and sold by defendant, had ever been passed off as plaintiff's or was capable of being passed off (Complaint, R. V. I, pp. 5-25). All biscuits of both plaintiff and defendant are sold in cartons which are so distinctly different that no confusion or passing off is possible.

II. The facts developed at the trial as found by the trial Judge (R. V. I, p. 193).

(1) Shredded wheat biscuit is made by machine. The shreds or strings are deposited in successive layers on a belt and are then cut across to form the biscuit or loaf. During the baking operation the shreds arch up and give a truss-like rigidity to the fragile biscuit. The biscuit cannot be individually marked (R. V. I, p. 221).

(2) The patents on the so-called Perky machine used by the plaintiff and its predecessor to make the shape and

form of biscuit in issue, expired years ago (R. V. I, pp. 196 and 223).

(3) Plaintiff's predecessor for many years prior and up to the year 1915 printed on all the cartons of its packaged shredded wheat the following notice:

> "Patented, September 17, 1895, October 15, 1895. This Food, the Process of Making It, The Special Machinery for Its Manufacture, are Under the Protection of The United States Government by virtue of Many Patents As Follows" (Listing 41 patents) (R. V. I, pp. 195-6).

Included among the patents listed under this notice was plaintiff's patent, No. 24,688, on the design or form of the biscuit which had been declared invalid in *Natural Food Company* v. *Henry P. Bulkley, et al.*, No. 28,530, N. Dist. of Illinois, East Div., because Perky swore falsely that the design had not been in public use or on sale for more than two years before his application for patent (R. V. I, p. 197).

Plaintiff's basic patents expired in 1912 and all of its patents had expired before defendant entered the field (R. V. I, p. 223).

(4) The machine of the expired patents produces the very form and shape of biscuit in dispute (See V. 5, pp. 12-13, Perky patent No. 532,286 and V. 5, pp. 110-119, Perky patent No. 678,127). A perpetual monopoly in the form and shape of the biscuit would unavoidably give plaintiff a similar monopoly in the machine of the expired patents in spite of the expiration of the patents, for the necessary result of the use of the machine is to produce the particular form and shape of biscuit in controversy. The shape of the biscuit is functional and the function of the machine is to produce that shape of biscuit.

(5) Defendant's proofs established that it had tried to mark or band the biscuit but that it was not practical to do so (R. V. I, p. 221). Plaintiff in effect, confessed this to be true by offering no proof of any way of marking the biscuit and by contending that defendant should

make some other shape of biscuit (R. V. 3, p. 2019, and V. I, p. 270). Defendant's proofs showed that the only known way visually to distinguish its biscuit was to make them shorter and darker than plaintiff's and enclose them in distinctive cartons. This defendant has always done (R. V. I, p. 221). As a matter of fact after defendant had marketed its small biscuit for five years, plaintiff copied the defendant's size exactly thus wiping out the size distinction which defendant had adopted (R. V. I, p. 204).

(6) The language which plaintiff claims to have exclusive right to use, that is, the words "shredded wheat", is the very language used in the specification of the Perky patents under which plaintiff's predecessor had a monopoly for seventeen years, to describe the product and process of making it. Thus

Perky patent No. 520,496, May 29, 1894:

> "the resulting product * * * in the form of films, strings, or *shreds* are deposited * * * "
> "these *shreds* * * * fall upon this roll * * *" (R. V. 5, p. 10).

Perky patent No. 532,286, January 8, 1895 (R. V. 5, p. 13):

> "* * * a food preparing machine to receive the *shredded* or thread-like product in layers."

Perky patent No. 532,697, January 15, 1895 (R. V. 5, p. 27):

> "the threads or *shreds* of the food product * * *"
> "the material to be *shredded* * * *"
> "to receive the *shredded* or filamentous discharge * * *"

Perky patent No. 533,555, February 5, 1895 (R. V. 5, p. 53):

> "one of the *shredders* in section * * *"
> "Each reducer or *shredding* device * * *"
> "adherence of the *shredded* or treated product * * *"

Perky patent No. 681,656, August 27, 1901 (R. V. 5, p. 141):

> "machines for cutting *shredded wheat* * * *"

Perky patent No. 713,795, November 18, 1902 (R. V. 5, p. 171):

> "a cracker of filamentous or *shredded wheat* or other grain * * *"

Many additional quotations from plaintiff's patents, cartons and advertisements showing the use of the words "shredded wheat" by plaintiff in a solely descriptive way appear in Appendix A, p. 27.

(7) Plaintiff's cartons (V. 1, p. 205) have always prominently displayed various registered trademarks, no infringement of which is claimed in the present litigation. Its complaint does not allege any similarity. Plaintiff's main brief on appeal stated, p. 62, that "The present case is not a patent case nor a carton case", meaning that no carton similarity was charged. The Trial Court held that defendant's cartons could not be mistaken for or passed off as Plaintiff's. Plaintiff's trademark prominently carried on its cartons from 1894 until 1915, was a representation of the mythological Goddess "Ceres", holding a sheaf of wheat in her arms. This trademark was registered May 22, 1906, No. 52,858 (V. 4, p. 193). About 1915, the "Ceres" mark was supplanted by a picture of the Niagara Falls, which is still prominently displayed on plaintiff's cartons (V. 1, p. 209). In 1905, plaintiff made its first claim to the words "shredded whole wheat" as a trademark and sought to register these words, first as a fanciful mark, and later as a descriptive term. The application was rejected and the rejection upheld on appeal. *Natural Food Co.* v. *Williams*, 30 App. D. C. 348. On November 5, 1912, plaintiff registered as its trademark the pictorial representation of its Niagara Falls factory (V. 1, p. 205), and this trademark has since constituted the most prominent feature of its cartons. This registration No. 89,071 (V. 4, p. 199), states that the factory picture trademark is used for "shredded wheat in Class No. 46, foods and ingredients of foods". Plaintiff's registration states that "No claim is made herein to the words 'The Home of Shredded Wheat' ". Plaintiff's predecessor also secured trademark registration No. 85,186 (V. 4, p.

197), on an alleged trademark showing a shredded wheat biscuit in a dish with a spoon and cream. The registration states "no claim being made to the representation of a shredded wheat biscuit," thus applying the precise description to the precise illustration and, in effect, disclaiming both.

Plaintiff's predecessor in 1926 procured registration No. 216,593 (V. 4, p. 205) for a trademark shown in the drawing as a dish containing two shredded wheat biscuits. The illustration of the two shredded biscuits is clear and undisputable. The registration states that Plaintiff "disclaims any exclusive right to the representation of the two biscuits apart from the mark shown."

Plaintiff on January 15, 1924 and again on May 25, 1926, registered the words "shredded wheat" under the Act of March 19, 1920 (V. IV, pp. 201 and 3). These registrations are statutory admissions that the words are descriptive, as the Act was enacted to permit registration of descriptive terms. These registrations are without presumption of validity.

Charles Broadway Rouss v. *Winchester*, (C. C. A. 2) 300 Fed. 706-712;
Sleight Metallic Ink Co. v. *Marks*, 52 Fed. (2) 664.

Thus plaintiff twice registered other things as its trademark and in each registration illustrated a shredded wheat biscuit, described it as a shredded wheat biscuit and disclaimed it as a trademark.

Plaintiff also disclaimed the words "shredded wheat" specifically and by descriptive usage.

Although this trademark-disclaimer-defense of the words and the design was clearly a bar to the injunction ordered, as to both form and description of the biscuit, as repeatedly held by this Court, the Circuit Court of Appeals denied rehearing without having stated its position on the question of the disclaimer on either hearing, although the defense was pressed on both hearings.

8. In 1915, Ross Biscuit Company began to make and sell a biscuit identical in size and color with plaintiff's and its right to do so was upheld by the Circuit Court of Appeals

for the 2nd Circuit in 1918. *Shredded Wheat Co.* v. *Humphrey Cornell,* 250 Fed. 960. Thereafter, the resources of the Ross Company became exhausted and it retired from the field. (R. V. I, p. 202).

9. Plaintiff's Canadian subsidiary, after this suit was filed, sued defendant's Canadian subsidiary in the Supreme Court of Ontario on the same cause of action here involved. After trial, that suit was dismissed on the ground of the patent expirations. *Canadian Shredded Wheat Co.* v. *Kellogg Co. of Canada, Ltd.,* 1936 Ontario Rep. 281. The five judges of the Court of Appeals of Ontario unanimously upheld that judgment. *Same* v. *Same,* 1936 Ont. Rep. 613.

10. Plaintiff's predecessor first warned defendant's predecessor in January 1922 not to make the patent-expired biscuit. The notice did not charge unfair acts but warned against any competition whether fair or not (R. V. I, pp. 103-08). Defendant retired from the market in 1922 and reentered in 1927. Suit was instituted in 1928 admittedly in part for advertising purposes, news releases being planted with newspapers days before the bill was filed (R. V. I, pp. 604-605).

In 1930 that suit was withdrawn without prejudice and this suit started two years later and tried, defendant believes, because, weary of ten years of harassment, defendant sued plaintiff for violation of the Sherman Anti-trust Act. *Kellogg Co.* v. *National Biscuit Co.,* 71 Fed. (2) 662.

11. After trial, the District Court dismissed the bill on the ground that the patent-expirations precluded any relief as to form, name or picture under the doctrine of *Singer* v. *June,* (supra); that the words "shredded wheat" were descriptive of the patent-expired biscuit, and had always been so used by plaintiff; that the shape of the biscuit was functional and not merely ornamental or fanciful; that relief could be based only on wrongful acts of defendant in passing its goods off as plaintiff's and that there had been no passing off; that defendant's packages were incapable of being passed off as plaintiff's; that defendant's biscuits outside of the package were distinguished in size and color from plaintiff's as far as was possible;

that further distinction of defendant's biscuit from plaintiff's other than by size and distinctive carton was impossible without destruction of defendant's undeniable right to compete; that plaintiff had failed to prove either its ownership of the three exclusive and perpetual monopolies it claimed as trademarks or any acts of unfair competition by defendant. (The opinion of the District Court is unreported and appears at R. V. I, p. 193. The findings are included in the opinion.)

IV. Plaintiff's appeal to the Circuit Court of Appeals for the Third Circuit was argued by Mr. Drury W. Cooper and ex-Judge Thomas G. Haight December 3, 1935 and the findings of fact and conclusions of law of the District Court and its decree dismissing the bill were unanimously affirmed in a *per curiam* opinion on January 16, 1936.

(The *per curiam* opinion of the Circuit Court of Appeals, composed of Circuit Judges Buffington, Davis and Thompson, is unreported and appears in R. V. III-A, p. 2069).

V. Plaintiff thereupon, on February 15, 1936, petitioned for rehearing on the ground principally that its alleged exclusive occupation of the market, from 1922 to 1937, after its patents had expired in 1912, had created exclusive and perpetual monopolies of form and of verbal and pictorial description of the biscuit, all by analogy to the ten year clause of the Trademark Act of February 20, 1905 (U. S. C. Tit. 15 Sec. 85). Plaintiff's counsel on the rehearing petition were those previously appearing in the cause. (R. V. III-A, p. 2079).

VI. The petition for rehearing was granted on May 7, 1936, and the reargument took place on October 8, 1936 (R. V. III-A, p. 2082). Hon. David A. Reed first appeared on plaintiff's brief on rehearing and, along with Judge Haight, argued the cause for plaintiff on rehearing, relying on the same authorities and facts as cited by Mr. Cooper and Judge Haight on the first hearing.

VII. On April 12, 1937, the Circuit Court of Appeals, filed its second opinion by Davis, C. J., reversing its former

opinion but not disturbing the findings of fact of the District Court except as to the conclusion that the words "shredded wheat", were descriptive, saying, strangely enough, that if the words "shredded wheat" were descriptive they *"could not have been the subject of a patent"*. (R. V. III-A, p. 2086 but see, Appendix A, pp. 27-28). The Court ordered the District Court perpetually to enjoin defendant from marketing the patent-expired biscuit, from pictorially describing it by illustration on its package, or from marketing any product under the words "shredded wheat". The second decision of the Circuit Court of Appeals revived the expired design, product, process and machinery patents as applied to shredded wheat biscuit and made them perpetual. The second opinion of the Court on rehearing is not yet reported and appears at R. V. III-A, p. 2083.

VIII. Defendant thereupon filed a petition for rehearing on May 7, 1937, and thereafter filed motions (R. V. III-A 2130 and 2145) for an injunction and for recall of the second decision on the ground that plaintiff had widely, unfairly and falsely advertized that defendant was under injunction and had otherwise unfairly exploited the Court's second opinion by publishing unfair excerpts therefrom, especially as to the phrase "The original bears this signature W. K. Kellogg" which had never been an issue in the case, was not mentioned in the complaint and is not covered by the prayers for relief or by the injunction ordered and which was off of nearly all of defendant's cartons at the time of the trial (R. V. III-A, p. 2131).

IX. The Court on July 13, 1937 denied defendant's petition for a rehearing without opinion (R. V. III-A, p. 2240), and on the same day denied its motions concerning respondent's untrue statement that defendant was under injunction and other unfair use of the decision (R. V. III-A, 2241). This denial was also without comment or condemnation of the unfair exploitation by plaintiff of a decision, with no mandate issued, with a petition for rehearing pending and other avenues of review unexplored.

The mandate below is still stayed pending this petition.

III. Reasons for Granting the Writ.

A. Preliminary.

The questions presented are whether the case involves serious and important constitutional questions and conflicts of decision involving the same or similar subject matter as between the first decision of the Circuit Court of Appeals and the last one and also as between that decision and the decisions of this Court concerning the effects of patent expirations on names and forms of patented products and machines; also as to the effect of trademark disclaimers; and as to the well established rule that perpetual monopolies of manufacture of either unpatented or patent-expired products shall not be set up under the guise of trademarks, and that patents, or monopolies, may be granted or extended only by Congress and not by the Courts and only for limited terms.

Also whether there is conflict between the last decision of the Court and the decisions of the Supreme Court and Court of Appeals of Ontario on the same subject matter and involving the same rules of law as to patent-expiration. Also as to whether there is conflict between the Second and Third Circuits, where on substantially the same facts one Court holds that defendant has a cause of action against plaintiff and the other Court holds that plaintiff has a cause of action against defendant.

Also whether there is conflict between the last decision below holding that the words shredded wheat were a true trademark and the decision of the Circuit Court of Appeals of the District of Columbia which held the exact opposite.

Also whether there is conflict between the Circuit Court of Appeals for the Second Circuit which held that the right of the Ross Biscuit Company to make and sell the patent-expired biscuit in issue was indubitable and the last decision in the Third Circuit which enjoins defendant from selling the biscuit in issue and thus, in effect, from making it.

B. Specific Reasons for Granting the Writ.

1. The last decision of the Circuit Court of Appeals of the Third Circuit holding that plaintiff may lawfully appropriate exclusively the form of (and thus the right to manufacture) the biscuit in issue is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Shredded Wheat Co.* v. *Humphrey Cornell, supra,* in which an opposite conclusion was reached. In that case, plaintiff's predecessor, The Shredded Wheat Company, sued the Humphrey Cornell Company, distributor for Ross Biscuit Company, in the District Court in Connecticut for alleged trademark infringement and unfair competition, alleged to consist of making and selling shredded wheat biscuit of the same size and shape as plaintiff's, in cartons which were incapable of being confused with plaintiff's cartons of shredded wheat biscuit. The District Court after the trial enjoined the defendant from marketing any biscuit in cartons or apart from cartons unless each biscuit was individually impressed, tagged or marked to distinguish it from plaintiff's unmarked biscuit. This corresponded to plaintiff's final prayer in the instant case. Footnote, *ante,* p. 2.

On appeal, the Circuit Court of Appeals for the Second Circuit modified the District Court's decree by holding (1) that as to biscuit that reached the final consumer in defendant's cartons, there should be no injunction, (2) that as to biscuit served apart from the carton (restaurant service), the defendant should endeavor for a period of six months to tag or impress a mark upon such biscuit and (3) that if after the six month's trial, the defendant should be unable to mark its biscuit without destruction of its right to compete, it might apply to the Court to vacate the injunction ordered. Judge Ward dissented, holding that the bill should be dismissed; that the form was functional and that the fragile biscuit could not be marked.

Even Judge Thomas in the District Court in the Humphrey Cornell case did not go so far as to enjoin

the defendant from making the biscuit at all and in perpetuity, and Ward, C. J., as aforesaid, dissented from the tentative and limited injunction ordered by the compromise reached by Judges Learned Hand and Hough of the Court of Appeals of the Second Circuit.

2. The last decision of the Circuit Court of Appeals of the Third Circuit holding that the words shredded wheat are not descriptive of the goods, were not so used by plaintiff and are capable of exclusive appropriation by plaintiff is in substantial conflict with the decision of the Court of Appeals of the District of Columbia in *Natural Food Company* v. *Williams, supra,* in which a contrary conclusion was reached on substantially the same issues and in which plaintiff acquiesced by the disclaimers aforesaid. *Ante,* p. 7.

In that case it appeared that the words shredded wheat were used originally by plaintiff's predecessor, Natural Food Company, descriptively and without claim of trademark, but after the enactment of the Trademark Act of February 20, 1905 (U. S. C. Title 15 Sec. 85) with a provision permitting registration of descriptive words used exclusively for at least ten years next preceding passage of the act, plaintiff's predecessor first associated a trademark notice with the words shredded wheat and filed an application to register them. After rejection as a fanciful name, plaintiff vainly sought registration as a descriptive mark used exclusively for ten years prior to 1905. Opposition was filed by William E. Williams on the ground of concurrent user and descriptiveness. The opposition was sustained by the tribunals of the Patent Office and by the Court of Appeals of the District of Columbia.

The Circuit Court of Appeals held that plaintiff's predecessor had not for ten years prior to 1905 exclusively used the words "shredded whole wheat" and that in fact it was open to question whether the words had ever been claimed or used as a trademark prior to the enactment of the ten year clause in 1905. It was also held that the words were clearly and solely descriptive of the product of many

shredded wheat patented machines and used in the patents as a description. *Natural Food Co.* v. *Williams, supra.*

3. The last decision of the Circuit Court of Appeals of the Third Circuit is in substantial conflict with the decision of the Second Circuit in *Kellogg Company* v. *National Biscuit Company, supra.*

In that case defendant in or about 1932 sued plaintiff for damages for alleged violation of the Sherman Anti-Trust Act, reciting facts which it claimed established a conspiracy to monopolize the manufacture of the patent-expired shredded wheat. The complaint in that action contains the affirmative allegations made in the answer filed by defendant in the instant litigation. District Judge Caffey, on motion, dismissed the complaint. On appeal the Circuit Court of Appeals for the Second Circuit reversed and held that the complaint set forth a cause of action for violation of the Sherman Act. Therefore, on substantially the same state of facts, the Circuit Court of Appeals of the Second Circuit holds for defendant and the Third Circuit holds for plaintiff. Conflict could hardly be more pronounced.

4. The last decision of the Circuit Court of Appeals of the Third Circuit is in substantial conflict with the decision of the highest court of Ontario on the identical issues in *Canadian Shredded Wheat Company, Ltd.* v. *Kellogg Company of Canada, Ltd., supra.* In that case brought after starting the instant suit, plaintiff's Canadian subsidiary sued defendant's Canadian subsidiary on the same cause of action in the Supreme Court of Ontario. Mr. Justice McTague dismissed the complaint, *Canadian Shredded Wheat Company, Ltd.* v. *Kellogg Company of Canada, Ltd., supra,* holding that plaintiff had no trademark rights in the form and verbal and pictorial description of the patent-expired biscuit.

On appeal, the five judges of the Court of Appeals of Ontario unanimously affirmed the judgment of Mr. Justice McTague. The case is now pending in the Privy Council.

The Canadian law as applied in that case is the same as the American, English and French law. Defendant's business north of the Canadian line is now held to be lawful while south it is unlawful. This is a serious and important conflict in every way. Surely defendant should be free to compete with plaintiff in a fair way in the United States as in Canada.

5. The last decision of the Court below is also, we believe, in conflict with the decision of this Court in *Singer* v. *June, supra,* regarding the effect of patent expirations upon the form and name of a patented article.

In that case it was held that after the Singer patents had expired the product covered by them and the name applied thereto could not be restricted to the sole use of the patentee. Yet in the present case the Circuit Court of Appeals for the Third Circuit has wholly disregarded this doctrine and granted a perpetual monopoly.

The Singer-June rule of irrevocable dedication of name and form by patent expiration is elementary, sound and established law and should not, we submit, be overruled, repealed or disregarded as the Court below does in its second decision.

6. The last decision of the Court below is also in conflict with the Constitution of the United States (Art. I, Sect. 8, par. 8). The Court and Congress both lack power to revive patents or to grant perpetual monopolies in the form and in the pictorial and verbal description of a product after the expiration of patents on the design or form and on the product itself, as well as the method of and machinery for its manufacture. The Court's action in reviving and perpetuating plaintiff's patent monopolies after their expiration is a virtual breach of the constitutional limitation on the powers of Congress. The Constitution, Art. I, Sec. 8, sub-par. 8, grants power to Congress to extend monopolistic privileges to inventors and authors only and for a limited time. Under this authorization Congress has seen fit to grant to inventors

in return for their public dedication of their invention monopolies for 17 years only.

7. The injunction ordered is also in conflict with the Sherman Anti-Trust Act, approved July 2, 1890, as amended. That Act makes fair competition mandatory. Here the Court below enjoins defendant from all competition, fair or otherwise.

8. The last decision of the Court below is also in substantial conflict with its own view of the law of patent-expiration as applied in *Amiesite* v. *Interstate Amiesite Co.*, 72 F. (2d) 946, and also with the decision of the Circuit Court of Appeals for the Second Circuit in *Du Pont Cellophane* v. *Waxed Products*, 85 Fed. (2) 75; Certiorari denied, 57 Sup. Ct. 194.

9. The last decision of the Court below is contrary to *Delaware & Hudson Canal Co.* v. *Clark*, 13 Wall. 311, *Standard Paint Co.* v. *Trinidad Asphalt Manufacturing Co.*, 220 U. S. 446,* and *Warner* v. *Eli Lilly*, (supra), which hold the invariable rule to be, that relief in trademark infringement and unfair competition cases alike rests upon the wrongs of the defendant in passing off its goods as plaintiff's and not upon any alleged right of a plaintiff to be protected in a name or form which under the guise of a trademark will set up monopolies in products which all are free fairly to make and sell. Here the finding is that defendant's goods have never been passed off as plaintiff's and are so distinctly marked as to be incapable of being passed off (R. V. I, 204-226, V. III-A, 2072).

10. The last decision of the Court below is also in conflict with that of this Court in *Warner* v. *Eli Lilly*, *supra*, and of the Second Circuit in *Shredded Wheat Co.* v. *Humphrey Cornell*, *supra*, and other cases, holding that a Court has power only to restrain the deceptive use of ornamental,

* Judge Davis, in the second decision below, cites this case in the Circuit Court of Appeals (163 Fed. 977). Why he does so we do not know unless he is relying on the dissenting opinion of Judge Sanborn. The majority opinion of that Court, however, overruling the dissenting opinion of Judge Sanborn, was unanimously affirmed by this Court in 220 U. S. 446.

fanciful or non-essential features of dress or appearance and not, by enjoining the use of functional or mechanical shapes, forms or essential features and descriptive names, to stop the defendant from all competition however honorable and fair.

11. The last decision below is in conflict with *Warner* v. *Eli Lilly*, (*supra*), in another respect also. The Court below, in that case, attempted by injunction to go beyond the unfair acts of the defendant and to set up a perpetual monopoly of the right to combine cocoa and quinine there involved. This Court reversed that decision and the Circuit Court of Appeals, in effect, has now apparently disregarded the admonition of this Court by setting up similar perpetual monopolies of form and shape and of pictorial and verbal descriptions of a patent-expired product.*

12. The last decision below is also in conflict with *Centaur* v. *Heinsfurter*, (C. C. A. 8) 84 Fed. 955, in which Mr. Justice Brewer held that dedication of name and form by patent-expiration under the Singer-June doctrine was perpetual and not revocable even in a case of ten years exclusive occupation of the market by the patentees after the patent had expired. The Third Circuit now holds that five years occupation of the market (accomplished by threats) revives the long dead patents and makes them perpetual.

13. The last decision below also conflicts with *Kellogg Toasted Corn Flake Co.* v. *Quaker Oats Co.*, (C. C. A. 6) 235 Fed. 657. The Court there held that even if secondary meaning for the words "Toasted Corn Flakes" pointed to this plaintiff's predecessor as maker, the Quaker Oats Company could still make the same patent-expired product and market it as "Quaker Toasted Corn Flakes" in distinc-

* It is irrelevant to argue that "shredded wheat" is not descriptive, for the picture indisputably is descriptive and that is enjoined too. In our brief (p. 35), we give instances of the use of shredded wheat in a purely descriptive way in plaintiff's patents and advertisements.

tive and fair cartons. Different "makes" of corn flakes are just as indistinguishable, when served apart from their cartons, as are shredded wheat biscuit.

14. The last decision below is also squarely in conflict with the decision of this Court in *Beckwith* v. *Commissioner of Patents*, 252 U. S. 538, and *Rahtjen's* v. *Holzapfel's*, 183 U. S. 1, holding that disclaimers embodied in trademark certificates are irrevocable.

This point was wholly disregarded by the Court although always pressed by defendant.

15. When the second decision came down, plaintiff, with all the driving force of its great advertising, publicity and sales promotion departments, sent all over the country advertisements, circulars, and news releases, with double check follow ups (R. V. III-A, p. 2130), stating that defendant was under injunction and excerpting only the statements of the second decision regarding the phrase "The original bears this signature W. K. Kellogg". That phrase was never an issue on the trial. The complaint makes no mention of it and there is no prayer for relief. The injunction ordered does not mention it. The phrase originated on defendant's corn flake cartons and was almost out of use at the time of the trial and had not been in use for several years prior to the second decision. Motions were made (R. V. III-A, p. 2130) to recall and to restrain the unfair use of the Court's decision. The Court denied the motion, thus putting its seal of approval on this inequitable proceeding. That action was in conflict with:

Peters v. *McDonald*, (C. C. A. 2nd) 61 Fed. (2nd) 1031;

Art Metal Works v. *Abraham and Straus*, 62 Fed. (2nd) 79.

16. Finally, we complain because we believe the Court below was unfair and denied due process because at both

hearings defendant's counsel were denied an opportunity fully to argue the case. This was particularly true with respect to the secondary defense of disclaimer and to defendant's conceded right to make and sell the biscuit in issue. After the Circuit Court of Appeals had granted its far reaching injunction on the second hearing, it refused defendant an opportunity to reargue the case. This, we believe, was unfair in view of the fact that the injunction granted went far beyond plaintiff's final prayers. *Ante*, p. 2, footnote.

We respectfully petition the Court to grant a writ of certiorari.

Respectfully submitted,

W. H. CRICHTON CLARKE,
EDWARD S. ROGERS,
ROBERT T. McCRACKEN,
Counsel for Defendant-Petitioner.

BRIEF IN SUPPORT OF PETITION.

1. Opinions Below.

The opinion of the District Court of the United States for the District of Delaware, filed January 11, 1935, is printed at Record V. I, p. 193, and is not officially reported.

The first opinion of the Circuit Court of Appeals for the Third Circuit, filed January 16, 1936, is printed at Record, V. III-A, p. 2069, and is not yet reported.

The second opinion of the Circuit Court of Appeals for the Third Circuit, sur rehearing, filed April 12, 1937, is printed at Record V. III-A, p. 2083, and is not yet reported.

2. Jurisdiction.

The original decision of the Circuit Court of Appeals for the Third Circuit was rendered January 16, 1936. Plaintiff respondent duly filed a petition for rehearing which was granted, and the second decision of the Circuit Court of Appeals, sur reargument, was rendered April 12, 1937. Defendant appellee thereafter duly presented its petition for rehearing, and its motion to recall the decision, and, after argument on the latter, both the petition to rehear and the motion to recall were denied July 13, 1937 (R. V. III-A, pp. 2240-2241).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936.

3. Statement of the Case.

See petition, supra, pp. 4-11.

4. Specification of Errors Relied Upon.

The Circuit Court of Appeals, in its second decision, erred:

1. In holding that since the expiration of plaintiff's patents on shredded wheat, defendant was not entitled to

advertise or sell shredded wheat biscuits in a form and shape similar to plaintiff's, although that is the only form and shape in which said biscuits can be manufactured by the formerly patented machinery without modification.

2. In holding that plaintiff could appropriate, as trademarks, descriptive words, forms and pictures which it had specifically disclaimed as trademarks for the purpose of registering other things as its trademarks.

3. In holding that, since the expiration of plaintiff's patents on shredded wheat, defendant is not entitled to display in its advertisements pictures of shredded wheat biscuits in form and shape similar to plaintiff's, although that is the only form and shape in which said biscuits can be manufactured by the formerly patented machinery.

4. In holding, in effect, that in spite of the expiration of plaintiff's patents on shredded wheat, defendant is not entitled to use the formerly patented machinery for the purpose of manufacturing the sole product of such machinery, shredded wheat biscuits.

5. In substantially granting plaintiff a perpetual monopoly in the formerly patented machines in violation of the limitation contained in Art. 1, Sec. 8, sub-par. 8 of the Constitution which provides for the granting of such monopolies to new inventors only and for a limited time only and by Congress only, and grants no power even to Congress to revive long dead patents.

6. In holding that, since the expiration of plaintiff's patents on shredded wheat, defendant is not entitled to use the words shredded wheat to describe its product, although that is the precise language used in plaintiff's trademark registrations and patents to describe the product.

7. In holding that the words shredded wheat are not purely descriptive and that they are therefore capable of exclusive appropriation as a trademark, even after specific statutory disclaimer.

8. In holding that the words shredded wheat have acquired a secondary meaning in the minds of the public, and in further holding that they have thus become the exclusive property of the plaintiff and incapable of distinguishing and fair use by defendant.

9. In holding that the words shredded wheat, after dedication to the public by the expiration of patents pertaining thereto, and after specific statutory trademark disclaimers, may be reappropriated exclusively by plaintiff through continued user (principally because defendant was prevented by threats of litigation from competition from 1922 to 1927).

10. In holding that the words shredded wheat were capable of exclusive appropriation by plaintiff through continued user for a period of years, even in the absence of patent-dedication and trademark disclaimer.

11. In holding that defendant, who had distinguished its shredded wheat biscuits from plaintiff's in so far as possible in shape and form, and who had packed said biscuits in distinctive cartons, and who had never imitated plaintiff's carton trademarks, was guilty of trademark infringement or unfair competition.

12. In holding that the words "the original has this signature: W. K. Kellogg", a statement formerly placed on some of defendant's packages, was evidence of an intention to deceive the public and of unfair competition, especially where such phrase had never been an issue in the case, was not mentioned in the complaint or prayers for relief, and was not covered by the injunction ordered.

ARGUMENT.

By its second decision the Court below ordered the District Court to enjoin defendant perpetually

(a) from the use of shredded wheat as a tradename.
(b) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark.
(c) and also ordered an accounting for damages and profits.

Injunction clause (b) does not mention making and does not mention size or color.

Defendant can make the patent expired product but it is enjoined from "advertising or offering it for sale."

As to size, the plaintiff duplicated defendant's small sized biscuit five years after defendant had put it on the market and the court below has now enjoined defendant perpetually from advertising or selling any sized biscuit large or small, whether banded, tagged, packaged or not.

Moreover, plaintiff has recently sued the Ralston Purina Company in the United States District Court for the Eastern District of Missouri (*National Biscuit Co.* v. *Ralston Purina Company*, in Equity No. 11817) for making a thumb-nail size of shredded wheat marketed as "Shredded Ralston".

In short, plaintiff has now received a perpetual monopoly against anyone ever calling or picturing any product of any size as shredded wheat or using any kind of machinery now known or formerly patented or hereafter devised for making any size of product that resembles "the form and shape" of plaintiff's biscuit. All this in perpetuity.

Plaintiff never had anything like that kind of protection even during the life of its forty-one patents.

Petitioner respectfully submits that the second decision of the Circuit Court of Appeals is not only in conflict with the applicable decisions of this Court on important questions of law relating to patent-expirations, disclaimers, trademarks and unfair competition and with recent decisions of other Circuit Courts of Appeals involving substan-

tially the same questions of law (*Kellogg Company* v. *National Biscuit Company, supra*), but is also in direct conflict with Art. 1, Sec. 8, sub-par. 8 of the Constitution which grants power to Congress to extend monopolistic privileges to inventors only and to such for a limited time only. Not even Congress is given power to revive long-dead patents and to make them perpetual. The second decision is also in conflict with decisions of other Courts in cases involving the specific trade-mark and product involved in this case.

Petitioner maintains specifically that the second decision of the Court below granting perpetual monopolies in the name, shape and form of a patent-expired article is directly in conflict with the decision of this Court in *Singer* v. *June* (*supra*), of the Circuit Court of Appeals of the Second Circuit in *Dupont Cellophane Co.* v. *Waxed Products Co.* (*supra*), and of the Circuit Court of Appeals of the Third Circuit in a decision just preceding the one here sought to be reviewed—*Amiesite Asphalt Co. of America* v. *Interstate Amiesite Co.* (*supra*).

The decision is directly in conflict with decisions of another Circuit Court of Appeals bearing upon the specific name shredded wheat in that it grants a perpetual trademark in this name by injunction, although the registration of such trademark under the Act of 1905 has been judicially denied.

The Natural Food Company v. *Williams* (*supra*);

See also

McKesson & Robbins v. *Phillips Chemical Co.*, 53 Fed. (2nd) 1011.*

Plaintiff having in its patents, advertisements and trademark applications described the product itself as "shredded wheat" and specifically disclaimed exclusive right to the words "shredded wheat" and to the representation of "a shredded wheat biscuit", its claim to the exclusive use of these words and representation is barred by such descrip-

* The *McKesson-Robbins* case, 23 Fed. (2d) 763, cited by the Court below (V. IIIA at p. 2091), was reviewed in a bill under Section 4915 of the revised statutes brought by the defeated party. The Circuit Court of Appeals for the Second Circuit (53 Fed. (2d) 342; 53 Fed. (2d) 1011) vacated the decree of the Court of Appeals of the District of Columbia and cancelled the registered marks involved.

tion and disclaimers and the decision granting such exclusive use is in conflict with applicable decisions of this Court.

Beckwith v. *Commissioner of Patents*, (*supra*);
Holzapfel's v. *Rahtjen's* (*supra*).

In the absence of any confusion as to the source of manufacture or any acts which result in passing off of the defendant's product as plaintiff's, there can be no unfair competition under such cases as:

Delaware & H. Canal Co. v. *Clark* (*supra*);
Saxlehner v. *Wagner*, 216 U. S. 375.

The decision also conflicts with the settled law that defendant may lawfully enter the competitive field at any time after the expiration of plaintiff's patents. A dedication once made cannot be recalled.

Centaur Co. v. *Heinsfurter* (C. C. A. 8), *supra.*

And the "right to individual appropriation once lost is gone forever."

Saxlehner v. *Eisner*, *supra.*

Finally, we confidently rely on the judgment of this Court in *William Warner* v. *Eli Lilly*, *supra.*

There the defendant was grossly unfair but this Court did not regard that as any ground for giving the plaintiff a perpetual monopoly of the right to combine cocoa and quinine as a remedy.

Here the defendant, Kellogg Company, was found to be scrupulously fair, yet plaintiff is given a perpetual monopoly of the form or shape and verbal and pictorial description of a patent-expired product.

Respectfully,

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Counsel for Defendant-Petitioner.

APPENDIX.

As to Plaintiff's use of Shredded Wheat as a descriptive term.

Paragraph III, page 23, of Plaintiff's Brief on Rehearing below started with the caption "The name 'Shredded Wheat' when first adopted by the plaintiff, was not, and never has been merely descriptive of the product * * *" (not in record).

The argument was that the word "shredded" is only properly applicable to a substance that is cut or torn into small strips and that shreds that are made by rolling or mangling as distinguished from tearing are not shreds but are something else. As a matter of English, this is not so.

I. Dictionary use.

Webster's New International Dictionary (Second Edition):

> shred n. 1. A long, narrow piece cut or torn off; a strip; as, a *shred* of ground, of toast. 2. *a* A fiber-like strip, as of cloth, peel, thread, membrane, or cloud. *b* In general, a fragment; a piece; particle. 3. *obs. a pl* parings *b* A twig, *c slang* A tailor. 4. A shard *rare.*
>
> shred v. 1. to cut; hew; lop off; prune; strip. *obs.* 2. To cut or tear into small pieces, esp. narrow and long pieces, as of cloth or leather; to tear into shreds. 3. To divide into two; to sever, as with shears.
>
> scrod, scrotum, scroll, screed and shroud are all cognate words.

In the Oxford Dictionary (1914), the following occurs:

> **shredded wheat: The grain of wheat cut by machinery into long filaments.** (Emphasis ours.)

The Century Dictionary (1910) has:

> *Shredder.* h. 1. A machine for cutting into shreds or short slivers, the stalks, leaves, and husks of ripe corn plants in making stover or shredded fodder for

cattle * * * the machine delivers the shredded product to a stacker or to a baling press. 2. **A machine for shredding whole wheat into long filaments or shreds. It consists essentially of pairs of steel rolls, one having a finely fluted face, placed above a traveling conveyor. Prepared whole wheat is fed between each pair of rolls and is torn into long threads, that fall upon the conveyor and are conveyed to cutting knives which divide them into cakes ready for baking.**" (Emphasis ours.)

II. Trademark and patent usage of shredded what was purely descriptive.

Moreover, the use of the words "shred" and "shredded" by plaintiff and its predecessors contradicts their counsel's assertion. For over forty years they have used the words "shred" and "shredded" to describe the product in their patents, now expired, under which the article was made, on the cartons containing it, and in the advertisements to the public, always in a merely descriptive sense.

To save the court the labor of referring to the voluminous exhibits, we quote the following (emphasis in each instance ours):

Trade-mark registration No. 85,186, January 30, 1912,

> "no claim being made to the representation of a **shredded-wheat** biscuit * * *." The biscuit is shown in the drawing and is thus identified as **shredded-wheat.**

Trade-mark registration No. 89,071, November 5, 1912,

> "has adopted and used the trade-mark * * * for **shredded-wheat** * * *."

Perky Patent No. 520,496, May 29, 1894, for a machine for the manufacture of food products from cereals,

> "the resulting product * * * in the form of films, strings, or **shreds** are deposited * * *."
>
> "these **shreds**, strings or films fall upon this roll * * *."
>
> "which catches such **shreds**, strings or films * * *."

Perky Patent No. 521,810, June 26, 1894, for a machine for the manufacture of food products from cereals,

"in uniformly irregular shapes of **shredded** or filamentous form * * *."

Perky Patent No. 532,286, January 8, 1895,

"to receive the **shredded** or thread-like product * * *."

Perky Patent No. 532,480, January 15, 1895, for a roll-machine for reducing cereals for food,

"to the form of long threads or **shreds** * * *."

"which disposes said threads or **shreds** lengthwise * * *."

"discharged in thread or **shred**-like form * * *."

"these **shreds** or threads * * *."

"to receive the **shreds** or threads * * *."

"disposes these continuous **shreds** * * *."

"disposition of the **shreds** or threads * * *."

Perky Patent No. 532,481, January 15, 1895, for a perforated-roll machine for reducing cereals for food,

"for reducing grain to thread-like or **shred**-like form * * *."

"in the form of threads or **shreds** * * *."

Perky Patent No. 532,697, January 15, 1895, for a roll-machine for reducing cereals for food,

"for the reduction of grain to **shredded** or thread-like form * * *."

"the threads or **shreds** of the food product * * *."

"the grain or other material to be **shredded** * * *."

"the material to be **shredded** * * *."

"to receive the **shredded** or filamentous discharge * * *."

Perky Patent No. 532,698, January 15, 1895, for a groove-roll machine for reducing cereals for food,

"for reducing grain or other articles for food to **shredded** or thread-like form * * *."

"discharged from these grooves in **shred** or thread-like form * * *."

Perky Patent No. 533,551, February 5, 1895, for a roll-machine for reducing cereals for food,

"to reduce the material to **shred**-like or filamentous form * * *."

"discharging the same in thread-like or **shred** form * * *."

Perky Patent No. 533,552, February 5, 1895, for a roll-machine for reducing cereals for food,

"for the reduction of grain to **shredded** or thread-like form * * *."

"the threads of material * * * in **shredded** or thread-like form * * *."

Perky Patent No. 533,553, February 5, 1895, for a roll-machine for reducing cereals for food,

"circumferentially grooved **shredding** roller * * *."

"to thread-like or **shredded** form, the threads or **shreds** being discharged therefrom * * *."

Perky Patent No. 533,554, February 5, 1895, for a roll-machine for preparation of cereals for food,

"in the shape of continuous fine threads or **shreds** * * *."

"discharged the threads or **shreds** of food * * *."

Perky Patent No. 533,555, February 5, 1895,

"one of the **shredders** in section * * *."

"a series of reducers or **shredders** * * *."

"Each reducer or **shredding** device * * *."

"in the form of continuous threads or **shreds** * * *."

"the discharged threads or **shreds** * * *."

"adherence of the **shredded** or threaded product * * *."

"the threads or **shreds** of material * * *."

Perky Patent No. 548,086, October 15, 1895, for bread and method of preparing same,

"their rough and porous thread-like or **shred**-like form * * *."

Perky Patent No. 571-284, November 10, 1896, for machine for reducing and preparing cereals for food,

"to thread-like or **shredded** form * * *."

"a series of reducers or **shredding**-heads * * *."

"reduced by their grooved rollers to **shred** or thread-like form * * *."

"a layer of the **shred**-like product * * *."

"a series of reducing or **shredding** heads * * *."

"the series of reducing or **shredding** heads * * *."

"in a grain **shredding** or reducing machine * * *."

"a grain **shredding** or reducing machine * * *."

"in a grain reducing or **shredding** machine * * *."

Perky Patent No. 571,285, November 10, 1896, for machine for reducing cereals,

"a small quantity of the **shredded** or filamentous product * * *."

Perky Patent No. 598,745, February 8, 1898, for roll reducing-machine for preparing food,

"the prepared grain above referred to or **shreds** of the same * * *."

"the discharge of the **shreds** or strips * * *."

Perky Patent No. 614,338, November 15, 1898, for machine for reducing cereal food products to form for use,

"several sets or gangs of **shredding** devices * * *."

"the number of **shredding**-heads in each set * * *."

"these roll-**shredders** discharge the material in the form of threads or **shreds** * * *."

"the threads or **shreds** are transferred * * *."

"the **shredding** or reducing head * * *."

"a comminuting or **shredding** effect * * *."

Perky Patent No. 618,288, January 24, 1899, for apparatus for making folded wafers,

"the reducing or **shredding** rolls * * *."

"the **shreds** or threads of the material * * *."

"to **shredded** form, the **shreds** or threads being discharged * * *."

"the threads or **shreds** are transferred * * *."

Perky Patent No. 625,696, May 23, 1899, for a machine for reducing and baking cereals in form,

"continuous layers of **shred** or thread-like form * * *."

"continuous threads or **shreds** * * *."

Perky Patent No. 667,892, February 12, 1901, for apparatus for manufacturing cereals into forms of food or bread,

"to **shred** or thread-like form, each head depositing a layer of the **shred**-like threads * * *."

Perky Patent No. 678,127, July 9, 1901, for machine for reducing food material to form and distributing same,

"reduced to **shred** or thread-like form * * *."

Perky Patent No. 678,625, July 16, 1901, for pneumatic panning or distributing machine,

"formed by **shredding** the grain * * *."

Perky Patent No. 681,656, August 27, 1901, for continuous cutting-machine,

"machines for cutting **shredded** wheat * * *."

Burbank Patent No. 684,789, October 22, 1901, for distributive depositing or panning machine,

"sections or cakes of **shredded** wheat * * *."

Perky Patent No. 713,795, November 18, 1902, for filamentous cracker,

"a cracker of filamentous or **shredded** wheat or other grain * * *."

Perky Patent No. 797,604, August 22, 1905, for machine for preparing food,

"the fibered, filamentous, or **shredded** form of the reduced grain * * *."

"which **shred** the grain * * *."

III. Plaintiff's cartons, pamphlets and advertisements use the words "shred", "shredded", "shredded wheat", in a merely descriptive sense.

Plaintiff's carton (Exhibit D228, R. 1157) reads:

"The Original Shredded Wheat. It's all in the Shreds. Shredded Wheat is made of the whole wheat and is made digestible by steam-cooking, **shredding** and baking, contains all of the elements necessary for building, nourishing and sustaining the human body."

Plaintiff's pamphlet (Exhibit D229, R. 1157) reads in part:

> "How shall we prepare the whole wheat so that its body-building elements may be digested and formed into healthy tissue, bone and brain? That question was solved by the man who invented Shredded Whole Wheat Biscuit. In making Shredded Wheat the whole wheat grains are first thoroughly cleaned, then cooked in steam, then drawn out into filmy **shreds**, then baked in ovens at a high temperature. The crispness of the **shreds** encourage thorough chewing, and that insures perfect digestion. That's the reason Shredded Wheat is such a perfect food for children. It makes sound teeth and healthy gums. They like the crisp, flavory **shreds** of the baked whole wheat, and it is so much better for them than mushy porridges."

Plaintiff's book of recipes (Exhibit D230, R. 1157) reads:

> "Only plump whole grains of choice, sun-ripened wheat go into Shredded Wheat. Nothing added, nothing taken away. All the bran, the minerals, the vitamins Nature stores in this perfect cereal food are retained in Shredded Wheat.
>
> Shredded Wheat brings you wheat in its most digestible form. The plump whole grains are steamed to break down all the starch cells, insuring quick digestibility. Then they are drawn into long, filmy **shreds**, so porous they will readily absorb more than four times their own weight in milk. Layer upon layer, the **shreds** form biscuits. Then—unsalted, unsweetened—they march into the ovens. And these tempting **shreds** of whole wheat are baked to a crisp and appetizing golden-brown."

Plaintiff wrote (Exhibit D227, R. 1157):

> "We invite you to visit The Home of Shredded Wheat, either at Niagara Falls, or at Oakland, Calif. Your trip through the bright, clean bakeries will be an interesting experience, and competent guides will show you how the plump, sun-ripened whole wheat

grain is steam-cooked, drawn into filmy, porous **shreds** and baked into crisp, nutritious Shredded Whole Wheat Biscuit. Bring your friends with you! A treat is in store for you."

Plaintiff's advertisement (Exhibit D226, R. 1156) appearing at R. 1173-74, reads:

"You Mustn't Grow Old.

Nature never intended us to grow old. Keeping the arteries soft and pliant is a matter of intelligent food selection and rational exercise. Avoid hardening of the arteries and the self-poisoning that comes from undigested foods by eating

Shredded Wheat

By our **shredding** process we have developed a food that is thoroughly and completely digested in the stomach and intestines, supplying all the lime-salts that make good teeth, also bran for keeping the colon clean and healthy. Youngsters like the tasty crispness and the nutlike flavor of the baked wheat. Nothing better for them to grow on or play on—a salt-free food—you season it to suit your own taste.

When you ask for Shredded Wheat be sure you get the **original Shredded Wheat** you have always eaten, made at Niagara Falls, N. Y. It has taken twenty-five years to perfect and develop this clean, wholesome, nutritious whole wheat food. Made in a form and size that is most convenient whether eaten as a simple 'breakfast cereal' or in combination with fruits or creamed vegetables. Imitations are never as good as the original.

If you ask for Shredded Wheat and receive a **different Shredded Wheat** from that which you have always eaten (made in Niagara Falls, N. Y.), kindly write us at the Home Office and receive a copy of our booklet, 'The Happy Way to Health.'

Made for twenty-five years by

"The Shredded Wheat Company,

Niagara Falls, N. Y."

Plaintiff's advertisement (R. 1155) reads:

> "Made at Niagara Falls. Look for the picture of Niagara Falls on the end of the carton when you buy Shredded Wheat Biscuit. **Any other shredded wheat** that may be offered you is merely a poor imitation of the **only original Shredded Wheat**, the kind your customers have always bought, the kind that stands up in the market, always clean, always pure, always the same. Made only at Niagara Falls, New York, in the cleanest, finest food factory in the world."

The following are excerpts from some of plaintiff's advertisements in evidence:

> "All body-building material in the whole wheat steam-cooked, **shredded** and baked in the finest, cleanest food factory in the world."

Shredded wheat is

> "—just whole grains of wheat steam cooked, **shredded** and baked to a crisp, golden brown, * * *."

> "It is the whole wheat and nothing but the wheat, steam-cooked, **shredded** and baked in the cleanest, finest food factory in the world."

> "Triscuit is the **shredded** wheat wafer * * *."

> "* * * whole wheat grain, steam-cooked, **shredded** and baked."

> "It is the **shredding** process that puts the 'eat' in whole wheat."

> "The crisp, flavory **shreds** of oven-baked whole wheat * * *."

> "Have you tasted our new Triscuit? * * * It is the whole wheat steam-cooked, **shredded**, pressed into a wafer and baked in electric ovens."

> "**It's all in the Shreds.**"

> "It is through the cooking and **shredding** process used in making Shredded Wheat that the whole wheat is prepared in its most digestible form."

"* * * the whole wheat made digestible by steam-cooking, **shredding** and baking."

"* * * the outer bran coat is scattered along the **shreds** in infinitesimal particles * * *."

"In making Shredded Wheat we make all these elements digestible by steam-cooking, **shredding** and baking into crisp, golden brown biscuits or 'little loaves'."

"In making Shredded Wheat Biscuit we steam-cook the grains of whole wheat, draw them into delicate, filmy **shreds**, form them into little loaves or Biscuits and bake them to a crisp, golden brown."

"* * * just pure wheat made digestible by steam-cooking, **shredding** and baking in crisp, golden brown Biscuits."

"* * * the whole wheat grains made digestible by steam-cooking, **shredding** and baking. The delicate, porous **shreds** of baked wheat * * * The **shredding** process compels into discard all broken, small and defective grains * * *."

"Try toasted Triscuit, the **shredded** wheat wafer, for luncheon * * *."

"Contains all the body-building elements of the whole wheat grain, steam-cooked, **shredded** and baked in convenient little loaves."

"Triscuit * * * is made of perfect whole grains of wheat cooked in steam, **shredded**, compressed into wafer form and baked in electric ovens."

"Shredded wheat is the whole wheat grain—steam-cooked, **shredded** and baked in convenient little loaves."

"Steam-cooked grains of whole wheat, **shredded** and baked in handy loaves * * *."

"Every biscuit is filled with the wholesomeness of whole wheat—made easy to serve and easy to eat in crisp, oven-baked **shreds**."

"* * * Crisp, flavory **shreds** of whole wheat * * *."

"All the goodness of the whole wheat grain made digestible by steam cooking, **shredding** and baking."

"It is the whole wheat steam-cooked, **shredded** and baked—nothing added, nothing taken away."

"Triscuit, the **shredded** wheat Toast."

Good Housekeeping, June, 1924:

"* * * * Triscuit * * * is the whole wheat steam-cooked, **shredded**, pressed into a wafer and baked in electric ovens."

Ladies' Home Journal, March, 1927:

"Every **shred** gives golden health."

Good Housekeeping, November, 1928:

"* * * crisp, flavory, oven baked **shreds** of whole wheat * * *."

Good Housekeeping, September, 1929:

"Those crispy **shreds** give teeth and glands their needed daily dozen."

Good Housekeeping, June, 1930:

"* * * flavory **shreds** of baked whole wheat."

"You can't **shred** anything but perfect whole grains of cooked wheat. That's the reason we have to clean the wheat so thoroughly before **shredding** it. We then cook it and draw it into light, porous **shreds** * * *."

"Such a food is **shredded** whole wheat, made of the best white wheat that grows, cleaned, cooked, drawn into light porous **shreds** and baked."

"Every detail in the process of cleaning, cooking and **shredding** wheat is open to the world * * *."

The foregoing are typical examples of statements appearing throughout the mass of plaintiff's advertising. They could be multiplied indefinitely.

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MAY 23 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

NO. [redacted] 56

KELLOGG COMPANY,

Petitioner,

against

NATIONAL BISCUIT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

THOMAS D. THACHER,
W. H. CRICHTON CLARKE,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No.

KELLOGG COMPANY,
Petitioner,

AGAINST

NATIONAL BISCUIT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioners respectfully pray that a writ of certiorari be issued to review the order (R. 3-A, p. 2285) of the Circuit Court of Appeals for the Third Circuit entered on May 5, 1938 pursuant to decision of that court (Buffington, Davis and Thompson, *J.J.*) rendered on that day

(R. 3-A, p. 2282) recalling and clarifying the mandate theretofore issued by said court pursuant to its order filed April 12, 1937 reversing the decree of the United States District Court for the District of Delaware herein. Said order of reversal also vacated and set aside the decree of said Circuit Court of Appeals of January 16, 1936 by which said court affirmed the decree of the District Court of the United States for the District of Delaware entered in the District Court on January 23, 1935 (R. 1, p. 228).

Following the order of reversal entered in the court below on April 12, 1937 and the denial of a petition and motion for reargument, petitioner filed in this Court a petition for certiorari to review said order of reversal which was denied by this Court October 25, 1937. Petitioner thereafter applied for reconsideration of its petition, which was denied by this Court November 8, 1937.

The cause now having been decided by the Circuit Court of Appeals under a decree and mandate substantially different from that heretofore sought to be reviewed in this Court, and reargument having been denied May 16, 1938 (R. 3-A, p. 2295), the petition for certiorari is renewed in order that this Court may in its discretion review the proceedings which have resulted in the decree of April 12, 1937, as modified by the decree of May 5, 1938.

Opinions Below.

The opinion of the United States District Court for the District of Delaware (R. 1, p. 193) was filed on January 11, 1935. It contains a statement of the essential facts found by the court in conformity with Equity Rule 70½ (R. 1, p. 228). It is not reported.

The per curiam opinion of the Circuit Court of Appeals affirming the final decree of the District Court (R. 3-A, p. 2069) was filed January 16, 1936, and is not reported.

The opinion of the Circuit Court of Appeals upon rehearing, reversing the judgment of the District Court

and vacating its decree affirming said judgment (R. 3-A, p. 2083) was filed April 12, 1937 and is reported in 91 F. (2d) 150.

The opinion of the Circuit Court of Appeals recalling and modifying its mandate (R. 3-A, p. 2282) was filed May 5, 1938, and is not yet reported.

Jurisdiction.

The jurisdiction to issue the writ requested is found in the provisions of Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. A. Sec. 347(a)).

Questions Presented.

This case involves the right of the petitioner to manufacture and sell in competition with the respondent shredded wheat biscuits, the court below having enjoined the petitioner (1) from the use of the name "Shredded Wheat" as a trade name; (2) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit; and (3) from doing either.

The questions presented are:

1. Whether the respondent is entitled to the exclusive use of the trade name "Shredded Wheat" when used to describe that well-known product, or otherwise;

2. Whether the respondent is entitled to the exclusive right to sell shredded wheat biscuits in a form and shape covered by expired patents; and

3. Whether the respondent is entitled to a perpetual monopoly in the use of the descriptive term shredded wheat biscuits and in the right to manufacture and sell its biscuits in a form and shape constituting the subject matter of expired patents.

Statement.

This action was commenced in the United States District Court for the District of Delaware. It was brought by the respondent, National Biscuit Company, to restrain the petitioner from the manufacture and sale of shredded wheat biscuits and from the use of that term to describe its product, on grounds of unfair competition and trade-mark infringement. After trial the bill of complaint was dismissed by the District Court upon findings of fact incorporated in its opinion (R. 1, p. 228).

In its first opinion (R. 3-A, p. 2070) the Circuit Court of Appeals approved the full and satisfactory discussion by the trial court of all the issues involved and stated that it found no occasion to write a further opinion, but with a view to avoiding needless repetition confined itself to stating that—

> "on the expiration of plaintiff's patent No. 548,086, the exclusive right to make and sell the food product therein described ended. And on the expiration of plaintiff's design patent No. 24,688, the exclusive right to the designed biscuit also ceased."

The Court added (R. 3-A, p. 2070):

> "In that regard we agree with the Judge below, namely:
>
> 'In this case plaintiff claims in perpetuity the monopolistic right to the descriptive word "shredded" and a monopolistic right in the shape or form of the biscuit. Any right of plaintiff must be based upon the wrong of defendant. Relief must be based upon confusion or 'palming off, otherwise relief should be denied. Originally patents covered every phase of plaintiff's business. There were product, process and design patents which secured plaintiff a perfect monopoly of the business. These patents have expired and *the case falls into the class of expired patent cases* and is controlled by the Singer case'."
>
> (*Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169.)

The District Court found that up to 1915 plaintiff printed prominently upon packages containing its biscuit the following notice (R. 1, pp. 195-196):

> "September 17, 1895, Patented October 15, 1895
>
> "This Food, the process of making it and special machinery for its manufacture, are under the protection of the United States Government by virtue of many patents as follows:"

The notice was followed by a list of forty-one patents, including the design patent, which was declared invalid in 1908. With reference to this the District Court stated:

> "Instead of removing the notice of the Perky design patent from the carton or otherwise notifying the public it was no longer claiming protection under the patent, plaintiff continued for seven years thereafter to warn the public not to make the biscuit as it was under the protection of the Government by virtue of this design patent. By its professions and conduct plaintiff secured a monopoly not for fourteen years but actually for twenty years" (R. 1, p. 197).

The court below in its first opinion stated that upon the expiration of the patents under which the product had become known to the trade and consumers by the descriptive words "shredded wheat":

> "* * * the public could use the patented process both in making the patented product and in making it in the form described in the design patent, and in calling it 'shredded', provided in doing so it avoided simulating the product so as to prevent confusion and lead buyers into the belief they were buying plaintiff's product. This, in the judgment of the court below and of this court, the defendant has done in compliance with the requirements of *Singer* v. *June*, 163 U. S. 169, for the product of the defendant has at all times, in its cartons and otherwise, been marked with its own name, in words and colors (green and red) of such distinctive character, that buyers thereof knew they were getting defendant's product and were not buying that of the plaintiff. Moreover, it is clear

> that the word 'shredded' was a descriptive word, aptly describing the process to which wheat grains were subject by any one using shredding or mangling in processing wheat grains" (R. 3-A, p. 2071).

The court below added that the word "shredded" was open to all shredders of wheat provided that they so used it as not to mislead and confuse the public (R. 3-A, p. 2071).

With reference to the question of confusion, the court below expressly stated:

> "Now, that no confusion, misleading or deceit is shown in this case, is clear. In that regard we agree with the court's summary:
>
> > 'Where the name is the only name by which the article can be described and is the only name by which it was described during the existence of the patent that name becomes public property upon the expiration of the patent. Here the patented biscuit was known as Shredded Wheat or Shredded Wheat Biscuit. Upon the expiration of the patent that name became public property.'" (R. 3-A, p. 2071).

The court below also adopted with approval the finding of the District Court as follows:

> "The testimony of a hundred witnesses from all parts of the country establishes there was no passing off of defendant's biscuit for plaintiff's or deception of the public to any appreciable extent." (R. 3-A, p. 2072).

Insofar as these statements of the court below disclose facts, they adopt and approve the findings of the District Court.

After reargument the court below did not qualify or retract its approval of the findings of fact in the District Court, except that it did withdraw its conclusion that the words "shredded wheat" or "shredded wheat biscuit" were descriptive and held that whether descriptive or not they and the shape and form of the biscuit had by usage

following the expiration of the patents acquired a secondary meaning indicating manufacture by the respondent. It also changed is views regarding the design patent and because of its invalidity held that the case stood in equity as if there had been no patent (R. 3-A, p. 2088). Upon these premises the court below concluded that the respondent enjoyed the exclusive right to use this descriptive term and the characteristic form, although the District Court had found, and the court below had approved the finding, that there was no passing off or confusion in this case (R. 3-A, pp. 2071-72).

The record discloses that in 1912 respondent registered the picture of its factory as its trademark "For Shredded Wheat in Class 46, Foods and Ingredients of Foods", No. 89,071 (R. 4, p. 199). Respondent's present claim is that its trademark for shredded wheat is "Shredded Wheat". Its registration No. 89,071 states that "No claim is made herein to the words 'The home of shredded wheat' which appear above the factory picture". This is a double disclaimer of the words "shredded wheat", —first, by using the word to describe the product itself, and second, by disclaiming the words as part of the phrase "The home of shredded wheat". Respondent's predecessor also secured trademark registration No. 85,186 (R. 4, p. 197) on an alleged trademark showing one shredded wheat biscuit in a dish with a spoon and cream. The registration contains the following disclaimer: "no claim being made to the representation of a shredded wheat biscuit", applying the precise description to the precise illustration of the biscuit and, in effect, disclaiming both. Respondent's predecessor also procured registration 216,593 (R. 4, p. 205) for an alleged trademark consisting of a dish containing two of the characteristic biscuits in issue. The registration states that respondent's predecessor "disclaims any exclusive right to the representation of the two biscuits apart from the mark shown".

Comparison of respondent's carton (R. 1, p. 207) with petitioner's carton (R. 1, p. 215) shows no trademark

violation as to the bowl or plate which the District Court held the petitioner had a right to use (R. 1, p. 228).

The District Court found and the finding was not disturbed in the court below that the biscuits cannot be separately branded and marked (R. 1, p. 221).

The fact found in both courts is that there were not only design patents, but product and process patents as well, which secured to plaintiff a perfect monopoly of the business, including the form and shape which characterized the biscuit made with patented machinery (R. 1, pp. 196-197, 223; R. 3-A, p. 2070). This form and shape is inherent in the patented product and in the process of making it (R. 5, pp. 59-60) when the multiple-layer filaments are cooked in an oven (R. 1, pp. 196-197). The disclosure of these patents included machinery which could only be used in making biscuits in the form and shape in which plaintiff made and sold them (R. 5, pp. 12-13, Perky patent No. 532,286; pp. 84-85, Perky patent No. 614,338; p. 110, Perky patent No. 678,127). By virtue of these patents the respondent's predecessor in title enjoyed a complete monopoly of the form and shape which characterized the biscuit.

The Court in its second opinion referred to a legend upon some of the cartons used by the petitioner: "The original has this signature, W. K. Kellogg" (R. 3-A, p. 2092). This was not mentioned in the complaint. The answer contains a statement that the legend was used. There was no proof of the extent of its use beyond the statement in the answer, or of any confusion or deceit resulting from such use. The court below could not have considered the matter of any importance, since no injunction was directed against the use of the legend. The matter was not mentioned in the opinion of the District Court nor in the first opinion of the court below. Of course, whatever the practice may have been, it could not justify the injunction directed by the court below, which prevents all sales however fairly the goods may be represented as the goods of petitioner.

Notwithstanding the facts the court below characterized the acts of the defendant as deliberately designed to acquire by unfair competition and misstatements trade which equitably belonged to the plaintiff. The court below not only granted the respondent a perpetual monopoly in the use of the descriptive terms "shredded wheat" and "shredded wheat biscuits" but also in the form and shape in which the biscuit had been patented.

Specification of Errors Relied Upon.

We respectfully submit that the court below erred—

1. In failing to affirm the decision of the District Court dismissing the complaint, and in reversing its judgment.

2. In holding that the respondent was entitled to the exclusive right to sell biscuits in the pillow-shape form under any name, and in enjoining petitioner from advertising or selling its product in the pillow-shape form in distinctive cartons.

3. In holding that the respondent was entitled to the exclusive use of the words "shredded wheat" as applied to food products, and in enjoining petitioner from the use of the words "shredded wheat" as a trade name.

4. In holding that respondent was entitled to the exclusive trademark use of the pictorial representation of two biscuits in a dish.

5. In holding that the name shredded wheat is not descriptive.

6. In awarding costs to respondent and directing an accounting for profits and damages.

7. In directing the issue of an injunction which in effect creates a perpetual monopoly in subject matter and descriptive name dedicated to the public upon the expiration of prior patent monopolies.

8. In failing to hold that by disclaimers in trademark registrations plaintiff's predecessor abandoned all claim of exclusive right, if any there was, to the words "shredded wheat" or "shredded wheat biscuit" as a trade name and to the shape, form, design, appearance or representation of the biscuit.

9. In holding that since the expiration of the patents the pillow-shape biscuit has acquired a secondary meaning, and in holding that this fact justifies the issuance of a perpetual injunction against the manufacture and sale of such biscuits without regard to the size of the biscuits or the distinctive containers in which they are sold.

10. In failing to dismiss the complaint in view of the lack of any evidence that petitioner's goods were ever passed off as respondent's goods, and in view of the finding that the size of petitioner's biscuits and the character of the containers in which they were sold were so distinctive as to preclude any sale of petitioner's goods as the goods of the respondent.

Reasons Relied upon for Allowance of the Writ.

(1) The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 Fed. 960, in which respondent's predecessor was plaintiff.

In that case it was held that the long monopoly of the original manufacturer during the patent period created, as it was bound to create, an association in the public mind of the familiar wheat biscuit with a single, though

anonymous, maker, and that under these circumstances the manufacturer was entitled to some protection—"as much when the association be through mere appearances as when it be wrapped up in a name".[1]

In considering what protection should be extended the court held in that case that so far as appearances of the biscuit were concerned the rule was "that minor, or 'non-functional' changes in appearance may be required, so long as the substantial elements are left in the public domain", but that "where the 'secondary meaning' is bound up in elements of the appearance which cannot be changed without cutting off the defendant's substantial right to make and sell that kind of goods the plaintiff must suffer the resulting confusion".

Characterizing these well established principles, for which many authorities were cited in the opinion, the Court said:

> "Under the guise of protecting against unfair competition, we must be jealous not to create perpetual monopolies."

Applying these principles to that case which is an earlier edition of the case at bar, it was held that the defendant should be permitted to continue to sell biscuits without change of form, color or size from the characteristic biscuits sold by plaintiff. With respect to biscuits which reached the final purchaser in cartons no relief was granted because, as the court found, the defendant's cartons were so different from plaintiff's that no confusion was possible. With respect to biscuits sold out of the carton, as in hotels, restaurants, lunchrooms and boarding houses, these were required to be marked, tagged or labeled, but even as to this single requirement it was provided in the court's decree that the defendants should be

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[1] This conclusion appears to be in conflict with the decision of Justice Brewer sitting as a Circuit Justice in *Centaur Co.* v. *Heinsfurter*, 84 Fed. 955 (C. C. A. 8).

relieved from marking, tagging or labeling such biscuits if after a fair trial this could not be done "except at an expense which would make impossible any continued competition in the business of selling biscuits outside the cartons".

In the case at bar the District Court found (R. 1, p. 221):

> "By making its biscuit substantially smaller than plaintiff's, and using individual cartons, defendant has met the requirements of the decree of the Circuit Court of Appeals for the Second Circuit in the Ross case [*i. e.* Shredded Wheat Co. *v.* Humphrey Cornell]. In this case the proof fully confirms the testimony of Andrew Ross that the biscuit itself cannot be branded or marked. With each biscuit distinctively marked by carton and by size, there can be no excuse for confusion or deception. Had the proof in this case as to marking been before the Court of Appeals in the Ross case the opinion of Judge Ward would doubtless have been the opinion of the Court."

and further predicated its decision upon the opinion of Judge Ward in the *Humphrey Cornell* case, *supra*, quoting as follows (R. 1, p. 201):

> "Moreover, I think that the form and size of the biscuit as always made by the complainant are functional, and that imitation of these features is no evidence of unfair competition. The form evidently tends to strengthen a product made out of such fragile material and the size is apparently the best fitted for use as a breakfast food on a saucer. I think the bill should be dismissed." *Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 Fed. 960, 967.

The court below has directed that an injunction issue which will end all competition in the business of selling biscuits of the characteristic form and shape, whether in or out of cartons, however the carton or individual biscuits may be marked, and regardless of the size or color of the biscuits.

With respect to the sale of biscuits without change of form, color or size the decision of the court below is in irreconcilable conflict with the decision of the Second Circuit in the *Humphrey Cornell* case. Upon the facts in this record the petitioner was entitled to dismissal of the complaint under the ruling in that case.

(2) The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the 8th Circuit in *Centaur Co.* v. *Heinsfurter*, 84 Fed. 955 (C. C. A. 8; opinion by Circuit Justice Brewer) where the ruling in *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, was applied to the use of the word "Castoria". The controversy in the *Singer* case arose immediately after the expiration of the patent, but in the *Castoria* case the plaintiff continued in the exclusive manufacture of Castoria for some ten years after the expiration of its patent and contended that during the time when the right to manufacture and sell was common it acquired a trade-mark in the name. Disposing of this contention Mr. Justice Brewer said:

> "But this matter of time makes no difference. The word had become known as the name of the thing, and as such it could not be appropriated as a trade-mark. "* * * As well might a manufacturer of flour claim a trade-mark in the word 'flour', as the manufacturer of 'Castoria' the trade-mark in that name."

Thus the right to individual appropriation, once lost, is gone forever. This principle was subsequently confirmed by this Court in *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 36, and *Saxlehner* v. *Wagner*, 216 U. S. 375, 381.

The court below held that upon patent expiration the petitioner was free to adopt the name, but because of delay and continued use of the name by respondent the case stands just as if there had been no patent (R. 3-A, p. 2087-88).

In its application of the rule of the *Singer* case, *supra*, to the facts in the case at bar the decision of the court below is in irreconcilable conflict with the decision of the Eighth Circuit in the *Castoria* case, in that it is predicated upon an alleged reappropriation of the name "shredded wheat" after the expiration of the patents (R. 3-A, p. 2088).[2]

(3) The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Kellogg Toasted Corn Flake Co.* v. *Quaker Oats Co.*, 235 Fed. 657, 667.

In that case the court held that where some dealers and other customers in toasted cornflakes understood those words alone as having a secondary meaning indicating Kellogg's products, relief only of a qualified character such as would prevent others from selling toasted cornflakes as those of Kellogg was permissible in a suit for unfair competition, and that unless the defendant was shown to have failed clearly and effectively to distinguish its product from Kellogg's no relief could be granted. Since the defendant had sold its toasted cornflakes in cartons distinctively marked, all relief was denied.

In the case at bar the court enjoined not only the use of the name which under the decision in the *Singer* case, *supra*, had come to designate the product which all could sell, but enjoined the sale of the product itself.

(4) The decision of the court below is in conflict with the decision of the Court of Appeals for the District of Columbia in *Natural Food Co.* v. *Williams*, 30 App. D. C.

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[2] The validity of the principle applied in the *Castoria* case is not questioned by the decision in *Centaur Co.* v. *Genesh*, 33 F. (2d) 985, decided in the Western District of Pennsylvania thirty years after Justice Brewer's decision, because in the later case it was found as a fact that Castoria is not and never was the product of the expired Pitcher Patent, although in the original *Castoria* case there was a finding that it was.

348, in that it grants a perpetual trademark in this name by injunction, although the registration of such trademark under the Trademark Act of 1905 (33 Stat. 725, 15 U. S. C. A. § 85) was denied to respondent's predecessor in that case.

(5) The decision of the court below is in conflict with applicable decisions of this Court.

In *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, chocolate was used in a medicinal preparation to give it a distinctive color and a distinctive flavor. The chocolate had no therapeutic value. The defendant was found to have been guilty of grossly unfair competition in attempting to imitate the appearance of the plaintiff's medicine so as to persuade dealers to sell its product as the plaintiff's. In dealing with this situation the Circuit Court of Appeals for the Third Circuit unconditionally enjoined defendant from using chocolate in its preparation to simulate the color of plaintiff's preparation. This Court reversed the decree, holding that the right to which the plaintiff was entitled was that of being protected against unfair competition, not of having the aid of a decree to create or support, or assist in creating or supporting, a monopoly of a preparation which everyone, including the petitioner, is free to make and vend. The court below was directed to confine its relief to the requirement of sales of the product in cartons appropriately marked to prevent confusion, deception and fraud.

This case and many others are but instances of a basic and controlling principle common to the law of trademarks and of unfair competition, declared in *Canal Co.* v. *Clark*, 13 Wall. 311, in *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, and in many other controlling decisions, which limits the defendant's liability and the plaintiff's right to relief in such cases to indemnity for or prevention of the wrongful sale of defendant's goods as the goods of plaintiff. Nothing of the kind is

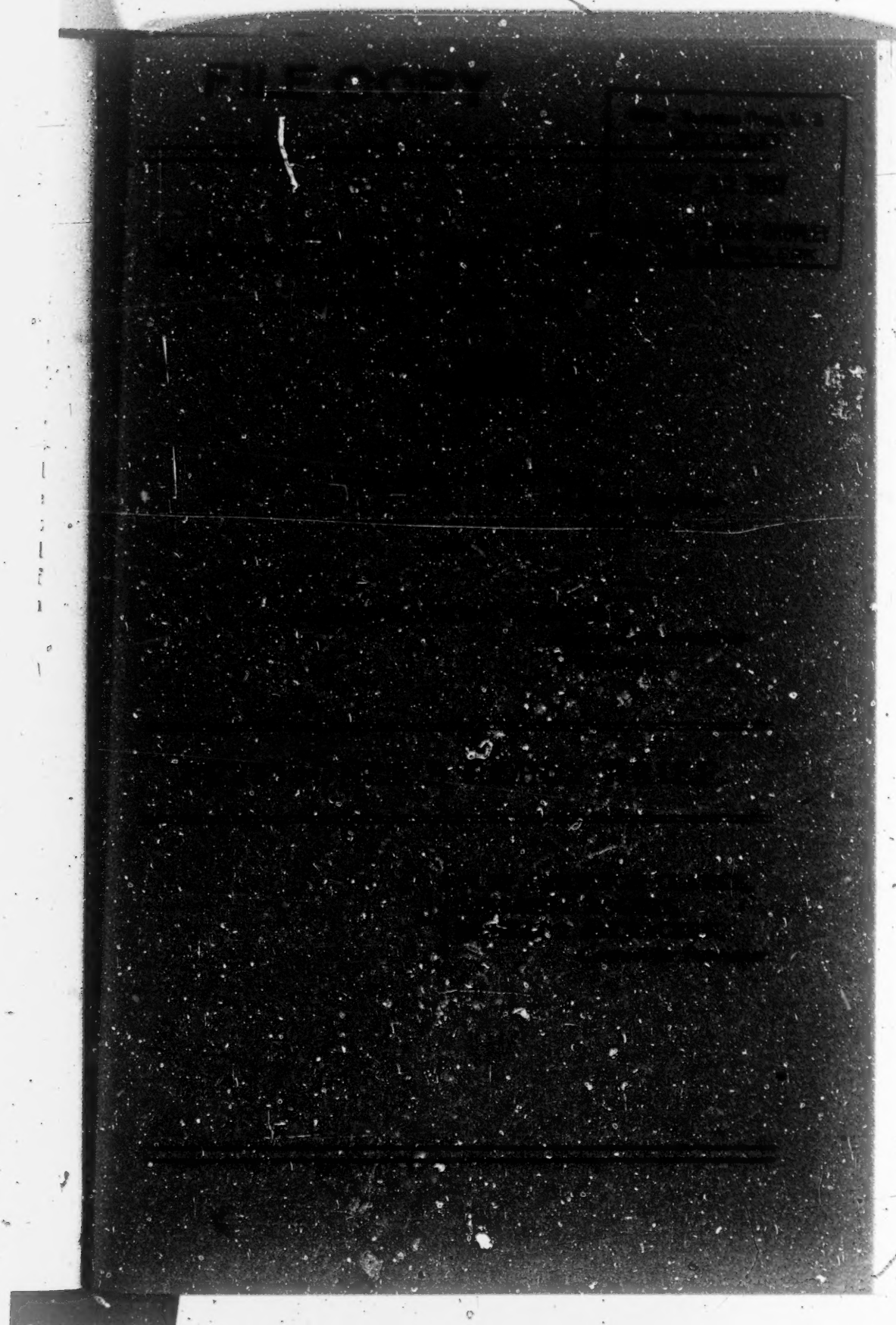
Appeal, where it will be considered in the light of the authoritative decision of the Lord Justices sitting in the Privy Council.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain therein named a transcript of the record and proceedings herein, and that the order of said Circuit Court of Appeals for the Third Circuit reversing the decree of the District Court for the District of Delaware be reversed by this Honorable Court and that said decree of said District Court be affirmed, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray, &c.

Dated: New York, N. Y., May 23, 1938.

THOMAS D. THACHER,
W. H. CRICHTON CLARKE,
Counsel for Petitioner.



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Supreme Court of the United States,

OCTOBER TERM 1937.

No. 396.

KELLOGG COMPANY,
Petitioner-Appellee-Defendant,

against

NATIONAL BISCUIT COMPANY,
Respondent-Appellant-Plaintiff.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

Certain material statements in Respondent's Brief in Opposition are incorrect and misleading. Petitioner craves leave to point them out and to comment thereon:—

1. Respondent states, p. 1:—"This is an action for unfair competition." The general distinction between trademark and unfair competition cases is that trademarks are considered as exclusive, property rights, whereas the remedy of unfair competition is employed to restrain a defendant from unfairly using a generic, descriptive, geographical or other word or device which he has an undisputed right to use in a fair or honorable way. The instant case is purely and exclusively a trademark case. The decree below holds in substance and effect, that plaintiff has perpetual and exclusive trademark property rights in the words "shredded wheat" and in the shape, appearance or design of the patent-expired biscuit and thus in the patent-

expired machinery and method for making it. The very wording of the decree is based upon the maintenance of trademark rights (R. V. III-A, p. 2093). The District Court is ordered "to enter a decree enjoining the defendant from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit *in violation of its trademark.*" (Italics ours.) The Court below held that these perpetual trademark monopolies are held to arise by prescription, i. e., by continued possession of the market after the patents expired, and are not based on any alleged wrongs of the defendant. No matter how distinctively defendant marked each biscuit to establish its origin, it still would be enjoined. The case is a trademark case and the second decision below reverses the established rule that relief in trademark and unfair competition alike rests upon and must be limited to the wrongs of the defendant and cannot rest upon any alleged prescriptive rights of the plaintiff. Petition, p. 17.

2. Respondent asserts that the case "is peculiarly one that must stand on its own facts." Brief, p. 2. Respondent did not produce a single witness, man, woman or child, who testified in effect "I asked for plaintiff's product and received defendant's product thinking it was plaintiff's." The trial court held that it was impossible to mistake defendant's cartons for plaintiff's. R. V. I, pp. 204-227 and V. 3, p. 2055. This fact is patent from the cartons themselves (V. I, pp. 205-219). The District Court found that no one had been deceived by defendant; that defendant's goods had not been and could not be sold as plaintiff's. The Circuit Court of Appeals does not find that anyone was ever deceived by defendant. It mentions the phrase "The Original bears this signature. W. K. Kellogg" but does not hold that that phrase ever led any one to purchase defendant's product thinking it was plaintiff's. The phrase was never in issue or heard of on the trial and is not enjoined. It

had been long out of use at the time the Court below reversed itself. If plaintiff's case "is peculiarly one that must stand on its own facts," then plaintiff is lost, because on the facts there was no deception and without deception there can be no relief. Plaintiff's case is peculiarly one of law. Unless revolutionary and unique law can be invented to apply to the fact as found by the trial court (V. I, p. 227) that "Plaintiff is complaining, not of unfair competition but of effective competition," plaintiff's case falls here as it fell in the trial court and in the first decision of the Circuit Court of Appeals.

3. Plaintiff states at p. 3 of its Brief In Opposition that Andrew Ross, its former employee, "was enjoined." This is misleading. Judge Thomas in the *Humphrey Cornell* case, 244 Fed. 508, merely prescribed that Ross should band or tag every biscuit even when packed in distinctive cartons. The futility of this tagging requirement is clear. Any dealer who would tear off a carton in order to deceive a lunch-room or plate-customer would just as easily tear off the band or the tag. If the dealer could not easily remove the tag, what would the customer do—eat it? Judge Thomas' "injunction" thus was a futile direction, not to stop manufacturing the biscuit, but to mark, band or tag it, and this was modified on appeal (250 Fed. 960) so as not to apply to biscuit reaching the final consumer in cartons and was to be vacatable if defendant found it could not tag or band the biscuit without an impossible competitive handicap.

Such discussion of that case brings out clearly the distorted application of it which the plaintiff has attempted to impose on pages 10 and 11 of its brief. Plaintiff at that point would have the Court interpret that case as prohibiting the marketing of these biscuits unless tagged or branded. The exact opposite is the true conclusion. The Court as stated, issued no injunction against the marketing of these biscuits in cartons and decreed that if it were impracticable to brand or mark them when sold loose, there should be no injunction at all. It was for this very reason and in light

shown in this case, and the injunction which has been granted is not limited to preventing any such wrong.

Thus the decision below, in granting an injunction and directing an accounting of profits and damages, is in conflict with the applicable decisions of this Court.

The court below ignored the decisions of this Court in *Holzapfel's Co.* v. *Rahtjen's Co.*, 183 U. S. 1, 12, and *Beckwith* v. *Commissioner of Patents*, 252 U. S. 538, 545, in dealing with respondent's disclaimer of the words "shredded wheat", see p. 7, *supra*.

(6) The court below has so far departed from the accepted and usual course of judicial proceedings by ignoring the applicable and controlling principles limiting the right to relief in cases of unfair competition as to call for an exercise of this Court's power of supervision.

We do not suggest that this Court should concern itself with all departures from accepted principle in the lower courts, and thus become a court for the correction of errors, but we do most respectfully suggest that where one of the inferior courts by judicial decree is supporting and maintaining a perpetual monopoly in a standard food product long after the statutory monopoly under forty-one patents has ended, the case is one which calls for an exercise of this Court's power of supervision.

In considering the importance of the questions of law presented in this case this Court will wish to consider the decision of the Privy Council in England in *Canadian Shredded Wheat Co. Ltd.* v. *Kellogg Co. of Canada, Ltd., and another*, 55 R. P. C. 125, All English Law Reports Annotated, 1938, Vol. 1, Part 8, pp. 618-634. For the convenience of the Court we are filing with the Clerk printed copies of this decision. The case was decided on February 4, 1938, after the denial of the original petition for certiorari herein. It arose in the Canadian courts and the parties to the suit were the respective Canadian sub-

sidiaries of the parties to this suit. The questions presented were the same as the questions here involved, and in all material respects the facts were the same as those in the case at bar. The principles applied were those which we believe should be applied under the applicable decisions of this Court. The result was in direct conflict with the decision of the court below.

Concluding the judgment of the Privy Council, Lord Russell of Killowen said:

> "One further observation their Lordships desire to make. Litigation has taken place in the United States of America in which a company called National Biscuit Company sought to restrain a company called Kellogg Company from using the words 'shredded wheat'. The action was dismissed by decree of the U. S. district court for the district of Delaware, and, on appeal to the U. S. circuit court of appeals for the third circuit, the decree was affirmed. Subsequently, on reargument before the same judges, that decision was reversed, and a decree was entered:
>
> 'enjoining the defendant from the use of the name "shredded wheat" as its trade name, and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark'.
>
> Their Lordships can only (but with the greatest respect for the court) express the view that, if the facts of that case were similar in all respects to the facts of the present case, they prefer the first judgment of the circuit court of appeals to its later decision. Their Lordships are of opinion that this appeal should be dismissed, and will humbly advise His Majesty accordingly."

The judgment of Mr. Justice Bennett upon which the court below relied as reaching a conclusion different from that of the Privy Council was decided in the Chancery Division of the English High Court of Justice on December 21, 1937, in a proceeding to correct the registry of trademarks, before the decision of the Privy Council, and is now pending on appeal in the English Court of

Giving plaintiff the benefit of every possible doubt as to the meaning of this statement, it is clear that if defendant had in 1932 used the word "shredded" *in its advertising only* and only the expression "a shredded wheat product" in small letters on the side of its whole wheat carton (V. I, p. 219), and only the dish-biscuit picture, plaintiff would not then have objected to defendant making the biscuit and marketing it as "Kellogg's Whole Wheat Biscuit." (Pet., p. 2, footnote).

8. Plaintiff states, Brief in Opposition, p. 4, that "It is undisputed that . . . both name and form of the biscuit were accepted by the trade and consumers as identifying the biscuit with plaintiff." This is sharply disputed and the contrary was found as a fact by the District Court. This finding was not disturbed by the Circuit Court of Appeals. The form of the biscuit is functional and was once also patented as a design and the words shredded wheat were always used in the patents, trademark registrations and advertisements to describe the biscuit itself not to indicate its origin. Pet. Appendix, pp. 27-38. Even the Circuit Court of Appeals in its second decision below specifically finds that the name shredded wheat "has come to stand for the product itself." V3A, p. 2089.

9. Plaintiff states, Brief, p. 4, that "During that fifteen years plaintiff . . . had expended more than $17,000,000." in advertising. This figure is reached by pyramiding each years advertising upon the preceding years. Advertising investment is not like capital invested in constructing a building. The usual practice is for an advertiser to appropriate about twenty per cent of this year's receipts from sales for next year's advertising. In short the public put up this advertising appropriation. Defendant also has been a heavy advertiser in pointing out the competitive advantages of its small dark biscuit. We do not seek to belittle plaintiff's advertising figures which seem to have loomed so large in Judge Davis' mind on the sec-

ond hearing. We merely point out that the price of a product must include advertising expense or the producer will go bankrupt and in this case the public supplied the $17,000,000 which the second decision below, in effect, holds has now purchased a complete monopoly by which perpetually to oppress the public which supplied the money through its daily purchases.

10. Plaintiff's brief, p. 5, refers to a cellophane window in defendant's package. Plaintiff evidently expects defendant never to let the public know what it is making—to hide its light under a bushel—not to call the product by the only descriptive term it has ever had and to make people buy "sight unseen." The words "whole wheat biscuit" are so broadly, so generically, descriptive as to cover dozens of different kinds of crackers, biscuit or breads made of whole wheat. As to the biscuit shape, this is what may be called a hidden trademark case. The shape-trademark is enclosed in a distinctive package and cannot be seen until the package is opened unless a cellophane window is used.

11. Plaintiff on page 6, criticizes defendant for using the words shredded wheat "as a tradename." A tradename differs from a trademark in that the former is descriptive. Defendant's package states prominently first that the product inside is "*Kellogg's*" and second, that it is "shredded wheat." Why should one fact be stressed less than the other? Should the public be told on the front panel that the contents are "Kellogg's" and then have to look to the small text matter on the side panel to find out just what the contents are? (V. I, p. 219). Plaintiff, in its brief below, Pet., p. 2, footnote, conceded defendant's right to make but it has always disputed defendant's right effectively to tell the public just what it makes.

12. Plaintiff's Brief in Opposition, p. 6, characterizes the revolutionary character of the second decision below better than defendant has done by stating that the first

decision "was not in harmony with the modern doctrine of unfair competition as defined by this court in *Schechter Poultry Corporation* vs. *United States*, 295 U. S. 495.". Plaintiff, evidently realizes that none of the authorities cited by the Court below in its second decision really supports the conclusion reached. All of these "authorities" were urged on the court by plaintiff on the first hearing and the District Court was promptly affirmed. Plaintiff has now elected to defend the second decision by arguing that it is "in harmony with the modern doctrine of unfair competition." Just what that is, plaintiff does not state. Defendant sees no relevance in the *Schechter* case. What has an unconstitutional attempt by Congress to regulate the methods of removing chickens from crates in intrastate commerce in Brooklyn got to do with the reviving of long dead patents and making them perpetual as a new exercise of "equity" by the Court below?

13. Plaintiff argues, brief p. 6, that "The case is not one of public interest, but depends upon its own peculiar facts." The case patently is one of great public interest. The Court below seeks by judicial legislation to add a new kind of five year clause to the trademark statutes and to set up a revolutionary system of perpetual monopolies akin to patents. If this attempt to reverse the Singer-June doctrine of dedication of form and name by patent expiration shall succeed, the country will soon be oppressed by perpetual monopolies in every art and industry. Nothing could be much more important than that from a public standpoint.

The only "peculiar" fact cited by plaintiff as distinguishing this case is that defendant made "two retractions" and this is not true. Defendant withdrew its shredded wheat in 1922, put it out in 1927 and has never retracted it since. If defendant had retracted its product in 1930, what was there for plaintiff really to sue defendant about in 1932? Was this suit really about defendant's advertising, as plain-

tiff avers, brief pp. 4-6, or was it merely another form of plaintiff's advertising, as defendant avers? Plaintiff and its predecessor have now used the courts three times as sort of adjuncts of their advertising department, first, in 1928, when the later abandoned suit was brought, second in 1932 when this suit was started and, third, in 1937, when the Court below reversed itself. Pet., pp. 9-11-19 and R. V. IIIA, 2130-2199.

The Court below based its second decision on one fact of alleged unfairness—the "W. K. Kellogg" phrase, which came over from defendant's corn flakes cartons and was always associated with the Kellogg name. Plaintiff never complained of that phrase until after the trial was over. A mere request would have caused its removal. It was a small type relatively insignificant feature of a carton prominently marked as "Kellogg's." It never misled anyone. It had been out of use for a year or two when the second decision came down. It almost seems as though the Court below finally concluded that the litigation was really over that phrase, yet it is not even mentioned in the injunction as ordered. The complaint does not refer to it and the matter was never heard of by defendant until many months after the trial was over. The District Court does not mention it in its voluminous findings and plaintiff made no request for a finding about it at the trial.

Now plaintiff seeks to bolster the frivolous contention about the small text "W. K. Kellogg" phrase by the untrue statement that defendant made "two retractions (1922-1930)". That misstatement does not make the case itself either peculiar or even "modern". The law still is that relief in trademark and unfair competition cases alike must be based on wrongs or frauds of the defendant, not on perpetual monopolies of the plaintiff.

14. The cases cited by plaintiff on pp. 7-8 of its brief do not support the second conclusion of the Court of Appeals. The unauthorized use of unpublished news (*Associated*

Press case), unfair and false statements concerning a filter (*Motor Improvement Co.* v. *A. C. Spark Plug Co.*), use of a well known trademark to misrepresent the origin of another kind of goods (*Rolls Royce* and *Aunt Jamima* cases) are cases which have nothing to do with defendant's right to make a patent-expired product and advertise it fairly as of its own manufacture.

15. Plaintiff on page 10 of its brief states that there are "thousands and millions" of biscuit served outside of the carton. The trial Court found (V. I, p. 204) that about one biscuit in five thousand is sold apart from a carton. Both parties put out and push restaurant cartons containing two biscuit each. The injunction ordered below makes no distinction between biscuit sold in or apart from cartons. Both are banned by the injunction ordered.

16. Plaintiff seeks (brief pp. 11-12) to minimize the fact that on the facts here involved the Courts of Appeals for the Second and Third Circuits both held for defendant and then the Third Circuit reversed itself. The Sherman Anti-Trust case was dismissed without prejudice for lack of prosecution. A bill of discovery in aid thereof is now pending and defendant is now about to file a new action based upon further unfair acts of the plaintiff occurring since the first action was instituted. Defendant's Bill of Discovery in aid of its law action was filed to ascertain certain facts concerning the merging of the Shredded Wheat Company with plaintiff.

17. Plaintiff (brief pp. 14-15) cites no authorities as to defendant's disclaimer defense. It does not attempt to distinguish or avoid the *Beckwith* or *Rahtjens* cases. Pet., p. 19. Its only attempted reply is that "There is no point to the alleged disclaimers." They were made and under the law they are not revocable. They stand as a bar to the injunction ordered and they destroy the trademark claims now made by plaintiff.

18. Plaintiff states (brief p. 15) that "The use of the expression 'shred' and 'shredded' in patents and advertising is equally (as) unimportant" as the "alleged disclaimers." This characterizes both of plaintiff's statements. That is to say, the disclaimers are just as important or just as unimportant as the descriptive use of shredded wheat in plaintiff's patents, trademarks and advertisements. Both we submit are equally important and equally fatal to plaintiff's case.

19. Assignments of Error (Plaintiff's brief p. 15). These assignments were included in defendant's brief accompanying the petition. We understand they were not required, but we crave leave hereby, to add to them by averring that the Court below erred in ordering any injunction and any accounting and in reversing the trial Court, and in not adhering to its original decision affirming the order of the District Court dismissing the complaint.

20. In *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 137, Mr. Chief Justice Fuller said:

> "It is said that the use of the word 'Remington in the name 'Remington-Sholes' was unnecessary,—as if necessity were the absolute test of the right to use. But a person is not obliged to abandon the use of his name or to unreasonably restrict it. The question is whether his use is reasonable and honest, or is calculated to deceive."

In *Flagg Mfg. Co.* v. *Holway*, 178 Mass. 83, 90, Mr. Justice Holmes said:

> "Both zithers are adapted for the use of patented sheets of music, but the zithers are not patented. Under such circumstances the defendant has the same right that the plaintiff has to manufacture instruments in the present form, to imitate the arrangement of the plaintiff's strings or the shape of the body. In the absence of a patent, the freedom of the manufacturer cannot be cut down under the name of preventing unfair competition."

21. We also confidently rely upon the authority of this Court in *William Warner and Co.* v. *Ely Lilly & Co.*, 265 U. S. 526. There the defendant was grossly unfair but this Court denied the power of the Court below to deny that unfair defendant a right to combine cocoa and quinine. Here the defendant has never deceived anyone yet it is to be enjoined perpetually and immediately from making the patent-expired biscuit in issue if this petition be now denied.

It is respectfully submitted that the petition should be granted.

W. H. Crichton Clarke,
Edward S. Rogers,
Robert T. McCracken,
Counsel for Petitioner.

of this holding that defendant here proved the impracticability of marking the loose biscuit concerning which the Circuit Court in the *Humphrey Cornell* case had expressed such doubt. Pet., pp. 5-6.

A further misapplication of this case is found on page 8. Again it is said: "No other competitor (except Ross who was enjoined) has ever used that form." This reference to Ross, though obscure, refers to the same case cited as *Shredded Wheat* v. *Humphrey Cornell.*

The first "injunction" which ever completely prohibited the sale of either marked, unmarked or cartoned biscuit was the second decree ordered below. Neither Judge Thomas nor the Circuit Court of Appeals in the Second Circuit ever questioned the fact that the Ross Company's right to compete was indisputable under the patent expirations and the long line of decisions based on *Singer* v. *June,* 163 U. S. 169. Perhaps the strangest feature of this attempt in 1937 to set up a perpetual prescriptive monopoly in a patent-expired product was that the Circuit Court of Appeals in the Second Circuit in 1918 held that the right of Ross to make the identical biscuit here in issue was "indubitable" (*Shredded Wheat Co.* v. *Humphrey Cornell, supra*).

4. Respondent states (Brief In Opposition, p. 3) that Quaker Oats Company and Loose-Wiles Biscuit Company both use the "process disclosed by the (Perky) patent" to make "Muffets" and "Rippled Wheat." No record references are cited for these statements and there is nothing in the record to support them. These products are not shredded wheat but both are what is called ribbon wheat—that is the wheat is formed in ribbons rather than in separate shreds (R. 285).

5. Respondent states (brief p. 3) that defendant's operations began in 1922. The trial Court found (VI, p. 203):

> "From 1912 to 1919 defendant manufactured a shredded wheat biscuit marketed in cartons marked

> 'Kellogg's Toasted Wheat Biscuit.' From the Fall of 1921 to the Fall of 1922, defendant manufactured and sold a shredded whole wheat biscuit of small size and pillow-shape. The size was less than two-thirds the size of plaintiff's biscuit. In 1927, defendant resumed the manufacture of the small shredded wheat biscuit *and still continues to market that biscuit in cartons marked 'Kellogg's Shredded Whole Wheat Biscuit.' Since 1930, defendant also marketed this small biscuit in cartons marked 'Kellogg's Whole Wheat Biscuit.'* " (Emphasis ours).

The shredded wheat biscuit marketed by defendant from 1912 until stopped by war wheat shortage in 1918, was rectangular but flattened on top by the process of manufacture as was plaintiff's shredded wheat wafer called "Triscuit."

Even under the second theory of the Court below, namely, that prescriptive or uninterrupted possession of the market revives the long dead patents, plaintiff's case must fail on the facts as well as the law. Defendant was in the shredded wheat business from 1912 to 1918 and from 1921 to 1922 and from 1927 to date. Ross made plaintiff's identical biscuit from 1915 to 1918, and his right to do so was held to be "indubitable" in the Second Circuit as aforesaid. *Shredded Wheat Co.* v. *Humphrey, Cornell, supra.* Surely such intervening rights as well as the perpetual rights of the public to deal in a competitive market, cannot now be swept away without constitutional change.

6. Plaintiff's Brief In Opposition, p. 4, seeks to create the impression that the first suit brought by plaintiff against defendant in 1928 was discontinued because defendant "again abandoned the use of the name 'shredded wheat'." That is doubly untrue. There was no abandonment of use and after plaintiff had taken depositions (V. I, p. 203), the case became dormant until notice was received in 1930 that it was going to be dismissed for want of prosecution. The italicized quotation above from the findings in the Dis-

trict Court shows that defendant never abandoned the shredded wheat name. It continued to use the shredded wheat name and also brought out the same product as "Kelloggs Whole Wheat Biscuit."

The discontinuance of this suit as stated by respondent was distinctly "without prejudice" and by written stipulation. Such a discontinuance cannot be deemed an "abandonment" of defendant's claimed right to manufacture. Certainly if the plaintiff had conceived at that time that defendant had "abandoned" its rights, it would have insisted upon a consent or other decree on the merits. If, after notice that defendant reserved its rights by this discontinuance without prejudice, ~~defendant~~ plaintiff proceeded to spend the sums referred to in its brief it was certainly with notice of defendant's claim and at plaintiff's risk with respect thereto.

7. Plaintiff in the following paragraph on page 4 repeats the incorrect statement concerning an abandonment in 1930 by defendant of the marketing of "Kellogg's Shredded Whole Wheat Biscuit." Plaintiff states "The present suit, commenced in 1932, followed the defendant's resumption of the use of the name 'Shredded Wheat' as a tradename *in its advertising and on the ends of its cartons*" and by its use of two biscuits shown in a dish (emphasis ours). This again is doubly misleading. Defendant's marketing of "Kellogg's Shredded Wheat Biscuit" has been continuous and unbroken from 1927 to date (V. I, p. 203). There was no "resumption" because there had never been any "second abandonment," and the second suit was not brought to enjoin defendant merely from using the words shredded wheat "in its advertising and on the ends of its cartons" or by the use of the dish-biscuit picture. If that statement were true, the judgment below could not be sustained on that ground alone. A suit to restrain a mere "advertising" use or a mere small type use "on the ends" of the cartons (V. I, p. 219), would never support an in-

junction to stop all marketing of the biscuit under any name whatever or any and all use of the words "Shredded Wheat" as a tradename. The suit was brought (V. I, pp. 24-25) to prevent defendant (a) from making any biscuit like plaintiff's, (b) from calling any kind of a product "Shredded" or "Shredded Wheat" and (c) from showing a picture of the biscuit on its packages or in its advertising.

Plaintiff's statement that the present suit was brought merely to restrain defendant's use of the words "shredded wheat" in its advertising and on the ends of its cartons and to restrain the use of the picture, amounts in effect to a confession that this suit was never intended as an attempt to prevent defendant from making and marketing its biscuit as "Kellogg's Whole Wheat Biscuit." If the language does not mean that, its meaning otherwise is not clear. In short, plaintiff in effect, renews its concession of defendant's indisputable right to make the patent expired biscuit which the Court below has denied it (Pet., p. 2, footnote).

This attempt of plaintiff to lead the Court to believe that defendant had "again abandoned" the words "Shredded Wheat" in 1930, that there was thus only the almost trivial excuse of defendant's use of the word "shredded" *in its advertising only* and on the *ends of its cartons only*, and *of the dish picture only*, to justify the bringing of this suit, would make the present action trivial if not almost moot, and would certainly show that the sweeping injunction finally ordered was highly unusual to say the least.

Also the above statement tends to support defendant's charge that the present suit like the first one was brought for advertising rather than judicial purposes and that it was only tried because defendant's Anti-Trust suit (*Kellogg Co.* v. *National Biscuit Co.*, 71 Fed. (2) 662) had forced plaintiff to try this advertising suit or stand as confessing that it had brought a trivial suit for advertising purposes. (Pet. pp. 9-19).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

NOS. 2 AND 56.

KELLOGG COMPANY,

Petitioner,

against

NATIONAL BISCUIT COMPANY,

Respondent.

BRIEF FOR PETITIONER

THOMAS D. THACHER,
W. H. CRICHTON CLARKE,
Solicitors for Petitioner.

RICHARD H. DEMUTH,
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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

Nos. 2 and 56.

KELLOGG COMPANY,
Petitioner,

AGAINST

NATIONAL BISCUIT COMPANY,
Respondent.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the United States District Court for the District of Delaware (R. 1, p. 193) was filed on January 11, 1935. It contains a statement of the essential facts found by the court in conformity with Equity Rule 70½ (R. 1, p. 228). It is not reported. The per curiam opinion of the Circuit Court of Appeals for the Third Circuit, affirming the decree of the District Court (R. 3-A, p. 2069), was filed January 16, 1936, and is not reported. The opinion of the Circuit Court of Appeals upon rehearing, vacating its decree affirming the judgment of the District Court and reversing said judgment (R. 3-A, p. 2083), was

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> and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade-mark''

which trade-mark the Court described in its opinion (R. 3-A, p. 2085) as

> ''consisting of a dish containing two biscuits submerged in milk''.

To review this judgment petitioner filed a petition for certiorari in this Court, which was denied October 25, 1937, and thereafter applied for reconsideration of its petition, which was denied November 8, 1937.

Upon the issuance of the mandate, an interlocutory decree was entered and injunction issued in the words of the mandate. Thereafter question arose in the District Court as to the meaning of the words of injunction taken from the mandate (R. 3-A, pp. 2249-2250). On May 5, 1938, the Circuit Court of Appeals, on motion of respondent to recall its mandate for clarification, ordered (R. 3-A, p. 2286):

> ''That the said Mandate be clarified so as to direct the United States District Court for the District of Delaware to enter a decree, in the usual form, enjoining the defendant Kellogg Company (1) from the use of the name 'Shredded Wheat' as its trade name, (2) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit, and (3) from doing either * * *.''

Thereupon petitioner filed in this Court a second petition for certiorari to review this last decree of the Circuit Court of Appeals. Coincidentally therewith, petitioner moved for leave to file out of time a second petition for rehearing of its first petition for certiorari, seeking review of the decree of the Circuit Court of Appeals entered on April 12, 1937. On May 31, 1938 this motion and both petitions for certiorari were granted.

Shredded wheat is a product composed of whole wheat which has been boiled, partially dried and then drawn out into thin shreds. The product is best known to the public in the familiar form of pillow-shaped biscuits which are used as a dry cereal food. The pillow-shaped form of the biscuits unavoidably results from the process of their manufacture, which was formerly protected by patents held by respondent and its predecessors (hereinafter referred to collectively as "respondent"), and is the only commercially practicable form in which the biscuits can be made.

The monopoly enjoyed for many years by the respondent under the protection of these patents covered the product shredded wheat, the process of its manufacture, the characteristic pillow-shaped form of the biscuits and the machinery essential for their manufacture. Respondent has always called its biscuits by their generic name, "Shredded Wheat", without any prefix or suffix indicating origin.

Petitioner's biscuits, made by the use of the patent-expired machinery and process, are in the same form as respondent's but are less than two-thirds their size (R. 1, p. 203). They are sold in distinctive cartons under the names "Kellogg's Whole Wheat Biscuit" and "Kellogg's Shredded Whole Wheat Biscuit". Reproductions of petitioner's and respondent's cartons appear in the opinion of the District Court at R. 1, pp. 205-219.

The District Court found (R. 1, pp. 204, 221, 225, 226) and the evidence abundantly establishes:

(1) That both parties sell their product only in cartons and that the cartons employed by petitioner, which are dominated by the name "Kellogg" printed in bold script, bear no resemblance to respondent's cartons and cannot be mistaken for them;

(2) That no confusion can result from the sale of petitioner's biscuits in the distinctive Kellogg cartons, that there has been no passing off of petitioner's

biscuits for respondent's, and that there has been no deception of the public;

(3) That only 2½% of petitioner's biscuits are served in restaurants, lunchrooms and hotels, that of this 2½%, 98% are served in distinctive individual cartons and that only approximately one in every 5,000 biscuits sold by the petitioner is served apart from the carton;*

(4) That petitioner's biscuits served outside the carton are distinguishable from respondent's because of their smaller size; and

(5) That "shredded wheat" is the only name by which the biscuit is known to the public and is the only name by which it was described during the existence of the patents.

Without disturbing these findings, the Circuit Court of Appeals none the less held on reargument that respondent had the exclusive right to sell the biscuit in its only commercially practicable form and to call it by the only name by which it is known. In effect, therefore, and without any proof of deception or passing off, the Circuit Court of Appeals has granted respondent a perpetual monopoly of this standard food product.

(1) Respondent's Monopoly of Shredded Wheat.

The opinion of the District Court briefly and succinctly reviews the history of the shredded wheat industry (R. 1, pp. 194-203). This review is prefaced by the following pertinent observation, amply borne out by the evidence (R. 1, p. 194):

"The case involves a brief review of events from 1894 to date—a stretch of 40 years. The early years

* The computation of one in 5,000 made by the District Court upon the percentages shown is incorrect and the correct result is one in every 2,000.

cover the period of plaintiff's patent monopoly of the manufacture and sale of shredded wheat biscuit. Throughout the subsequent years the review deals with plaintiff's efforts to perpetuate that monopoly by means of trade-marks and suits against competitors."

Henry D. Perky, of Denver, Colorado, was the founder of respondent's business. He incorporated The Cereal Machine Company in 1893 and became its president. This company operated the Cereal Restaurant in Denver, in which were sold all sorts of shredded food, including wheat, turkey, lobster, vegetables and meats (R. 1, p. 195; R. 2, pp. 984-985). Its advertisements featured shredded whole wheat bread and shredded cereal coffee (R. 1, p. 195; D. Ex. 108*). Perky's original shredding machines were located in the basement of this restaurant (R. 2, p. 981). His plan at the start, as indicated by the name "The Cereal Machine Company", was to sell small shredding machines to the public so that housewives could shred their own food (R. 1, pp. 195, 575; R. 3, p. 2011).

This plan was soon abandoned, and after an experimental period in Denver and an unsuccessful start at Worcester, Massachusetts, respondent in 1901 established itself permanently at Niagara Falls, N. Y. where a large factory was built (R. 1, 195). The business was at that time conducted by The Natural Food Company, of which Perky was president. The name of the company was changed to The Shredded Wheat Company in 1908, and its business and good-will were acquired by the respondent in 1930.

Perky was a prolific inventor, having secured over forty patents connected with the production of shredded wheat and shredded wheat biscuits between 1893 and 1905, the year of his death. The applications made by Perky for these patents consistently used the words "shreds",

* Respondent's exhibits not printed in the record will be referred to as "P. Ex." followed by the appropriate number, and petitioner's exhibits as "D. Ex."

"shredded", "shredding rolls" "shredding machines", and the like, in a purely descriptive sense to describe the patented manufacturing process and the patented product made by use of the process (R. 1, p. 196; R. 5, pp. 1-328; see p. 74, *infra*).

The basic Perky patent No. 548,086 (R. 5, p. 59) was granted on October 15, 1895. This patent discloses a process of boiling the original whole wheat berry, partially drying it and then forcing it between compression rollers, one or both of which has peripheral grooves which mash the several parts of the berry into a soft paste. This paste is then forced out by means of combs or scrapers, so as to emerge in thin filaments or shreds. The patent covered both the process and the product. It expired by limitation on October 15, 1912 (R. 1, pp. 196-197).

On September 17, 1895, Perky took out a design patent, No. 24,688, upon a biscuit shown in accompanying drawings (R. 5, pp. 62-63). The form and shape of the biscuit covered by this design patent are the form and shape of the biscuit as made by respondent from the commencement of its business to the present date. This patent would have expired by limitation on September 17, 1909, but in 1908 it was declared invalid by Judge Koblsaat on the ground that the design had been in public use for more than two years prior to the application for the patent and therefore had already been dedicated to the public. *Natural Food Co.* v. *Bulkley*, No. 28,530, N. Dist. Ill., East. Div. (P. Ex. 273).

Among the other patents secured by Perky were several covering improvements in the machinery for the production of shredded wheat biscuits, which, as shown in the patent specifications, were designed to produce the characteristic pillow-shaped shredded wheat biscuits (R. 5, pp. 12-13, Perky patent No. 532,286; p. 50, Perky patent No. 533,555; p. 66, Perky patent No. 571,284; p. 82 Perky patent No. 614,338; p. 92, Perky patent No. 667,892; p. 110, Perky patent No. 678,127; p. 122, Perky patent No. 678,625; p. 136, Perky patent No. 681,656). Indeed, respondent's chief chemist, who was formerly the produc-

tion manager of the Shredded Wheat Bakeries, admitted that respondent's machines, constructed according to the expired Perky patents, "cannot produce anything else except the pillow-shaped form of biscuit" (R. 1, p. 291).

The District Court found that *up to 1915* respondent printed prominently upon packages containing its biscuit, the following notice (R. 1, pp. 195-196):

> "September 17, 1895 PATENTED October 15, 1895
>
> THIS FOOD, the process of making it, and special machinery for its manufacture, are under the protection of the United States Government by virtue of many patents, as follows:"

This notice was followed by a list of forty-one patents, including the basic product and process patent which had expired in 1912, and the design patent which was declared invalid in 1908, and would have expired in 1909. With reference to the latter, the District Court stated (R. 1, p. 197):

> "* * * Instead of removing notice of the Perky design patent from the carton or otherwise notifying the public it was no longer claiming protection under the patent, plaintiff continued for seven years thereafter to warn the public not to make the biscuit as it was under the protection of the government by virtue of this design patent. By its professions and conduct plaintiff secured a monopoly not for fourteen years but actually for twenty years."

(2) Respondent's Persistent Use of "Shredded Wheat" As the Generic and Descriptive Name of the Biscuit.

A. Respondent's Trade-Marks.

The District Court found that for twenty years, from 1894 until 1914, respondent's trade-mark was the goddess Ceres, represented as holding a torch in one hand and a sheaf of wheat in the other (R. 1, p. 195). This "Ceres"

trade-mark appeared on both ends of respondent's carton until 1910, when it was removed from one end and supplanted by a picture of Niagara Falls (R. 1, pp. 588-589). In 1915 the goddess was entirely removed and the picture of Niagara Falls substituted (R. 1, 597).

Respondent made no claim to the words "shredded wheat" or "shredded whole wheat" as a trade-mark until 1905, when it filed an application for the registration of "Shredded Whole Wheat" as a trade-mark under the so-called ten-year clause of the newly-enacted Trade-Mark Act of 1905 (33 Stat. 725, ch. 592, 15 U. S. C. A. § 85). Filing of the application under the ten-year clause was, of course, an admission that the words were either the generic or descriptive name of the product, or both, and, as such, not entitled to protection as a technical trade-mark.* William E. Williams filed notice of opposition. The proceeding was carried through the Patent Office to the Court of Appeals of the District of Columbia. In *Natural Food Co.* v. *Williams*, 30 App. D. C. 348, that court held that the words "shredded whole wheat" accurately and aptly describe the product, that until 1905 they had been used by respondent as descriptive rather than as a trade-mark, respondent's trade-mark having been the goddess Ceres, and that they were not entitled to registration under the

* The Trade-Mark Act of 1905 provides for the registration of distinctive trade-marks, but prohibits the registration of a mark which consists "merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods * * *." The ten-year clause, however, provides that the foregoing prohibition shall not "prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding February 20, 1905. * * *" (33 Stat. 725, ch. 592, 15 U. S. C. A. § 85).

ten-year clause because respondent had not used them exclusively for the prescribed period.

Thereafter, in 1912, respondent registered the picture of its factory as one of its trade-marks, No. 89,071 (R. 4, p. 199). This picture has appeared on the face of respondent's cartons since 1910, accompanied by the words "The Home of Shredded Wheat." Acquiescing in and acting upon the holding in *Natural Food Co.* v. *Williams* that "shredded wheat" were descriptive words and therefore not properly subject to registration, respondent, to secure the registration of the factory picture, disclaimed the descriptive words by stating "No claim is made herein to the words 'The Home of Shredded Wheat' ". Further, in describing the goods to which the trade-mark was applied, respondent stated that it had adopted the picture as a mark "for shredded wheat, in class No. 46, Foods and ingredients of foods" (R. 4, p. 199).

Respondent also secured in 1912 trade-mark registration No. 85,186 (R. 4, p. 197) on an alleged trade-mark showing one shredded wheat biscuit in a dish with a spoon and milk or cream. The application contains the following disclaimer: "no claim being made to the representation of a shredded wheat biscuit." The appearance of the article was again disclaimed in respondent's trade-mark registration No. 216,593 (R. 4, p. 205) of an alleged trade-mark consisting of a dish containing two shredded wheat biscuits in milk or cream, which states: "Applicant disclaims any exclusive right to the representation of two biscuits apart from the mark shown."

When the Trade-Mark Act of 1920 (41 Stat. 533, 15 U. S. C. A. § 121) was enacted, permitting the registration of descriptive and generic names, respondent secured two registrations of the words "shredded wheat", Nos. 178,725 and 213,456 (R. 4, pp. 201, 203). Despite the decision of the Court of Appeals in *Natural Food Co.* v. *Williams, supra,* that the words had not been employed by respondent as a trade-mark prior to 1905, and, being descriptive,

were not entitled to be so used, respondent claimed use as a trade-mark "since January 1, 1894." Registration under the 1920 Act, unlike that under the 1905 Act, creates no presumption of validity or ownership (see pp. 79-80, *infra*). Respondent's registration under this Act is, however, a formal admission that the words registered, being either descriptive or generic or both, are not subject to appropriation as a valid technical trade-mark.*

Since 1910 respondent has also used a picture of Niagara Falls, where its principal factory is located, as a trade-mark to indicate the origin of its goods, irrespective of whether they are produced at the Niagara Falls factory or elsewhere (R. 1, p. 564). This mark was extensively advertised, as a result of which respondent's product since at least 1911 has been generally known as Niagara Falls Shredded Wheat.†

B. Respondent's Cartons and Advertisements.

In its cartons and advertisements, as in its trade-mark registrations, respondent has continuously used the words "shredded wheat" and "shredded whole wheat" in their primary sense, as descriptive of and as the generic name of the biscuit it produces. The following few instances of such use are but typical of the many contained in the record.‡

Most of respondent's cartons have contained, in one form or another, the explanatory phrase: "Consists of the entire wheat grain (nothing added) made light and short

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* See page 79, *infra*. A proceeding is now pending before the Commissioner of Patents for the cancellation of this registration but the proceeding has been stayed by stipulation pending final determination of this case.

† Respondent's former advertising manager testified to this effect (R. 1, p. 601) and his testimony is amply supported by the testimony of consumers throughout the country (see, *e. g.*, R. 2, pp. 711, 715).

‡ See P. Exs. 2-4, 87-112.

by mechanical shredding and thorough cooking" (R. 1, p. 583; P. Exs. 2-4).

Respondent's cartons have also consistently contained the phrases: "Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding and baking" and "The crispness of its shreds promotes thorough mastication" (R. 1, p. 591).

Ever since 1907 respondent's cartons have prominently carried the phrase "It's All In The Shreds". The reason for this slogan is aptly stated by Colonel De Weese, for twenty-five years advertising manager of respondent's predecessor, The Shredded Wheat Company. He stated (R. 1, pp. 581-582):

> "The reason for the slogan 'It's All In The Shreds' was that those five words seemed to embody everything there was to say about the whole wheat; It's All In the Shreds meaning that the whole wheat grain, all the whole wheat grain was in the shreds; and then the other meaning conveyed was that the virtue of the product was in the shredding process, you see. So we meant to have those five words convey all there was to say about Shredded Wheat."

For several years, when threatened by competition in the sale of shredded wheat biscuits, respondent placed upon its cartons the words "The Original Shredded Wheat". Thus respondent recognized that it was necessary to distinguish its shredded wheat from any other shredded wheat on the market. As respondent's former advertising manager explained (R. 1, p. 597):

> "* * * The words *The Original* above Shredded Wheat were also a reaction to competition of some sort and were put on there because another shredded wheat was being made. We wanted to identify this Niagara Falls Shredded Wheat as the original one." (Italics in original.)

It should be noted that at the time of trial, respondent was still calling its product "Original Shredded Wheat" on its 36 package cartons sold to grocers (R. 3, p. 1957).

Respondent's advertisements used the words "shredded wheat" in a similarly descriptive and generic sense. A few typical examples follow:

Respondent's pamphlet (D. Ex. 229) reads in part:

> "How shall we prepare the whole wheat so that its body-building elements may be digested and formed into healthy tissue, bone and brain? That question was solved by the man who invented Shredded Whole Wheat Biscuit. In making Shredded Wheat the whole wheat grains are first thoroughly cleaned, then cooked in steam, then drawn out into filmy shreds, then baked in ovens at a high temperature. The crispness of the shreds encourages thorough chewing, and that insures perfect digestion. That's the reason Shredded Wheat is such a perfect food for children. It makes sound teeth and healthy gums. They like the crisp, flavory shreds of the baked whole wheat, and it is so much better for them than mushy porridges."

Respondent's book of recipes (D. Ex. 230) states:

> "Shredded Wheat brings you wheat in its most digestible form. The plump whole grains are steamed to break down all the starch cells, insuring quick digestibility. Then they are drawn into long, filmy shreds, so porous they will readily absorb more than four times their own weight in milk. Layer upon layer, the shreds form biscuits. Then—unsalted, unsweetened—they march into the ovens. And these tempting shreds of whole wheat are baked to a crisp and appetizing golden-brown."

One of respondent's advertisements (D. Ex. 226) suggests to the public:

> "When you ask for Shredded Wheat be sure you get the original Shredded Wheat you have always eaten, made at Niagara Falls, N. Y. • • • •
>
> If you ask for Shredded Wheat and receive a different Shredded Wheat from that which you have

always eaten (made in Niagara Falls, N. Y.), kindly write us at the Home Office and receive a copy of our booklet, 'The Happy Way to Health.'"

Another (R. 2, p. 1155) reads:

"Made at Niagara Falls. Look for the picture of Niagara Falls on the end of the carton when you buy Shredded Wheat Biscuit. Any other Shredded Wheat that may be offered you is merely a poor imitation of the only Original Shredded Wheat * * *."

Advertisements appearing in newspapers and magazines throughout the country reiterated for years on end the assertions that respondent's product was nothing but whole wheat, "steam-cooked, shredded and baked", that "it is the shredding process that puts the 'eat' in whole wheat", that the biscuits are "made easy to serve and easy to eat in crisp, oven-baked shreds" and that "It's All In The Shreds" (P. Exs. 87-112). Booklets entitled "Shreds of Life" and "Health in Every Shred" were distributed in lots of one to five million to publicize respondent's product (R. 1, p. 565). Examination of the hundreds of advertisements in evidence shows that almost all of them were designed to convey to the public the belief that the particular virtue of respondent's product lay in the shredding process and the shredded form of the product (see R. 1, p. 570).

Thus it was very largely due to respondent's own efforts that shredded wheat has become at once the descriptive, generic and only name of the article, just as condensed milk is the descriptive, generic and only name for that particular article. Respondent's former advertising manager testified (R. 1, p. 571-572):

"The effect of this continual advertising of Shredded Wheat upon the expression *shredded wheat* was to make it a sort of household word, as if you would speak of starch or potatoes, as differentiated or distinguished from proprietary foods, like Grape-Nuts, or Mello-Wheat, or any of those foods in those days. You would not expect to find any of them mentioned

filed April 12, 1937 and is reported in 91 F. (2d) 150. The opinion of the Circuit Court of Appeals, recalling and clarifying its mandate (R. 3-A, p. 2282), was filed May 5, 1938 and is reported in 96 F. (2d) 873.

Jurisdiction.

The jurisdiction of this Court has been invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347(a)).

The order of the Circuit Court of Appeals reversing the decree of the District Court was filed on April 12, 1937 (R. 3-A, p. 2094). Petition for a writ of certiorari to review this order was filed in this Court on September 10, 1937 and denied on October 25, 1937. Thereafter, on May 5, 1938, the order of the Circuit Court of Appeals, recalling and clarifying its mandate, was filed (R. 3-A, p. 2285). Upon consideration of a petition for a writ of certiorari to review said order and upon reconsideration of the original petition, writs of certiorari to review both orders of the Circuit Court of Appeals were granted by this Court on May 31, 1938.

Questions Presented.

This case involves the right of the petitioner to manufacture and sell in competition with the respondent, shredded wheat biscuits, the court below having enjoined the petitioner (1) from the use of the name "Shredded Wheat" as a trade-name; (2) from advertising or offering for sale its product in the form and shape of respondent's pillow-shaped biscuit; and (3) from doing either.

The questions presented are:

(1) Whether the manufacture and sale by petitioner of shredded wheat biscuits in the pillow-shaped form constitutes unfair competition;

(2) Whether the use by petitioner of the words "shredded wheat" as part of the designating phrase "Kellogg's Shredded Whole Wheat Biscuit" constitutes trade-mark infringement or unfair competition;

(3) Whether respondent is entitled to a perpetual monopoly in the name and form of shredded wheat biscuits after its patent monopoly has terminated; and

(4) Whether, if petitioner has the right to make shredded wheat biscuits in the pillow-shaped form, it has the right to illustrate its product on its cartons and in its advertisements by pictorial representation of its biscuit appearing in a dish or otherwise.

STATEMENT.

This action was commenced in the United States District Court for the District of Delaware. It was brought by respondent, a New Jersey corporation, to restrain petitioner, a Delaware corporation, from the manufacture and sale of shredded wheat biscuits in their characteristic pillow-shaped form and from the use of the words "shredded wheat" to designate its product, on grounds of unfair competition and trade-mark infringement.

After trial, the bill of complaint was dismissed by the District Court upon findings of fact incorporated in its opinion (R. 1, p. 228).

Upon appeal to the Circuit Court of Appeals for the Third Circuit, the judgment of the District Court was unanimously affirmed (R. 3-A, pp. 2069, 2093), but upon reargument the order of affirmance was vacated and the District Court was directed (R. 3-A, p. 2094):

> "to enter a decree enjoining the defendant from the use of the name 'Shredded Wheat' as its trade name

marketed in limited quantities under the name "Kellogg's Shredded Whole Wheat Biscuit". Respondent immediately asserted exclusive rights in the name "shredded wheat" and in the appearance of the biscuit (R. 1, pp. 103-105). Petitioner denied the existence of any such rights (D. Ex. 237) and continued operations for approximately a year (R. 2, p. 1048).*

In 1927 petitioner re-entered the field with the production of the small-sized shredded wheat biscuit which it sells today. This biscuit has been marketed both under the name "Kellogg's Whole Wheat Biscuit" and under the name "Kellogg's Shredded Whole Wheat Biscuit". In 1928 respondent brought suit in Connecticut against two of petitioner's dealers. After some depositions were taken respondent moved no further until the suit was ripe for dismissal for want of prosecution. In 1930 the action was discontinued by stipulation without prejudice to petitioner's rights, and petitioner continued in the manufacture and sale of its biscuit (R. 1, p. 203). Two years later, five years after petitioner had recommenced production and sale of its biscuit, without any further change in the situation, the present suit was commenced to enjoin the further conduct of this established business.

In 1934, when the petitioner introduced its biscuit into Canada through its Canadian company, suit was brought against this company by respondent's Canadian subsidiary, seeking precisely the same relief and on the same grounds as respondent seeks in the case at bar. After trial upon the merits, the action was dismissed. *Canadian Shredded Wheat Company, Ltd.* v. *Kellogg Co. of Canada, Ltd. and another*, [1936] Ont. Rep. 281. This judgment was unanimously affirmed by the Court of Appeal of Ontario in November, 1936 and by the Judicial Committee of the Privy Council in February, 1938. *Canadian Shredded*

* The statement in the second opinion of the court below that petitioner ceased producing its 1922 biscuit immediately after respondent's complaint to it (R. 3-A, p. 2085) is a clear misapprehension of the record.

Wheat Company, Ltd. v. *Kellogg Co. of Canada, Ltd. and another*, 55 R. P. C. 125, All England Law Reports Ann. 1938, Vol. 1, Part 8, pp. 618-634, affirming [1936] Ont. Rep. 613. The well-considered opinion of the Privy Council is printed as an appendix to this brief with annotations to show how precisely the controlling facts in that case are duplicated in the case at bar (see pp. 125-143, *infra*).

Two other products made with machinery covered by the Perky patents should be noted. One is "Muffets", a round cereal biscuit marketed by the Quaker Oats Company, and the other is "Rippled Wheat", made by the Loose-Wiles Biscuit Company. Neither Muffets nor Rippled Wheat is a shredded wheat product. They are both rolled ribbon products, the Perky machines being adjusted contrary to the instruction of the patents for the production of shredded wheat (R. 1, p. 285; R. 2, pp. 1079-1080, 1129). They differ from shredded wheat biscuits in textural structure and in their baking qualities; they are not comparable products from a commercial standpoint (R. 2, p. 1129). Neither Muffets nor Rippled Wheat meets the specifications of the federal government for shredded wheat, whereas both respondent's and petitioner's products do (R. 2, pp. 1079-1080).

(4) Petitioner's Methods of Competition and its Precautions to Avoid Confusion and Passing Off.

The District Court found, and the finding is fully supported by the evidence, that the petitioner is competing fairly with the respondent and has succeeded in its efforts to distinguish its product from respondent's "Shredded Wheat" (R. 1, pp. 204, 221, 225-228). As the District Court said in its opinion (R. 1, p. 227): "Plaintiff is complaining, not of unfair competition but of effective competition."

A. Petitioner's Cartons.

The District Court found (R. 1, pp. 204, 225-226) that "Defendant's cartons bear no resemblance to plaintiff's and cannot be mistaken for them."* Examination of the reproductions of both cartons, which appear in the opinion of the District Court at R. 1, pp. 205-219, supports this conclusion beyond question. The uncontradicted depositions of hundreds of witnesses from all parts of the country bear testimony that there could be and has been no confusion between them.†

The carton used by petitioner for its shredded wheat biscuit is similar in appearance to the billions of cartons in which all but one of its other cereal products have been sold;‡ it is printed in the familiar Kellogg red and green colors and in the typical Kellogg style of lettering, with the word "Kellogg's" in bold red script dominating the entire package.§ Consumers immediately recognize it as one of the Kellogg family.¶

Respondent packed 12 biscuits in its carton and printed this fact on the outside of its package. Petitioner, on the other hand, sold 15 of its smaller biscuits to the package

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* Indeed in its main brief before the Circuit Court of Appeals, the respondent stated that this is "not a carton case" (Appellant's Brief, p. 105).

† See, *e. g.*, the testimony of respondent's own witnesses in the first of the three volumes of depositions in the record, at pp. 334, 349, 350, 357, 360, 361, 366, 372, 385, 386, 401, 404, 414, 423, 425, 427, 428, 430, 439, 445, 446, 452, 471, 482, 483, 485, 488, 492, 493, 506, 512, 514, 515, 520, 534, 613, 614, 635, 640, 642, 644, 649, 654, 656.

‡ The only exception is one bran flake packed in a brown and yellowish package for purposes of distinction (R. 2, p. 1136).

§ In addition to its distinctive coloring, lettering and wording, petitioner's carton is taller and thinner than respondent's.

¶ See, *e. g.*, R. 1, pp. 349, 350, 357, 404, 414, 427, 488, 668; R. 2, pp. 707, 875, 1259; R. 3, p. 1429.

and its cartons contained the words "15 biscuits" printed prominently in large script (R. 1, pp. 204, 211, 215). Petitioner also placed advertising matter on many of its cartons, explaining the comparative merits of its product. Moreover, petitioner tinted the inside of its carton green—a thing never before done in cereal cartons—and developed a new type of separator for packing its biscuit (R. 2, p. 1001).

Another distinctive feature of some of the Kellogg cartons was the use of a cellophane window (see, *e. g.*, P. Exs. 147, 176, 177). This window is made by cutting out a section of the front of the package and pasting a piece of cellophane over the aperture. The use of this window does not detract from the distinctive appearance of the carton as one of the Kellogg group of cereals. It has proved to be a very attractive sales feature (R. 2, pp. 1249, 1262, 1306, 1311, 1319).

Respondent has criticized the use of the cellophane window because it is placed in the front of petitioner's cartons, where the ends of the biscuit are seen, rather than at the side of the carton where a side view of the biscuits would be obtained. Display of the ends of the biscuits does not, of course, reveal the difference in length between the two biscuits. The reason for the position of the window is that the cartons are placed on the grocers' shelves with only the face pointing towards the customer. If, therefore, the cellophane window is to receive notice, it must be on the face of the package rather than on the side (R. 2, p. 1000). Since the packages containing the window are entirely dissimilar from respondent's cartons and cannot be mistaken for them, objection to the window comes to the essence of respondent's complaint, *i. e.* that petitioner is selling a competing shredded wheat biscuit as its own product and is revealing to the public what it has for sale.

The cellophane window serves another useful purpose. From 1930 until after the first decision of the Circuit

Court of Appeals, most of petitioner's biscuits were sold under the name "Kellogg's Whole Wheat Biscuit" rather than under the name "Kellogg's Shredded Whole Wheat Biscuit". The undisputed testimony of more than twenty witnesses from different sections of the country demonstrates that the words "whole wheat biscuit" could connote any one of a dozen different products; they do not signify whether the product thus designated is a cookie, a cracker or a cereal, and they furnish no indication of the form or shape of the product or whether it is composed of shredded wheat or made from pure flour (R. 1, pp. 329, 425, 451, 456, 462, 501, 511, 518, 527, 531, 544, 617, 637, 666; R. 2, pp. 709, 752, 825, 833; R. 3, pp. 1575, 1743, 1797). All of these witnesses agreed, and there was no testimony to the contrary, that a carton containing only the name "Kellogg's Whole Wheat Biscuit" would be a blind package and therefore extremely difficult to sell.

The difficulty thus encountered was obviated in part by use of the cellophane window which permits the consumers to see exactly what product is contained in the package. In even greater measure, however, the difficulty was met by placing upon the face of cartons having no such window a pictorial representation of two of petitioner's biscuits in a bowl of cream. This advertising device is very commonly employed in the sale of food products (R. 1, pp. 358, 360, 362, 371, 617, 626, 627, 668, 671; R. 2, pp. 710, 1001, 1150), and is used by the respondent itself on a large proportion of its various food cartons (R. 1, p. 626).

Comparison of the pictorial representation used by petitioner (R. 1, pp. 215, 217) with that used by respondent (R. 1, p. 207), reveals no similarity between the two illustrations which would be likely to confuse or mislead, particularly when displayed on a carton such as petitioner's which prominently carries petitioner's name as the manufacturer. The picture on petitioner's carton was designed to emphasize the fact that two of its small size biscuits

exactly fit the ordinary cereal bowl, as compared with respondent's larger biscuit which must be crumbled in order to fit such a bowl (R. 2, pp. 999-1000).

Respondent's criticism of petitioner's use of the bowl picture is significant when considered in conjunction with its other assertions. Respondent claims the right to prevent petitioner from describing its product verbally by use of the only name by which the article is known to the public and also from describing it visually by showing it to the consumer either directly through the cellophane window or indirectly through pictorial representation. It would thus prevent the petitioner from revealing the nature of its product either by name, pictorial representation or physical exhibit. In other words, respondent seeks to enjoin the sale of petitioner's competing product as a competing product, no matter how fairly sold—and this under the guise of protecting its own reputation as a manufacturer.

B. The Form of the Biscuits.

Petitioner has not only marketed its biscuit in distinctive cartons, but has employed every commercially practicable means to make its individual biscuits of distinctive appearance. That it has succeeded is readily apparent from physical examination of the two biscuits. There is no evidence that any purchaser accepted petitioner's biscuit believing that he was receiving respondent's product. To the contrary, scores of witnesses called by both parties were asked whether they could distinguish between the two products, and, without exception, their answers were all in the affirmative.*

* See, *e. g.*, R. 1, pp. 302, 391, 405, 426, 428, 431, 439, 446, 465, 467, 505, 521, 530, 554, 629-630, 635, 642, 645-646, 648, 651-652, 656, 682, 685; R. 2, pp. 706, 744, 788, 803, 819, 841, 845, 855, 862, 886, 889-890, 910, 965-966, 1037, 1181-1182, 1247, 1353, 1368-1369; R. 3, pp. 1400, 1429, 1447, 1468, 1469, 1613, 1711, 1742, 1751, 1788, 1794, 1810, 1928.

The principal point of distinction between the two biscuits lies in their size, respondent's being less than two-thirds the size of petitioner's (R. 1, p. 203). Petitioner's biscuit is rounded at the bottom and on top and is toasted on both sides, whereas respondent's biscuit has a flattened bottom and is toasted only on top (R. 2, pp. 997, 1051). Furthermore, petitioner's biscuit is made of materially finer shreds.

Respondent in effect conceded the distinctiveness of petitioner's biscuit when in June, 1932, after petitioner's biscuit had been marketed for five years, respondent began selling to the restaurant trade a shredded wheat biscuit of the same size as petitioner's, put up in individual two-biscuit cartons. This small sized biscuit was produced by respondent for the express purpose of meeting petitioner's competition (R. 4, p. 169).

Such similarity as there is between respondent's and petitioner's biscuits results from the fact that both are made of shredded wheat, are oblong in shape and are puffed in the center, giving them the characteristic pillow-shaped form. The puffing of the biscuit is caused by the baking process and is inherent in the nature of its manufacture. When the shreds of wheat emanate from the shredding rolls, they are piled upon each other in a trough and are then cut into biscuits by knives which shear or pinch together the shreds at the edges. When heat is applied during the baking process, the center of the biscuit puffs out but the edges, being pressed together, cannot puff. The pillow-shaped form of biscuit inevitably results (see *Perky* patents cited at p. 8, *supra;* R. 1, p. 291).

Petitioner experimented for two or three years in an attempt distinctively to mark its biscuits (R. 2, pp. 1122, 1139). These efforts included wrapping the biscuit with a band carrying the name Kellogg, tagging the biscuit with a Kellogg tag, and placing the biscuit in a glassine envelope. Attempt was also made to distinguish the biscuit by inserting a band of rice in its center, by painting it with a green

coloring matter, by placing red coloring matter on the bottom of the biscuit, and by branding the letter "K" on the top of the biscuit (R. 2, pp. 1122-1126, 1139-1141). None of these experiments was successful. Either the cost was commercially prohibitive or the biscuit was so weakened or deformed or its appearance so objectionable as to make it completely unmarketable (R. 2, pp. 1122-1126, 1139-1141, 1162-1163).

The conclusion reached by petitioner that there is no commercially practicable method to mark or brand the individual biscuit is in accord with the experience of The Ross Food Company in attempting to comply with the decree of the Circuit Court of Appeals in the *Humphrey Cornell* case, as outlined in the case at bar by Andrew Ross, president of The Ross Food Company (R. 3, pp. 1995-1996). As previously stated (p. 19, *supra*), the District Court found that "the proof fully confirms the testimony of Andrew Ross that the biscuit itself can not be branded or marked" and held that if the proof in this case as to marking had been before the Court of Appeals in the *Ross* case "the opinion of Judge Ward would doubtless have been the opinion of the court" (R. 1, p. 221). This finding was undisturbed in the court below.

Notwithstanding the facts found or established by the undisputed evidence that only one out of 2,000 of petitioner's biscuits reaches the ultimate consumer outside of petitioner's distinctive cartons, that petitioner's biscuit is distinctive and has not been confused with respondent's, that respondent has imitated the distinctive size of petitioner's biscuit, and that all biscuits made with the machines disclosed in the Perky patents must necessarily be in a pillow-shaped form, respondent yet insists that petitioner, if it is to engage in this business at all, should make its shredded wheat biscuits in the form of doughnuts, cones or in other irregular shapes.

The record clearly demonstrates that none of the irregular-shaped biscuits suggested by respondent would be com-

> in any book on dietetics, for instance, or in a book by a physician; but they mentioned Shredded Wheat as if it were a commonly accepted well-known name of a food. For instance, Walter Page, in his books giving his experiences during the World War, mentioned Shredded Wheat in one of them. He said that, if his shredded wheat lasted, he would get through all right. There were references like that in a great many books, where they would not think of mentioning any other proprietary article." (Italics in original.)

Publicity given to "Triscuits", a cracker produced by respondent and made of compressed shredded wheat, is equally illuminating. Respondent's advertisements tell the public that its Triscuit is "whole wheat steam-cooked, shredded, pressed into a wafer and baked"; it is described as "the shredded wheat toast", "the shredded wheat wafer" and "the shredded whole wheat cracker" (P. Exs. 87-112). Obviously respondent's use of the words "shredded wheat" to describe the composition of its cracker is totally inconsistent with its present assertion that "shredded wheat" is a non-descriptive trade-mark for its biscuit.

(3) Respondent's Efforts to Perpetuate Its Monopoly by Litigation.

The District Court found that when its patents had expired the respondent attempted to perpetuate its monopoly by means of trade-marks and suits against its competitors (R. 1, p. 194). We have already shown its trade-mark practice (pp. 9-12, *supra*), including the successful litigation of Williams establishing that respondent had no exclusive trade-mark rights in the descriptive words "shredded whole wheat".

The Ross Food Company was the first to enter the field after the expiration of the patent monopoly. The biscuits produced by this company were identical in size and appearance with those made by respondent. Its cartons were, however, entirely dissimilar in shape and color.

Printed upon the face of its package was an exact reproduction of the biscuit with the words "Ross's Whole Wheat Biscuit". No individual cartons were sold for the restaurant trade (R. 1, p. 199). Consumers in restaurants therefore had no means of distinguishing Ross's product from respondent's when served outside the carton.

Respondent brought suit charging unfair competition and seeking to enjoin Ross from making the biscuits in their characteristic form. The Circuit Court of Appeals for the Second Circuit (*Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 Fed. 960) denied the respondent any relief with respect to biscuits reaching the ultimate purchaser in package form, on the ground that the Ross cartons, even though containing a picture of the Ross biscuit which was identical with respondent's, were so dissimilar from the respondent's cartons as to obviate any possibility that its goods could be sold for those of the respondent.

A majority of the court directed that all biscuits reaching the last purchaser outside of their cartons should be marked with some symbol impressed in their substance or have fastened upon them a tag or band stating that they were made by the defendant, but provided that (p. 967):

> "* * * the defendant at the end of six months may apply to the District Court to be relieved of the second requirement, upon showing that after a bona fide trial of all possible expedients it cannot comply with that provision, except at an expense which would make impossible any continued competition in the business of selling biscuits outside the cartons with any assurance of reasonable profit."

Judge Ward concurred in the denial of relief with respect to biscuits sold in the carton but dissented from the decision insofar as it required marking of biscuits sold to customers outside the carton. He stated (pp. 967-968):

> "The complainant's claim to be protected in any secondary meaning its goods have acquired can go no

further than its injury, and that is only so far as the public buys or is likely to buy the defendant's product supposing that it is the complainant's. The retail dealer and the purchaser of cartons are not misled. Guests in boarding houses and hotels on the American plan take what they are given. It is only a very small part of the public, namely, those who patronize lunch rooms, restaurants, or hotels on the European plan, and who order biscuit which they see on the counters, or on plates or saucers, supposing they are the complainant's, when they are really the defendant's manufacture. This seems to me an insufficient reason for giving the complainant a monopoly for all time of what apparently is the best size of this ordinary commercial article, unless the defendant and other manufacturers adopt distinguishing marks which either increase the cost of manufacture or deform and weaken the product.

Moreover, I think that the form and size of the biscuit as always made by the complainant are functional, and that imitation of these features is no evidence of unfair competition. The form evidently tends to strengthen a product made out of such fragile material and the size is apparently the best fitted for use as a breakfast food on a saucer. I think the bill should be dismissed."

In the case at bar, petitioner, in order to distinguish its product from respondent's, has sold smaller biscuits and for the restaurant trade has put up two of its smaller biscuits in individual cartons distinctively marked. The evidence to be reviewed later (pp. 26-28, *infra*) clearly establishes that it is commercially impracticable to make shredded wheat biscuits in any other than the pillow-shaped form or to distinguish them in any other manner than petitioner has done. The District Court found, and the finding was not disputed in the court below, that the biscuits cannot be separately branded or marked. In this connection the District Court said (R. 1, p. 221):

"* * * The small or individual cartons with the same distinctive markings remove all confusion in

> the lunch room, restaurant and retail service. By making its biscuit substantially smaller than plaintiff's, and using individual cartons, defendant has met the requirements of the decree of the Circuit Court of Appeals for the Second Circuit in the *Ross* case. In this case the proof fully confirms the testimony of Andrew Ross that the biscuit itself can not be branded or marked. With each biscuit distinctively marked by carton and by size, there can be no excuse for confusion or deception. Had the proof in this case as to marking been before the Court of Appeals in the *Ross* case the opinion of Judge Ward would doubtless have been the opinion of the court."

Ross' capital was exhausted by the *Humphrey Cornell* litigation and soon after the decision of the Circuit Court of Appeals his company was forced into bankruptcy (R. 3, p. 1996).

Petitioner was the next to challenge respondent's pretensions to monopoly (R. 1, p. 203). Petitioner is the largest manufacturer of cereals in the country (*id.*). Since 1905, it has spent $50,000,000. in advertising its products and the name "Kellogg's" has appeared in every advertisement; it sells approximately one and one-half billion cartons of cereal every year and the name "Kellogg's" appears prominently on each carton (*id.*). For years, therefore, as the District Court found, "Kellogg's" has been a distinctive household name, meaning a particular maker of cereal foods (*id.*).

Beginning in 1912, petitioner manufactured a shredded biscuit marketed under the name "Kellogg's Toasted Wheat Biscuit" (*id.*). This biscuit was made from a dough rather than directly from the whole wheat berries and it contained extrinsic flavoring matter (R. 2, pp. 1046-1047; R. 3, p. 1999). When use of wheat was restricted during the war, other grains were added which ruined its palatability. Its manufacture ceased in 1919 (R. 2, p. 1047).

In 1922 petitioner brought out a small shredded wheat biscuit of the same size as its present biscuit which was

mercially feasible to produce. Each of them is objectionable either because its shape would prevent proper baking or otherwise make the biscuit of inferior quality, or because the biscuit would be too costly to produce or too fragile or too irregular to admit of proper packing (R. 2, pp. 1113-1130, 1141-1148, 1162). For the convenience of the court, a detailed analysis of the objections to each of the suggested irregular-shaped biscuits is given in Appendix A hereto (pp. 108-112, *infra*).

C. Petitioner's Advertising and Sales Methods.

One who decides to trade on the good will of another does not deliberately dispel the possibility of deceiving purchasers by large expenditures for advertising or by distinctively dressing his goods. The fact is that petitioner has extensively advertised its shredded wheat biscuit (D. Exs. 129-129-E; R. 2, p. 1020). The purpose and effect of this advertising has been to identify petitioner's biscuits as its own and to emphasize their advantages over respondent's biscuits. Indeed, petitioner's whole sales policy was expressly designed to establish as quickly as possible the differences between Kellogg's shredded wheat biscuit and respondent's competing product (R. 2, pp. 997-998).

The manner in which this policy was carried out is revealed by the evidence. Petitioner's advertisements, all of which contain the Kellogg name in prominent script as well as an illustration of petitioner's distinctive carton, emphasize that Kellogg's is a "new" biscuit, that it is in a "new convenient size" so that "two just fit the cereal bowl", that it is toasted "on both top and bottom—not just on one side", making it "crisper than ever" and that there are "15 to the package instead of the usual dozen" (R. 2, pp. 1007-1013).

The attention of the Court is respectfully directed to the advertisements appearing in the first volume of the record at pages 111 to 159, which respondent introduced in evi-

dence. The newspaper advertisements are run under such headlines as "Many Features for New Shredded Biscuit—Kellogg's Whole Wheat Biscuit Sets New Standard for this Type of Cereal"; "New Shredded Biscuit More Economical—Just One of the Improvements Developed for Kellogg's Whole Wheat Biscuits", "New Shredded Biscuit Toasted on Both Sides—Extra Crispness Just One of Many Improvements Developed for Kellogg's Whole Wheat Biscuit" and "New Shredded Biscuits Offer Many Advantages". The copy proceeds to explain the various points of distinction above alluded to. Almost all of the articles end by stating: "You can identify these new biscuits by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek" (R. 1, pp. 111-137; R. 2, p. 1013).

Other types of advertisements are run under banner headlines reading "A New Taste Thrill", "Here's a New Treat", "Just compare these improved biscuit", or "Just try this new Whole Wheat Biscuit (Shredded)—Different in size * * * different in crispness * * * different in flavor!" (R. 1, pp. 138-147; R. 2, p. 1011). Typical of the reading matter is: "One of the first things to be noticed about the new improved Kellogg's Whole Wheat Biscuit is the unusually delightful flavor and crispness. The Kellogg Company uses a special process of pressure cooking. This takes in the original flavor. Every shred is thoroughly cooked and therefore easier to digest. The biscuit are then toasted a light golden brown on both top and bottom. This makes them crisper and crunchier. Economy has not been overlooked either. Instead of the usual dozen, you get fifteen biscuit to the package. Incidentally, the biscuit are new, convenient size, two just fit the cereal bowl. * * * Local grocers have this new shredded biscuit. It may be identified by the familiar red and green package. Made by Kellogg in Battle Creek" (R. 2, pp. 1012-1013).

Many other similar advertisements are contained in the record (D. Exs. 129-129-E), but the foregoing quotations

suffice to show their general tenor. The respondent has been unable to point to a single instance of fraudulent or deceptive advertising by the petitioner, and the fact is that there has been none.

The same care to distinguish its product which is apparent in petitioner's advertisements has likewise characterized its sales methods. Petitioner called as witnesses its district sales managers from various sections of the country who testified that petitioner's biscuit has been introduced in the market by the same methods as all other Kellogg products, through window and store displays, circulars, sampling, door to door canvassing and Saturday store demonstrations. In the use of all these methods, the same emphasis has been placed on the name "Kellogg's" and on the distinctive features of petitioner's biscuit as in the case of petitioner's advertisements.

For example, the most frequently used window display was a large jumbo package of Kellogg's biscuit, from which six ribbons ran out to legend cards reading (R. 3, pp. 1405-1406):

> "1. Certified for food value by Medical Arts Laboratory, Philadelphia, Pennsylvania.
>
> 2. Convenient size. Fits the bowl. Kellogg's.
>
> 3. Six vitamins: A, B, C, D, E and G are present when served with milk and cream. Kellogg's.
>
> 4. Double toasted, top and bottom.
>
> 5. Finer shreds and finer flavor.
>
> 6. You get fifteen biscuit in each carton."

Counter displays, placards and circulars contain similar copy.

Extensive sampling was undertaken, always in the distinctive individual Kellogg cartons, and a door to door canvassing campaign was conducted in several markets, housewives being offered one package of biscuits free upon the purchase of another package. In doing such can-

vassing, the meritorious points of distinction between petitioner's product and respondent's were always stressed. The same is true of the Saturday store sales when a package of "Whole Wheat Biscuit" was offered free with every purchase of three other Kellogg cereals. In addition, innumerable store demonstrations were given to point out petitioner's principal selling points—the smaller biscuit, the double toasting, the finer shred and the larger package. These and other promotional devices employed, as described in the testimony of petitioner's sales managers, make abundantly clear that no stone was left unturned to introduce petitioner's biscuit to the market as a new and distinctive product of its own manufacture (R. 2, pp. 1094-1103, 1183-1194; R. 3, pp. 1403-1416, 1531-1544, 1554-1562, 1712-1731, 1862-1880, 1953-1966).

As a result of petitioner's advertising and sales promotional campaign, petitioner's biscuit is carried by approximately 120,000 of the 300,000 retail grocery stores in the United States (R. 2, p. 1030), and there has been created a large consumer demand for its particular biscuit as distinguished from all other competing products. In many sections of the country, petitioner's biscuit greatly outsells respondent's and its sales have been particularly heavy in the newer type self-service stores, where consumers select their own merchandise from the grocery shelves (see, *e. g.*, R. 2, pp. 1290, 1309). The effect of the decree below is to prevent these consumers from receiving the distinctive product which they have manifested a desire to purchase.

D. Sale of Biscuits to the Restaurant Trade.

At the time of the *Humphrey Cornell* decision, the use of the individual two-biscuit cartons was unknown. The product was displayed in restaurants in large glass globes (R. 1, p. 454). Since that time, however, due to strenuous efforts by both respondent and petitioner, practically all restaurants and lunch rooms serve the biscuits only in

such individual cartons (R. 1, p. 611; R. 3, pp. 1413, 1558, 1713). The District Court found and the evidence demonstrates that only 2½% of petitioner's biscuits were sold to the restaurant trade, and that of this 2½%, only 2%, or one out of every 2,000 biscuits, were sold outside the carton (see note p. 6, *supra;* R. 1, pp. 204, 611; R. 2, pp. 1075, 1184, 1230, 1243; R. 3, pp. 1413, 1532, 1713, 1954).

The use of these individual cartons is advantageous for the producer because it serves as an advertisement of its goods; it is advantageous for the restaurant owner because it obviates the danger that the remaining biscuits in a large opened carton may become stale. It is advantageous to the consumer because service in the carton preserves the original sanitary condition of the biscuits and precludes the possibility of confusion or ignorance as to their source. It is only in a very few restaurants and lunch rooms and in those few hotels which have a policy against serving food in cartons, that petitioner's product ever reaches the final purchaser apart from its package (*id.*).

Due to petitioner's established policy aggressively to push the sale of its individual cartons, as well as to the distinctive size and shape of petitioner's biscuit, every commercially possible safeguard against confusion in the restaurant trade has been taken and the requirements of the *Humphrey Cornell* decision have been met.*

E. Dealer Advertising of Petitioner's Biscuit.

Petitioner's sales campaign has been supplemented by dealer advertising of its product. Petitioner makes no advertising allowance to its dealers and has no control

* Petitioner has also attempted to stress the distinctiveness of its product to the restaurant trade by use of Kellogg displays and menu slips listing its product as "Kellogg's Whole Wheat Biscuit" (R. 2, p. 1074).

over the copy which they use;* it does, however, occasionally supply them with a cut of its carton (see, *e. g.*, R. 2, p. 1193). Most of the dealer advertisements describe petitioner's product by its full name "Kellogg's Whole Wheat Biscuit" (R. 2, pp. 1016-1017; D. Exs. 134-137). Sometimes, however, the product is described in such dealer advertisements simply as "Kellogg's Shredded Wheat" (*id.*; R. 1, pp. 163-189). Such use is illuminating, since it is a clear indication that the dealer regards "shredded wheat", not as a distinctive trade-name but as the generic name of the article, like oatmeal or condensed milk.**

F. Governmental and Institutional Sales of Petitioner's Biscuit.

Petitioner has developed a substantial governmental and institutional business. This business is conducted through invitations to bid sent out by the prospective institutional purchaser, specifying the nature of the article desired; the producer or one of its wholesalers or jobbers then submits its price for the commodity. The form in which such invitations to bid generally appear is highly significant. Typical is the Department of Interior specification appearing at R. 2, p. 1042:

> "56-G-590-1072. Case of biscuits, Whole Wheat, Shredded, to meet Federal Specification No. NC-191, as described, E2H thereof. 24 12½ oz. packages and 36 12 oz. packages to type 1 or 2 carton; samples not desired. State price per pound."

It will be noted that this specification covers both Kellogg's product, which is packed 24 12½ oz. cartons to the case, and respondent's product which is packed 36 12 oz. packages to the case. When such bids are received, peti-

* R. 2, p. 1017; R. 3, pp. 1537, 1558, 1717, 1868, 1955.

** In one instance a dealer mistakenly advertised petitioner's product as "Kellogg's Shredded Wheat" with a cut of respondent's package (R. 4, p. 125). Surely petitioner is not responsible for any such stupid and obviously unintentional blunder.

tioner always fills in the name of its product "Kellogg's Whole Wheat Biscuit" (R. 2, pp. 1043, 1082). In the case of the invitation to bid quoted above, respondent filled in as the name of its product "Original Shredded Wheat" (R. 2, p. 1043).*

Sometimes the institutional specification calls for "Wheat, shredded" or "Shredded Wheat", which the specification generally requires "shall be processed with or without added flavoring, drawn into fine shreds, formed and baked in oblong biscuits of uniform size and shape" (see, *e. g.*, R. 2, pp. 1044, 1060, 1064, 1068; R. 3, pp. 1536, 1866-1867, 1964). Such bids, many of which appear in the record, are a clear recognition by the governmental and institutional authorities that the words "shredded wheat" are both the generic name of the article and descriptive of its properties. Petitioner submits bids on such specifications always giving the full name of its product and generally submitting samples contained in the distinctive Kellogg cartons (R. 2, pp. 1072-1073).**

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* Occasionally bids are received by both respondent and petitioner the specifications of which, because of the weight of package and the number of packages to the case, apply only to the other's product. The general practice followed by both parties in such cases was to cross out that portion of the specification with which their product failed to comply and to type in the appropriate specification together with the trade-name of the product (R. 2, pp. 1085-1089).

** In one instance appearing in the record, "Shredded Wheat" was called for under specifications covering both respondent's and petitioner's product and Price Brothers, a large wholesale grocer in Philadelphia, submitted a bid without specifying which brand was to be supplied. Its bid was accepted in the form submitted, enabling it to supply either product. Petitioner's product was supplied and was accepted (R. 2, p. 1084). Respondent's criticism of this is entirely unjustified. It is obvious from the specifications of the invitation to bid that the words "shredded wheat" were used generically, in the same manner in which condensed milk might be ordered.

Kellogg's
WHOLE WHEAT
BISCUIT
DOUBLE TOASTED – A DELICIOUS
CEREAL MADE OF WHOLE WHEAT
W. K. Kellogg
NET WEIGHT
MADE BY KELLOGG IN BATTLE CREEK, MICH., U. S. A.

In not a single instance where a bid for petitioner's goods was accepted were they rejected as not being the article ordered (R. 2, pp. 1072-1073; R. 3, pp. 1537, 1716, 1960). Clearly, respondent's objection to petitioner's sales to institutions is based, not on any passing off of petitioner's goods for its own, but on the fact that petitioner has secured a large portion of the institutional shredded wheat trade of which respondent previously had a monopoly.

G. Petitioner's Use of the Phrase "The original has this signature, W. K. Kellogg".

On petitioner's corn flakes and other packages, petitioner has long used the phrase "The original has this signature, W. K. Kellogg." At the time of the trial, this legend appeared in minute type upon some of petitioner's individual two-biscuit Whole Wheat Biscuit cartons and in some of its window advertising, but not on its large fifteen-biscuit cartons which constitute 97½% of its trade. No mention of its use was made in the complaint, no proof was taken as to the extent of its use, and there is no evidence in the record that any jobber, restaurant owner or consumer ever noticed it, much less was confused or deceived by it. The legend has long since disappeared and the court below, although mentioning the phrase in its opinion on reargument, did not direct the issuance of an injunction against it. Of course, whatever the practice may have been, it could not justify the injunction directed by the court below, which prevents all sales no matter how fairly the goods may be represented as goods of petitioner.

A full size reproduction of one of the two-biscuit cartons containing the legend appears on the opposite page and is an ocular demonstration of the triviality of respondent's criticism.

(5) The Record is Completely Devoid of Any Evidence of Passing Off or Deception of the Public.

One after another, consumers, retail grocers, wholesale grocers, restaurant owners and sales managers, respondent's and petitioner's witnesses alike, testified to instant recognition from the cartons and also from the biscuits themselves when removed from the cartons that petitioner's product was not susceptible of confusion with respondent's product. These witnesses, relating their own experiences, were the actors in a dramatic demonstration that, as the District Court found (R. 1, pp. 226, 227), there was no confusion, passing off of goods or deception of custmers, or any possibility thereof. References to the testimony of some 150 of these witnesses are given in the footnote.* There is no evidence in contradiction.

A few excerpts from this testimony, typical of scores of others equally cogent, appear in Appendix B (pp. 112-116, *infra*).

An illuminating light is cast on the entire case by analysis of the proof upon which respondent relied in its brief in the court below to show unfair competition on

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* R. 1, 302, 334, 349, 350, 357, 360, 361, 366, 372, 386, 391, 401. 404, 414, 419, 423, 425, 427, 428, 430-431, 439, 445, 446, 452, 465, 467, 471, 482, 483, 484-485, 488, 492-493, 505-506, 512, 514-515, 520, 521, 530, 534, 554, 614, 635, 636, 640, 641-642, 644, 645, 648-649, 654, 656, 695; R. 2, 706, 728, 733, 744, 788-789, 800, 803-804, 819, 832, 845, 855, 862, 873, 875, 882-883, 885-886, 890, 900, 902-903, 905, 909-910, 965, 1181-1182, 1197, 1200, 1213, 1221, 1243, 1247, 1259, 1266, 1303, 1310, 1314, 1343, 1353, 1364, 1368; R. 3, 1388, 1400, 1401, 1429, 1447, 1468, 1469, 1486, 1489, 1490, 1492, 1501, 1504, 1517, 1522, 1533, 1544, 1548, 1562, 1571, 1574, 1615, 1619, 1645, 1653, 1661, 1668, 1686, 1711, 1717, 1751, 1760, 1773, 1775, 1788, 1792, 1800, 1806, 1808, 1810, 1816, 1823, 1829, 1835-1836, 1842, 1848, 1853, 1857, 1860, 1881, 1894, 1895, 1900, 1914, 1917, 1928, 1930, 1937, 1941, 1972.

the part of petitioner. Some twenty-five pages of its brief are prefaced by the heading "Actual Instances of Confusion and Passing Off of Defendant's Product". Not one actual instance of passing off was shown.

The testimony of most of the witnesses upon which respondent relied* was solely to the effect that when a consumer asked for shredded wheat, he was or could be offered a package of Kellogg's Whole Wheat Biscuit, that sometimes grocers receiving an order for shredded wheat did not know whether respondent's or petitioner's product was desired, and that Kellogg's biscuit was sometimes offered to consumers as a shredded wheat product.

None of these witnesses testified that any consumer had ever received Kellogg's biscuit believing that it was respondent's and most of them expressly denied that there had been any such passing off. The testimony of the other witnesses referred to by respondent is of the same general character and is analyzed in Appendix C, pages 117-121, *infra*.

Respondent's reliance on this testimony reveals that its fundamental complaint is that when a consumer asks for shredded wheat there are now two products which will supply his demand instead of one, as was the case when respondent had its monopoly. Its complaint is not that consumers wanting respondent's product will get petitioner's thinking that it is respondent's, but that a con-

* R. 1, Sanborn, p. 358, Barrett, p. 360, Doyle, p. 367, Daggett, p. 397, Bradbury, p. 407, Goodman, p. 429, Pialet, p. 440, Greene, p. 459, Michalak, p. 496, Holmer, p. 503, Kleeman, p. 527, Leonard, p. 538, Bohnet, p. 644; R. 2, Beck, p. 699, Rickard, p. 821, Mears, p. 1194, Brun, p. 1202, Schmidt, p. 1210, Inman, p. 1231, Robbins, p. 1242, Lee, p. 1252, Fierstone, p. 1256, Creigton, p. 1302, Roselle, p. 1352, Williams, p. 1359, Inman, p. 1361, Loverin, p. 1379; R. 3, Dunmire, p. 1429, Miller, p. 1451, Molitor, p. 1486, Twentyman, p. 1507, DeWolf, p. 1515, North, p. 1524, Rush, p. 1546, Mueller, p. 1579, Lippert, p. 1582, Schwager, p. 1587, McDowell, p. 1596, Stephens, p. 1618, King, p. 1625, Harvey, p. 1669, Dietrich, p. 1677.

sumer desiring the article shredded wheat may now have his want satisfied by a product other than that made by respondent.

If a consumer asked simply for "shredded wheat", having in mind respondent's brand of shredded wheat, and were none the less offered Kellogg's biscuit, this would simply be the result of respondent's use during its long monopoly of the generic name of the article as the only name of its biscuit without qualifying prefix or suffix and would in no sense be deceptive. Undoubtedly such situations may occur so long as there is any competition in the sale of the article and so long as respondent persists in using "Shredded Wheat" as the only name of its shredded wheat product. The controlling fact in this case, however, is that petitioner has so far succeeded in distinguishing its goods from those of the respondent that, despite respondent's use of the generic name of the article as the only name of its biscuit, no consumer has ever taken petitioner's product believing that he was receiving respondent's.

The record, therefore, shows no deception of the public, but open and honest competition fairly and actively waged. Quite obviously the decree here under review does not protect respondent's good will by enjoining unfair competition. To the contrary without any justification because of any wrong of the petitioner or any privilege of the respondent, this decree perpetuates a statutory grant of monopoly in a standard food product long after the expiration of the grant and in derogation of the conditions imposed by Congress.

(6) Decisions Below.

The District Court, after fully reciting the facts and making the findings above referred to (pp. 5-6, *supra*), posed the issue raised by these facts and stated the controlling principle of law as follows (R. 1, p. 223):

> "In this case plaintiff claims in perpetuity the monopolistic right to the descriptive word 'shredded'

> and a monopolistic right in the shape or form of the biscuit. Any right of plaintiff must be based upon the wrong of defendant. Relief must be based upon confusion or palming off, otherwise relief should be denied. Originally patents covered every phase of plaintiff's business. There were product, process and design patents which secured plaintiff a perfect monopoly of the business. These patents have expired and *the case falls into the class of expired patent cases* and is controlled by the *Singer* case." * (Italics in original.)

The District Court, finding that no deception or passing off had occurred, concluded that the bill must be dismissed.

In its first opinion (R. 3-A, p. 2069), the Circuit Court of Appeals approved as "full and satisfactory" the discussion by the District Court of all the issues involved and held that "on the expiration of plaintiff's patent No. 548,086, the exclusive right to make and sell the food product therein described ended. And on the expiration of plaintiff's design patent No. 24,688, the exclusive right to the designed biscuit also ceased." The court then stated that upon the expiration of these patents, during the life of which the product had become known to the trade and consumers by the descriptive words "shredded wheat" (R. 3-A, p. 2071):

> "* * * the public could use the patented process both in making the patented product and in making it in the form described in the design patent and in calling it 'shredded', provided in doing so it avoided simulating the product so as to prevent confusion and lead buyers into the belief they were buying plaintiff's product. This, in the judgment of the court below and of this court, the defendant has done in compliance with the requirements of *Singer* v. *June*, 163 U. S. 169, for the product of the defendant has at all times, in its cartons and otherwise, been marked with its own name, in words and colors (green and red)

* *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169.

> of such distinctive character, that buyers thereof knew they were getting defendant's product and were not buying that of the plaintiff. Moreover, it is clear that the word 'shredded' was a descriptive word, aptly describing the process to which wheat grains were subject by any one using shredding or mangling in processing wheat grains. * * *"

The court added that the word "shredded" was open to all shredders of wheat provided that they so used it as not to mislead and confuse the public (R. 3-A, p. 2071). With reference to the question of confusion, the court expressly stated, "Now, that no confusion, misleading or deceit is shown in this case, is clear" (*id.*).

After reargument, the court below did not qualify or retract its approval of the findings of fact of the District Court, except that it did withdraw its conclusion that the words "shredded wheat" and "shredded wheat biscuit" were descriptive. The court stated that the process of manufacture could not properly be described as shredding, since the wheat was not cut or torn into small pieces but was rather forced through grooved rollers. Based upon the premises that shredding means only tearing or cutting and that descriptive words are only such as describe the process of manufacture rather than the product itself, the court held that the words "shredded wheat" were at most suggestive.

The court also changed its views regarding the design patent and, because of its invalidity, held that the case stood in equity as if there had been no patent (R. 3-A, pp. 2088, 2092). It then held that the words "shredded wheat", whether descriptive or not, had by long usage following expiration of the patents acquired a "secondary meaning" and that respondent's advertising expenditures had made "shredded wheat" a household word and the form of its biscuit known throughout the world as its product. Because of this, the court directed that an injunction issue "In order to secure the property of the plaintiff in the name and form of its product" (R. 3-A, p. 2092).

In its opinion the court used the term "secondary meaning" in the exact converse of its normal connotation. A descriptive name is generally said to have acquired a secondary meaning when it signifies, not the article, but the maker of the article. The court below, however, found that the name shredded wheat has acquired a secondary meaning because *"it has come to stand for the article itself"* (R. 3-A, pp. 2087, 2089).*

When the case came up to the court below again upon respondent's petition for clarification of the mandate, petitioner filed a petition for rehearing of the case upon the merits. The court on May 5, 1938 denied petitioner's petition for want of jurisdiction but stated that, even if it had jurisdiction, it saw no reason why the petition should be granted. In this connection, the court stated (R. 3-A, pp. 2284-2285):

> "* * * Nothing new is presented except that in February, 1938, the British Privy Council in *Canadian Shredded Wheat Co. Ltd.* v. *Kellogg Company of Canada, Ltd.* reached, it is claimed, a different conclusion from that of this court. Even if the record in the two cases were the same, the latter decision does not persuade us that the conclusion at which we arrived was wrong. We are advised that the British High Court of Justice on a full record reached a different conclusion from that of the British Privy Council as to the registerability of 'Shredded Wheat' as a trade name under the English statute."

The decision of the British High Court of Justice, referred to by the court below, was reversed on appeal on July 28, 1938. *In the Matter of the Trade Marks. Acts, 1905 to 1919* and *In the Matter of Trade Mark No. 500,671 Registered in the Name of The Shredded Wheat Co., Ltd. in Class 42* (*Supreme Court of Judicature, Court of Appeal*). In this case, hereinafter referred to as the *"British Trade-Mark Case"*, the registration in 1929 of the words "Shredded Wheat" under the English Trade-Mark Act

* Unless otherwise indicated, all italics appearing in quotations in this brief are supplied by us.

of 1905 was held invalid on the ground that at the date of registration the name was descriptive rather than distinctive. For the convenience of the Court, the opinion is printed in an appendix to this brief (pp. 143-147, *infra*).

In considering the opinions below, this Court will wish to consider the decision of the Judicial Committee of the Privy Council in *Canadian Shredded Wheat Co., Ltd.* v. *Kellogg Company of Canada, Ltd. and another,* printed at page 125, *infra.* In that case, as has already been stated, precisely the same issues were raised as are presented in the case at bar. The Privy Council, in an opinion rendered by Lord Russell of Killowen, held that the words "shredded wheat" were both the name of the product and descriptive of that product and that they had been so used by the respondent. Although recognizing that the words had become associated with the goods of the respondent because of its long monopoly, the Privy Council held that they had not lost their primary meaning as describing and signifying the article itself, and had not acquired the secondary meaning of signifying only goods manufactured by the respondent. The court added that it would "be passing strange if they had acquired such a meaning, for it would be a meaning directly contrary to the sense in which those words had been put forward to the public by the plaintiff company in its cartons and advertisements."

With respect to respondent's allegation that petitioner's biscuits are of such shape and size that hotels and restaurants could supply them in response to the request of a consumer who, in asking for shredded wheat, desired respondent's biscuit, Lord Russell stated (p. 141, *infra*):

> "* * * Their Lordships see no reason for granting any such relief, upon the evidence given in the present case. They are not satisfied that a person asking for shredded wheat will not have his request truly satisfied if the product shredded wheat, as manufactured by Kellogg's or any other manufacturer, is supplied. Nor are they satisfied that a cus-

tomer who really desires a biscuit of the plaintiff company's manufacture will necessarily be deceived by being offered a biscuit of the same shape but perceptibly smaller. Such likelihood of deception requires to be proved, and it is noticeable that no witness was shown a Kellogg's biscuit and asked whether he would have taken that to be a biscuit of the plaintiff's company's manufacture. * * *"

The Privy Council pointed out that its decision had been reached without specific reference to the existence of patents which had expired, but added in its opinion (pp. 141-142, *infra*):

"* * * Their Lordships, however, find it difficult to conceive that a manufacturer could in such a case be held guilty of passing off, if he manufactured the goods in accordance with the expired patents, and the only similarity between the rival goods lay in the appearance of the goods so manufactured and the application to them of the name by which the patented goods had been known. It is conceivable that, in the case of a patent long ago expired, the evidence might possibly establish that the name had become distinctive of a particular manufacturer rather than descriptive of the goods, with the result that other manufacturers of the goods could be compelled to adopt some means of effectively distinguishing their goods from those of the particular manufacturer. Difficult as such a case is to prove in the case of a descriptive word, it must be additionally difficult in the case where a word is the name of goods as well as being descriptive of those goods. * * *"

Concluding the judgment of the Privy Council, Lord Russell said (p. 143, *infra*):

"One further observation their Lordships desire to make. Litigation has taken place in the United States of America in which a company called National Biscuit Company sought to restrain a company called Kellogg Company from using the words 'shredded wheat.' The action was dismissed by decree of the U. S. district court for the district of Delaware, and, on appeal to the U. S. circuit court of appeals for the third circuit, the decree was affirmed. Subse-

quently, on reargument before the same judges, that decision was reversed, and a decree was entered:

> enjoining the defendant from the use of the name 'shredded wheat' as its trade name, and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark.

Their Lordships can only (but with the greatest respect for the court) express the view that, if the facts of that case were similar in all respects to the facts of the present case, they prefer the first judgment of the circuit court of appeals to its later decision. * * *"

Specification of Errors.

We respectfully submit that the court below erred:

(1) In failing to affirm the decision of the District Court dismissing the complaint, and in reversing its judgment;

(2) In holding that respondent is entitled to the exclusive right to sell shredded wheat biscuits in the pillow-shaped form under any name, and in enjoining petitioner from advertising or selling its product in the pillow-shaped form in distinctive cartons;

(3) In holding that respondent is entitled to exclusive use of the words "shredded wheat" as applied to food products, and in enjoining petitioner from use of these words as a trade-name;

(4) In holding that respondent is entitled to the exclusive trade-mark use of a pictorial representation of two shredded wheat biscuits in a dish;

(5) In holding that the name shredded wheat is not descriptive;

(6) In awarding costs to respondent and directing an accounting for profits and damages;

(7) In directing the issuance of an injunction which in effect creates a perpetual monopoly in the sale of an article which was protected by patents long since expired

and in the use of the descriptive name of the article which was its generic designation during the patent monopoly;

(8) In failing to hold that by disclaimers in respondent's trade-mark registrations respondent abandoned all claim of exclusive right, if any there was, to the words "shredded wheat" or "shredded wheat biscuit" as a trade-name and to the shape, form, design, appearance and representation of the biscuit;

(9) In holding that since the expiration of the patents respondent acquired property rights in the pillow-shaped biscuits which justify the issuance of a perpetual injunction against the manufacture and sale of such biscuits without regard to the size of the biscuits or the distinctive containers in which they are sold; and

(10) In failing to affirm the decision of the District Court dismissing the complaint in view of the lack of any evidence that petitioner's goods were ever passed off as respondent's goods or that the public was ever deceived as to the source of such goods, and in view of the finding that the size of petitioner's biscuits and the character of the containers in which they are sold are so distinctive as to preclude any likelihood of such passing off or deception of the public.

Summary of Argument.

I. The court below in its first opinion expressly approved the finding of the District Court that no confusion, misleading or deceit is shown in this case. In directing the issuance of an injunction despite this finding, the court ignored the cardinal principle that the essence of the wrong in cases of this kind consists in the sale of the goods of one manufacturer or vendor for those of another, and that unless such palming off of goods is shown, no relief can be granted. Since the record establishes that no use was made of the pillow-shaped form or the name "shredded wheat" which led any person to

believe that in purchasing petitioner's product he was receiving respondent's product, the essential element of a cause of action is lacking.

II. Petitioner's manufacture and sale of shredded wheat biscuits in the pillow-shaped form does not constitute unfair competition. 1,999 out of 2,000 of petitioner's biscuits reach the last purchaser in petitioner's distinctive cartons which no consumer has mistaken or could mistake for those of the respondent. The few biscuits which reach the last purchaser outside the carton were completely distinguishable from respondent's because of their small size until respondent copied petitioner's size five years after it had been popularized by petitioner; even as to these few biscuits, there is no evidence of passing off or deception of the public. Respondent's case is therefore utterly lacking in the necessary factual foundation.

Moreover, the pillow-shaped form inevitably results from the process of manufacture of shredded wheat biscuits and there is no commercially practicable method to make such biscuits distinctive other than the methods adopted by the petitioner. If petitioner cannot make this form of biscuit, it must withdraw entirely from competition in the trade. The authorities are conclusive that this may not be required under the guise of protecting respondent against unfair competition. Imitation of non-functional features of an article may be enjoined if likely to lead to confusion, but the functional or essential features of a product not protected by patent are open to all to use and may not be exclusively appropriated by anyone.

Finally, under the rule established by this Court in *Singer Manufacturing Co* v. *June Manufacturing Co.*, 163 U. S. 169, upon the expiration of a patent the right to make the patented product in the form in which it became known to the public during the patent monopoly becomes dedicated to the public. Respondent had a design patent on this very form of biscuit, it had patents on machinery designed to produce this very form of biscuit, and, during

the life of its basic product and process patent, the product shredded wheat became known to the public in the form of the pillow-shaped biscuit. Upon the expiration of these patents, therefore, the right to make and vend the pillow-shaped biscuits was dedicated to the public. The effect of the contrary ruling of the court below, for all practical purposes, is to extend the life of respondent's expired patents to eternity.

III. If petitioner has the right to make the product, it has the right to call it by the only name which that product bears. Respondent has no property right in the words "shredded wheat"; petitioner may employ them with equal right so long as it does not so use them as to deceive the public into believing that its goods are those of the respondent. The record conclusively establishes that there has been no such deception of the public and no possibility of such deception. The necessary prerequisite to injunctive relief is therefore entirely wanting.

Furthermore, the record shows beyond question that the words "shredded wheat" are the descriptive, the generic and the only name for the product. Respondent has consistently used the words in a descriptive and generic sense and the public understands them to mean what the respondent has always asserted that they mean. The authorities are entirely clear that descriptive and generic names are not subject to exclusive appropriation by anyone; all competitors have a right to use such names provided only that they do what petitioner has always done, plainly indicate the source of manufacture. This rule applies with peculiar force where, as here, the descriptive and generic name has no synonym or substitute but is the only name by which the product is known to the trade and to the public. Anyone who may make an article may use the only words in the common stock of language which denote and describe that article.

Even if the record showed, as it does not, that "shredded wheat" was originally adopted as a distinctive and fanci-

ful name, the name became dedicated to the public upon the expiration of respondent's patents in 1912 under the rule in *Singer Manufacturing Co.* v. *June Manufacturing Co., supra.* The *Singer* doctrine is that any words which have become known to the public during the patent period as the identifying name of the patented product fall into the public domain upon expiration of the patent and may not thereafter be exclusively appropriated by anyone. Since "shredded wheat" was the only designation given to the biscuits during the life of respondent's patents, petitioner may now use that name as the name of its product made in accordance with the disclosures of those patents. The contrary holding of the court below permits the respondent to perpetuate its patent monopoly indefinitely by excluding others from using the only words by which the patented article is known.

IV. If petitioner has the right to make and sell the biscuit, it likewise has a right to tell the public what it is marketing by placing a pictorial representation of its biscuit on the outside of its carton. The picture on petitioner's carton does not constitute any infringement of respondent's alleged trade-marks of the picture of a dish containing one or two of its biscuits immersed in milk or cream; the pictures are totally dissimilar. Moreover, respondent does not employ the dish illustration as a trade-mark indicating the origin of its product but rather as a pictorial explanation of how its product should be used. No charge of unfair competition can be predicated upon petitioner's use of the picture since it has not caused and could not cause any purchaser to believe that petitioner's goods are the goods of the respondent.

V. Respondent's claim to the exclusive right to make the biscuit in the pillow-shaped form, to call it by its name and to illustrate it by pictorial representation, is without merit because of its disclaimers of those very rights in its trade-mark registrations. *Beckwith* v. *Commissioner of Patents,* 252 U. S. 538.

ARGUMENT.

Introductory Statement.

This action seeks to establish in the respondent the exclusive right to make shredded wheat biscuits in their only commercially practicable form and to call them by the only name by which they are known. An exclusive right in the form could only properly be predicated upon a valid and subsisting patent, and in the name only upon a valid trade-mark. Respondent's patent monopoly has long since ceased and, since "shredded wheat" is the generic and descriptive product name, it has no valid trade-mark rights therein. Whatever exclusive rights respondent may have had during the life of its patents, upon their expiration the form and generic name of the biscuit became free for all to use under the principle established by this Court in *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169.

The essential element of respondent's asserted cause of action is the sale or attempted sale of petitioner's goods as the goods of respondent. This essential element is entirely lacking in this case. Respondent relies solely on alleged "equitable grounds" to preserve its former monopoly. Its contentions confuse competition with unfair competition.

Competition is rivalry between two or more producers in the sale of the same or a similar article. The reputation of and demand for the article, as such, inures to the benefit of all producers. Thus, if one manufacturer spends large sums of money advertising the excellence of a particular article, as distinguished from other articles, competing producers of that article will doubtless derive benefit therefrom. It is of the essence of competition that the

good will of the article is available to all. *Saxlehner* v. *Wagner*, 216 U. S. 375, 380.*

Unfair competition is an appropriation, not of the good will of the article, but of the good will of a particular manufacturer of the article. The essential feature of unfair competition is the sale by one producer of its goods as the goods of a rival producer.

There are no "equitable grounds" for protection of trade against competition; relief must be predicated upon the existence of unfair competition. One may establish himself in business notwithstanding the fact that he foresees that the effect of his competition will be to diminish the trade of another, perhaps to ruin him. O. W. Holmes, Jr., The Common Law, pp. 144-145. To paraphrase the language of this court in *Canal Co.* v. *Clark*, 13 Wall. 311, 328, if respondent's sales are diminished, it is because it is not the only producer of shredded wheat, and not because of any fraud of the petitioner.** Competition such as this "must be met in some other way than by a lawsuit". *P. Lorillard Co.* v. *Peper*, 86 Fed. 956, 962 (C. C. A. 8).

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* Under this rule respondent's large expenditures in popularizing shredded wheat, to which much importance was attributed in the opinion of the court below, are not significant.

** There is no proof in the record that there has, in fact, been any diminution of respondent's sales because of petitioner's competition.

POINT I.

The Record Presents a Plain Case of *Damnum Absque Injuria* and Respondent Is Entitled to No Relief.

It is upon the assumption that the respondent has an exclusive right to sell shredded wheat biscuits in their characteristic form and under the only name by which they are known to the public that the court below predicated its decree. In reaching this result it did not reject the findings of the District Court that petitioner's biscuits are sold in cartons which cannot be mistaken for respondent's and that petitioner's biscuits are distinguishable in appearance from respondent's.

In its first opinion, the court below expressly affirmed the findings of the District Court by stating that there was no confusion, misleading or deceit shown in the case (R. 3-A, p. 2071). Upon reargument, without questioning this finding, the court below vacated its decree and in concluding its opinion baldly stated that petitioner "deliberately started out to acquire by unfair competition and misstatement the trade which equitably belonged to the plaintiff and that it is practically impossible for defendant to use the name and form of plaintiff's biscuit to designate its product without confusion, deception of the public and unfair competition with the plaintiff" (R. 3-A, p. 2093). No new facts were found in support of this contradictory conclusion. It is based, as the opinion of the court shows, (1) upon the court's erroneous conclusion of law that respondent, because of its large advertising expenditures and long monopoly after the expiration of its patents, has acquired an exclusive right to sell shredded wheat biscuits in their characteristic form and under the name by which they became known to the public; (2) upon the court's failure to apply the rules announced in *Singer Manufac-*

turing Co. v. *June Manufacturing Co.*, 163 U. S. 169; (3) upon the court's failure to appreciate the distinction between the good will of a product (which belongs to all) and the good will of a particular manufacturer thereof (which belongs to him alone); and (4) upon the court's extraordinary misconception and misapplication of the doctrine of "secondary meaning" of descriptive words. The last mentioned doctrine applies only in cases where the evidence shows that the descriptive words, in their ordinary usage, have come to signify the source of manufacture of an article rather than the article itself. Yet twice in the second opinion in this case, the court below held that the name "shredded wheat" had acquired a "secondary meaning" because "it has come to stand for the product itself" (R. 3-A, pp. 2087, 2089)—a statement of law which is opposed to all the authorities on that subject.

These errors of law, rather than any disagreement with the facts as found by the District Court, led to the above quoted conclusion of the opinion—a conclusion perhaps correct, if the statement of principles upon which it is founded is sound, but undoubtedly erroneous if the statement is unsound.

Apart from the above mentioned legal questions, all of which receive consideration in this brief, the court below ignored the cardinal principle underlying all cases of this kind. Trade-marks and trade-names are property only in a qualified sense and the owner's right is defined by the law of torts, not by the law relating to the title and ownership of property. *Beech-Nut Co.* v. *Lorillard Co.*, 273 U. S. 629, 632; *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 413. The owner's right is defined as no more and no less than "the right to prohibit the use of the trade-mark so far as to protect the owner's good will against the sale of another's product as his". *Prestonettes, Inc.* v. *Coty*, 264 U. S. 359, 368.

Injunctions against unfair dealing are not predicated upon any proprietary right of the plaintiff in the form, name or appearance of its product; they are predicated solely upon the right of the plaintiff to be protected in its trade against deceptive practices which may cause another's goods to be sold as its. The essence of the wrong which measures the plaintiff's right to relief consists in the sale of the goods of one manufacturer or vendor as those of another and it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities. *Canal Co.* v. *Clark*, 13 Wall. 311, 322; *Elgin Nat'l Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 674; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140; *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446, 462; *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 413; *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526.*

The court below did not follow these well established principles. Having adopted in its first opinion the findings of fact of the District Court, and without rejecting its own findings concerning the distinctive size of peti-

* See also: *Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Goodyear Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598; *The French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427; *Waterman Company* v. *Modern Pen Co.*, 235 U. S. 88; *Straus* v. *Notaseme*, 240 U. S. 179; *Prestonettes, Inc.* v. *Coty*, 264 U. S. 359; *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 27; *Reddaway* v. *Banham*, [1896] A. C. 199, 13 R. P. C. 218; *Rathbone, Sard & Co.* v. *Champion Steel Range Co.*, 189 Fed. 26 (C. C. A. 6); *Rouss, Inc.* v. *Winchester Co.*, 300 Fed. 706 (C C. A. 2), cert. den. 266 U. S. 607; *Fawcett Publications* v. *Popular Mechanics Co.*, 80 F. (2d) 194 (C. C. A. 3); *Du Pont Cellophane Co.* v. *Waxed Products Co.*, 85 F. (2d) 75, 81, cert. den. 299 U. S. 601, 82 L. ed. 1041; *Bayer* v. *United Drug Co.*, 272 Fed. 505 (S. D. N. Y.).

tioner's biscuits and their sale in distinctive cartons, the court proceeded to ignore these facts and treated the form of the biscuit as an exclusive property right wrongfully "appropriated". Similarly, having misconstrued and misapplied the doctrine of "secondary meaning" to the words "shredded wheat", it completely ignored the principle that others may nonetheless use these words to designate their product provided all confusion as to the manufacturer is avoided.

Any consideration of the evidence (see pp. 36-38, *supra*) shows that no use was made of the form or of the name which led any person to believe that in purchasing petitioner's product he was receiving respondent's product. It follows upon basic principles that, there having been no palming off of petitioner's biscuits as biscuits made by the respondent, the essential element of a cause of action is lacking. If respondent has lost trade to a vigorous competitor who has exhausted every effort to distinguish its goods from those of the respondent and has succeeded in such efforts, such loss is *damnum absque injuria* for which the law affords no remedy.

The authorities we have cited appear to control decision that upon this record, which affirmatively shows that there has been no palming off or any likelihood of palming off of petitioner's goods as the goods of respondent, there can be no relief. In the following points we consider the petitioner's right to make and sell the biscuit in its only commercially practicable form, to call it by its only proper name and to portray it by pictorial representation. Upon this consideration respondent's failure to prove any ground for relief will more clearly appear.

POINT II.

The Manufacture and Sale by Petitioner of Shredded Wheat Biscuits in the Pillow-Shaped Form Does Not Constitute Unfair Competition.

The decree below directs the issuance of an injunction absolutely prohibiting petitioner from advertising or offering for sale its biscuits in the pillow-shaped form. The injunction directed to be issued covers all sales of the biscuits, whether contained in distinctive cartons or not, and is operative irrespective of whether the size, color and composition of petitioner's biscuits simulate those of the respondent or completely differ therefrom. This sweeping injunction is not predicated upon trade-mark infringement because the article itself could not constitute a trade-mark. *Daniel* v. *Electric Hose & Rubber Co.*, 231 Fed. 827 (C. C. A. 3). Its effect, however, is to establish a monopoly differing only from a patent in that it is perpetual.

In directing the issuance of this injunction the court below, we submit, misconceived the essential nature of unfair competition as outlined in Point I, *supra*, and disregarded the fact that the pillow-shaped form is a functional characteristic of the biscuit and that it is the only form in which the biscuit became known to the public during the life of respondent's expired patents.

A. Petitioner's use of the pillow-shaped form has caused no confusion, misleading or deceit.

As the District Court found, there has been no deception of the public as to the origin of respondent's and petitioner's products and no sale of petitioner's goods as those of respondent (p. 36, *supra*). Only one out of 2,000, or .05%, of petitioner's biscuits is served to the final purchaser outside the carton; the remaining 1,999, or

99.95%, are sold only in packages distinctively marked with petitioner's name and entirely dissimilar from respondent's package (pp. 5-6, *supra*). No consumer examining petitioner's carton has thought, or could reasonably think, that he was receiving respondent's product. There has been and can be no confusion between them.

It follows that as to 1,999 out of 2,000 biscuits sold by petitioner, the fundamental prerequisite to relief in an action for unfair competition is entirely lacking. Therefore, even apart from the fact that petitioner's biscuits are distinctive because of their size, that the pillow-shaped form of biscuit is the only commercially practicable form and that the product was protected by patents which have long since expired, it is clear that the injunction against the sale of petitioner's pillow-shaped biscuits in their distinctive cartons cannot be supported and must be reversed. In this respect, the decision below is irreconcilable with *Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 Fed. 960 (C. C. A. 2) and *Canadian Shredded Wheat Co., Ltd.* v. *Kellogg Company of Canada, Ltd. and another* (Privy Council), p. 125, *infra*.*

Similar considerations apply with respect to those few biscuits which may be sold by restaurants and lunch rooms outside the carton, because petitioner's biscuits are clearly distinguishable. As has previously been stated, scores of witnesses, respondent's and petitioner's alike, testified to the differences from which they knew at once that the smaller biscuits were not respondent's product and the record is barren of evidence that any purchaser ever

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* See also *Postum Cereal Co.* v. *American Health Food Co.*, 119 Fed. 848 (C. C. A. 7); *Heide* v. *Wallace & Co.*, 135 Fed. 346 (C. C. A. 3); *Diamond Match Co.* v. *Saginaw Match Co.*, 142 Fed. 727 (C. C. A. 6), cert. den. 203 U. S. 589; *Coca Cola Co.* v. *Gay-Ola Co.*, 200 Fed. 720 (C. C. A. 6), cert. den. 229 U. S. 613; *Miller Rubber Co.* v. *Behrend*, 242 Fed. 515 (C. C. A. 2); *Krem-Ko Co.* v. *Miller & Sons, Inc.*, 68 F. (2d) 872 (C. C. A. 2).

received petitioner's biscuits believing them to be products of respondent (see p. 25, *supra*). Indeed, that the two products were known to purchasers to be different is demonstrated by respondent's own action in marketing a small biscuit of substantially the same size as petitioner's for the express purpose of meeting petitioner's competition in the restaurant trade, five years after petitioner had introduced its distinctively sized product to the public use (see p. 26, *supra*).

Conclusion follows that, in the absence of any passing off or likelihood thereof, no injunction applicable to either class of trade can possibly be justified.

B. The pillow-shaped form is a functional and essentially useful characteristic of the biscuit, the use of which cannot be enjoined.

The pillow-shaped form results from the puffing up of the shreds of wheat in the baking after these shreds have been panned and cut by the formerly patented apparatus (see p. 26, *supra*). The biscuits cannot be made in any other form if the machinery covered by these patents is used in accordance with the teaching of the specifications (R. 2, p. 291).

Not only is the pillow-shaped form functional in the sense that no other form can be produced with the patented machinery, but the form itself is a commercially essential feature of the product of these patents. There are several tests which any shredded wheat biscuit must meet in order to be commercially practicable. It must be in some regular shape so as to avoid any waste of material in the cutting and so as to allow packing and handling without undue breakage. It must be puffed so that during the baking process heat can be equally distributed throughout the biscuit and all the shreds thoroughly toasted. Finally, it must be open on at least two sides in order to allow proper baking and to reduce the hard undesirable edges to a minimum. See Appendix A, page 108, *infra*.

It is most desirable that it be of such size that two can fit the cereal bowl. The pillow-shaped form of biscuit is the only shape and form which meets these requirements (R. 2, pp. 1143-1144).

The form being functional, its use cannot be enjoined as unfair competition. The doctrine of all the authorities is that injunctions will lie only against the use of non-functional or decorative features of an article which have acquired a distinctive significance indicating origin with the complainant.

In all cases in which relief is sought against the sale of an article on the ground that the appearance of complainant's product has acquired a secondary meaning and that the defendant's product is confusingly similar thereto, a delicate balance must be drawn by the courts between the right of the defendant to make and vend the article in any form it chooses and the right of the plaintiff to be protected against the sale of another's product as its own. In balancing these rights, the courts have consistently adhered to the rule that "minor or 'non-functional' changes in appearance may be required so long as the substantial elements are left in the public domain", but that "where the 'secondary meaning' is bound up in elements of the appearance which cannot be changed without cutting off the defendant's substantial right to make and sell that kind of goods the plaintiff must suffer the resulting confusion." *Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 Fed. 960, 964 (C. C. A. 2).

This principle is strikingly illustrated by the decision of this Court in *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526. The plaintiff in that case was a manufacturer of liquid quinine, flavored and colored with chocolate, which was marketed under the name "Coco-Quinine". The defendant made the same preparation with the same flavoring and coloring matter and sold it under the name "Quin-Coco". Both products were sold by druggists in bulk and the evidence indicated that the defendant had consciously

adopted the policy of inducing the druggists to pass off its product as that of the plaintiff. The Court found that the use of chocolate, which gave the two products an identical appearance, had no therapeutic value, but that it served a desirable function by acting as a suspending medium and by imparting to the preparation a quality of palatability for which there was no equally satisfactory substitute. This was considered a substantial and desirable use "which prevents it from being a mere matter of dress". No injunction was therefore granted against the use of the chocolate and relief was limited to the requirement that the defendant should state on its original packages sold to druggists that the preparation was not to be sold as Coco-Quinine or used in filling orders therefor.

The opinion of the Court on this aspect of the case is significant. It stated (pp. 531-532):

> "* * * The petitioner or anyone else is at liberty under the law to manufacture and market an exactly similar preparation containing chocolate and to notify the public that it is being done. *Saxlehner* v. *Wagner*, 216 U. S. 375, 380; *Chadwick* v. *Covell*, 151 Mass. 190. * * * If petitioner had been content to manufacture the preparation and let it make its own way in the field of open and fair competition, there would be nothing more to be said. It was not thus content, however, but availed itself of unfair means, either expressly or tacitly, to impose its preparation on the ultimate purchaser as and for the product of respondent.
>
> "Nevertheless, the right to which respondent is entitled is that of being protected against unfair competition, not of having the aid of a decree to create or support, or assist in creating or supporting, a monopoly of the sale of a preparation which everyone, including petitioner, is free to make and vend. * * *"

The decision in *Coca-Cola Co.* v. *Koke Co.*, 254 U. S. 143 is to the same effect. The defendant in that case marketed a product identical in appearance with Coca-Cola which it sold under the name "Koke". An injunction was

sought not only against use of the name but also against use of the same coloring matter employed by the plaintiff. This Court, although finding that the defendant had purposely imitated plaintiff's product in order to sell its mixture as and for plaintiff's goods, limited relief to an injunction against use of the name, stating (p. 147): "The product including the coloring matter is free to all who can make it if no extrinsic deceiving element is present." See also *Saxlehner* v. *Wagner*, 216 U. S. 375, 380.

Flagg Manufacturing Co. v. *Holway*, 178 Mass. 83, a decision by Mr. Justice Holmes rendered while he was a member of the Supreme Judicial Court of Massachusetts and cited with approval by this Court in *Saxlehner* v. *Wagner, supra*, is one of the leading cases on this subject. That was a suit to restrain the defendant from selling zithers made in imitation of the plaintiff's. The court found that the defendant had deliberately copied the plaintiff's instrument in all essential and many non-essential details. In limiting relief to the requirement that the defendant plainly mark its instruments so as to indicate unmistakably that they were made by it and not by the plaintiff, Mr. Justice Holmes said (pp. 90-91):

> "We are of opinion that the decree was wrong in principle. 'Both zithers are adapted for the use of patented sheets of music, but the zithers are not patented. Under such circumstances the defendant has the same right that the plaintiff has to manufacture instruments in the present form, to imitate the arrangement of the plaintiff's strings or the shape of the body. In the absence of a patent the freedom of manufacture cannot be cut down under the name of preventing unfair competition. *Dover Stamping Co.* v. *Fellows*, 163 Mass. 191. See *Singer Manuf. Co.* v. *June Manuf. Co.*, 163 U. S. 169. All that can be asked is that precautions shall be taken, so far as are consistent with the defendant's fundamental right to make and sell what he chooses, to prevent the deception which no doubt he desires to practise.
>
> It is true that a defendant's freedom of action with regard to some subsidiary matter of ornament or label

may be restrained, although a right of the same nature with its freedom to determine the shape of the articles which it sells. But the label or ornament is a relatively small and incidental affair, which would not exist at all, or at least would not exist in that shape but for the intent to deceive; whereas the instrument sold is made as it is, partly at least, because of a supposed or established desire of the public for instruments in that form. The defendant has the right to get the benefit of that desire even if created by the plaintiff. The only thing he has not the right to steal is the good will attaching to the plaintiff's personality, the benefit of the public's desire to have goods made by the plaintiff. Probably if there were an absolute conflict between the defendant's right as we have stated it and the plaintiff's, the defendant's would prevail. *American Waltham Watch Co.* v. *United States Watch Co.*, 173 Mass. 85, 86, 87. But the plaintiff's right can be protected sufficiently by requiring the defendant's zithers to be clearly marked so as to indicate unmistakably that they are the defendant's and not the plaintiff's goods. This is the relief which the master found to be proper, and we are of the opinion that he was right. To go further is to save the plaintiff from a competition from which it has no right to be exempt."

In *Marvel Co.* v. *Pearl*, 133 Fed. 160 (C. C. A. 2), the plaintiff, manufacturer of a syringe sold under the name "Whirling Spray", sought to enjoin the defendant from marketing an almost identical syringe under the name "Whirlspray". Although finding that the two products were so similar that the ordinary purchaser would not distinguish one from the other, the court denied relief on the ground that the form of defendant's syringe was functional. In this connection, the court remarked (pp. 161-162):

"In the absence of protection by patent, no person can monopolize or appropriate to the exclusion of others elements of mechanical construction which are essential to the successful practical operation of a manufacture, or which primarily serve to promote its

efficiency for the purpose to which it is devoted. Unfair competition is not established by proof of similarity in form, dimensions, or general appearance alone. Where such similarity consists in constructions common to or characteristic of the articles in question, and especially where it appears to result from an effort to comply with the physical requirements essential to commercial success, and not to be designed to misrepresent the origin of such articles, the doctrine of unfair competition cannot be successfully invoked to abridge the freedom of trade competition. The enforcement of such a claim would permit unfair appropriation, and deny the exercise of the right of fair competition. The case at bar is an illustration of such an attempted perversion of the doctrine of unfair trade."

Globe-Wernicke Co. v. *Fred Macey Co.*, 119 Fed. 696 (C. C. A. 6), cert. denied 194 U. S. 634, illustrates the same princi[illegible] In that case, the court refused to enjoin as unfair competition the sale by the defendant of sectional bookcases, identical in appearance with those made by the plaintiff, on the ground that no one could secure the exclusive right to manufacture an article in its most desirable or characteristic form.

The *Marvel* and *Globe-Wernicke* cases, *supra*, were relied upon in *Daniel* v. *Electric Hose & Rubber Co.*, 231 Fed. 827 (C. C. A. 3) to deny an injunction against the sale by the defendant of rubber hose with longitudinal corrugations. Such fluted hose had been protected by an expired patent and for many years subsequent to the expiration of the patent plaintiff had been the only maker of such hose. Although rubber hose could clearly be made in some other form, the court held that the corrugations were useful and functional and therefore not subject to exclusive appropriation by anyone. In this connection the court stated (pp. 833-834):

"* * * The testimony being clear that the longitudinal corrugations on the tube are useful and functional, the authorities * * * are clear that such use-

> ful features are common property, may be made by any manufacturer of such an article, and cannot be appropriated as a trade-mark. Where the article itself is one which any one of common right may make, no person by making that article for any period of time—no matter for how long—can convert that article itself into a trade-mark and thereby acquire an exclusive right to make it in perpetuity. To allow this would be to destroy the 17-year limitation of the patent system. The purpose of a trade-mark is, as its name signifies, to provide a mark for an article in which one trades. It is the evidence of the article's genuineness, but is not the article itself.'"*

See also *Rathbone, Sard & Co.* v. *Champion Steel Range Co.*, 189 Fed. 26 (C. C. A. 6), *P. Lorillard Co.* v. *Peper*, 86 Fed. 956 (C. C. A. 8), cert. denied 171 U. S. 690, *Edward Hilker Mop Co.* v. *United States Mop Co.*, 191 Fed. 613 (C. C. A. 6), *Crescent Tool Co.* v. *Kilborn & Bishop Co.*, 247 Fed. 299 (C. C. A. 2), *Maytag Co.* v. *Meadows Mfg. Co.*, 35 F. (2d) 403 (C. C. A. 7), cert. denied 281 U. S. 737, 283 U. S. 843, and *Pope Automatic Merchandising Co.* v. *M'Crum-Howell Co.*, 191 Fed. 979, 982 (C. C. A. 7), cert. denied 223 U. S. 730, in the last of which cases the court pointed out that if the plaintiff could secure, not by a patent but by an unfair trade suit, the exclusive right to manufacture an article in its most desirable form, "he would be given gratuitously a monopoly more effective than that of the unobtainable patent in the ratio of eternity to 17 years."

Clearly, the pillow-shaped form—the unadorned product of the patent-expired machinery—is not a "mere matter of dress"; it is not simply an ornamental design adopted by the respondent to distinguish its goods from those of others. To the contrary, it is an essential feature

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* This opinion, written by Judge Buffington, affirmed the District Court decision of Judge Thompson. Both Judge Buffington and Judge Thompson ruled to the contrary in the case at bar without distinguishing or even mentioning their earlier decisions.

of any commercially marketable biscuit (R. 2, pp. 114 1144; see pp. 57-58, *supra*). Under these circumstance the authorities above cited are controlling that no abs lute injunction against use of the form can be grante since to do so would be to deprive petitioner of it substantial right to compete and to grant respondent perpetual monopoly in the sale of this product. As Judg Learned Hand pointed out in *Shredded Wheat Co.* v *Humphrey Cornell Co., supra,* "Under the guise of pro tecting against unfair competition, we must be jealous no to create perpetual monopolies" (250 Fed. at p. 964).*

Furthermore no limited form of injunction, such as that granted in the *Humphrey Cornell* case, can be justified here. As has previously been stated, the Circuit Court of Appeals for the Second Circuit in that case denied the respondent all relief with respect to biscuits reaching the last purchaser in cartons, even though the defendant's biscuits were identical in size and appearance with respondent's biscuits. The decree did require that all biscuits reaching the last purchaser outside of their cartons in restaurants and lunch rooms must bear a letter, cross or other plain symbol impressed in their substance, or have fastened upon them a wrapping, tag or band stating that they were made by the defendant, but even this limited injunction was to be lifted if, after a six months' experimental period, defendant was unable to comply with the requirement "except at an expense which would make impossible any continued competition in the business of selling biscuits outside the carton with any assurance of reasonable profit." Judge Ward, in a dissenting opinion, expressed the view that no relief at all should be granted on the ground that the evidence showed

* See also *Canal Co.* v. *Clark,* 13 Wall. 311; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.,* 138 U. S. 537; *Brown Chemical Co.* v. *Meyer,* 139 U. S. 540; *Elgin Nat'l Watch Company* v. *Illinois Watch Company,* 179 U. S. 665; *Standard Paint Co.* v. *Trinidad Asphalt Co.,* 220 U. S. 446; *Warner & Co.* v. *Lilly & Co.,* 265 U. S. 526.

that the form was functional and that the requirement imposed by the majority was impracticable.

At the time that this decree was entered, confusion was shown to exist in the restaurant trade because of the identity of Ross' and respondent's biscuit in appearance and size and because the use of individual cartons was then unknown. Now, however, there is no confusion because petitioner has made its product in a distinctive size and because almost all restaurants and lunch rooms use petitioner's individual two-biscuit cartons. Clearly these individual cartons are just as distinctive of the origin of petitioner's product and may no more readily be removed than a paper band or tag.

The District Court found on uncontradicted testimony, and the finding was not disputed in the court below, that the individual biscuits cannot be separately branded and that they cannot be individually wrapped or tagged except at an expense making profitable competition impossible. The various unsuccessful efforts made by the petitioner and also by The Ross Food Company so to mark and wrap their biscuits are recounted in the record and have been described above (pp. 26-27, *supra*). Their experience amply justifies the statement of the District Court that "Had the proof in this case as to marking been before the Court of Appeals in the *Ross* case the opinion of Judge Ward would doubtless have been the opinion of the Court" (R. 1, p. 221).

But slight attention need be given to respondent's contention that, since all regular-shaped biscuits must necessarily be in the pillow-shaped form and since such biscuits cannot be differentiated from respondent's product by any other means than those adopted by the petitioner, petitioner should be enjoined entirely from competing in this trade unless it markets some irregular-shaped biscuit, such as a diamond-shaped biscuit, a cone-shaped biscuit or a doughnut-shaped biscuit. Thus respondent claims a perpetual monopoly in the right to manufacture a particular

type of article on the ground that the article itself, not any of its decorative or non-functional features, is a distinctive product which the public has associated with respondent's manufacture.

The commercial impracticability of making any of the suggested biscuits is established by the evidence, a detailed analysis of which appears in Appendix A hereto (pp. 108-112, *infra*). But it is enough to say that the right to make a desirable article is not abridged because there may be some other type of article which may be equally desirable. Protection of trade from unfair practices does not extend to prevention of competition in the particular type of article for which there is a supposed or established public desire, even if this desire has been created by the complainant. *Flagg Manufacturing Co.* v. *Holway, supra.*

C. Upon the expiration of respondent's design patent covering the pillow-shaped form of biscuit, of its various patents on machinery designed to produce this form of biscuit, and of its product and process patent, during the life of which that product was known to the public only in this form, the right to make and vend the pillow-shaped biscuit was dedicated to the public.

Completely apart from the considerations adverted to above, the injunction directed to be entered by the court below is, we submit, erroneous because it proceeds in the face of the established rule that, upon the termination of a patent, there passes to the public the right to make the article covered by the patent in the form in which it was made during the patent monopoly. *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169; *Shredded Wheat Co.* v. *Humphrey Cornell Co., supra; Bristol Co.* v. *Graham*, 199 Fed. 412 (C. C. A. 8); *Daniel* v. *Electric Hose & Rubber Co.*, 231 Fed. 827 (C. C. A. 3); *William H. Keller, Inc.* v. *Chicago Pneumatic Tool Co.*, 298 Fed. 51 (C. C. A. 7), cert. denied 265 U. S. 593; *J. A.*

Scriven Co. v. *Morris*, 154 Fed. 914 (D. Md.), aff'd, 158 Fed. 1020 (C. C. A. 4), appeal dismissed, 223 U. S. 742.*

The decision of this Court in *Singer Manufacturing Co.* v. *June Manufacturing Co., supra,* is the leading case on this subject. The plaintiff in that case was the original manufacturer of the celebrated Singer sewing machines. The fundamental principles according to which those sewing machines were constructed had been covered by various patents owned by the plaintiff which had expired. None of the machines, however, had been patented as a whole. After the expiration of the patents, the defendant began to market a sewing machine in exact imitation of the plaintiff's, calling it an "Improved Singer". Its conduct indicated, as this Court found, that it was intentionally striving to have its product sold as that of the plaintiff. It imitated plaintiff's machine not only in functional principle but in every detail of external appearance, even including ornamentation. Because the serial number on plaintiff's machines ran into the millions, the defendant began its serial numbers with 300,000,000. It even placed a dummy screw, serving no mechanical purpose whatever, on its machines to imitate a tension screw, still covered by a subsisting patent, which was used on plaintiff's machines. Despite the purposefully deceitful conduct of the defendant, this Court denied the plaintiff relief except to the extent of requiring the defendant to put its name on its machines.

The opinion of this Court with respect to the right of the defendant to use the name "Singer" is discussed

* See also *Warren Featherbone Co.* v. *American Featherbone Co.*, 141 Fed. 513 (C. C. A. 7); *Rice-Stix Dry Goods Co.* v. *J. A. Scriven Co.*, 165 Fed. 639 (C. C. A. 8), cert. denied 212 U. S. 582; *Yale & Towne Manufacturing Co.* v. *Ford*, 203 Fed. 707 (C. C. A. 3); *National Lock Washer Co.* v. *Hobbs Mfg. Co.*, 210 Fed. 516 (D. Mass.); *The Singer Manufacturing Company* v. *Loog*, L. R. 8, App. Cases 15 (House of Lords); *The Cellular Clothing Company* v. *Maxton & Murray*, [1899] A. C. 326, 16 R. P. C. 397.

in Point III, *infra*. What is important here is the fact that, although the plaintiff had no patent on any of its machines as a whole, although the defendant purposefully imitated the appearance of plaintiff's machines, including many purely ornamental features, and although the likelihood of public deception was entirely clear, no injunction was granted because the form of defendant's product was the form in which plaintiff's product was made during the life of the patents. In this connection the Court said (p. 185):

> "It is self evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. We may, therefore, dismiss without further comment the complaint, as to the form in which the defendant made his machines."

Respondent's claim of exclusive right to use the pillow-shaped form cannot withstand the application of these decisions. This form was protected by a design patent, it was the form in which shredded wheat was made and known to the public during the life of the basic product and process patent, and the respondent held various other patents covering improvements in the machinery for making shredded wheat which, as shown in the patent specifications, were designed to produce only the pillow-shaped biscuits. The effect of the decree below, for all practical purposes, is to extend the life of these expired patents to eternity.

The court below declined to apply the doctrine of the *Singer* case because of the fact that in 1908, a year before its expiration, respondent's design patent No. 24,688 was held invalid by Judge Kohlsaat in *Natural Food Company*

v. *Bulkley*, No. 28,530, N. D. Ill., East. Div. (P. Ex. 273). This ruling, we submit, misconceives the fundamental principle of the *Singer* rule.

The fact is that respondent successfully asserted exclusive rights to the design of the biscuit during the entire term of the patent and for some time thereafter by printing prominently upon its packages until 1915 a notice that the biscuits were protected thereby (see p. 9, *supra*). As the District Court stated in this connection (R. 1, p. 197), "By its professions and conduct plaintiff secured a monopoly not for fourteen years but actually for twenty years."

The authorities are clear that under these circumstances respondent cannot now be heard to say that the design of its biscuit was not in fact protected by patent. *Collis Co.* v. *Consolidated Machine Tool Corporation*, 41 F. (2d) 641 (C. C. A. 8), cert. denied 282 U. S. 886; *Horlick's Food Co.* v. *Elgin Milkine Co.*, 120 Fed. 264 (C. C. A. 7).

In the *Collis* case, *supra*, the doctrine of the *Singer* case was held to be applicable to an article which the plaintiff had sold under the claim of patent protection, even though it was not clear that plaintiff's product was actually the article covered by the patent. In this connection, the court said (pp. 644-645):

> "But it is further contended that the tool as in fact manufactured by the plaintiff was not and is not the device covered by the Davis patent. It appears by the record in this case that this identical tool was for seventeen years manufactured and sold under the protection of the Davis patent. In fact, the tool itself falsely bore evidence that it was patented for at least one year subsequent to the expiration of the patent; and continuously up to the time of the commencement of this action the advertisements of the plaintiff and its predecessor indicated that it was protected by patent. The plaintiff, having enjoyed the benefits of the monopoly protected by this patent, cannot consistently now be heard to say that in fact the device manufactured and sold by it was not the

device so patented. *Sproull* v. *Pratt & Whitney Co.* (C. C.) 97 F. 807. There is an intimation in the record that the defendant's delay in commencing the manufacture of its chuck precluded it from invoking the doctrine announced in *Singer Manufacturing Company* v. *June Manufacturing Company, supra,* but it should be observed in this connection that during all this time the plaintiff and its predecessor were, through their advertisements, falsely representing that this device was protected by patent. It is not in the mouth of the plaintiff, therefore, to urge that the defendant should earlier have discovered its deception or fraud. To permit plaintiff so to do would allow it to take advantage of its own wrong."

A similar ruling was made in *Horlick's Food Co.* v. *Elgin Milkine Co., supra,* where the court stated (pp. 266-267):

"It matters not, in our judgment, that the patent may not have been in fact valid; nor that the product, —malted milk—could not in fact have been covered by the description of the patent. The point is, that appellant chose to mark its product as if it were a monopoly, thereby obtaining, measurably at least, the benefit of a monopoly; and gave to it a name, that became the generic name of the supposed monopoly. The case is thus brought, in our judgment, within the principle, if not the exact facts, of *Singer Mfg. Co.* v. *June Mfg. Co.,* 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, and must be ruled accordingly."

Furthermore, the *Singer* doctrine would be applicable to the case at bar even had no design patent ever existed. The rule of the *Singer* case is that upon the expiration of a patent there passes to the public the right to use not only the article as described in the specifications of the patent but also the characteristic form in which it became known to the public during the patent monopoly. This rule is the necessary result of the right of the public to the full enjoyment of the patented product since, unless

the competing article can be recognized by the public to be the same article as that protected by the patent, the right to make and vend it would be of little value. The rule is based upon the same considerations as the doctrine, discussed at pages 95-103, *infra*, that upon the expiration of a patent, the public may use the generic name by which the article was known during the patent period.

Respondent's basic patent, which expired in 1912, was upon the product shredded wheat and upon the process of its manufacture (see p. 8, *supra*). During the life of this patent, shredded wheat became known to the public in the form of the pillow-shaped shredded wheat biscuit. Upon the expiration of this basic patent, therefore, the public had a right to make and vend the pillow-shaped biscuit even though this particular form of the product was not disclosed in the specifications of the basic patent. Indeed, this was the exact situation in the *Singer* case, where, as has been pointed out, the patents extended only to the fundamental principles of the sewing machines and not to the machines as a whole.

Moreover, even apart from the design patent and the product and process patent, petitioner is clearly entitled under the *Singer* case to make and vend the pillow-shaped biscuit because some eight patents were held by respondent covering improvements in machinery for the production of shredded wheat biscuits which, as shown in the patent specifications, were designed to produce this particular form of product (see p. 8, *supra*). Clearly, upon the expiration of those patents, the machinery, as disclosed, could be employed by anyone to produce the article which that machinery was designed to produce.

Respondent seeks to avoid application of the *Singer* doctrine on the further ground that it has enjoyed the exclusive use of the form for many years since the expiration of its patents. This contention again, we submit, involves a misunderstanding of the *Singer* rule. The essence

of that rule is that the 17-year patent monopoly is granted upon the condition that at the end of that period all exclusive rights to the article cease. The patented product thereafter belongs in the public domain and no period of exclusive use can withdraw it therefrom. As this Court said in *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 36, "The right to individual appropriation once lost is gone forever."

The same contention now made by the respondent was made in *Daniel* v. *Electric Hose & Rubber Co.*, 231 Fed. 827 (C. C. A. 3). The reply there given by the court is, we submit, unanswerable. After stating what has been quoted above (p. 63) that "Where the article itself is one which anyone of common right may make, no person by making that article for any period of time—no matter how long—can convert that article itself into a trade-mark and thus acquire an exclusive right to make it in perpetuity", the court continued (p. 834):

> "* * * Indeed, in the last analysis the whole case of the plaintiff rests on the unwarranted assumption that, by being for some years the maker and vender of a patent-expired article, it thereby could acquire and had acquired an exclusive and perpetual right to make it. Were this the law, it would follow that if Mayall, after the expiration of his patent, had been the only maker of his hose for some years following, he could by his own act turn his patent, which the law limited to 17 years, into a perpetual patent."*

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* As will be pointed out below (pp. 99-101, *infra*), the same principle applies to the generic name of a patent-expired article. Even though such a generic name be used exclusively by the plaintiff for a long period of years after the expiration of its patent, this will not withdraw it from the public domain. *Centaur Co.* v. *Heinfurter*, 84 Fed. 955 (C. C. A. 8); *Collis Co.* v. *Consolidated Machine Tool Corporation*, 41 F. (2d) 641 (C. C. A. 8), cert. den. 282 U. S. 896; *Saxlehner* v. *Eisner & Mendelson Co.*, *supra*.

POINT III.

The Use by Petitioner of the Words "Shredded Wheat" as Part of the Designating Phrase "Kellogg's Shredded Whole Wheat Biscuit" Does Not Constitute Trade-Mark Infringement or Unfair Competition.

The injunction directed to be issued by the court below enjoins petitioner from using "the name 'Shredded Wheat' as its trade name" (R. 3-A, p. 2286).* Just as that portion of the decree discussed in Point II grants a monopoly in the form irrespective of the name, so this portion of the decree grants a monopoly in the name irrespective of the form.

Since it is clear from the record, as previously analyzed (pp. 36-38, *supra*), that petitioner's use of the words "shredded wheat" has not induced the sale of petitioner's biscuits as respondent's goods, respondent is not entitled to an injunction against such use (see Point I, *supra*).

But even apart from this basic consideration, it is entirely clear that "shredded wheat" is a generic and descriptive product name, which, under controlling decisions of this Court, is not subject to exclusive appropriation by anyone.

A. "Shredded wheat" is the descriptive, generic and only name of the article.

The words "shredded wheat" have been used constantly and consistently as the generic and only name of the well known pillow-shaped breakfast food. Indeed, the

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* Petitioner has designated its biscuits "Kellogg's Whole Wheat Biscuit" and "Kellogg's Shredded Whole Wheat Biscuit". It is assumed, however, that the meaning of the decree below is to enjoin petitioner from using any combination of the two words "shredded" and "wheat" as part of the identifying name of its product.

article cannot be described or differentiated from other wheat biscuits without using the words "shredded wheat" any more than condensed milk can be described or distinguished from other milk products without using the word "condensed". Under these circumstances the law is entirely clear that petitioner may use the name of the article which it produces so long as it clearly indicates that its goods thus named and described are its products and not products of the respondent.

Perhaps the most persuasive evidence that the words shredded wheat are both descriptive and generic is found in the patents of Henry D. Perky, originator of the product and founder of respondent's business, and in other patents owned by respondent. Required to describe the process of manufacture for which patent rights were sought, Perky consistently stated that the fundamental principle of his invention was the reduction of whole wheat grain to "shredded form", "shred-like form", or to "shreds" by forcing the grain through "shredding rolls", "shredding devices", "grain shredding machines" or simply "shredders". One of his inventions was stated to relate "to machines for cutting shredded wheat and other food preparations into regular and uniform sections", another to have as its objective "to provide a cracker of filamentous or shredded wheat or other grain".* Similarly,

* See the following Perky Patents: No. 520,496 (R. 5, p. 5), No. 532,286 (R. 5, p. 11), No. 532,480 (R. 5, p. 15), No. 532,481 (R. 5, p. 21), No. 532,697 (R. 5, p. 25), No. 532,698 (R. 5, p. 29), No. 533,551 (R. 5, p. 33), No. 533,552 (R. 5, p. 37), No. 533,553 (R. 5, p. 41), No. 533,554 (R. 5, p. 45), No. 533,555 (R. 5, p. 49), No. 548,086 (R. 5, p. 59), No. 571,284 (R. 5, p. 65), No. 598,745 (R. 5, p. 77), No. 614,838 (R. 5, p. 81), No. 618,288 (R. 5, p. 87), No. 667,892 (R. 5, p. 91), No. 678,127 (R. 5, p. 109), No. 678,625 (R. 5, p. 121), No. 681,656 (R. 5, p. 135), No. 718,795 (R. 5, p. 169), No. 797,604 (R. 5, p. 201). Quotations from these patents appear in the appendix to petitioner's first petition for certiorari, pp. 28-33.

in the Burbank, House and Webster patents, owned by respondent, the terms "shredded wheat" and "shredded wheat biscuit" are used generically without suggestion that they are trade-names (R. 5, pp. 161, 281-282, 309).

Thus those who invented the process and the product named the product shredded wheat or shredded wheat biscuit. Neither the shreds of wheat nor the biscuit have been known by any other name.

Respondent itself has continually used "shredded", "shredded wheat" and "shredded wheat biscuit" in a descriptive and generic sense on its cartons and in its advertising and has consistently sought to impress upon the public that the particular virtue of its biscuit results from the shredding process and that it is a shredded wheat biscuit. Thus it has repeatedly stated that its biscuit is "made light and short by mechanical shredding", that it is made digestible by "steam cooking, shredding and baking", that "the crispness of its shreds promotes thorough mastication", that "It's All In The Shreds", that its product is "The Original Shredded Wheat" and that "Any other shredded wheat * * * is merely a poor imitation of the only Original Shredded Wheat." Millions of booklets entitled "Shreds of Life" and "Health in Every Shred" have been distributed. Millions of newspaper and periodical readers have been told that respondent's biscuit is whole wheat "shredded and baked", that it is in the form of "crisp, oven-baked shreds", and that Triscuit, a compressed shredded wheat cracker marketed by respondent, is a "shredded wheat toast", "shredded wheat wafer", and a "shredded whole wheat cracker".

The foregoing and other typical excerpts from respondent's cartons and advertisements have been quoted and discussed at pages 12-16, *supra*; further repetition is unnecessary here. It suffices that the effect of all this advertising, as stated by Colonel DeWeese, respondent's former advertising manager, has been to make shredded wheat "a sort of household word, as if one would speak

of starch or potatoes as differentiated or distinguished from proprietary foods like Grape-Nuts or Mello-Wheat" (see p. 15, *supra*). Needless to say, household words like starch, potatoes or shredded wheat cannot be appropriated as a trade-mark by anyone.

On a similar record, the Privy Council in *Canadian Shredded Wheat Co., Ltd.* v. *Kellogg Co. of Canada, Ltd., and another*, p. 136, *infra*, concluded that "The plaintiff company [respondent's Canadian subsidiary] was in fact using the words shredded wheat to indicate the thing, not the manufacturer, to indicate the stuff of which the biscuits were composed, not who made them." And in the *British Trade-Mark Case* (p. 146, *infra*) the English Court of Appeal reached the same conclusion from a consideration of the cartons and advertisements of respondent's English subsidiary, which were similar to those of respondent, stating: "The carton is wholly inconsistent with the possibility of the words 'Shredded Wheat' having up to 1926 become the Respondents' trade mark and distinctive of their goods. A considerable mass of advertisements issued by the Respondents was in evidence; and so far from those advertisements indicating that prior to 1926 the words 'Shredded Wheat' were used by the Respondents as a trade mark those advertisements confirm the evidence of the carton that the Respondents used the words 'Shredded Wheat' as the name of the product." Indeed, on the appeal of that case, respondent's counsel specifically abandoned any contention that the words did not have direct reference to the character or quality of respondent's product (p. 144, *infra*).

Equally cogent evidence of the descriptive and generic nature of the name of respondent's product is furnished by respondent's trade-mark registrations. Its trade-mark registration No. 89,071 (R. 4, p. 199) on the picture of its factory states that the mark had been adopted for "shredded wheat, in class 46, Foods and ingredients of foods" and expressly disclaims the descriptive words

"The Home of Shredded Wheat". Similarly, respondent's registration No. 85,186 of an alleged trade-mark showing one shredded wheat biscuit in a dish with a spoon and milk or cream (R. 4, p. 197) contains the disclaimer: "no claim being made to the representation of a shredded wheat biscuit".

Earl T. Oakes, respondent's chief chemist and former production manager of the Shredded Wheat Bakeries, in describing the process of manufacturing the biscuits, used the words "shreds", "shredded", "shredding", "shredders", "reshredded", "re-shredding", "shredded wheat" and "shredded whole wheat" in a descriptive sense more than eighty times in some thirty-five pages of testimony (R. 1, pp. 259-294). The testimony of Edwin L. Wallace, managing director of respondent's English plant (R. 1, pp. 316-324), is to the same effect as that of Oakes in this respect.

But perhaps the ultimate test of the nature of the words as descriptive or generic is the manner in which they are used by the public. One of respondent's witnesses, a wholesale grocer, testified (R. 1, pp. 666-667, 669):

> "* * * If anybody asked me what a shredded wheat biscuit was, I would describe it as a pillow-shaped biscuit, made out of whole wheat in shredded form. When I speak of being familiar with shredded wheat, I mean that type of biscuit, a shredded whole wheat biscuit in pillow-shaped form. * * *
>
> "I know that the current name of a product like Uneeda Biscuit is soda cracker and rolled oats is oat-meal. There could not be any other name than shredded wheat biscuit or shredded wheat to describe Shredded Wheat, that product. Any other name that could be used for this whole wheat biscuit would not describe it, but shredded wheat or shredded wheat biscuit does describe it exactly.
>
> "* * * As I understand, there are two brands of shredded wheat biscuit. I wish to be understood as testifying that Kellogg is making a shredded wheat biscuit similar to the Shredded Wheat."

Witness after witness testified to the same effect. Wholesale grocers, retail grocers and consumers alike used the words shredded wheat in a generic sense, described the article as made of wheat which has been shredded, and stated that they knew of no other name for the article than shredded wheat or shredded whole wheat. References to the testimony of over one hundred of these witnesses is contained in the footnote.* For the convenience of the Court typical excerpts from this testimony, each of which could be multiplied almost indefinitely, are set forth in Appendix D, pages 121-125, *infra*.

More than a score of witnesses testified that whole wheat biscuit might be any one of several kinds of biscuit and unless it was called shredded whole wheat biscuit no one would know what it was (see p. 24, *supra*).

The same usage is found in governmental and institutional invitations for bids. These invitations to bid call for both petitioner's "Whole Wheat Biscuit" and respondent's biscuit under names such as "Shredded Wheat", "Wheat, shredded" and "Whole Wheat, Shredded"; they frequently specify that the wheat must be "drawn into fine shreds, formed and baked in oblong biscuits" (see p. 34, *supra*).

In addition to all this evidence, it should be noted that respondent in effect admitted the generic and descriptive nature of the name by its attempted registration of

* R. 1, pp. 302, 345, 351, 352, 354, 361, 370, 372, 386, 400, 403, 404, 408, 413, 415, 419, 420, 422, 425, 426; 430, 434, 436, 439, 441, 445, 449, 454, 457, 458, 462, 463, 465, 471, 473, 478, 488, 511, 518, 521, 526, 529, 530, 536, 544, 547-548, 617, 628, 631-632, 637, 646, 666, 682, 697-698; R. 2, pp. 704-705, 722, 730, 733, 740, 749-750, 788, 794, 799, 803-804, 816, 822-824, 833, 842, 851, 863, 880, 887, 894, 903, 909, 929, 962, 984-985, 1134, 1181, 1197, 1211-1212, 1216, 1226, 1231, 1238, 1241, 1245, 1249, 1259, 1263, 1264, 1273, 1275, 1292-1293, 1298, 1306, 1348, 1352, 1353, 1367; R. 3, pp. 1388, 1396-1398, 1422, 1459, 1464, 1501-1502, 1542-1543, 1615, 1618, 1656, 1741, 1754, 1760, 1796, 1802, 1816, 1881.

"Shredded Whole Wheat" as a trade-mark under the so-called ten-year clause of the Trade-Mark Act of 1905, which registration was refused in *Natural Food Co. v. Williams*, 30 App. D. C. 348 (see pp. 10-11, *supra*). This Act provides for the registration of distinctive marks no matter how long used, but prohibits the registration of non-distinctive marks unless used exclusively by the applicant or its predecessors for ten years prior to 1905. Filing of the application under the ten-year clause, therefore, was a clear admission that the words are not a technical trade-mark capable of exclusive appropriation at common law (*Thaddeus Davids & Co. v. Davids*, 233 U. S. 461, 465) but are, in the words of the statute, "descriptive of the goods with which they are used, or of the character or quality of such goods" (33 Stat. 725, ch. 592, 15 U. S. C. A. § 85).

The same is true with respect to respondent's two registrations of "Shredded Wheat" as a trade-mark under the Act of 1920 (see pp. 11-12, *supra*). This Act (41 Stat. 533, 15 U. S. C. A. § 121) provides for the registration of marks which are not capable of registration under the 1905 Act. Registration under the 1920 Act, therefore, like registration under the ten-year clause of the 1905 Act, is an admission that the words registered are not distinctive or capable of exclusive appropriation as a common law trade-mark, but are descriptive or generic or both.

It should be noted that registration under the 1920 Act, unlike that under the 1905 Act, creates no presumption of validity or ownership. The purpose of allowing registration of descriptive and generic words under the 1920 Act was to enable manufacturers to comply with legislation in foreign countries, which necessitates registration in the United States as a necessary prerequisite to foreign registration. The 1920 Act has no effect on the domestic rights of anyone. *Charles Broadway Rouss, Inc. v. Winchester Co.*, 300 Fed. 706 (C. C. A. 2), cert. den. 266 U. S.

607; *Kellogg Company* v. *National Biscuit Company*, 71 F. (2d) 662 (C. C. A. 2).

Finally, the descriptive nature of the name shredded wheat has been the subject of judicial determination. In *Natural Food Co.* v. *Williams, supra*, the Court of Appeals for the District of Columbia, refusing respondent's application for registration of "Shredded Whole Wheat" under the ten-year clause of the 1905 Act, expressly declared that these words "accurately and aptly describe an article of food" and that "they are descriptive within the meaning of the statute". The same ruling was made, on a record similar to that in the case at bar, by two Canadian courts and by the Privy Council in *Canadian Shredded Wheat Company, Ltd.* v. *The Kellogg Co. of Canada, Ltd. and another*, page 125, *infra*, and by the English Court of Appeal in the *British Trade-Mark Case*, page 143, *infra*.*

The court below, in its opinion on reargument, disregarded all of the proof, admissions and authorities adverted to above and held that, because the wheat is rolled or mashed rather than cut or torn during the process of manufacture, the name "Shredded Wheat" is not descriptive but at most merely suggestive (R. 3-A, p. 2086). This ruling is, we submit, based on the false premises that descriptive words are only such as describe the process of manufacture rather than the product itself, that the descriptiveness of words is to be tested by their strict etymological meaning rather than by the meaning established by common usage and understanding, and that "shredded" means only something which has been torn or cut.

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* The opinions in the *Natural Food Company* and *Canadian Shredded Wheat Company* cases, as well as the opinion of the Circuit Court of Appeals for the Second Circuit in the *Humphrey Cornell* case, consistently use the words shredded wheat and shredded wheat biscuit in a generic and descriptive sense. See also *Sanitas Nut Food Co.* v. *Voigt*, 139 Fed. 551 (C. C. A. 6).

In support of its position respondent cited to the court below several dictionary references to prove that the verb "shred" means to tear or to cut into small strips. If this were a battle of lexicons we could refer to the Century and Oxford dictionaries as defining the word "shredded" by describing the product shredded wheat. See also Webster's International Dictionary. But this case does not turn upon etymological accuracy but rather upon the primary descriptive sense in which the words used are understood by the public. *Computing Scale Co.* v. *Standard Computing Scale Co.*, 118 Fed. 965, 969 (C. C. A. 6); *Brooten* v. *Oregon Kelp Ore Products Co.*, 24 F. (2d) 496, 497 (C. C. A. 9); *Pennsylvania Salt Manuf'g Co.* v. *Myers*, 79 Fed. 87, 89-90 (E. D. Mo.); *Parsons Bros. & Co.* v. *John Gillespie & Co.*, 15 R. P. C. 57, 61 (Privy Council). "A word means what people understand it to say and there is an end of it." *Coty* v. *LeBlume Import Co.*, 292 Fed. 264, 266 (S. D. N. Y.).

The significant fact, therefore, is that the respondent has consistently described its process as shredding and its product as shredded and the public has come to understand that the biscuits are made of shredded wheat. Of the multitude of witnesses who were asked to state their conception of the nature of respondent's product, all but one testified that they considered it to be a biscuit consisting of wheat which had been shredded.* For purposes of this case, therefore, the process of manufacturing the biscuits must be taken to be a shredding process. *Kellogg Toasted Corn Flake Co.* v. *Quaker Oats Co.*, 235 Fed. 657, 660 (C. C. A. 6); *Franklin Knitting Mills, Inc.* v. *Fashionit Sweater Mills, Inc.*, 297 Fed. 247, 248 (S. D. N. Y.), aff'd without opinion, 4 F. (2d) 1018 (C. C. A. 2).

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* The only exception was James F. Bell (R. 2, pp. 949-950), president of one of petitioner's large competitors, who testified that he would call the biscuit a vermicelli-formed wheat product rather than a shredded wheat product.

The court below was clearly in error in holding that descriptive words are only those which describe the process of manufacture and not those which describe the product itself. The language of the Trade-Mark Act of 1905 is directly contrary to this ruling. That statute forbids registration of words which "are descriptive of the goods with which they are used, or of the character or quality of such goods" (33 Stat. 725, 15 U. S. C. A., § 85). Innumerable words have been held to be descriptive which aptly describe the product but which have no reference to the process of its manufacture. See, *e. g., Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446 ("Ruberoid"); *Beckwith* v. *Commissioner of Patents*, 252 U. S. 538 ("Moistair Heating System"); *Computing Scale Co.* v. *Standard Computing Scale Co., supra* ("Computing"); *Marvel Co.* v. *Pearl*, 133 Fed. 160 (C. C. A. 2) ("Whirling Spray"); *McKesson & Robbins, Inc.* v. *Phillips Chemical Co.*, 53 F. (2d) 342, 1011 (C. C. A. 2) ("milk of magnesia"). In *Parsons Bros. & Co.* v. *John Gillespie & Co., supra*, "Flaked Oatmeal" was held to be descriptive of oatmeal in the form of flakes, though made by a process of rolling or crushing. And in *Coty* v. *LeBlume Import Co., supra*, the word "Origan" was held to be descriptive of a perfume having the scent known by that name, even though containing no origan.

There can be no dispute that shredded wheat is made of shreds of wheat and is accurately and aptly described as shredded wheat. This has been the assertion of respondent for over forty years and is the universal understanding of the public.

The court below in holding that the term "shredded wheat" is not descriptive relied in part upon the registration of the term under the trade-mark laws of various states and foreign countries (R 3-A, p. 2087). Mere registration under state laws has no evidentiary significance because in none of the states is there any such

procedure as that followed by the Patent Office to examine the character and validity of the trade-mark itself.* Wherever there has been responsible consideration and determination of the question the term has been held to be descriptive and generic. *Natural Food Co.* v. *Williams*, 30 App. D. C. 348; *Canadian Shredded Wheat Co., Ltd.* v. *The Kellogg Co. of Canada, Ltd. and another*, p. 125, *infra*; *British Trade-Mark Case*, p. 143, *infra*.

B. Since "shredded wheat" is the descriptive, generic and only name of the article, no injunction may be granted against its use by the petitioner.

A trade-mark is "a distinctive mark of authenticity, through which the products of particular manufacturers * * * may be distinguished from those of others. It may consist in any symbols or in any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade mark, which from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose." *Elgin Nat'l Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 673. See also *Canal Co.* v. *Clark*, 13 Wall. 311, 323-324; *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, 53-54; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 138 U. S. 537, 546; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540, 542; *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446, 453; *Beckwith* v. *Commissioner of Patents*, 252 U. S. 538, 543-544; *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 531.

It follows that respondent's claim of trade-mark infringement is entirely without merit. The claim of exclusive right to use the product name is equally without foundation in the law of unfair competition. A descriptive

* *Derenberg, Trade-Mark Protection and Unfair Trading*, p. 477.

or generic name is entitled to protection in an unfair competition case if, and only if, (1) it has acquired a "secondary meaning", *i. e.*, it has come to signify the source of manufacture of an article rather than the article itself, and (2) it has been so used by the defendant as to cause passing off or as to create a likelihood thereof. Moreover, even if these factors be established, no absolute injunction will be granted but protection will be limited to requiring the defendant to do what petitioner has always done, namely to mark its goods so as to show that they are made by it and not by the complainant. *Canal Co.* v. *Clark*, 13 Wall. 311; *Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Goodyear Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Elgin Nat'l Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118; *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554; *Saxlehner* v. *Wagner*, 216 U. S. 375; *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446; *Waterman Co.* v. *Modern Pen Co.*, 235 U. S. 88; *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403; *Beckwith* v. *Commissioner of Patents*, 252 U. S. 538; *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526; *Du Pont Cellophane Co.* v. *Waxed Products Co.*, 85 F. (2d) 75 (C. C. A. 2), cert. den. 299 U. S. 601, 82 L. ed. 1041; *Reddaway* v. *Banham*, [1896] A. C. 199, 13 R. P. C. 218; *Parsons Bros. and Co.* v. *John Gillespie and Co.*, 15 R. P. C. 57; *The Cellular Clothing Co.* v. *Maxton & Murray*, [1899] A. C. 326, 16 R. P. C. 397.*

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* See also *Computing Scale Co.* v. *Standard Computing Scale Co.*, 118 Fed. 965 (C. C. A. 6); *Hygienic Fleeced Underwear Co.* v. *Way*, 137 Fed. 592 (C. C. A. 3); *Brooten* v. *Oregon Kelp Ore Products Co.*, 24 F. (2d) 496 (C. C. A. 9); *Fawcett Publications* v. *Popular Mechanics Co.*, 80 F. (2d) 194 (C. C. A. 3); *Standard Oilshares* v. *Standard Oil Group*, 17 Del. Ch. 113, 150 Atl. 174.

The record in this case falls far short of establishing that "shredded wheat" has acquired a secondary meaning.* The doctrine of secondary meaning was first established in *Reddaway* v. *Banham, supra,* the famous "Camel-hair Belting" case. The plaintiff in that case used the word "Camel-hair" as the trade-name for its belting, which was in fact made of camel's hair but was not known by the public to be so made. The proof established that the words "did not mean in the market belting made of a particular material, but belting made by a particular manufacturer." Because the name had thus acquired a secondary meaning to the exclusion of its primary meaning, use of the name by the defendant, without distinguishing words showing the source of manufacture, would inevitably lead consumers to believe that defendant's goods were of plaintiff's make. An injunction was therefore granted, not absolutely forbidding use of the words, but restraining the defendant from using them "in such a manner as to deceive purchasers into the belief that they were purchasing belting of plaintiff's manufacture, and from thereby passing off their goods as the plaintiff's." The opinion of the House of Lords is well summarized in the words of the Lord Chancellor: "For myself, I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else."**

The finding of the court below that the name "shredded wheat" has acquired a secondary meaning because "it has come to stand for the article itself" (R. 3-A, pp. 2087,

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* Upon a similar record, the Privy Council so held in *Canadian Shredded Wheat Co., Ltd.* v. *Kellogg Co. of Canada and another,* pp. 133-140, *infra.* See also *British Trade-Mark Case,* pp. 146-147, *infra.*

** The distinction between the case at bar and *Reddaway* v. *Banham* is clearly presented in the opinion of the Privy Council in *Canadian Shredded Wheat Co., Ltd.* v. *Kellogg Company of Canada and another,* at pp. 140-141, *infra.*

2089) reveals an extraordinary misconception. The fact is that it has always stood for the article itself and in no sense as indicating its source. It is purely a product name and cannot serve as a mark indicating manufacture by respondent. The proof in this case, as analyzed above (pp. 74-78, *supra*), shows that, although during respondent's former monopoly shredded wheat was generally known as respondent's product so long as it was the only manufacturer, these words were always used as the only name of the product and retained their primary meaning as the only product name. As the Privy Council stated in the *Canadian Shredded Wheat Company* case (p. 139, *infra*), it would "be passing strange if they had acquired such a [secondary] meaning, for it would be a meaning directly contrary to the sense in which those words had been put forward to the public by the plaintiff company in its cartons and advertisements."*

Secondary meaning is not established by mere proof that during respondent's monopoly shredded wheat was used by consumers to denote its biscuit, because there was then no other shredded wheat product to which those words could apply. This is made entirely clear

* In the *British Trade-Mark Case* (p. 146, *infra*) the court stated: "The new evidence brought before this Court thus makes it, in our judgment, reasonably clear that up to 1926 the words 'Shredded Wheat' were not used by the Respondents as distinctive of their goods but were used by the Respondents as the name of the product. It was not suggested that the product made according to Perky's patents was ever known by any name but that of 'Shredded Wheat' and since 'Shredded Wheat' was thus used as the name of the product clear evidence would be required to establish that a secondary distinctive meaning had been acquired by the word. Furthermore it is not easy to see how such a distinctive meaning could have come into being unless there were rival producers of the same article in the market. There was no evidence that any such rivals were in the market, at all events to any substantial extent, before the 5th March, 1929."

in the leading case of *The Cellular Clothing Company* v. *Maxton & Murray, supra,* where a similar situation was involved. During the course of his opinion in the House of Lords, Lord Davey made the following statement, which has since been repeatedly quoted (16 R. P. C. at 409, 410):

> "The other observation which occurs to me is this, that where a man produces, or invents if you please, a new article, and attaches a descriptive name to it, a name which, as the article has not been produced before, has of course not been used in connection with the article, and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the Plaintiffs' goods alone, is of a very slender character, for this very simple reason because the Plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, and no merchant or manufacturer to resort to except the Plaintiff. Of course, my Lords, that is a matter of express decision in the case of a Patent. If a man invents a new article and protects it by a Patent, then, during the term of the Patent, he has of course a legal monopoly, but when the Patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the Patentee has attached to it during the time when he had the legal monopoly of the manufacture. But, my Lords, the same thing in principle must apply where a man has not taken out a Patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article—all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may *prima facie* use the name by which the article is known in the market."

See also *Parsons Bros. & Co.* v. *John Gillespie & Co.*, 15 R. P. C. 57 (Privy Council); *Kellogg Toasted Corn Flake Co.* v. *Quaker Oats Co.*, 235 Fed. 657 (C. C. A. 6); *Fels* v. *Christopher Thomas & Brothers, Ltd.*, 21 R. P. C. 85; *S. Chivers & Sons* v. *S. Chivers & Co., Ltd.*, 17 R. P. C. 420.

But even if secondary meaning were established, respondent would be entitled to no relief unless it were also shown that petitioner had so used the words as to cause purchasers to believe that its product was of respondent's manufacture, and then only to the extent of requiring petitioner to mark its goods so as clearly to indicate that it is the manufacturer. See authorities cited at page 84, *supra*. The record shows (pp. 22-25, 36, *supra*) that the petitioner has always marketed its biscuit under its own distinctive name and in its own distinctive cartons, and that no purchaser seeing its cartons or its product has been or could be deceived as to their origin.* Irrespective of "secondary meaning", therefore, respondent's case is utterly lacking in factual foundation.

The basic rule is well stated in *Saxlehner* v. *Wagner*, 216 U. S. 375. In that case the plaintiff, who sold mineral water under the name "Hunyadi Janos", sought to enjoin the defendant from marketing a non-mineral water, similar in taste, under the name "W. T. Wagner's Sons Artificial Hunyadi Janos". This Court, holding that the name "Hunyadi" was the generic name of natural water of a

* The criterion of deception is, of course, whether ordinary attention by the purchaser would enable him at once to distinguish the products. *McLean* v. *Fleming*, 96 U. S. 245; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118; *Columbia Mills Company* v. *Alcorn*, 150 U. S. 460. Deception of the indifferent or careless, even if it were shown, would be immaterial. *P. Lorillard Co.* v. *Peper*, 86 Fed. 956 (C. C. A. 8), cert. den. 171 U. S. 690; *Postum Cereal Co.* v. *American Health Food Co.*, 119 Fed. 848 (C. C. A. 7); *Jamieson & Co.* v. *Jamieson*, 15 R. P. C. 169.

certain type coming from Hungary, refused relief. Mr. Justice Holmes stated (216 U. S. at pp. 380-381):

> "We see no reason for disturbing the finding of the courts below that there was no unfair competition and no fraud. The real intent of the plaintiff's bill, it seems to us, is to extend the monopoly of such trade-mark or trade name as she may have to a monopoly of her type of bitter water, by preventing manufacturers from telling the public in a way that will be understood what they are copying and trying to sell. But the plaintiff has no patent for the water, and the defendants have a right to reproduce it as nearly as they can. They have a right to tell the public what they are doing and to get whatever share they can in the popularity of the water by advertising that they are trying to make the same article and think that they succeed. If they do not convey, but, on the contrary, exclude the notion that they are selling the plaintiff's goods, it is a strong proposition that when the article has a well-known name they have not the right to explain by that name what they imitate. By doing so they are not trying to get the good will of the name, but the good will of the goods. See *Flagg Manufacturing Co.* v. *Holway*, 178 Massachusetts, 83, 91; *Chadwick* v. *Covell*, 151 Massachusetts, 190, 191. Although the application is different, the principle seems to be similar to the rule that when a patent has expired descriptive words or even an arbitrary or personal name by which it has become known may be used if sufficient precautions are taken to prevent the public from being deceived. See *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169."

Similarly in *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446, the plaintiff, manufacturer of a roofing material sold under the name of "Ruberoid", sought an injunction against the sale by defendant of a similar roofing material under the name "Rubbero". This Court held that "Ruberoid" was a descriptive word and therefore not subject to appropriation as a technical trademark, stating: "A public right in rubberoid and a private

monopoly of rubberoid cannot coexist." (220 U. S. at p. 453). With respect to the unfair competition aspect of the case, it was pointed out that the color, design and general appearance of the labels and markings on the packages used by the defendant were so different from those used by the plaintiff as to preclude any likelihood of passing off. Relief was therefore denied, the Court saying (pp. 461-462):

> "• • • The only imitation by the Asphalt Company of the roofing of the Paint Company is that which exists in the use of the word 'rubbero,' and this only by its asserted resemblance to the word 'ruberoid.' To preclude its use because of such resemb' ce would be to give to the word 'ruberoid' the fu effect of a trade-mark, while denying its validity as such. It is true that the manufacturer of particular goods is entitled to protection of the reputation they have acquired against unfair dealing, whether there be a technical trade-mark or not, but the essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another. *Elgin National Watch Co.* v. *Illinois Watch Co., supra.* Such a wrong is not established against the Asphalt Company. It does not use the word 'rubbero' in such a way as to amount to a fraud on the public."

The many authorities cited at page 84, *supra*, are all to the same effect.

The *Canadian Shredded Wheat Company* case (p. 125, *infra*) is precisely analogous to the case at bar. In principle so also are *Kellogg Toasted Corn Flake Co.* v. *Quaker Oats Co.*, 235 Fed. 657 (C. C. A. 6) and *Parsons Bros. & Co.* v. *John Gillespie & Co.*, 15 R. P. C. 57 (Privy Council). In the first of these cases, the plaintiff, manufacturer of "Kellogg's Toasted Corn Flakes", sought to enjoin the defendant from marketing a similar article under the name "Quaker Toasted Corn Flakes". The cartons employed by the defendant were strikingly different in appearance from those of the plaintiff. In an exhaustive opinion, in which most of the questions here involved were considered, the court held that the words were descriptive and therefore not sub-

ject to exclusive appropriation by the plaintiff, and that, since the defendant had sold its goods in distinctive packages, no injunction of a limited nature could be granted. The same ruling was made by the Privy Council in the *Parsons Bros.* case with respect to "Flaked Oatmeal".

The underlying conception of all these cases is that if the first producer in the field could acquire an exclusive right to the descriptive and generic name of the article by adopting it as the trade-name of his product, he could frequently monopolize the trade in that article. Competition must often be crippled if competitors have not the right to tell the public precisely what article they are marketing. This principle was forcefully stated by this Court in *Canal Co.* v. *Clark*, 13 Wall. 311, 323-324, in a passage which has since been reiterated in many cases:

> "• • • No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection. As was said in the well-considered case of *The Amoskeag Manufacturing Company* v. *Spear*, 2 Sandford's Supreme Court, 599, 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols, that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or a symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose.' "

See also *Goodyear Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 138 U. S. 537; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Elgin Nat'l Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665; *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446; *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526.

The doctrine of the *Canal Co.* case applies with peculiar force in the case at bar where the name is the only name of the product and is essential to any adequate description of it.

Some of the lower federal courts and some English courts have, in a few exceptional cases, granted an absolute injunction against use by the defendant of a descriptive or geographical name which had acquired a secondary meaning indicating manufacture by the plaintiff. *Wotherspoon* v. *Currie*, [1872] L. R. 5, H. L. 508 ("Glenfield" as applied to starch made at Glenfield); *Thompson* v. *Montgomery*, 41 Ch. Div. 35, 8 R. P. C. 361 ("Stone" as applied to ale made at Stone); *Photoplay Publishing Co.* v. *LaVerne Publishing Co.*, 269 Fed. 730 (C. C. A. 3) ("Photoplay" as applied to a movie magazine);* *Barton* v. *The Rex Oil Co.*, 29 F. (2d) 474 (C. C. A. 3) ("Dyanshine" as applied to shoe polish);* *Scandinavia Belting Co.* v. *Asbestos & Rubber Works*, 257 Fed. 937 (C. C. A. 2) ("Scandinavia" as applied to

*In *Fawcett Publications* v. *Popular Mechanics Co.*, 80 F. (2d) 194 (C. C. A. 3), doubt was thrown on the decisions in *Photoplay Publishing Co.* v. *LaVerne Publishing Co.* and *Barton* v. *The Rex Oil Co.* by the very court which decided them. The court stated (p. 197): "It may be that the decrees went too far in absolutely enjoining the use of the descriptive words in the Photoplay and Dyanshine Cases for the reason that being descriptive words they could not be exclusively appropriated." Despite this fact, the *Dyanshine* decision was relied upon by this same court in its opinion on reargument in the case at bar (R. 3-A, p. 2069).

brake linings made in the United States); *Trappey* v. *McIlhenny Co.*, 281 Fed. 23 (C. C. A. 5) ("tabasco" as applied to pepper sauce). In all of these cases the proof showed (1) that the defendant had a fraudulent intent, (2) that the defendant's goods had been purchased as and for those of the plaintiff, (3) that deception of the public could only be prevented by an absolute injunction and (4) that the geographical or descriptive significance of the name enjoined was either incidental or commercially unnecessary, *i. e.*, that other words were available which were equally descriptive of the article as the words enjoined.*

For example, in *Wotherspoon* v. *Currie, supra,* the plaintiff sold a well known product under the name "Glenfield Starch". The defendant used the same name for starch made by him at Glenfield. It clearly appeared that defendant was attempting to trade upon the good will of the plaintiff and had selected Glenfield as the place of manufacture and as a trade-name for the sole purpose of consummating the fraud. Glenfield was a place with sixty inhabitants, not even large enough to constitute a village. The House of Lords, finding that the name as applied to starch had no real geographical connotation but signified only the goods of the plaintiff, granted an absolute injunction against use of the name. But compare *Clark, Son & Morland, Ltd.'s Trade Mark,* 1938, Vol. 2, All England Law Rep. Ann. 377. See also *Thompson* v. *Montgomery, supra, and Scandinavia Belting Co.* v. *Asbestos & Rubber Works, supra.*

* Moreover, none of these cases involved the name of a patent-expired article except the *Scandanavia* case and there the name, which the court held had not become generic during the life of the expired patent, had been used exclusively by the plaintiff for more than ten years after the expiration of the patent and prior to 1905 and was therefore properly registered under the ten-year clause of the Trade-Mark Act of 1905.

In *Barton* v. *The Rex Oil Co., supra,* a decision subsequently criticized by the very court which rendered it,* the manufacturer of a shoe polish known as "Dyanshine" sought to enjoin the defendant from using the words "Dye and Shine" as the name of its shoe polish. At the first hearing of the case, relief was limited to a requirement that defendant state that its product was not the product made by the plaintiff. On rehearing, however, it was established that this form of relief was ineffective to prevent passing off, and an absolute injunction against use of the words as a trade-name was granted. See also *Photoplay Publishing Co.* v. *LaVerne Publishing Co., supra.*

The significant fact about all of these cases is that the words enjoined were not in any sense commercially indispensable to free and fair competition in the article to which they were applied. Their adoption by the defendant in each case was for the purpose of trading on the plaintiff's reputation and in each case the court believed that consummation of the fraud could not be prevented except by an absolute injunction.

These decisions obviously have no application to a generic and descriptive name which is commercially indispensable if the public is to be told what the article is and what it is made of. No case has been cited or found in which an absolute injunction against the use of such a name has been granted. The authorities are unanimous that no such relief can be afforded.**

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* See footnote, page 92, *supra.*

** *Saxlehner* v. *Eisner & Mendelson Co.,* 179 U. S. 19; *The French Republic* v. *Saratoga Vichy Spring Co.,* 191 U. S. 427; *Saxlehner* v. *Wagner,* 216 U. S. 375; *Standard Paint Co.* v. *Trinidad Asphalt Manufacturing Co.,* 220 U. S. 446, aff'g *Trinidad Asphalt Manufacturing Co.* v. *Standard Paint Co.,* 163 Fed. 977 (C. C. A. 8); *Du Pont Cellophane Co.* v. *Waxed Products Co.,* 85 F. (2d) 75 (C. C. A. 2), cert. den. 299 U. S. 601, 82 L. ed. 1041; *Amiesite Asphalt Co.* v. *Interstate Asphalt Co.,* 72 F.

Under all of the authorities, therefore, petitioner, having the right to make the article, likewise has the right to use the only words in the English language which denote and describe the article.

C. Shredded wheat biscuits produced under respondent's patents were known to the public during the life of the patents only as shredded wheat or shredded wheat biscuits and, upon the expiration of the patents, the right to use these terms to designate the biscuits was dedicated to the public.

The doctrine that no generic name may be exclusively appropriated as a trade-mark applies with peculiar force to a name which, during the life of an expired patent, became the generic designation of the patented product. Ever since the decision of this Court in *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169, it has been established law that, upon the expiration of a patent, there passes to the public the right not only to make the patented article as it was made during the patent period, but also to apply thereto the name by which it then became known, provided only that the name be accompanied by indicia signifying the source of manufacture. *Holzapfel's Co.* v. *Rahtjen's Co.*, 183 U. S. 1; *Merriam Co.* v. *Syndicate Publishing Co.*; 237 U. S. 618; *The Singer Manufacturing Company* v. *Loog*, L. R. 8,

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(2d) 946 (C. C. A. 3); *Brooten* v. *Oregon Kelp Ore Products Co.*, 24 F. (2d) 496 (C. C. A. 9); *Bayer* v. *United Drug Co.*, 272 Fed. 505 (S. D. N. Y.); *Horlick's Food Co.* v. *Elgin Milkine Co.*, 120 Fed. 264 (C. C. A. 7); *Leclanche Battery Co.* v. *Western Electric Co.*, 23 Fed. 276 (S. D. N. Y.); *The Cellular Clothing Company* v. *Maxton & Murray*, [1899] A. C. 326, 16 R. P. C. 397; *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. Div. 834. See also *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169 and the other cases cited in the succeeding section of this brief, in which the same rule is applied to the name of a patent-expired product which became generic during the patent monopoly.

App. Cases 15 (House of Lords); *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. Div. 834; *Yale & Towne Manufacturing Co.* v. *Ford*, 203 Fed. 707 (C. C. A. 3).*

In the *Singer* case, the facts of which have been analyzed at page 67, *supra*, this Court stated the controlling principle as follows (pp. 185-186):

> "* * * It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly, in consequence of the designation having been acquiesced in by the owner, either tacitly, by accepting the benefits of the monopoly, or expressly by his having so connected the name with the machine as to lend countenance to the resulting dedication. To say otherwise would be to hold that although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly. In other words, that the patentee or manufacturer could take the benefit and advantage of the patent upon the condition that at its termination the monopoly should cease, and yet when the end was reached disregard the public dedication and practically perpetuate indefinitely an exclusive right.
>
> "The public having the right on the expiration of the patent to make the patented article and to use its

* See also *Centaur Co.* v. *Heinsfurter*, 84 Fed. 955 (C. C. A. 8); *Horlick's Food Co.* v. *Elgin Milkine Co.* 120 Fed. 264 (C. C. A. 7); *Warren Featherbone Co.* v. *American Featherbone Co.*, 141 Fed. 513 (C. C. A. 7); *Collis Co.* v. *Consolidated Machine Tool Corporation*, 41 F. (2d) 641 (C. C. A. 8), cert. den. 282 U. S. 886; *Amiesite Asphalt Co.* v. *Interstate Asphalt Co.*, 72 F. (2d) 946 (C. C. A. 3); *Du Pont Cellophane Co.* v. *Waxed Products Co.*, 85 F. (2d) 75 (C. C. A. 2), cert. den. 299 U. S. 601, 82 L. ed. 1041; *Leclanche Battery Co.* v. *Western Electric Co.*, 23 Fed. 276 (S. D. N. Y.).

> generic name, to restrict this use, either by preventing its being placed upon the articles when manufactured, or by using it in advertisements or circulars, would be to admit the right and at the same time destroy it. It follows, then, that the right to use the name in every form passes to the public with the dedication resulting from the expiration of the patent."

This principle, as this Court pointed out in its exhaustive opinion, is universally recognized by the American, English and French authorities.

Broadly the *Singer* case is but another application of the underlying principle that generic names of articles which all may sell cannot be exclusively appropriated. It simply applies this doctrine to names which, though distinctive when first adopted, become known as the name of a patented product during the patent monopoly.

This is well illustrated by *Linoleum Manufacturing Co.* v. *Nairn, supra,* cited with approval by this Court in the *Singer* case. There the plaintiff had patented a new type of floor covering which it called "Linoleum" during the patent period. The court held that after the expiration of the patent everyone had the right to use this name since the article could not be otherwise designated. In this connection the court said (pp. 836-837):

> "* * * It appears that the Defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no answer; and for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if *'Linoleum'* means a substance which may be made by the Defendants, the Defendants may sell it by the name which that substance bears.
>
> "* * * In my opinion, it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that

the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article. It is admitted that no such case has occurred, and I believe it could not occur; because until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name as shewing that the manufacture of one person is indicated by it and not the manufacture of another."

A similar ruling was made by this Court in *Holzapfel's Co.* v. *Rahtjen's Co., supra.* In that case, the plaintiff sold a particular type of ship paint, formerly protected by an English patent, under the name "Rahtjen's Composition", and sought to enjoin the defendant from using those words as part of a trade-name for its similar product. In denying relief, this Court said (pp. 9-10):

"* * * This way of designating the composition was employed by Rahtjen in Germany for his own sales, and Suter, Hartmann & Co. simply copied his method of describing the same. How else could this article thereafter be described? When the right to make it became public, how else could it be sold than by the name used to describe it? And when a person having the right to make it described the composition by its name and said it was manufactured by him, and said it so plainly that no one seeing the label could fail to see that the package on which it was placed was Rahtjen's composition manufactured by Holzapfel & Co., or Holzapfel's Composition Company (Limited), how can it be held that there was any infringement of a trade-mark by employing the only terms possible to describe the article the manufacture of which was open to all? Of necessity when the right to manufacture became public the right to use the only word descriptive of the article manufactured became public also.

"* * * If any one had desired to use this paint and had called for it in the market, he would necessarily have been compelled to describe it as 'Rahtjen's Composition,' as there was no other name for the

> article, and though in England while the patent lasted no one but the patentee or his licensees could manufacture the article, yet the description would still have been 'Rahtjen's Composition;' but when the patent expired the exclusive right to manufacture the article expired with it, while the name which described it became, under the facts of this case, necessarily one of description and did not designate the manufacturers. There was no other name for the article, and in order to obtain it a person would have to describe it by the words 'Rahtjen's Composition.' The words thus became public property descriptive of the article, and the right to manufacture it was open to all by the expiration of the English patent."

The court below recognized that, at the time of the expiration of respondent's patents in 1912, any competitor would have had a right to use "shredded wheat" as the name of its product, but held that this right was lost because of respondent's exclusive use of the words for more than ten years thereafter. This holding, we submit, reveals a complete misconception of the *Singer* doctrine.

The basic principle of the *Singer* case, as above stated, is that no one can monopolize the name of an article which all are free to make. At the expiration of respondent's patents in 1912, the words "shredded wheat" were clearly the name of the article which then became dedicated to the public. There has been no usage since that date which has changed their meaning. The formerly patented product is not known or adequately described by any other name today. Just as no period of exclusive sale of the article after the expiration of a patent can deprive the public of its right to manufacture and sell the formerly patented product, so no period of exclusive use of a product name can deprive the public of its right to call the article by its product name.

The ruling of the court below in this respect is directly contrary to the decision of the Circuit Court of Appeals for the Eighth Circuit in *Centaur Co.* v. *Heinsfurter*, 84

Fed. 955. There the plaintiff owned a patent on a medical preparation known as "Castoria" and continued in the exclusive manufacture of the product for ten years after the patent expired. The court nevertheless denied an injunction against the use of the word "Castoria" as applied to the defendant's product which was made in accordance with the disclosure of the expired patent. The court, through Mr. Justice Brewer, stated (p. 958):

> "But this matter of time makes no difference. The word had become known as the name of the thing, and as such it could not be appropriated as a trade-mark. * * * As well might a manufacturer of flour claim a trade-mark in the word 'flour', as the manufacturer of 'Castoria' a trade-mark in that name."*

See also *Collis Co.* v. *Consolidated Machine Tool Corporation*, 41 F. (2d) 641 (C. C. A. 8), cert. denied 282 U. S. 886.

The court below, referring to the ten-year clause of the Trade-Mark Act of 1905, permitting the registration of generic and descriptive names used exclusively for ten years prior to the passage of the Act, held that this provision is merely declaratory "of the equitable doctrine that the exclusive use of a trade-mark by a person for ten years after the expiration of the patent entitles him to the exclusive use of it thereafter" (R. 3-A, pp. 2091-2092). No cases were cited which support any such proposition. The trade-marks in *Scandinavia Belting Co.* v. *Asbestos & Rubber Works*, 257 Fed. 937 (C. C. A. 2) and *McKesson & Robbins* v. *Chas. Phillips Chemical Co.*, 23 F. (2d) 763

* The validity of the principle applied in the *Castoria* case is not questioned by the decision in *Centaur Co.* v. *Genesh*, 33 F. (2d) 985, decided in the Western District of Pennsylvania thirty years after Mr. Justice Brewer's decision, because in the later case it was found as a fact that Castoria is not and never was the product of the expired Pitcher Patent, although in the original *Castoria* case there was a finding that it was.

(App. D. C.)* were both registered under the Act of 1905 and held to be entitled to such registration under the express provisions of the Act because of exclusive use during ten years prior to the enactment of the statute. The ten-year clause, in contrast with most of the provisions of the federal statutes relating to trade-marks, is in derogation of the principle of the common law that no generic or descriptive term may be employed as a trade-mark, and there is no support to be found in any of the authorities for the ruling that this clause is merely declaratory of any principle in law or in equity which can make effective through exclusive usage for any period of time a trade-mark invalid in its inception because of its descriptive and generic character. The right to individual appropriation of the name once lost is gone forever. This is so regardless of patent expiration. *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 36. It follows that the *Centaur* and *Collis* cases, dealing with the effect of patent expiration and holding the rule to be contrary to that stated by the court below, are correct. The ten year clause, being expressly limited in its application to marks exclusively used during the period from 1895 to 1905, cannot be extended by judicial construction to include cases clearly not within its terms.**

Scant attention need be paid to the contention that because the words "shredded wheat" were applied to the

* In this case, registration of the words "milk of magnesia" under the ten-year clause of the 1905 Act was allowed. The registration was subsequently cancelled, however, on the ground that the registrant had not been the exclusive user of the words during the ten-year period. *McKesson & Robbins, Inc.* v. *Chas. Phillips Chemical Co.*, 53 F. (2d) 342, 1011 (C. C. A. 2), cert. den. 285 U. S. 552.

** Registration of "Shredded Whole Wheat" under the 1905 Act was refused because the words had not been used exclusively as a trade-mark but only as descriptive of the biscuit during the statutory period. *Natural Food Co.* v. *Williams*, 30 App. D. C. 348. See pp. 10-11, *supra*.

biscuits before the patents were secured, the *Singer* rule does not control this case. Surely respondent is not entitled now to a monopoly of the national market in this product because Perky for a year or two prior to the issuance of his patents sold shredded wheat biscuits (not even under the trade-name "Shredded Wheat") in a small restaurant in Denver. The decision of this Court in *Holzapfel's Co. v. Rahtjen's Co., supra,* determines this point. The *Singer* rule was there applied to the words "Rahtjen's Composition" even though that name had been used in connection with the paint before the English patent had been secured. See also *Bayer* v. *United Drug Co.*, 272 Fed. 505 (S. D. N. Y.). *Batcheller* v. *Thompson*, 93 Fed. 660 (C. C. A. 2) and *President Suspender Co.* v. *MacWilliams*, 238 Fed. 159 (C. C. A. 2), upon which respondent relies, were simply cases where the name, rather than the patent, gave value to the article. Neither name involved in those cases had become known to the public during the patent period as the identifying and generic name of the patented article. These cases are, of course, inapplicable to the facts of the case at bar; even the court below recognized that at the expiration of respondent's patents, "shredded wheat" was the generic name of the article which everyone was then free to use.*

The *Singer* doctrine, as applied to the case at bar, creates no new rights in the petitioner; it simply reinforces what would otherwise be entirely clear, that the petitioner, having the right to manufacture and sell shredded wheat biscuits, has the right to say that it is doing so and for that purpose to use as the name of its

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* Moreover, although the Denver sales may have occurred prior to the issuance of Perky's basic product and process patent and his design patent in 1895, application for the basic patent was made in 1894 (R. 5, p. 89) and Perky had secured a patent as early as 1893 (application for which was filed in 1892) which covered the basic principles for the production of shredded wheat (R. 5, p. 3; see also R. 5, p. 9).

product the name of the article which it is producing. The opinion of Lord Chancellor Selborne in *The Singer Manufacturing Company* v. *Loog*, L. R. 8, App. Cases 15 (House of Lords), the English edition of *Singer Manufacturing Co.* v. *June Manufacturing Co.*, well summarizes the applicable legal principle (p. 27):

> "* * * The reputation acquired by machines of a particular form or construction is one thing; the reputation of the plaintiffs, as manufacturers, is another. If the defendant has no right, under colour of the former, to invade the latter, neither have the plaintiffs any right under colour of the latter, to claim (in effect) a monopoly of the former. If the defendant has (and it is not denied that he has) a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct, and unequivocal way."

POINT IV.

Petitioner's Use of a Pictorial Representation of Its Biscuits on Some of Its Cartons and in Some of Its Advertisements Does Not Constitute Trade-Mark Infringement or Unfair Competition.

In its bill of complaint, respondent prayed for an injunction against the use on some of petitioner's Whole Wheat Biscuit cartons and in some of its advertisements of a pictorial representation of two of petitioner's small size biscuits in a dish of milk (R. 1, p. 25). Although this prayer was not granted by the court below, that court in its opinion on respondent's petition to recall and clarify the mandate stated that it had intended to provide for such an injunction, and added: "Its use on a carton or in adver-

tising matter, when the defendant is not permitted to use the word 'Shredded Wheat' as a trade name or to advertise or sell biscuits in the pillow-shape form, would manifestly be so improper and so likely to mislead that we will assume that the appellee will not use it'' (R. 3-A, p. 2285).

If petitioner has no right to make and sell shredded wheat biscuits in the pillow-shaped form, it obviously has no right to place on its cartons a picture of a pillow-shaped biscuit; if, however, it has a right to make the biscuits, it seems entirely clear that it can tell the public what it is making, not only by describing its product verbally through use of the words shredded wheat, but also by describing it visually through pictorial representation.

The illustration used by petitioner obviously is not an infringement of respondent's alleged trade-mark No. 216,593 (R. 4, p. 205), consisting of a picture of a dish containing two of respondent's biscuits immersed in milk or cream. Respondent's application for the registration of this alleged trade-mark disclaimed any exclusive right to the representation of the biscuits ''apart from the mark shown on the drawing'' (R. 4, p. 205). Comparison of the illustration used by respondent (R. 1, p. 207) with that used by petitioner (R. 1, p. 217) shows no violation as to the bowl or plate which the District Court held petitioner had a right to use (R. 1, p. 228). The disclaimer preserves to all others the right truthfully to represent the biscuits by pictorial illustration except in such manner as to confuse or deceive purchasers. *Beckwith* v. *Commissioner of Patents*, 252 U. S. 538. Petitioner's illustration is distinguishable from respondent's illustration and no deception or confusion is possible because it is used only as part of the decoration upon petitioner's highly distinctive cartons and in its advertisements in association with its name as manufacturer.

Moreover, the dish picture has been employed by respondent, not as a distinctive trade-mark to indicate origin, but simply as a pictorial description of its product.

For example, respondent's former advertising manager testified that in 1908 the picture theretofore used of a dish containing only one biscuit was changed to the present two-biscuit illustration in order to induce people to eat two biscuits instead of one and thereby to double consumption (R. 1, p. 570; see also R. 1, p. 324). Similarly, in some years during the strawberry season, the biscuit has appeared in the picture in a dish with strawberries and cream; during other seasons it has been shown with bananas, prunes and various other stewed fruits (P. Exs. 87-112). This is obviously not trade-mark use; trade-marks do not alternate with the seasons. Illustrations similarly used as a pictorial description of the product were held not entitled to trade-mark protection in *Bristol Co.* v. *Graham,* 199 Fed. 412 (C. C. A. 8), *In re Scholl Manufacturing Co., Inc.,* 267 Fed. 348 (App. D. C.) and *Rit Products Corporation* v. *Park & Tilford,* 55 F. (2d) 436 (Cust. and Pat. App.).

Petitioner's illustration appears only on the distinctive Kellogg cartons and in advertisements which prominently display the Kellogg name. Therefore, unless it is unfair competition for Kellogg to sell shredded wheat biscuits at all, it cannot be unfair competition for Kellogg to reveal pictorially that it is doing so. *Shredded Wheat Co.* v. *Humphrey Cornell Co.;* 250 Fed. 960 (C. C. A. 2); *Bristol Co.* v. *Graham,* 199 Fed. 412 (C. C. A. 8); *Van Kannel Revolving Door Co.* v. *American Revolving Door Co.,* 215 Fed. 582 (C. C. A. 7).

In *Shredded Wheat Co.* v. *Humphrey Cornell Co.,* discussed at pages 17-18, *supra,* the defendant sold shredded wheat biscuits in distinctive cartons containing an illustration of its biscuit, which was identical in size and appearance with the respondent's biscuit. The Circuit Court of Appeals for the Second Circuit denied the respondent all relief with respect to the carton trade, holding that the distinctiveness of the defendant's package precluded any possibility of passing off. Similarly, in *Van Kannel Revolving Door Co.* v. *American Re-*

volving Door Co., supra, the Circuit Court of Appeals for the Seventh Circuit dismissed a bill of complaint seeking to enjoin the defendant from using a cut of a revolving door, similar to one shown in the plaintiff's catalogue, concluding that "Inasmuch as defendant may now make the door, it may illustrate it in its advertisements" (p. 584). See also *Bristol Co.* v. *Graham, supra.*

POINT V.

Respondent's Claim to the Exclusive Right to Make the Biscuit in the Pillow-Shaped Form, to Call It By Its Name and to Illustrate It By Pictorial Representation is Without Merit Because of Its Disclaimers of Those Very Rights in Its Trade-Mark Registrations.

As has been pointed out above (p. 11), respondent in three trade-mark registrations expressly disclaimed any exclusive rights in the appearance of the piflow-shaped biscuit and in the descriptive words shredded wheat. Yet this suit seeks, and the decree of the court below conveys, precisely the trade-mark protection which respondent thus disclaimed.

This Court in *Beckwith* v. *Commissioner of Patents,* 252 U. S. 538, declared that such disclaimers cannot thus be repudiated. In that case a mark consisting of a fanciful design employed in connection with the descriptive words "Moistair Heating System" was registered under the Trade-Mark Act of 1905 and the descriptive words were disclaimed. In the course of its opinion, this Court stated (pp. 545, 546):

> "It seems obvious that no one could be deceived as to the scope of such a mark, and that the registrant would be precluded by his disclaimer from setting up in the future any exclusive right to the disclaimed part of it. * * *

> "A disclaimer on the part of applicant that no claim is made to the use of the words 'Moistair Heating System' apart from the mark as shown in the drawing and as described, would preserve to all others the right to use these words in the future to truthfully describe a like property or result of another system, provided only that they be not used in a trade-mark which so nearly resembles that of the petitioner 'as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers' when applied 'to merchandise of the same descriptive properties'."

Holzapfel's Co. v. *Rahtjen's Co.*, 183 U. S. 1, is to the same effect.*

Since respondent has for many years had trade-mark protection only because of its disclaimer of any exclusive right to the name and appearance of its product, it is now precluded from claiming that which it has formally and deliberately renounced in order to secure such protection.

Conclusion.

We respectfully submit that the orders of April 12, 1937 and May 5, 1938 entered by the Circuit Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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* *Cf. Warner-Patterson Co.* v. *Malcomb*, 39 F. (2d) 274 (Cust. and Pat. App.); *In re Continental Oil Co.*, 75 F. (2d) 217 (Cust. and Pat. App.); *In re Canada Dry Ginger Ale, Inc.*, 87 F. (2d) 736 (Cust. and Pat. App.).

Appendix A.

Analysis of the Objections to Each of the Irregular-Shaped Biscuits Suggested by Respondent.

Respondent introduced in evidence six biscuits in different irregular shapes which it contended were just as commercially practicable for defendant to manufacture and sell as the pillow-shaped biscuit. These irregular-shaped biscuits were marked as Plaintiff's Exhibits 240 to 245, inclusive, and photographs of them, subsequently introduced in evidence, were correspondingly marked as Plaintiff's Exhibits 240-A to 245-A (R. 4, pp. 111-121). The process by which each such biscuit was made was described by respondent's witness Oakes (R. 1, pp. 270-276).

The record conclusively establishes that it is not commercially practicable to make any of these irregular-shaped biscuits (R. 2, pp. 1113-1115, 1131, 1142-1144, 1162). A detailed analysis of the objections to each appears below at pages 110-112). Before making this detailed analysis, however, some of the objections common to several or all of the irregular-shaped biscuits will be discussed.

(1) *Wastage.* In cutting shredded wheat into oblong biscuits, there is no normal waste of the product (R. 2, p. 1118). The wheat emanates from the shredding rolls in long shreds which are piled on top of one another and are then subdivided into the size biscuit desired; all of the wheat is used. If, on the other hand, an irregular-shaped biscuit is made, not all of the shreds can be used; there is necessarily a great deal of scrap, amounting in the case of at least one of the suggested biscuits to as much as 50% (R. 2, pp. 1118, 1142, 1143).

So far as petitioner is concerned, this scrap is entirely wasted; Kellogg does not reprocess its scrap but sells it for wet feed for animals (R. 2, pp. 1115, 1141-1142). Reprocessing has been tried but it has not proved satisfactory because it makes the shreds harder and more doughy and makes them lose the identity of the bran (R. 2, pp. 1115-1117; R. 3, p. 2037). A biscuit made of reprocessed scrap was introduced in evidence as Defendant's Exhibit 198; it was shown to be heavier and harder than the regular

biscuit and, although placed in the oven for twice the normal time, was less well baked because the heat could not penetrate it as well (R. 2, p. 1117; R. 3, pp. 2037-2038).

Moreover, if the scrap resulting from the manufacture of an irregular-shaped biscuit were reprocessed, a large portion of the reprocessed shreds would inevitably become scrap again when the next batch of biscuits was cut. Every biscuit, therefore, would contain shreds which were reprocessed not only once but two, three or four times. The shreds, of course, would become progressively worse with each reprocessing (R. 2, pp. 1119, 1142) and the expense of manufacturing the biscuit would be enormously increased (R. 2, pp. 1142, 1147).

The manufacture of any biscuit, the shape of which results in any appreciable amount of wastage, is, therefore, impracticable. Either the scrap must be sold as animal feed, thereby increasing the cost of manufacturing the biscuit by the cost of the wasted material, or it must be reprocessed, thereby making the biscuit of inferior quality and likewise increasing its cost by the cost of the requisite extra processing.

(2) *Heat Penetration.* In order properly to bake a shredded wheat biscuit its composition must be such that the heat from the ovens can penetrate it fully. The pillow-shaped biscuit is so composed, since it is open at both ends and puffs during the baking process. This puffing is essential to the distribution of the heat (R. 2, p. 1114). A biscuit, such as each of the irregular-shaped biscuits suggested by respondent, which is not open at any of its edges and therefore cannot puff as does the pillow-shaped biscuit, cannot be properly baked (R. 2, pp. 1114-1115).

(3) *Hard Edges.* Any shredded wheat biscuit necessarily has hard edges or rims where the knives pinch the shreds together; these hard edges are objectionable, not only because they do not allow proper heat penetration, but also because they are not as tender or palatable as is the remainder of the biscuit (R. 2, pp. 1113-1114, 1130). These hard portions are reduced to a minimum in the pillow-shaped form of biscuit because only the sides are sheared together, the ends remaining open. Each of the irregular-

shaped biscuits suggested by respondent, on the other hand, has hard rims on all sides, making them highly undesirable from a commercial standpoint (*id.*).

(4) *Packing and Breakage.* Shredded wheat biscuits are fragile and therefore must be packed largely by hand (R. 1, pp. 268, 277-278; R. 2 p. 1142). The pillow-shaped biscuit lends itself readily to packing, and, when packed, it is held on all four sides and is thus protected against breakage (R. 2, pp. 1143-1144). The irregular-shaped biscuits, on the other hand, would be far more difficult to place in a carton and would tend to create considerable spoilage in the packing process (R. 2, pp. 1130-1131, 1142-1143). Moreover, there would be space between the biscuits in the carton which would require expensive and objectionable stuffing and which would increase the breakage in shipment (*id.*). The added expense thus caused would make profitable competition virtually impossible. Use of irregular-shaped cartons would not obviate the difficulty since excessive breakage would still occur, and, in any event, such cartons would be entirely unmarketable (R. 2; p. 1178).

The two major tests for determining the commercial practicability of any biscuit are, of course, the cost of production and the edibility of the biscuit. The following detailed analysis of the particular objections to each of the suggested irregular shapes demonstrates that none of them meets these tests.

Diamond-Shaped Biscuit
(Plaintiff's Exhibits 240 and 240-A)

In the manufacture of this biscuit there would be a 50% wastage (R. 2, pp. 1118, 1142). The biscuit has four sharp hard edges, which is commercially objectionable in and of itself and which prevents the proper puffing essential for the distribution of heat (R. 2, p. 1114). If packed in a rectangular carton, there would be empty spaces between the biscuits which would cause tremendous breakage and would require objectionable stuffing (R. 2, pp. 1130, 1141, 1142). Breakage would be particularly great because the corners of the biscuit are excessively fragile (R. 2, pp. 1130, 1141). Moreover, the manufacture of this biscuit

would be extremely difficult, if not impossible, because of the necessity of fitting knives diagonally across the cutter chain (*id.*).

Triangular or Cone-Shaped Biscuit
(Plaintiff's Exhibits 241 and 241-A)

Although this biscuit can be made without wastage with a hand mold, it is not a practical biscuit from the standpoint of commercial manufacture (R. 2, p. 1127). It has sharp hard edges which are objectionable of themselves and which do not allow proper puffing and heat penetration (R. 2, pp. 1113-1114). The labor cost of packing this biscuit would be double that of packing the pillow-shaped biscuit (R. 2, p. 1142). There would also be undue breakage in handling the biscuit because of its fragile end (R. 2, p. 1142-1143).

Doughnut-Shaped Biscuit
(Plaintiff's Exhibits 242 and 242-A)

The manufacture of this biscuit would cause wastage of approximately 38% (R. 2, p. 1142). Its entire outer and inner rim is a sharp, hard and objectionable edge, not allowing the proper heat penetration (R. 2, p. 1114). This biscuit would be difficult to pack and, since only the edges of the biscuit would touch the package, there would be excessive breakage (R. 2, p. 1142).

Large Round-Shaped Biscuit and Small Round-Shaped Biscuit
(Plaintiff's Exhibits 243, 243-A, 244 and 244-A)

In the manufacture of both of these biscuits there would be a wastage of approximately 27% (R. 2, p. 1143). They both have the same objections as the doughnut-shaped biscuit, *i. e.*, hard outer edges, lack of proper heat penetration, difficulty in packing and excessive breakage (R. 2, pp. 1115, 1143).

Round Molded Biscuit
(Plaintiff's Exhibits 245 and 245-A)

This biscuit has the same objections as the two other round biscuits above discussed, except that, being made in a mold, there would be less wastage (R. 2, p. 1119). However, this type of biscuit would not be practicable to

make as it would require continual starting and stopping of the machinery in filling the mold (R. 2, p. 1143). This would, of course, make economical production impossible. This biscuit could not be made on the Perky machinery, used by both respondent and petitioner, which provides for continuous operation with a continually moving cutter chain (R. 2, p. 1143).

Appendix B.

TYPICAL EXCERPTS FROM THE TESTIMONY SHOWING THAT PETITIONER'S GOODS HAVE NOT BEEN AND COULD NOT BE CONFUSED WITH THOSE OF RESPONDENT.

References to the testimony of some 150 witnesses called by both parties to the effect that petitioner's cartons and its biscuit are entirely distinctive and have not been and could not be confused with those of the respondent are given at page 36, *supra*. In order that the Court may appreciate the full force of this testimony without resort to the record, we call attention to the following few excerpts as typical of scores of others equally cogent.

Respondent's witness, Howard Duane, a consumer, testified (R. 1, p. 302):

> "I saw immediately that the biscuit handed to me in this carton was not the biscuit I had been getting. I noticed the size was shorter than the Shredded Wheat Biscuit. I knew it was not the biscuit made by National Biscuit Company or the Shredded Wheat Company. * * *
>
> "The product that I consumed at the station was not Shredded Wheat. I knew it was not Shredded Wheat. It was wheat that was shredded, but I knew it was not the product of the Shredded Wheat Company."

Irma Colliflower, another consumer witness called by the respondent, stated (R. 1, p. 428):

> "* * * I had seen Kellogg's product on the shelves in stores and knew immediately that I was not being given the original Shredded Wheat as the

carton did not contain a picture of the Falls nor was it marked 'Home of the Shredded Wheat.' I understood right away that she was giving me a product made by Kellogg Company."

Similarly, George John Borneman, a grocer called by the respondent, stated (R. 1, p. 446):

"* * * I immediately recognized a difference in the biscuit, first in the package and then in the size and taste of the biscuit."

Respondent's witness, Theodore Keenan, a consumer, testified (R. 1, p. 452):

"I had never seen the Kellogg small package but had seen the Niagara Falls package and knew instantly that I was not getting the Niagara Falls product when the girl at Kresge's handed me the package."

Likewise Allan H. Fagan, a consumer testifying for the respondent, said (R. 1, p. 635):

"* * * As soon as the little package was handed to me, I knew right away it was not Niagara Falls Shredded Wheat, by the box. When I took the biscuit out of the carton I noticed it was a small biscuit."

John F. B. McCrum, another of respondent's consumer witnesses, stated (R. 1, p. 656):

"I saw the package he took down from the shelf, that it was a Kellogg package, when he put it on the counter. I recognized then right away it was a Kellogg package. * * * I knew right away, when I looked at it, that it was not the package the grocer was handing down to me. * * *

"* * * Looking at the contents of Defendant's Exhibit 6, I really could not tell you whether that looks like Shredded Wheat. It does not look like the National Biscuit Shredded Wheat."

Respondent's witness, Adele MacDuffie, gave testimony to the same effect. She stated (R. 2, p. 789):

"As soon as the clerks at these stores brought out the Kellogg packages, I knew right away it was not

the National Biscuit package; and I said right away, 'This is not Shredded Wheat.' By that I meant that it was not the National Biscuit Company's Shredded Wheat. I did recognize it, however, as Kellogg's Shredded Wheat."

The testimony of William C. Ruch, another of respondent's consumer witnesses, is similar. Mr. Ruch stated (R. 2, pp. 803-804):

"• • • As soon as I saw Kellogg's, I recognized right away that it was a different size shredded wheat and it was not what I wanted. • • •

"If my wife had bought the Kellogg's shredded wheat without telling me anything about it and had put some of them into a plate and served me in the dining room, I would have seen right away that I was getting a different shredded wheat than I had had."

Sidney A. Nelson, a retail grocer testifying for respondent, stated (R. 2, p. 845):

"Taking the resemblance between these two biscuits, surely, if I and most of my customers saw the two packages side by side, we would have no doubt that they are different products of different companies. • • •

"If two of Kellogg's Whole Wheat Biscuit were put in a plain dish and set on the table in front of the average householder or person who uses these cereals, they would know at once that they had gotton something different than Shredded Wheat. They would immediately notice it was a different product."

Mrs. W. A. Mahaffey, another of respondent's consumer witnesses, gave similar testimony (R. 2, p. 889):

"• • • My husband is the one who eats the cereals at our home, mostly. I served him Kellogg's biscuit. He did not think he was getting the same biscuit. He wanted to know why I did not get the other kind of biscuit. He always does that when I get a different kind of biscuit than Shredded Wheat. He always sees the difference right away. • • • The first time Kellogg's biscuit was handed to me in

the store, I recognized right away that it was not the National Biscuit package, because it is in a different box, and a different size."

Typical of the testimony given by wholesale grocers is that of David H. Bergey (R. 2, p. 1364):

"• • • There is no confusion in our house in ordering those two brands. They are separate and distinct, listed that way, and sold that way. We have never had instances where one was returned to us with the statement they wanted the other kind. I am familiar with both packages. I do not think the Kellogg package has any similarity to the Niagara Falls package."

Retail grocers testified to the same effect. Typical is the statement of Nat C. Reis, who said (R. 3, p. 1615):

"We have no confusion in this store between those two products. They call for them by brand name. Kellogg's Whole Wheat Biscuit is shredded whole wheat—that is, a shredded wheat biscuit, smaller than the other, with more in a package. I know of no way to describe it, other than to call it shredded whole wheat biscuit. I do not believe you could call it anything else. You could not mix up the dress of the packages. The Kellogg biscuit is in the same dress as the rest of the Kellogg line. There could be no confusion between that and the Niagara package at all."

John A. DeMallie, likewise a retail grocer, stated (R. 3, p. 1522):

"I have never practiced substitution in regard to the Kellogg Product. I do not see how it could be substituted for the Niagara Falls Shredded Wheat, because there is so much difference in the package. I do not believe you could substitute it, even to a child."

Another retail grocer, Cresson A. Medlin, also testified to the complete absence of confusion between respondent's and petitioner's biscuits (R. 3, p. 1737):

"I never, that I remember, had any mixup or confusion between the two products, when I was carrying

both. I never had any customer send back one and say she wanted the other one as far as I recall. The customers differentiated between the two. They would just ask for Kellogg's, and that was all there was to it."

To the same effect is the testimony of David D. Kay (R. 3, p. 1753):

"• • • It is pretty hard to mix them today, because there is so much difference between the two products, it is hard work to get them confused. I know of no instance of confusion, because you get a large biscuit of shredded wheat. On Kellogg's, you have a different kind of end, package, product inside, different shape and size, and everything else. I cannot see any chance of confusion."

Mrs. Mary E. Keene, a consumer witness for the respondent, stated (R. 3, p. 1788):

"• • • When I first saw Kellogg's biscuit, I did not by any means think it was the same biscuit I had been using. I remember the difference in size. Kellogg's biscuit fits my dishes better. We have had several people at home remark on the niceness of the biscuit and how they liked it, comparing it with shredded wheat biscuit."

The situation is well summed up in the testimony of Edwin A. Wurster, a wholesale grocer, who said (R. 3, p. 1792):

"• • • If a customer asks for shredded wheat and the retailer hands them the Kellogg package like Plaintiff's Exhibit 161, unwrapped, it might be an attempt at substitution on the part of the retailer, but it would be a very foolish attempt, because a person would have to be blind. If I go in a store and ask for shredded wheat, meaning the Niagara package, if they handed me the Kellogg package, I could see it was not the same in shape, appearance or color."

Appendix C.

ANALYSIS OF TESTIMONY RELIED UPON BY RESPONDENT TO SHOW CONFUSION AND PASSING OFF.

As stated above (p. 37, *supra*), respondent's attempt in its brief in the court below to prove that there had been "Actual Instances of Confusion and Passing Off" failed to reveal any actual case where such passing off had occurred.

We have already shown (p. 37, *supra*) that most of the witnesses upon whose testimony respondent relied stated only that when a consumer asked for shredded wheat, he was or could be offered a package of "Kellogg's Whole Wheat Biscuit", that sometimes grocers receiving an order for shredded wheat did not know whether respondent's or petitioner's product was meant, and that Kellogg's biscuit was sometimes offered to consumers as a shredded wheat product.

Of all the other witnesses whose testimony was referred to, eleven, all of whom were called by respondent, merely expressed the viewpoint that they considered it unfair for petitioner to put out a biscuit in competition with respondent after respondent had built up the shredded wheat trade by years of advertising and sales effort.* Examination of the testimony of five others fails to reveal any evidence that in any way indicates confusion, deception or passing off;** indeed, one of these five testified that she was a consumer of Kellogg's Whole Wheat Biscuit and had never purchased or eaten respondent's product (R. 2, p. 1286).

Mrs. Grace Darling, a consumer, stated merely that as she was walking up the aisle of a market, a clerk held out a package of Kellogg's biscuit, that she saw the picture on the package but did not stop to examine the carton

* R. 1, Hamilton, p. 355, Miller, p. 434, Orr, p. 450, Miller, p. 462, Leighton, p. 476, Planz, p. 498, Warren, p. 519, Gotwalt, pp. 525-526, Watkins, p. 546, Evans, p. 648; R. 2, Nelson, p. 839.

** R. 2, Maude, p. 1216, Condon, p. 1286, Florian, p. 1309; R. 3, Young, p. 1465, Denison. p. 1496.

and did not see the Kellogg name. She simply told the clerk to send the carton to her house. Her son opened the package before Mrs. Darling returned home and immediately knew that the biscuit was different from respondent's product to which he had always been accustomed (R. 1, p. 396).

Edward E. Sweet, a consumer, testified that, while reading his newspaper in a restaurant, he was served with petitioner's product in response to an order for shredded wheat. Without looking at it, he removed one of the biscuits from the carton. As soon as he tasted the biscuit, he knew it was not respondent's product. Looking at the carton for the first time then, he saw immediately that it was a Kellogg package and, when he examined the biscuit, noticed that it was shorter than the biscuit to which he had been accustomed (R. 1, p. 325).

Henry Adrian, retail grocer, testified that it would be hard to differentiate respondent's and petitioner's biscuits outside of the package; he had recognized, however, that petitioner's biscuit was smaller and crisper. He knew of no passing off, and in the only instance when he produced Kellogg's package in response to a request for shredded wheat, the customer stated that she wanted the other brand. He further testified: "I do not think one glancing at Exhibit 14 would be led to believe it was the Niagara Falls Shredded Wheat; because, if they did not have Niagara Falls on, they would know it was not the shredded wheat they had always been buying. Maybe they would know it was a biscuit of the same kind" (R. 1, pp. 384-387).

Elmer R. Jones, retail grocer, testified that Kellogg's Whole Wheat Biscuit was never sold as respondent's product and that a distinctive demand had been built up for it because of its size and the number of biscuits in the package (R. 1, pp. 538-539). He said that petitioner's biscuit had been easier to sell because of the popularity of respondent's biscuit, and that there was a possibility that a customer seeing petitioner's package with the dish picture might be led to think it was respondent's product. He gave no testimony that any such instance had ever occurred (R. 1, pp. 539-540, 543).

George Schapansky, a consumer, told a conflicting story. Having first testified that he was frequently served biscuits in restaurants outside of the carton and that he could not tell whether they were respondent's or petitioner's product (R. 2, p. 716), he then said that, with one exception, all the biscuits served to him without the carton were respondent's long biscuit. The exception was an instance when he saw petitioner's individual carton before the waitress threw it away and recognized it as a Kellogg package (R. 2, 716, 725). He also testified that when he examined petitioner's package in a self-service grocery store, he recognized it as a different product from respondent's (R. 2, pp. 717-718). This witness, who was a grocery clerk for a year, did not know that Kellogg's packages are all predominantly green and red, and did not recognize any family relationship between the Kellogg Whole Wheat Biscuit package and the Kellogg Corn Flake package (R. 2, p. 723).

Mrs. Jessie M. Fatjo, a consumer (R. 741-746), testified that she went into a store, asked for shredded wheat and was given a package of Kellogg's Whole Wheat Biscuit. She was in a hurry and just glanced at the package without seeing the name on it. It struck her as not quite familiar, however, so she asked whether it were shredded wheat and was told it was. As soon as she started home and really looked at the package, she saw it was not respondent's product. She ate a few of the Kellogg biscuits and noticed their small size. She testified that she could tell respondent's and petitioner's product apart outside the carton.

George J. Born, a retail grocer, testified only that his customers wanting shredded wheat biscuits were "confused" because they did not know whether to take respondent's or petitioner's brand (R. 2, 750). Customers asking merely for shredded wheat were always given respondent's brand (R. 2, p. 754). The witness testified to no confusion or possibility of confusion between the two brands.

William G. Eastman, a grocer (R. 2, p. 756), was confused by a dealer advertisement of "SHREDDED WHEAT—Kellogg's" because he didn't read far enough to see the word "Kellogg's." The witness testified to no case of customer confusion between the two products.

W. D. Van Ardsdale, a retail grocer, testified to an instance when a customer sent her twelve year old son for a package of shredded wheat, desiring respondent's brand thereof, and he picked out a package of Kellogg's without stopping to read it. When he took it home, his mother immediately recognized that it was petitioner's brand and sent her son back to change it (R. 2, p. 762).

Sidney W. Rodda, one of respondent's district sales managers, merely testified that the sale of petitioner's biscuit has been aided by the popularity of respondent's biscuit (R. 2, p. 820). He also said: "I believe the Kellogg Company has used all the ordinary and best known, most effective methods of introducing a new product to the consuming public through the retail trade, referring to Kellogg's Whole Wheat Biscuit. There is no indication in the stores that the Kellogg Company was trying to conceal the fact that it was in the market with a whole wheat biscuit" (R. 2, p. 815). The witness did not testify to any confusion or passing off or any likelihood thereof.

R. L. Waugh, a grocer, testified that in a few instances customers had picked up petitioner's package without looking at the name, thinking it was respondent's product, and that he would have to correct them (R. 2, pp. 849-50). He further stated that he believed that respondent's carton had "never registered itself on the memory of the general public in any way" and that consumers who opened petitioner's package would discover the difference in the biscuits and know that they were not respondent's product (pp. 854-855).

Henry L. Dingee, a grocer, stated that he believed there was a possibility of confusion between respondent's and petitioner's packages—and then conceded that the Kellogg Whole Wheat Biscuit package was as distinctive as any other Kellogg package and that anyone who might confuse it with respondent's package might "also pick up a package of Kellogg's Corn Flakes and think they were getting a package of Shredded Wheat" (R. 2, pp. 862, 872-873).

Howard P. Burke, a consumer, testified that in response to an order for shredded wheat in a restaurant he was brought a box of petitioner's biscuit. He asked the waitress

whether it was shredded wheat and she told him that it was. He then told the waitress that the box bore the name "Kellogg's Whole Wheat Biscuit" and the waitress replied that it was the same thing as shredded wheat (R. 2, p. 884). He further testified to having received petitioner's product in individual cartons on previous occasions and that he remembered the name "Kellogg's" because it was prominent on the package (R. 2, p. 886). Mr. Burke also stated that he had several times received shredded wheat in a restaurant outside of the carton but could not say whether what he had received was respondent's or petitioner's product (R. 2, pp. 887-888).

Paul W. Siebert, a grocer, testified only that a customer of his believed that some packages of Kellogg's biscuit which were sold from a wagon, contained respondent's product until she looked at the packages in his store, when she at once saw the difference between the two cartons. He further stated that petitioner's package could never be put out for respondent's (R. 2, p. 893).

Julius D. Frank (R. 3, p. 1485) testified that there was, in general, no confusion in his store between the two brands but that sometimes foreigners did not know which shredded wheat they wanted, Kellogg's or respondent's.

Appendix D.

TYPICAL EXCERPTS FROM THE TESTIMONY SHOWING THAT "SHREDDED WHEAT" IS COMMONLY USED AND UNDERSTOOD AS THE DESCRIPTIVE AND GENERIC NAME OF THE ARTICLE.

The witnesses called by both parties consistently used the words shredded wheat in a generic sense, described the article as made of wheat which has been shredded, and stated that they knew of no other name for the article than shredded wheat or shredded whole wheat. References to the testimony of over 100 of these witnesses is given at page 78, *supra*. Typical excerpts from the testimony follow.

Respondent's witness Alfred F. Braun, testified (R. 1, p. 415):

> "I understand 'shredded wheat' to be a wheat product made into biscuit form and shredded. I

recognized that Kellogg's Whole Wheat biscuit was a shredded biscuit the first time I saw it. I know of no other way of describing this product and have never heard any other name applied to it."

William P. Fisher, one of respondent's consumer witnesses, stated (R. 1, p. 463):

"* * * When the biscuit was served in the bowl I had no doubt about it being a shredded wheat biscuit product, that is, a wheat shredded into shreds and put into biscuit form."

Charles Berman, a retail grocer called by respondent, said (R. 1, p. 617):

"* * * I do not know any other name for Shredded Wheat, except Shredded Wheat. If anybody asked me what a Post Toasty was, I would say it was a corn flake. If anybody asked me what shredded wheat was, shredded wheat is the only name for it I know."

Similarly, respondent's witness Alexander Aitken testified (R. 1, p. 637):

"* * * Whole Wheat Biscuit might be one of six or eight different kinds of products, a flat biscuit, a pillow-shaped biscuit, or a rosette-shaped biscuit, to me. If, however, the package carried the name Kellogg's Shredded Wheat Biscuit, I would expect to find shredded wheat. I would know it was shredded wheat; meaning, by that, a pillow-shaped biscuit made out of wheat in shredded form."

George J. Born, another of respondent's grocer witnesses, stated (R. 2, pp. 749-750):

"* * * Shredded Wheat has no other current name, as far as I know, than the words Shredded Wheat. Uneeda Biscuit is a soda cracker; but I do not know any other name for shredded wheat or shredded wheat biscuit than the words Shredded Wheat or Shredded Wheat Biscuit. I should say Shredded Wheat is only Shredded Wheat. * * *

"If a manufacturer made that product, I do not know any other name that would describe it than the words shredded wheat or shredded wheat biscuit. I would not know what else he would call it. * * * I could not suggest any other name by which it could be described. I would not know any other name than shredded wheat biscuit."

Mrs. R. E. Anderson, a consumer called by respondent, gave the following typical testimony (R. 2, p. 794):

"When I looked through the cellophane window in this package, I saw it was shredded wheat. In other words, I did not think for a minute that it was corn flakes or oatmeal or anything of that sort. I knew that it was the cereal I know as shredded wheat."

Similarly, Clarence E. Lierley stated (R. 2, p. 799):

"I would say that corn flakes, oatmeal, and shredded wheat are all different types or kinds of dry cereals. Oatmeal is somewhat of a moist cereal, but corn flakes, wheat flakes, and shredded wheat are different kinds or types of cereal foods. Shredded wheat means to me a certain kind of cereal food."

P. F. McCarthy, a retail grocer testifying on behalf of respondent, said (R. 2, p. 833):

"If I want to describe the product itself, it is Shredded Wheat. Shredded Whole Wheat Biscuit is the only name that would describe it, I think. I presume it is correct to say that Whole Wheat Biscuit is not as descriptive a name as Shredded Whole Wheat Biscuit. Whole Wheat Biscuit does not say that it is not shredded. There might be ten or fifteen kinds of biscuit that would be all whole wheat biscuits. The other is shredded. * * * *

"Looking at these products of Kellogg and the National, they are both advertised as whole wheat; they are both shredded; they are both biscuits."

Respondent's witness Henry F. Steen, a consumer, stated (R. 2, p. 929):

"If somebody asked me to describe the National Biscuit Company Shredded Wheat, I would state that

it was a biscuit that was made of shredded wheat, properly manufactured, through toasting or baking, or whatever their process is, put into the form of a biscuit, and sold. In my definition, I have said it was made of wheat shredded, which is shredded wheat, that it is made out of whole wheat, and it is made into a pillow-shaped biscuit. If you say boiling down my description, that it is a shredded whole wheat biscuit, I would say that that is an exact description of this National Biscuit Shredded Wheat."

John E. Lurie, a retail grocer, stated (R. 3, p. 1464):

"* * * I would still describe the Whole Wheat Biscuit which was formerly sold as Shredded Wheat, as shredded wheat today. I really could not think of anything else to call it when Mr. Clarke asked me that. It is a whole wheat biscuit which is shredded, so that is what it is. It is hard for me to tell you exactly what I mean by shredded. I take for granted that it is shredded, because it is like shredded coconut, cut up in long, fine parts. When I speak of a thing being shredded, I mean it is cut up. I never went to Niagara Falls and saw them make it. I do not know how the so-called shreds are made.

"Assuming it is true that the wheat berry is pressed between rollers and caused to come out in a long string, that is a definition of shredded. It is not cut up; it is pressed, if you assume that to be true. That is my idea of shredding."

The situation is well summarized in the following testimony of Edwin A. Wurster, a wholesale grocer (R. 3, pp. 1795-1797):

"Shredded whole wheat biscuit might be anything that was made of whole wheat and shredded and held together in some particular form that held it together. It might not be that particular style. To me it would be always shredded whole wheat biscuit, no matter who made it. I cannot think of anything else to call it that would describe it as well as that. That is a description of the product, and that is the thing to call it. It has always been called whole wheat biscuit. The fact that it has been descriptive would

not alter, I think. It is always shredded whole wheat biscuit. I think that is all it was. If you should ask me what Uneeda Biscuit was, I would probably say it was a soda cracker. That is so. The trade name would be Uneeda Biscuit, and the descriptive name would be soda-cracker. If someone were to ask me what the trade name and what the descriptive name of shredded wheat was, I would say it would be just shredded whole wheat biscuit. The only descriptive name I know for it is shredded wheat or shredded whole wheat biscuit. It cannot be anything else.

"If anybody asked me what a *Kodak* was, I would say it was the trade name of the Eastman Kodak Company meaning a *camera,* the latter word being the descriptive name that anybody could call it by. I do not, however, know any other descriptive name that can be used to tell about shredded wheat, except shredded wheat, or shredded whole wheat biscuit, any other name you could call it."

Appendix E.

CANADIAN SHREDDED WHEAT CO., LTD. *v.* KELLOGG COMPANY OF CANADA, LTD., AND ANOTHER.

LORD RUSSELL OF KILLOWEN: The circumstances which have given rise to this litigation are exceptional, and must be stated in some detail. On May 27, 1896, one Henry D. Perky obtained a grant of Canadian letters patent (No. 52,428) covering a new product which he had invented, and a process and machine by means of which the new product was prepared or produced.* According to the patent, wheat is taken in berry form, and, after being thoroughly washed, is boiled for about an hour. It is then dried for some hours. The berries are then passed between compression rollers, one or both of which is or are provided with a series of fine circumferential grooves, whereby the berries are mashed, and their outer bran coats, gluten layers and

* Respondent's corresponding American patent, No. 548,086, appears at R. 5, p. 59, and is described at p. 8, *supra.*

starchy interior portions are thoroughly incorporated together and forced into the grooves, whence the resultant food is discharged by means of a comb "in light porous and tender threads or filaments into a pan or other receptacle, or upon a moving receiver whereby they may be disposed in layers." The specification then proceeds as follows:

> The food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways.
>
> The food presented is a purely cereal product, and all the parts of the berry are given to the consumer in attractive form. No chemical change is set up therein by the use of ferments or other foreign ingredients, and the percentage of water in the food is much less than in ordinary bread.
>
> The article as produced is a food or bread composed of superposed or massed layers or deposits of comparatively dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat, containing intermixed the bran, starch and gluten of the entire berry, and which is absolutely free from leavening or raising material or other products.

The apparatus for carrying out the process is then described, and finally the product, the process and the apparatus are severally claimed, the claim for the invented product being thus phrased:

> A food or bread composed of superposed or massed layers or deposits of comparatively dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch and gluten of the entire berry and which is free from leavening or raising material or other products.

It will be seen that the invented product is the food as discharged from the rollers, which may be either collected in a receptacle, or formed into layers by means of a moving receiver, and which may be used in its then condition, or may be further cooked by being baked in shapes.

On Aug. 13, 1901, Perky obtained a grant of Canadian letters patent (No. 72,695) for improvements in and relating to machines for making biscuits and other articles. This patent covered the machine which was used by the

plaintiff for the production of biscuit shapes, composed of the new product (the subject of patent No. 52,428) which issued from the rollers on to a travelling band.* The new product was called, and was known by the name of, shredded wheat. Although the process covered by patent No. 52,428 may be strictly a mashing rather than a shredding process, the product in fact presents every appearance of having been shredded, and it is to be observed that the patentee in his patent No. 72,695 himself refers to the process as "shredding the grain."** There can be no manner of doubt that the name shredded wheat very aptly describes the new product. The new product was first marketed in Canada in the year 1898 by a company which was registered in the United States of America, and which had its factory in that country. It continued to be imported from the United States into Canada and sold there to some extent for some six or seven years. In the year 1904, the plaintiff company was incorporated under the laws of the Province of Ontario. It acquired the goodwill of the business in Canada of the company which was at that time importing the product into Canada and selling it there. It built a factory for its manufacture on the Canadian side of Niagara Falls, and in 1905 commenced, and has ever since continued, to manufacture the product in Canada, and to sell it there. The product was sold in two forms, the one a biscuit, which consisted of the shredded wheat produced by the process and apparatus protected by patent No. 52,428, after it had been panned and cut for baking by the apparatus protected by patent No. 72,695, and baked, the other a biscuit made of the same material cut in a flattened and compressed form, which the plaintiff company sold under the name "triscuit." The trade in triscuits was small, but the plaintiff company's trade in the other biscuit undoubtedly developed large proportions.

The patent No. 52,428 expired in 1914. Down to that time no one had sold or could sell the product known as shredded wheat in Canada except the plaintiff company

* The machine covered by Canadian patent No. 72,695 was protected in the United States by the various patents referred to at p. 8, *supra*.

** See same language in respondent's American patents cited at p. 74, *supra*.

and its predecessors in title. In other words, for some 17 or 18 years the plaintiff company and its predecessors had enjoyed the monopoly of selling the patented product in Canada. Upon the expiry of the patent, anyone in Canada could make it. The patent No. 72,695 expired in 1919. The plaintiff company's monopoly thereunder then ceased, and any manufacturer of the product in Canada could use the apparatus covered by that patent, for the purpose of panning and cutting the product for baking. Any one would be entitled to sell in Canada as shredded wheat, or as shredded wheat biscuits, the articles so produced, provided that in so doing he did not (i) infringe some other person's trade mark, or (ii) pass off the goods as being the manufacture of some other person.

In 1912 the plaintiff company had registered in Canada as a trade mark "to be applied to the sale of shredded cereal biscuit," a picture of a shredded wheat biscuit in a dish or bowl, with a spoon resting in the bowl.* The biscuit as depicted shows the shape, resembling somewhat a little pillow or roll, which the biscuit apparently necessarily assumed after the article, which resulted from the product having been panned and cut by the apparatus under patent No. 72,695, had been baked. For some years after the expiry of the two patents, the plaintiff company continued in fact to enjoy its monopoly in Canada. No rival manufacturers appeared upon the scene. In 1924 a strange event happened. The United States Company (the Natural Food Company), which had in 1904 sold the goodwill of its Canadian business to the plaintiff company, had changed its name to the Shredded Wheat Co. In Mar., 1924, it applied to have registered as its trade mark in Canada in respect of biscuits or cracker the words "shredded wheat," alleging (amongst other things) that from Jan. 1, 1894, to date it had adopted and used the said trade mark by applying it to cartons containing the biscuits, that no other person had used the mark in Canada in connection with the sale of goods, and that it had had a factory at Niagara Falls, Ontario, for a great number of years.** Here was a pretty con-

* Respondent's corresponding American trade-mark registration No. 85,186 appears at R. 4, p. 197 and is discussed at p. 11, *supra*.

** Respondent's corresponding American trade-mark registration No. 178,725 appears at R. 4, p. 201 and is discussed at p. 11, *supra*.

fusion of ideas and entities. However, the words "shredded wheat" were in fact registered in the Trade Mark Register at Ottawa as the trade mark of the Shredded Wheat Company, to be applied to the sale of biscuits or crackers, and the words remained so registered for more than three years. The registration, however, was cancelled in Sept., 1927. On Mar. 20, 1928, the words "shredded wheat" were registered as the plaintiff company's trade mark to be applied to the sale of biscuits and crackers, and on Apr. 3, 1929, the same words were registered as its trade mark to be applied to the sale of cereal foods cooked or prepared for consumption.*

In 1934, the Kellogg Co. of Canada, Ltd., the first defendant to the action (hereinafter called Kellogg's), began to sell in Canada biscuits made of shredded wheat. Among their customers was a retail grocer, one Solomon Bassin (the second defendant to the action), who in turn resold some of the said biscuits to his retail customers. The plaintiff company immediately issued the writ in these proceedings, and obtained an undertaking (without prejudice) which had the effect of stopping the alleged wrongful sales until the trial or other final disposition of the action.

The biscuits sold in Canada by the defendants were made by the same, or substantially the same, process as that by which the plaintiff company's biscuits are made. In other words, the patented processes were used, and the patented product was thereby produced. The biscuit manufactured by Kellogg's, though of the same pillow or sausage-roll shape, was some 25 per cent. shorter in length. It would seem from the evidence that the rounded pillow shape is the result of puffing-up in the baking of the product, after it has been panned and cut by the apparatus protected by patent No. 72,695. The length and width would be determined by the width of the stream of the product and the spacing of the cutters. Kellogg's sold their shredded wheat biscuits in cartons, each containing 15 biscuits packed in 5 layers of 3 biscuits each, the layers being separated by a corrugated separator or pad. The carton contained on each of its four sides, and also on the top and bottom, the words "Kellogg's

* Respondent's corresponding American trade-mark registration No. 213,456 appears at R. 4. p. 203 and is discussed at p. 11, *supra*.

Shredded Whole Wheat Biscuit." On the top and bottom appeared the words "Made in U. S. A." On the two broad sides appeared the words "W. K. Kellogg" and "Kellogg Company, Battle Creek, Michigan." The cartons made it plain for all the world to see that the contents of the cartons were biscuits composed of shredded wheat, manufactured by a U. S. A. company called the Kellogg Company. No passing off by means of get-up of the cartons is alleged, or could be alleged, by the plaintiff company. Indeed, Kellogg's carton was in all respects quite different in get-up and appearance from the cartons in use by the plaintiff company. Apart from a question of passing off by reason of the form or shape of Kellogg's biscuit, the plaintiff company's claims to relief are two, and are both founded upon the use by Kellogg's of the two words "shredded wheat."

In the first place, the plaintiff company claims an injunction to restrain the defendants from infringing the registered trade marks consisting of the words "shredded wheat," by the use of the words "shredded wheat," or "shredded whole wheat" or "shredded whole wheat biscuit" or any words only colourably differing therefrom. As to this claim, their Lordships at this stage content themselves with observing that, if the plaintiff company's said trade marks are valid trademarks, there can, in their opinion, be no doubt that the defendants, by selling biscuits as shredded whole wheat biscuits, do infringe those marks. If the plaintiff company succeeds on the first claim, no injunction in respect of alleged passing off by the use of the words "shredded wheat" would be required, but, in the event of the trade marks being held invalid, the plaintiff company asks for an injunction to restrain the defendants from (putting it shortly), by the use of the same words or any words only colourably differing therefrom, passing off Kellogg's biscuits as the plaintiff company's biscuits. Their Lordships proceed to deal with these alternative claims, each of which, as will be seen, involves a consideration of the question of the aptness or capability of the words "shredded wheat" to distinguish the product or article manufactured by the plaintiff company from a similar product or article manufactured by anyone else, or their aptness or capability of indicating that goods to which they are applied are the exclusive manufacture of the plaintiff company.

The plaintiff company's first trade mark was not registered until 1928, when application was made to register the words "shredded wheat" to be applied to the sale of biscuits and crackers. For years down to 1912 the plaintiff company had been the sole manufacturer of biscuits composed of a patented product to which had been given the name shredded wheat, a name, as their Lordships think, completely descriptive of the patented product. There can be little doubt that, had the plaintiff company, when the patent expired, attempted to register the words "shredded wheat" as a trade mark for the sale of biscuits and crackers, the application would have met with short shrift. It would be attempting, by registering the name of the patented product, to prolong the patent monopoly, and this may not be done. Had the plaintiff company, during the currency of the patent, applied to the product manufactured by it a distinctive trade mark duly registered, it could have effectively secured for itself a means by which, when the patent expired, the shredded wheat which it manufactured would be distinguished from the shredded wheat manufactured by others, if and when anyone chose to avail himself of the right then open to the public of manufacturing shredded wheat. This the plaintiff company failed to do, except for the registration in 1912 of the bowl-and-spoon trade mark before referred to, and its user to the extent which hereinafter appears. The language used by LINDLEY, L.J., in *Re Palmer's Trade Mark* (1), at p. 521, may properly be quoted in this connection:

> I do not mean to say that a manufacturer of a patented article cannot have a trade-mark not descriptive of the patented article so as to be entitled to the exclusive use of that mark after the patent has expired; for instance, if he impressed on the patented articles a griffin, or some other device; but if his only trade-mark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out as a matter of fact that this mark denotes him as the maker as distinguished from other makers.

The plaintiff company, however, claims that, in the interval between the expiry of the patent in 1912 and the

(1) 24 Ch. D. 504; 43 Digest 179; 50 L. T. 30.

registration of the trade mark in 1928, no one else (with one possible exception) had manufactured the patented product, and that the words had in fact become distinctive of its manufacture, and were properly registrable as its trade mark accordingly. The trade marks here in question were registered under the Trade Mark and Design Act (R.S.C., 1927, c. 201). Sect. 5 (1) defines what for the purposes of the Act shall be considered and known as trade marks, in the following terms.

> 5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either, to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks.

By sect. 13 it is provided that, after registration, the proprietor "shall have the exclusive right to use the trade mark to designate articles manufactured or sold by him." By sect. 11, however, registration may be refused "if the so-called trade mark does not contain the essentials necessary to constitute a trade mark properly speaking." The effect of this provision is that a word which is merely descriptive of the character and quality of the goods in connection with which it is used is not registrable under the Act as a trade mark: *Standard Ideal Co.* v. *Standard Sanitary Co.* (2) and *Channell, Ltd.* v. *Rombough* (3). It is, however, clear that such a descriptive word may possibly have acquired a secondary meaning and have come to mean or to indicate that the goods in connection with which it is used are the goods of a particular manufacturer; in other words that the word in question has in its secondary meaning become indicative of origin: *Re Crosfield (J.) & Sons,*

(2) [1911] A. C. 78; 43 Digest 136; [1911] A. C. 259; 80 L. S. P. C. 87; 103 L. T. 440; 27 R. P. C. 789.

(3) [1925] 1 D. L. R. 233; 43 Digest 137.

Ltd. (4). The onus on the person who attempts to establish this secondary meaning, however, is a heavy one. If, in addition to being descriptive of the goods in connection with which it is used, it is in fact the name of the product of which these goods are composed, then it would seem to their Lordships that a state of affairs exists which makes it extremely difficult that the word should ever become indicative of origin, so as to render it capable of registration as a trade mark. The difficulty may sometimes be overcome in a case where the alleged trade mark is in fact a description of the goods, but is not recognised by the trade or the public as being such, and is taken by them as being a fancy name, *e. g.*, where a chemical description, not generally known to the public, has been adopted, or where an unusual substance unknown to the public is being used in the manufacture. Where the words are purely descriptive, and in common use, it is even more difficult to conceive a case in which they could acquire a secondary meaning.

It is, however, contended that in the present case such extreme difficulty has been surmounted, and that the evidence has established the fact that the words "shredded wheat" have acquired a secondary meaning, and, when applied to biscuits, mean shredded wheat biscuits manufactured by the plaintiff company, and by no one else. Their Lordships therefore proceed to consider the evidence, calling attention, however, to the fact that the oral evidence was in point of time not specifically directed to the date when the trade mark was registered, but referred to the time at which each particular witness was speaking, and was therefore more strictly relevant to the general question of passing off.

In the first place, it is of primary importance to see how the plaintiff company used the words "shredded wheat," *i. e.*, to see whether it used them as a trade name or common law trade mark for the purpose of indicating the origin of the goods, or merely descriptively. It was said in argument that the way in which the plaintiff company used the words was irrelevant. Their Lordships do not agree with this contention. In endeavouring to ascertain what it is that indicates who is the manufacturer of goods, great weight

(4) [1910] 1 Ch. 130; 43 Digest 153; 79 L. J. Ch. 211; 101 L. T. 587; 26 R. P. C. 837.

must necessarily be attached to the steps which the manufacturer takes to indicate origin. Indeed, the foundation of the relief granted in the well-known case of *Reddaway* v. *Banham* (5), to which further reference must be made hereafter, was that the words there in question had been used by the plaintiff as a trade mark. There was no question in that case of a registered trade mark, but the plaintiff had used the words as a common law trade mark. As LORD HERSCHELL phrased it, at p. 214: "he has chosen to employ it as his trade mark." The opinions of LORD SHAND and LORD DAVEY in *Cellular Clothing Co.* v. *Maxton & Murray* (6) attach the same importance to the user of the word in question by the person who is claiming that a descriptive word has acquired a secondary meaning as indicating exclusively his goods. LORD SHAND said, at p. 338:

> I am of opinion that the word is purely descriptive, and was so used by the appellants.

LORD DAVEY relied on the appellants' advertisements as showing that they used the word as descriptive of the goods, and not as indicating their origin. Further, in *Burberrys* v. *Cording (J.C.) & Co., Ltd.* (7), PARKER, J., said that, in absence of evidence of intention to deceive (and there is none such here), the inference of probability of deception must depend on the circumstances of each particular case, including the nature of the word or name the use of which is sought to be restrained. He adds the following observations most pertinent to the present case, at p. 987:

> It is important for this purpose to consider whether the word or name is *prima facie* in the nature of a fancy word or name, or whether it is *prima facie* descriptive of the article in respect of which it is used. It is also important for the same purpose to consider its history, the nature of its use by the person who seeks the injunction, and the extent to which it is or has been used by others.

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(5) [1896] A. C. 199; 43 Digest 277; 65 L. J. Q. B. 381; 74 L. T. 289; 13 R. P. C. 218.

(6) [1899] A. C. 326; 43 Digest 276; 68 L. J. P. C. 72; 80 L. T. 809; 16 R. P. C. 397.

(7) 100 L. T. 985; 43 Digest 304; 26 R. P. C. 693.

Before and up to 1928 the plaintiff company's shredded wheat biscuits were sold in cartons, each containing 12 biscuits. On the top and bottom of each carton appeared the words "shredded whole wheat." On one of the broad sides there was a large picture of a factory, across the top front of which were the words "The Canadian Shredded Wheat Company, Ltd." Above it were printed the words (in large capitals) "shredded wheat," and (in smaller capitals) "made in Canada." Below it were printed the words "The Shredded Wheat Factory, Niagara Falls, Ontario." On the other broad side there were printed at the top in large capitals the words "shredded wheat," and underneath, in smaller type and parallel columns, a series of statements as to the merits of shredded wheat, and directions—such as:

> The crispness of its shreds promote thorough mastication, which is the first process in digestion. Heat the biscuit in the oven to restore crispness; then pour hot or cold milk over it, adding a little cream. Salt or sweeten to taste.

Below occur the following words, in capitals, and in separate lines as shown by hyphens:

> Heat the biscuit in oven to restore crispness—As made for 25 years—The Canadian Shredded Wheat Co., Ltd.—Niagara Falls, Ont.:—Canada.

There is also a reference to a company in London, England, as being the European distributors. Occupying one of the narrower sides is found a picture of Niagara Falls, and on the picture appeared the words "The Home of Shredded Wheat, Niagara Falls, Ontario." On the other narrower side are found the words "the original shredded wheat," and, immediately underneath, the picture of a bowl containing one of the biscuits and a spoon resting in the bowl, with the words "trade mark." In addition, further below are found the words, "Twelve (12) biscuits," and, in quotation marks, "it's all in the shreds."*

A consideration of this carton, which was the form in which the biscuits were, at the relevant times, being sold

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* Respondent's corresponding American cartons are described at pp. 12-13, *supra*, and many of them are in evidence as Plaintiff's Exhibits 2-4.

throughout Canada, makes it clear, in their Lordships' view, that the plaintiff company was in no way using the words shredded wheat as indicative of the origin of the goods contained in the carton, but was using them only as descriptive of those goods. The indications of origin are the trade mark in association with the factory at Niagara Falls, and the name of the company, all of which are prominently displayed. By that carton the plaintiff company was telling the public as plainly as it could that shredded wheat need not necessarily be of its manufacture, but that it was the person who was the original manufacturer of the product known as shredded wheat. The plaintiff company was in fact using the words shredded wheat to indicate the thing, not the manufacturer, to indicate the stuff of which the biscuits were composed, not who made them.

An examination of such advertisements as have been put in evidence leads to the same conclusion. Exhibit No. 24 contains photostatic copies of ten advertisements which appeared in issues of *The Globe* newspaper of Toronto, during the years 1908, 1910, and 1913—at times, that is to say, while the patents were still in force. Three, which appeared in 1908, contain no indication of the manufacturer. They praise "shredded wheat." They recommend a biscuit for breakfast and a biscuit for luncheon, the article in each case being described as made of shredded wheat. One, which appeared in 1910, advertises "shredded wheat biscuits," urges people to try shredded wheat for breakfast, and acquire the shredded-wheat habit. This advertisement displays prominently the name of the plaintiff company, with the words added, "Niagara Falls, Ont." The remaining six all appeared in 1913. They all (except one) contain prominently the name and address of the plaintiff company, and in addition the picture of the bowl with a biscuit inside, and a spoon resting in the bowl. The bowl is steaming, and there is no reference to a registered trade mark. The exception is an advertisement of triscuit, which is described as "the shredded whole wheat wafer." In none of these is there any user of the words "shredded wheat" as indicative of the manufacturer of the biscuit or triscuit. The words are used merely as describing the substance of which the biscuit and triscuit are composed. Exhibit No. 40 contains a series of advertisements which

appeared in *The Globe* between May 1, 1913, and Apr. 30, 1915. Down to the end of 1914, the advertisements of the biscuits all contain prominently the plaintiff company's name and address, a picture of the bowl, biscuit and spoon, and the words "shredded wheat," to describe the stuff of which the biscuit is made. In 1915, the name of the plaintiff company drops out of the advertisements, but the picture of the bowl, etc., continues, and in addition the following words occur, "Made at Niagara Falls, Ontario." In these advertisements also the words "shredded wheat" are used merely as describing what is the composition of the biscuits and triscuits. They invariably state it thus: "Shredded wheat is made in two forms, biscuit and triscuit."* Other advertising-matter was put in evidence, viz., a collection of advertisements in the United States by the United States company which was manufacturing shredded wheat at Niagara Falls, N. Y. These advertisements become admissible and relevant only by reason of the evidence given by Mr. Edwin Wallace. Mr. Wallace had been with the U. S. A. company at Niagara Falls, N. Y., from June, 1901, until about 1904 or 1905, when he became superintendent of the plaintiff company, a post which he held until 1924. Mr. Wallace was asked to look at Exhibit 10 and to state whether that was the way in which, during his association with the plaintiff company, the product had been advertised and described, and he replied: "This is the advertising which has been carried on for many years." In these advertisements also the words "shredded wheat" are used descriptively, and not as indicating the exclusive manufacture of any person. As an instance, the public is warned:

> Look for the picture of Niagara Falls on the carton when you buy shredded wheat biscuit. Any other shredded wheat that may be offered you is merely a poor imitation of the only original shredded wheat.**

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* Respondent's corresponding American advertising is described at pp. 14-16, *supra*, and many examples, containing almost precisely the same material alluded to by the Privy Council, are in evidence as Plaintiff's Exhibits 87-112.

** See p. 15, *supra*.

Again:

> When you ask for shredded wheat be sure you get the original shredded wheat you have always eaten, made at Niagara Falls, N. Y.*

In the face of the use by the plaintiff company of the words "shredded wheat" as appearing on the carton and in the advertisements, it would appear to their Lordships difficult to believe that the words "shredded wheat" could have acquired a secondary meaning indicating goods exclusively manufactured by the plaintiff company. It is, however, claimed by the plaintiff company that the oral evidence establishes the fact. This necessitates a consideration of that evidence.

Three classes of witnesses (some 27 individuals) were examined on commission, viz., consumers, retail grocers, and wholesale grocers. They came from every province of Canada with the exception of Ontario and Quebec, but a formal admission was made on behalf of the defendants that similar witnesses from those provinces would, if examined on commission, testify to the same effect. It may thus be taken that the evidence, such as it is, covers the whole Dominion. Without analysing it in detail, it may be stated that, in their Lordships' opinion, it falls far short of establishing that in 1928, or indeed at any time, the words "shredded wheat" had acquired a secondary meaning which meant that the goods to which they were applied were the manufacture of the plaintiff company and of no one else. The questions (couched often in a leading form) and the answers given are full of ambiguity. It must be remembered that "shredded wheat" was not only the name given by the inventor to a new product which could be baked into a biscuit, but was also descriptive of the product as to both its composition and its appearance. It must also be remembered that for a lengthy period the plaintiff company enjoyed a legal monopoly of making and selling in Canada the product shredded wheat baked into biscuits, and that, with the negligible exception of some shredded wheat biscuits called muffets, the plaintiff company continued to be the sole maker of the product, baked or otherwise. In these circumstances, it was inevitable that the words "shredded wheat" and shredded wheat biscuits should become asso-

* See p. 14, *supra*.

ciated in Canada with the goods of the plaintiff company, since many members of the public would get to know that the product shredded wheat was in fact the plaintiff company's product.

This, however, is far from establishing the required meaning of distinctiveness, which must carry with it the feature that the goods distinguished are the goods manufactured by a particular person, and by no other. A word, or words, to be really distinctive of a person's goods, must, generally speaking, be incapable of application to the goods of anyone else. It is on this point that the evidence breaks down. It is full of ambiguities. One is left in doubt as to whether a witness, in speaking of shredded wheat, refers to the baked biscuit or to the material of which it is composed, and the answers of many are inconsistent with the witness really believing that the words "shredded wheat" necessarily indicate goods manufactured by the plaintiff company exclusively, and by no one else. It is sufficient to say that it fails to show that the words "shredded wheat," which were both the name of and descriptive of, Perky's invented product, ever acquired the secondary meaning of being distinctive of goods manufactured exclusively by the plaintiff company. It would, in their opinion, be passing strange if they had acquired such a meaning, for it would be a meaning directly contrary to the sense in which those words had been put forward to the public by the plaintiff company in its cartons and advertisements. The circumstances existing in the present case, and the extreme difficulty of the plaintiff company succeeding in establishing the desired secondary meaning, are exactly those which are described by LORD DAVEY in the well-known case of *Cellular Clothing Co.* v. *Maxton & Murray* (6), at pp. 343, 344, which passage has been aptly cited by MCTAGUE, J., in his judgment in the present case.

It was contended that MCTAGUE, J., had found the facts upon the issue of distinctiveness in favour of the plaintiff company, but their Lordships are unable so to read his judgment. Had he done so, he must, they think, have granted relief against infringement of trade marks. He states that the general effect of the evidence is that the words "shredded wheat" means to the witnesses the goods

(6) [1899] A. C. 326; 43 Digest 276; 68 L. J. P. C. 72; 80 L. T. 809; 16 R. P. C. 397.

of the plaintiff company. In view of the monopoly enjoyed under the patent, and the monopoly subsequently in fact enjoyed, the words must necessarily be identified with the plaintiff company's goods; but, in view of those exceptional circumstances, the judge holds that the requisite secondary meaning of exclusive distinctiveness has not been established. To quote his words:

> On the branch of the issue having to do with infringement of the trade mark, the conclusion must be that the words whose use is complained of are common words, merely descriptive, and have not acquired a secondary meaning in such manner as to give the plaintiff the relief sought.

Their Lordships agree with this finding, which also had the approval of the Court of Appeal.

In the result, their Lordships agree with both the Ontario courts in holding that the registrations of the plaintiff company's trade marks "shredded wheat" were invalid, and that, so far as the action is based on infringement of trade marks, it fails.

The same result must, they think, ensue in regard to passing off, so far as the alleged passing off is based on the use of the words "shredded wheat." Once it is established that these words are both the name of a product and descriptive of that product, the difficulty of establishing a passing off merely by the use of those words in relation to the product is extreme. The case mainly relied upon by the plaintiff company was *Reddaway* v. *Banham* (5) already referred to. In that case, the use of words which in fact described the belting there in question, and which in a sense could be said to be its name, was restrained, on the ground of passing off. The facts in that case were exceptional and peculiar, and have no real relation to the facts of the present case. For years different manufacturers of belting had made belting consisting of a yarn which was in fact principally composed of camel hair, but which was not known to contain in fact camel hair. Each manufacturer had given the distinctive name of some animal to his belting; e.g., yak, buffalo, llama, crocodile, etc. The plaintiff had identified his with the camel, and everyone concerned was under the

(5) [1896] A. C. 199; 43 Digest 277; 65 L. J. Q. B. 381; 74 L. T. 289; 13 R. P. C. 218.

impression that the plaintiff's name camel-hair belting was a fancy name, and in no way descriptive. The defendants Banham began in 1891 to make belting made of yarn like the plaintiff's, and gave it the name of the plaintiff's belting, camel-hair belting. Upon the facts of that case, a jury found, and no wonder, that the words (though descriptive in fact of the goods) meant the plaintiff's belting, as distinct from the belting of other manufacturers. The decision is one easily to be accounted for on the special facts, namely, that owing to the general but mistaken belief that camel-hair was a fancy name, the requisite secondary meaning had in fact been acquired. The plaintiff company's action must, in their Lordships' opinion, fail, so far as it is based on the use of the words "shredded wheat," with the result that, as against the defendant Bassin, the action was properly dismissed.

The plaintiff company, however, claims as against Kellogg's a passing-off injunction based upon the allegation that Kellogg's biscuits are of such shape and size that hotel-keepers and restaurant-keepers could, if so minded, supply them in response to the request of a customer who, in asking for shredded wheat, desired to be supplied with biscuits of the plaintiff company's manufacture. Their Lordships see no reason for granting any such relief, upon the evidence given in the present case. They are not satisfied that a person asking for shredded wheat will not have his request truly satisfied if the product shredded wheat, as manufactured by Kelloggs or any other manufacturer, is supplied. Nor are they satisfied that a customer who really desires a biscuit of the plaintiff company's manufacture will necessarily be deceived by being offered a biscuit of the same shape but perceptibly smaller. Such likelihood of deception requires to be proved, and it is noticeable that no witness was shown a Kellogg's biscuit and asked whether he would have taken that to be a biscuit of the plaintiff's company's manufacture. The plaintiff company has not, in their Lordships' opinion, made out a case in these proceedings which would justify the granting of a passing-off injunction based solely on the form of the biscuit.

Some further observations their Lordships think it desirable to make. Their decision has been reached without basing it specifically upon the existence of patents which have expired. Their Lordships, however, find it

difficult to conceive that a manufacturer could in such a case be held guilty of passing off, if he manufactured the goods in accordance with the expired patents, and the only similarity between the rival goods lay in the appearance of the goods so manufactured and the application to them of the name by which the patented goods had been known. It is conceivable that, in the case of a patent long ago expired, the evidence might possibly establish that the name had become distinctive of a particular manufacturer rather than descriptive of the goods, with the result that other manufacturers of the goods could be compelled to adopt some means of effectively distinguishing their goods from those of the particular manufacturer. Difficult as such a case is to prove in the case of a descriptive word, it must be additionally difficult in the case where a word is the name of goods as well as being descriptive of those goods. The case of *William Edge & Sons, Ltd.* v. *William Niccolls & Sons, Ltd.* (8) was peculiar, in that the goods there in question which were offered for sale were pieces of washing-blue, while the special form of stick which the defendants were restrained from associating with their pieces of washing-blue was in effect part of the get-up of the plaintiff's goods. In *Boake (A.), Roberts & Co., Ltd.* v. *Wayland (W. A.), & Co., Re Boake (A.), Roberts & Co., Ltd.'s, Trade Marks* (9), while the name of the patented article was "Kalium Meta Sulphite," or, more technically "Meta Sulphite of Potassium," the letters or initials K.M.S. were proved to distinguish in the brewing trade the Kalium Meta Sulphite, or Meta Sulphite of Potassium, manufactured by the plaintiffs, from the same article of other persons who were making it and calling it by various other names. The defendant was restrained from applying the letters or initials K.M.S. to his goods. In the case of *Edison Storage Battery Co.* v. *Britannia Batteries, Ltd.* (10), the distinctiveness was proved by admissions made by the defendants themselves, but for which, as BENNETT, J., pointed out, the plaintiffs would have had difficulty in satisfying the court that descriptive words had become distinctive Moreover, the plaintiffs' task in that case was clearly ren-

(8) [1911] A. C. 693; 43 Digest 312; 80 L. J. Ch. 744; 105 L. T. 459.

(9) 26 R. P. C. 251; 43 Digest 227.

(10) 48 R. P. C. 350; Digest Supp.

dered less difficult by the fact that the words there in question included the actual name of the inventor. Each of these cases presented some peculiar feature which brought the necessary proof within the range of possibility.

One further observation their Lordships desire to make. Litigation has taken place in the United States of America in which a company called National Biscuit Company sought to restrain a company called Kellogg Company from using the words "shredded wheat." The action was dismissed by decree of the U. S. district court for the district of Delaware, and, on appeal to the U. S. circuit court of appeals for the third circuit, the decree was affirmed. Subsequently, on reargument before the same Judges, that decision was reversed, and a decree was entered:

> enjoining the defendant from the use of the name "shredded wheat" as its trade name, and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark.

Their Lordships can only (but with the greatest respect for the court) express the view that, if the facts of that case were similar in all respects to the facts of the present case, they prefer the first judgment of the circuit court of appeals to its later decision. Their Lordships are of opinion that this appeal should be dismissed, and will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Appeal dismissed with costs.

Appendix F.

IN THE MATTER OF THE TRADE MARKS ACTS, 1905 TO 1919

AND

IN THE MATTER OF TRADE MARK NO. 500,671, REGISTERED IN THE NAME OF THE SHREDDED WHEAT COMPANY, LTD. IN CLASS 42.

LORD JUSTICE CLAUSON: This is an appeal from an Order of Mr. Justice Bennett of the 21st December, 1937, dismissing an application to the Court by the Kellogg Company of Great Britain Ltd. under Section 35 of the Trade Marks Act 1905 for an Order expunging from the Register

of Trade Marks a trade mark belonging to the Respondents, the Shredded Wheat Co. Ltd., consisting of the words "Shredded Wheat" registered on evidence of distinctiveness under Section 9 sub-section (5) of the Act on the 5th March, 1929. The application was grounded on the allegation that the mark at the date of registration was wholly descriptive and not adapted to distinguish the goods of the Respondents from those of other persons.

It appears that in October, 1895, one Perky obtained Letters Patent for a process of mashing wheat in berry form so as to produce an article presenting the appearance of being composed of a mass of cereal filaments or shreds. From 1896 until 1908, baked packets of this product in the shape of small "pillows" were made in the U. S. A. or Canada and imported into and sold in this country by a firm of Ingersoll & Melhuish under the name of "Shredded Wheat". The Respondent Company was formed in 1908 and took over this business of Ingersoll & Melhuish and continued the import and sale. In 1926 the Respondent Company erected a factory at Welwyn Garden City and thenceforward manufactured their "pillows" there and sold them in this country. The trade mark "Shredded Wheat" was, as already stated, registered on the 5th March, 1929. Throughout the "pillows" have been sold in this country in cartons each containing 12 "pillows".

The learned Judge quite correctly directed himself to the consideration of the question of fact whether on the evidence it appeared to the satisfaction of the Court that at the date of registration the mark was distinctive within the meaning given to that word by Section 9 of the Act, *i. e.* "adapted to distinguish the goods" of the Respondents "from those of other persons". Before the learned Judge it appears to have been suggested that the words "Shredded Wheat" had no direct reference to the character or quality of the goods and could have been registered under Section 9 sub-section (4). The learned Judge's judgment proceeds, however, on the footing that the words have direct reference to the character or quality of the goods, and the suggestion to the contrary was specifically abandoned in this Court by Counsel for the Respondents.

On the evidence the learned Judge held the following propositions to be established (i) that a wholesaler asked

to supply Shredded Wheat supplies as a matter of course the articles made by the Respondents and orders them as a matter of course from the Respondents, and to the wholesaler "Shredded Wheat" means the pillow-shaped article made by the Respondents and nothing else; (ii) that the retailer when he needs supplies of the Respondents' articles places with his wholesaler an order for "Shredded Wheat" and expects, on such an order, to get the Respondents' articles, and when he is asked for "Shredded Wheat" he supplies the Respondents' articles; (iii) the consumers when they ask for "Shredded Wheat" desire to get the Respondents' articles and nothing else.

We see no reason to differ from these findings of fact as to the attitude of mind at the present time of wholesalers, retailers and customers in-so-far as they sum up the effect of the oral evidence before the learned Judge; but these findings do not, in our judgment, of themselves lead to the conclusion that at the date of the registration in 1929 the mark "Shredded Wheat" was distinctive of the Respondents' goods. The learned Judge concluded upon those facts that although the words "Shredded Wheat" had reference to the character of the Respondents' goods it had in fact become distinctive of them; and on a fair reading of his judgment he must, we conceive, be held to have found that this distinctiveness had in fact come into existence by the 5th March, 1929, the date of registration. It is unfortunate that there was no evidence before the learned Judge as to the carton in which "Shredded Wheat" was sold in this country before 1926. The Applicants enquired of the Respondents' manager as to that carton but did not succeed in obtaining its production. Such a carton has, however, since been forthcoming and, by leave of this Court, was proved in evidence before it, and the facts as to the cartons used thus became available for the information of this Court.

It appears that up to the date in or about 1926, when the Respondents' factory at Welwyn Garden City came into operation the goods were sold exclusively in cartons imported from Canada. One such carton was proved before us. From a study of that carton it appears (i) that the trade mark as appearing on the carton under which the respondents sold their goods in this country, was a trade mark registered in Canada, though not in this coun-

try, consisting of a representation of two "pillows" of Shredded Wheat displayed on a dish with a spoon; and (ii) that on a careful reading of the letterpress on the carton it is clear that the words "Shredded Wheat" are used, in contradistinction to what is described thereon as the trade mark, as the name of the product. The carton is wholly inconsistent with the possibility of the words "Shredded Wheat" having up to 1926 become the Respondents' trade mark and distinctive of their goods. A considerable mass of advertisements issued by the Respondents was in evidence; and so far from those advertisements indicating that prior to 1926 the words "Shredded Wheat" were used by the Respondents as a trade mark those advertisements confirm the evidence of the carton that the Respondents used the words "Shredded Wheat" as the name of the product, and sought to teach the public to identify their goods by the trade mark of the dish with a spoon and two "pillows" of the product, that mark being their registered Canadian trade mark.

The new evidence brought before this Court thus makes it, in our judgment, reasonably clear that up to 1926 the words "Shredded Wheat" were not used by the Respondents as distinctive of their goods but were used by the Respondents as the name of the product. It was not suggested that the product made according to Perky's patents was ever known by any name but that of "Shredded Wheat" and since "Shredded Wheat" was thus used as the name of the product clear evidence would be required to establish that a secondary distinctive meaning had been acquired by the word. Furthermore it is not easy to see how such a distinctive meaning could have come into being unless there were rival producers of the same article in the market. There was no evidence that any such rivals were in the market, at all events to any substantial extent, before the 5th March, 1929.

The evidence is not clear as to the exact form of carton used by the Respondents from 1926 to 1929. There is no doubt that the carton used during that period contained a picture of and referred to the Welwyn factory. It would seem that during that period the dish with two "pillows" in it appeared on the carton but it is not clear whether the spoon appeared in the dish or whether, if it did, the design of spoon, pillows and dish was described as a trade mark. We cannot satisfy ourselves that there

is any evidence to show that between 1926 and 1929 there was any change in the position, or that by the end of that period the words "Shredded Wheat" had acquired a secondary meaning as distinctive of the Respondents' goods, which they clearly did not possess at the beginning of that period. The oral evidence as to the present attitude of mind of wholesalers, retailers and customers which the learned Judge treated as satisfactory evidence of distinctiveness becomes, in the light of the facts to which we have referred, of very slight weight; indeed, it merely shows that during the period since 1929 the registration of the words "Shredded Wheat" as the Respondents' trade mark has operated to preserve for them a complete monopoly in the use of the words "Shredded Wheat" and, as would appear from the evidence, an almost complete monopoly in the sale of the product, made according to the long expired patent, which was known by the name of, and at all events until 1926 was called by the Respondents themselves by the name of Shredded Wheat.

For these reasons, as the evidence now stands, we are unable to hold that the Respondents have established that at the date of registration on the 5th March, 1929, the words "Shredded Wheat" were adapted to distinguish their goods from those of other persons. The Order of the learned Judge will be reversed, and the mark will be expunged, and the Respondents will be ordered to pay the costs here and below.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. [redacted] 2

KELLOGG COMPANY,

Petitioner,
Defendant,

against

NATIONAL BISCUIT COMPANY,

Respondent,
Plaintiff.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

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The Evening Post Job Printing Office, Inc., 20 Lafayette St., New York, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

KELLOGG COMPANY,
Petitioner,
Defendant,

AGAINST

NATIONAL BISCUIT COMPANY,
Respondent,
Plaintiff.

No. 396.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION.

Statement of the Case.

The recital of facts in petitioner's petition and brief is incomplete and in several respects incorrect. The pertinent facts are as follows:*

This is an action for *unfair competition* involving, as often occurs in such cases, related questions of trade

* (For convenience the respondent will in this statement of facts be referred to as the plaintiff and the petitioner as the defendant).

mark and trade name infringement. *It is peculiarly one that must stand upon its own facts.*

About the year 1893, Henry D. Perky put to commercial use a new process for a form of bread manufactured out of whole wheat.* The process consisted in boiling wheat and passing, under pressure, the softened wheat berry between rolls, one of which contained grooves. This caused the wheat to be extruded in the form of long filaments or threads, which were later cut and baked in the form of a pillow-shaped biscuit, and were sold by Perky in Denver as early as 1893, under the fanciful and *then entirely novel name* of "Shredded Wheat" or "Shredded Wheat Biscuit.†

A year or two later, Perky applied for and obtained a patent, No. 548,086, dated October 15, 1895, covering the process of boiling the wheat and crushing and spinning it out in threads with the rolls; but the patent did not extend to the *completed* "Shredded Wheat" biscuit. The process produced the long filaments or threads which the inventor said were then ready for use as food without further cooking, "or it can be shaped for baking in various ways".‡

On September 17, 1895, design patent No. 24,688 was issued to Perky, covering a biscuit of the familiar "Shredded Wheat" form; but the design patent (which would have expired in 1909) was held invalid in 1908 by Judge Kohlsaat in the Northern District of Illinois, Eastern Division, upon the ground that the design had been in use by Perky for more than two years prior to application for the patent.§

In 1912, the process patent expired, and the right to make the long filaments or threads of boiled wheat disclosed in the patent became public property. There

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* R. 195

† R. 959, 971, 980.

‡ R. Vol. IV, p. 207.

§ R. 2020. The decision is unreported.

were also patents upon various machines for operating the process and upon mechanism incident to the manufacture and baking; and these, too, expired at the same time or soon after.

In 1915, a former employee of the Shredded Wheat Company (predecessor of plaintiff) started to market a whole wheat biscuit in exactly the same form and shape as the Perky biscuit, but was enjoined by the District Court of Connecticut upon the ground that the *form or shape* had acquired a secondary meaning connected with plaintiff's predecessor (*Shredded Wheat Co.* vs. *Humphrey-Cornell Co.*, 244 Fed. 508). That injunction was retained in modified form by the Circuit Court of Appeals for the Second Circuit (250 Fed. 960). The defendant in that case, however, did *not* attempt to use the name "Shredded Wheat" contenting himself with calling the biscuit "Whole Wheat," which is the true generic name.

The process disclosed by the patent has been used for many years since the expiration of the Perky patent by one competitor of the plaintiff, the Quaker Oats Company; but the latter *shapes* its product for baking in a manner totally unlike the familiar "Shredded Wheat" biscuit and calls it "Muffets".* Also, another competitor, the Loose Wiles Biscuit Company, has availed itself of the Perky process patent and produces still another *form* of biscuit, which it calls "Rippled Wheat" (*ibid*).

The Kellogg Company, defendant here, in 1922, *ten years* after the expiration of the patent, commenced the manufacture of a whole wheat biscuit resembling plaintiff's biscuit and called it "Shredded Wheat", but *desisted* in the same year, upon objection by plaintiff's predecessor.† Five years later, in 1927, and *fifteen years* after the expiration of the patent, the defendant again

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* R. 285.

† R. 103, plaintiff's Exhibit 7; interrogatories Nos. 12 and 13, R. p. 67.

began the manufacture of biscuits the *same* as plaintiff's under the name "Shredded Whole Wheat Biscuit".

The plaintiff's predecessor promptly brought suit for a injunction against the defendant and a dealer, in the District Court for Connecticut, seeking substantially the same relief as is sought in this suit. In 1930, and while that suit was pending, the defendant *again abandoned* the use of the name "Shredded Wheat" as part of its product name and commenced to designate its product on its cartons as "Kellogg's Whole Wheat Biscuit"; and, thereupon, the Connecticut suit was dismissed without prejudice.*

The present suit, commenced in 1932, followed the defendant's resumption of the use of the name "Shredded Wheat" as a *trade name* in its advertising and on the end of its cartons, and its appropriation on the face of its cartons of the plaintiff's registered trade mark, consisting of two biscuit in a dish,† and other deceptive devices to be hereinafter referred to.

Thus, for fifteen years after the expiration of the Perky patent, with the exception of the Ross Company, which in 1915, was enjoined, no one sought to use the process disclosed by the Perky patent to make a biscuit of the *form and shape* of plaintiff's; and *no one at all sought to use the name "Shredded Wheat"* except defendant for a short time in 1922, as before stated. All competitors except the defendant, have respected the plaintiff's right in the *name* and, with the exception aforesaid, in the *shape* of the biscuit. During that period of fifteen years, plaintiff and its predecessors expended more than $17,000,000 in connecting the *name* and particular *shape* of the biscuit with themselves, and thus identifying it as their product. It is undisputed that, at the time of defendant's entry into the competition complained of, both name and form of the biscuit were accepted by the trade and by

* See Plaintiff's Exhibit 251, Record volume 4, p. 127.

† R. Vol. I, pp. 217, 219.

consumers as identifying the product with plaintiff and its predecessors.

Thus it will be seen that the defendant alone of all competitors found it necessary to take from the plaintiff both its *name* and the *form* and *appearance* of its product. In its effort to trade on plaintiff's good-will, it did even more than that; it appropriated and placed on its packages the plaintiff's before-mentioned 2-biscuit-in-dish trade-mark. Defendant also utilized in the cartons in which it dispensed its product a cellophane window, which exhibited the ends of the biscuit so that anyone looking through such a window could not possibly distinguish the defendant's biscuit from that which had characterized the "Shredded Wheat" of plaintiff and its predecessors for approximately 40 years. Still worse, as pointed out by the court below, it placed on its cartons the words *"The original has this signature; W. K. Kellogg"*. The court below found that the defendant's object from this latter fact, coupled with the others, was as follows:

> "There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff",*

In 1922, when defendant made its first brief attempt to use the name "Shredded Wheat" from which it promptly desisted upon objection by plaintiff, the latter had spent more than $6,700,000 since the expiration of the patent in connecting the name and appearance of the product with itself. This sum was fortified by the previous expenditure during the life of the patent of approximately the same amount.

From 1922 to 1927, when the defendant again began manufacture, the plaintiff spent the enormous sum of $8,800,000 to the same purpose. During the two years

* R. Vol. III a, p. 2092. Officially reported 91 Fed. (2) 150.

immediately following the defendant's second abandonment of "Shredded Wheat" and its adoption of the name "Whole Wheat Biscuit" the plaintiff spent more than $2,500,000.

It should be observed that the defendant, while it lays stress on the fact that it claims the expression "Shredded Wheat" to be descriptive, uses it not in a *descriptive* sense but only as a *trade name.*

The District Court for Delaware dismissed the complaint principally upon the ground that upon the expiration of the patents the right to make the biscuit and to call it by its name passed to the public under the doctrine of *Singer Manufacturing Co.* vs. *June Manufacturing Co.*, 163 U. S. 169. The Circuit Court of Appeals, after the first hearing, affirmed the judgment of the District Court in a *per curiam* opinion. A rehearing was asked for on the ground that the decision of the Court was not in harmony with the modern doctrine of unfair competition as defined by this Court in *Schechter Poultry Corp.* vs. *United States*, 295 U. S. 495. The rehearing was granted and the case was again fully argued by both sides. The Court unanimously reversed itself.

ARGUMENT.

I.

The Case is Not One of Public Interest, But Depends Upon its Own Peculiar Facts.

From the foregoing statement of facts it should be apparent that the petitioner, *alone* among all competitors of the respondent, finds it necessary to copy the *name* and *form* from the respondent. Not only has it done this, but by *two retractions* (1922 and 1930) it has led the respondent to expend greater and greater sums of money in creating good will for itself inseparably connected with the form of the product and the name.

The facts of the case bring it squarely within the modern doctrine of unfair competition which has been markedly extended by this Court and other courts of this country so as to protect merchants and businessmen against the more subtle forms of unfair business dealing to which modern business conditions and lack of business ethics seem continuously to give birth. In the *Schechter* case, *supra*, at page 532 this Court referring to the doctrine of unfair competition, said:

> "In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own—*to misappropriation of what equitably belongs to a competitor.*"*

The following are other cases illustrative of the doctrine just quoted:

In *International News Service* vs. *Associated Press*, 248 U. S. 215, unauthorized use of news releases obtained by the Associated Press was enjoined as unfair although the act was not "passing off" as that term had previously been understood.

In *Motor Improvement, Inc.* vs. *A. C. Spark Plug Co.*, 80 Fed. (2nd) 385 (C. C. A. 6th), the defendant was enjoined from representing its filter as being the same as one which had been adjudged to infringe the plaintiff's patent, although it was not in fact the same.

In *Wall* vs. *Rolls Royce of America, Inc.*, 4 Fed. (2nd) 333, the Circuit Court of Appeals for the Second Circuit enjoined the use of the name "Rolls Royce" by a defendant who used it in connection with *radio tubes*, although the plaintiff had used the name only in connection with *automobiles*.

In *Aunt Jemima Mills Co.* vs. *Rigney & Co.*, 247 Fed. 407 (C. C. A. 3rd, cert. denied 245 U. S. 672), the Court enjoined the use upon *syrup* of a trade name previously

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* When italics are used in quotations it will be understood that the emphasis is ours unless otherwise noted.

used for many years on *pancake flour*, on the ground that the defendant would be enabled to get the benefit of the complainant's reputation and advertisement.

In the case at bar, the Circuit Court of Appeals affirmatively found that the petitioner by various means which in the aggregate, at least, were found to be unfair and inequitable, had sought to appropriate the plaintiff's good will. This finding of the Circuit Court of Appeals is amply supported in the record, the most important facts being set forth in the statement of the case *supra*. Defendant's entire course of conduct deprives it of any standing in a court of equity.

Thus it used the name "Shredded Wheat" when other competitors of respondent did not find it necessary to do so. It used the *form* and *shape* of the biscuit which has characterized respondent's product for over forty years, although no other competitor (except Ross who was enjoined) has ever used that form. It put on its cartons and in its advertising display (in the latter in large letters) "The original has this signature W. K. Kellogg". When it dropped the word "shredded" from the product name in 1930 and called its product "Whole Wheat Biscuit", it appropriated the plaintiff's trade mark of two biscuit in a dish and featured it on its cartons. Later it cut a window in its packages so that the ends of the biscuit would show in exactly the same form as plaintiff's.

It recognized respondent's rights in 1922 and desisted from the use of the name and form. It recognized them again in 1930 when it withdrew the word "Shredded" from its product name. During these intervals, as pointed out, the respondent expended vast sums of money in cementing with the public its great good will in this wholesome and popular food product. Petitioner now asserts that by adding the name "Kellogg" to the words "Shredded Wheat" the wrong is neutralized, notwithstanding that this Court said long ago that that "is an aggravation and not a justification" (*Menendez* vs. *Holt*, 128 U. S. 514, 521).

Surely such conduct amply justifies the relief to which the Circuit Court of Appeals found the respondent entitled.

II.

The Decision of the Circuit Court of Appeals Is Not In Conflict With Any Decision of This Court or of any Circuit Court of Appeals.

(a) There is no conflict with the decision in *Singer* vs. *June*, 163 U. S. 169. This Court, in *Singer* vs. *June* recognized and enforced upon the defendant the doctrine of unfair competition. There were no such acts of unfair competition, *except those which were enjoined*, in the *Singer* case as in the case at bar. In that case, there was no delay of 15 years or, indeed, any material delay in adopting the name, and there were no *retractions*, as there were in the case at bar, for *substantial* periods of time, of the use of the name, during which time vast sums of money were expended by the original user of the name in building a good-will and in connecting the name with its product. The fact that all competitors of plaintiff except the defendant have found it unnecessary, in order to utilize the process and market the product thereof, to employ the *name* and the *shape* which has characterized plaintiff's biscuit for many years, shows that it was not necessary for the defendant, in order to adequately use the patent, to also employ the name and the form by which the product of the patent had been marketed before the expiration of the patent.

Moreover in the case at bar the product was a food which, by its excellent and nutritious qualities had become widely known and consumed. The name "Shredded Wheat" and the pillow-shaped form of biscuit were synonymous with the healthful product which the plaintiff and its predecessors had made and sold for 40 years. An inferior product put out by an unscrupulous competitor under the name "Shredded Wheat" could easily be harmful to the public and destroy plaintiff's good-will.

The Court below correctly found that the equitable considerations arising from the *peculiar* circumstances of *this* case required the protection which it granted. The District Court felt that the requirements of *Singer* vs. *June* were met by the carton in which defendant packed its product, but the Circuit Court of Appeals disagreed with this conclusion especially in view of the thousands and millions of biscuit which are served to customers by hotels, restaurants, etc., *outside of the carton.**

(b) The decision of the Court below is in complete harmony with the decision of the Circuit Court of Appeals for the Second Circuit in *Shredded Wheat Co.* vs. *Humphrey-Cornell Co.*, 250 Fed. 960. In that case respondent's predecessor brought suit in Connecticut against a distributor of the Ross Company, which less than three years after the expiration of the patent started to manufacture a biscuit exactly like respondent's but which it did not, however, call "Shredded Wheat". Judge Thomas in the District Court enjoined the sale of all biscuit like respondent's unless banded or marked. The Circuit Court of Appeals modified and affirmed this judgment holding that the marking or banding should apply only to biscuit reaching the consumer without the distinguishing package.† Ross claimed it to be impossible to place a distinguishing mark required by the Court on the biscuit.‡ The defendant in the case at bar made a similar claim and introduced evidence to support it.§ The court below, therefore, did

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* See for example, R. pp. 501, 520, 527, 549, 554, 652, 714, 724, 731, 742, 784, 791, 798, 838, 845, 884.

† As pointed out (*supra*, p. 5), the Circuit Court of Appeals in the case at bar found that the defendant's *particular* package does not sufficiently distinguished the origin of the respetive products.

‡ R. Vol. III, pp. 1995-6.

§ R. Vol. II, p. 1122 *et seq.*

exactly as the Circuit Court of Appeals for the Second Circuit did; it forbade the defendant from making a biscuit resembling in shape and appearance that of the plaintiff, *which was the only adequate relief which it could give the plaintiff, in view of the defendant's insistence that a banding or marking of each biscuit was impractical.* This imposes no hardship upon the defendant that has not been overcome by all other competitors who have undertaken to make use of the process of the expired patent. "Muffets," made by Quaker Oats, has a distinguishing shape, and so does "Rippled Wheat," made by the Loose Wiles Company. As already pointed out, *supra*, page 2, the process patent does not produce a biscuit of any defined form but only the long filaments of wheat which may then be "shaped for baking in various ways."

(c) The decision of the Circuit Court of Appeals is not in conflict with the decision of the Court of Appeals of the District of Columbia in *Natural Food Co.* vs. *Williams*, 30 Appeals D. C. 348 decided in 1908. That case did not involve unfair competition or inequitable conduct. It involved a purely technical trade mark registration question which, upon purely technical grounds, was decided adversely to the predecessors of the present respondent.

(d) The decision of the Circuit Court of Appeals in no respect conflicts with the decision of the Circuit Court of Appeals for the Second Circuit in *Kellogg Company* vs. *National Biscuit Company*, 71 Fed. (2nd) 662. That was an action for treble damages under the Sherman Act for attempt to monopolize. The complaint was dismissed by the District Court upon demurrer. This action was reversed by the Circuit Court of Appeals which held that, the averments of the complaint which alleged an unlawful attempt to monopolize and restrain interstate commerce were sufficient "to withstand demurrer". The Kellogg Company, plaintiff in that case, has not yet

succeeded in filing an amended complaint and indeed apparently attaches no importance to the case as it permitted it to be dismissed for want of prosecution on June 18th, 1937. If anything were lacking to show the complete want of merit in the present petition, the absurd claim of conflict with that decision should be sufficient.

(e) The decision of the Circuit Court of Appeals is not in conflict with the decision in *Centaur Co.* vs. *Heinsfurter,* 84 Fed. 955, decided in 1898. There was in that case no evidence of any misconduct or unfair competition by the defendants. That fact alone distinguishes it clearly from the present case.

(f) The decision in this case is not in conflict with *Warner & Co.* vs. *Eli Lilly & Co.,* 265 U. S. 526. On the contrary, the decision in that case is illustrative of the relief to which the respondent here is entitled. That case involved the names "Coco-Quinine" and "Quin-Coco", both applied to a liquid preparation of quinine in combination with chocolate. The Circuit Court of Appeals had enjoined the defendant from using chocolate in the manufacture of the preparation and from continuing the use of the name. This Court, recognizing the right to manufacture this unpatented combination, nevertheless found the defendant guilty of fraudulent conduct and said (P. 532):

> "The use (of the name) dissociated from the fraud is entirely lawful, and it is against the fraud that the injuction lies. But respondent being entitled to relief, *it is entitled to effective relief;* and any doubt in respect of the extent thereof must be resolved in its favor as the innocent producer and against the petitioner which has shown by its conduct that it is not to be trusted."

In the case at bar, the Court has found that the petitioner was guilty of fraud and attempted to appropriate the respondent's good will. The relief which it granted was

intended to be *effective relief* and, under the circumstances of this case, no relief less than that granted *could* be *effective*.

(g) The decision of the Ontario Court in *Canadian Shredded Wheat Company, Ltd.*, vs. *Kellogg Company of Canada, Ltd.*, was rendered on November 30, 1936, before the decision of the Circuit Court of Appeals granting the injunction against petitioner's unfair practices. The decision of the Circuit Court of Appeals was rendered on April 12, 1937. An appeal has been taken in the *Ontario* Case to the Privy Council in London, but the case has not yet been argued.

(h) The suggestion of conflict with the Constitution as a reason for granting the petition is unusual, but there is no constitutional question involved and none was urged or decided in the lower courts. Since the expiration of the patent the respondent never has had and never has claimed a monopoly. This is proven by the fact that it already has two strong competitors in the manufacture of the Perky product who have not found it necessary in enjoying the fruits of the expired patent to attempt to appropriate also the plaintiff's good will. The expiration of a patent does not carry with it the patentee's good will and other intangibles. The petitioner's difficulty here is that it seeks to appropriate the latter and that is the gist of this case.

III.

The name "Shredded Wheat", when first adopted by the Plaintiff, was not, and never has been, merely descriptive of the product.

The Circuit Court of Appeals found that the expression "Shredded Wheat" was not descriptive of the process or of the product but was at most suggestive.* This finding is amply supported by the record in this case. As appears from the statement of facts *supra*, the wheat berries are crushed, not torn, and are extruded from the rolls in the form of long threads. They are not "shredded" within any accepted definition of that word.† As the Circuit Court of Appeals so aptly pointed out, it would be as logical to call steel rails "shredded steel" or copper wire "shredded copper".‡

But the point is unimportant in this case because the petitioner does not use or wish to use the words in a descriptive sense but in a trade mark sense in order more readily to appropriate the tremendous good will which years of advertising and expenditure of vast sums of money have created for the respondent. Moreover, we do not assume that this Court will wish to devote its time in deciding the question of *fact* as to whether the court below was right or wrong in concluding that the word was not descriptive but, at the best, merely suggestive.

There is no point in the alleged disclaimers. The disclaimer in the pictorial trade mark of the words "The Home of Shredded Wheat" cannot be construed on any rational basis as a disclaimer of the *trade name* "Shredded Wheat" when the latter has been asserted as such a trade name continuously for 40 years. It will be borne in mind

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* R. Vol. III a, 2086.

† See for example Century Dictionary 1906, Webster's International Dictionary 1900.

‡ R. Vol. III a, 2086.

that the words "Shredded Wheat" were registered under the Act of 1920* and in 27 states and many foreign countries.† The same applies to the other incidents referred to by defendant in which the words "Shredded Wheat" appeared only incidentally.

The use of the expression "shred" and "shredded" in patents and advertising is equally unimportant. If the term was not descriptive of either the process or the product, it was not made so by later referring to the product as "shredded". But, as we have pointed out, it will not avail the petitioner here because it does not use the word in a descriptive sense.

IV.

The assignments of error are insufficient.

It should be noted that petitioner does not assign as error the order of the Circuit Court of Appeals or any part thereof. He does not assign as error the direction to the District Court to issue an injunction, nor does he specify as error the order for an accounting. His specifications of error go to the *reasons* of the court below, but not to the action which it took.

Conclusion.

It is respectfully submitted that the petition should be denied.

Dated, September 27, 1937.

THOMAS G. HAIGHT,
DAVID A. REED,
DRURY W. COOPER,
CHARLES A. VILAS,
Of Counsel for Respondent.

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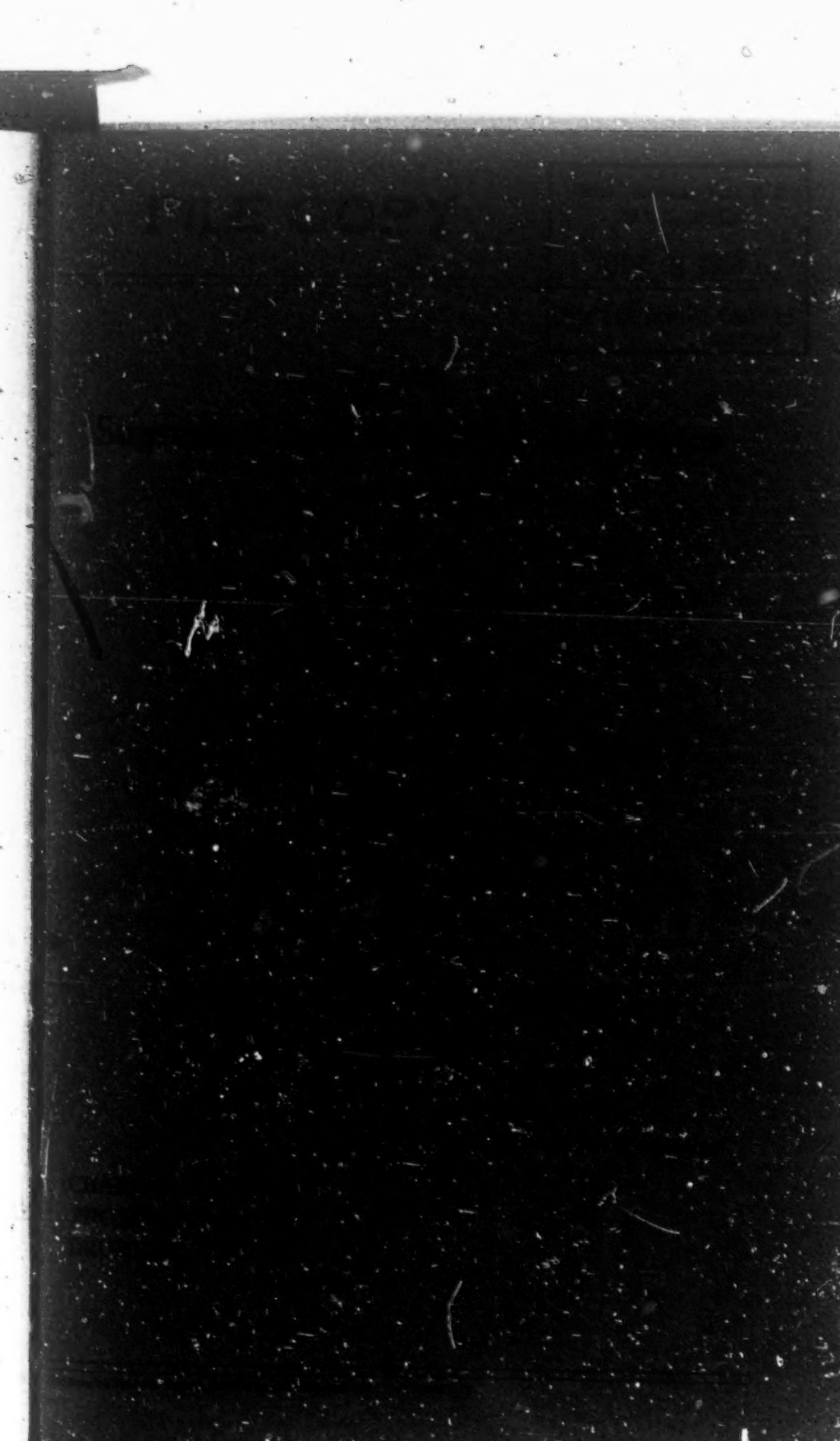
* R. Vol. IV, pp. 201-2.
† R. Vol. I, p. 315.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

Nos. 2 and 56.

KELLOGG COMPANY,
Petitioner,

AGAINST

NATIONAL BISCUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT

Abstract of the Proceedings

This case comes to this Court upon writs of certiorari to the Circuit Court of Appeals for the Third Circuit to review the action of that Court in reversing a judgment of the District Court for the District of Delaware which dismissed the plaintiff's bill of complaint; and also to review the further action of the Circuit Court of Appeals in clarifying its mandate to the District Court.

The action was commenced in June 1932 by the filing of a bill of complaint alleging unfair competition by the defendant. The District Court dismissed the bill on January 23rd, 1935 (R. vol. I, p. 228) with a written opinion not officially reported but found in the Record, page 193

On appeal by the plaintiff the Circuit Court of Appeals first affirmed the District Court with a *per curiam* opinion on January 16th, 1936. This opinion is not reported but is printed in the Record, volume III-a at page 2069.

A rehearing was granted and the case reargued at the October Term, 1936. On April 12th, 1937 the Circuit Court of Appeals made an order recalling its first opinion and reversing the judgment of the District Court and directing an injunction to issue (R. vol., III-a, p. 2094). The Court's opinion on reargument is reported 91 F. (2d) 150 and is also found in the Record, volume III-a, page 2083. A petition by the defendant for a writ of certiorari was denied by this Court on October 25th, 1937 (302 U. S. 733) and a reconsideration of said petition was denied on November 8th, 1937 (302 U. S. 777).

A motion by the defendant to stay the writ of injunction was denied by this Court December 6th, 1937 (302 U. S. 654).

The mandate of the Circuit Court of Appeals issued to the District Court on December 8th, 1937, and the District Court entered its interlocutory decree in the exact words of the mandate on January 5th, 1938 (R. vol. III-a, p. 2252), and a writ of injunction pursuant thereto was issued on January 7th, 1938 (*ibid* 2254).

On March 4th, 1938 the plaintiff petitioned the Circuit Court of Appeals to recall its mandate for the purpose of clarification (*ibid* 2248), which motion was granted, and the Circuit Court of Appeals on May 5th, 1938 entered an order recalling and clarifying its mandate (*ibid* 2285), accompanied by a written opinion (*ibid* 2282) reported in 96 F. (2d) 873.*

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* No point is made in petitioner's brief concerning the propriety of the action of the Circuit Court of Appeals in clarifying its mandate, and we assume that the second writ of certiorari was granted out of abundance of caution in order to have the entire record before the court. The application for clarification was made necessary by the petitioner's claiming in the District Court a construction of the mandate which entirely emasculated the injunction ordered by the Court of Appeals. (See *post*, p. 17).

The defendant thereafter petitioned this Court for a stay pending a further application for certiorari which was granted by this Court May 23rd, 1938 (303 U. S.); and on May 31st, 1938 this Court granted the defendant's application for reconsideration of its first application for certiorari, granted the application for the writ of certiorari, and granted a second application for a writ of certiorari to review the action of the Circuit Court of Appeals of May 5th, 1938 (303 U. S.).

Statement of the Case

This is an action for injunction against unfair competition. It is brought by the makers of the famous breakfast food "Shredded Wheat" to protect the good will which has attached to the article and to its name over a period of more than forty years, against the inroads of a competitor who is engaged in a systematic effort to appropriate the good will of the respondent.

The Circuit Court of Appeals found that the intention of the defendant, manifested by its conduct, is "to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff" (R. vol. III-a, 2092). This finding, as we shall demonstrate, is amply supported by the evidence.

The petitioner asserts that it may use the name and shape of the respondent's product because of the expiration of certain patents. It alleges that respondent seeks a "monopoly". But the fact is that the respondent has no "monopoly", and claims none (see *post*, p. 36).

"Shredded Wheat" is a whole wheat biscuit which has come to be known throughout the civilized world for its purity and cleanliness. What gives value to the trade name "Shredded Wheat" is the fact that throughout all the years the product has been made uniformly from specially selected wheat by a process carefully worked out and rigidly adhered to in order to prevent deviation

in quality. Thus a product which was once a laughing stock and the subject of quips and jokes (R. vol. III, p. 1658) has, by its sheer excellence and the uniform care always used in its preparation, become one of the standard articles of food in the United States and other parts of the world. The record shows that the product today is found in the homes of many millions of families in the United States. "Shredded Wheat" is a homely product, unattractive in its appearance, and its general acceptance by the public is due solely to its intrinsic merit—to the fact that the public has learned that it is a good food.

The process of treating wheat as employed in the production of "Shredded Wheat" was once the subject of United States patents, as was the machinery for making it. Those patents expired many years ago. During the decades that followed, the respondent spent many millions of dollars in building up a good will for its product and in teaching the public to be familiar with the trade name that denoted it. To claim now that it should have no equitable protection for that good will is to ignore entirely the basis in equity upon which this suit is founded and upon which protection is afforded to manufacturers and to merchants against the inroads of competitors who seek to reap where they have not sown. That this is true of the petitioner in this case is amply demonstrated by its conduct as disclosed in this record.

The public has a real interest in this matter. If petitioner is free to use the trade name "Shredded Wheat", then every other manufacturer may do the same. Nothing in this record would warrant us in asserting that the petitioner's product is inferior in quality, but it is self-evident that there would be many manufacturers who would not use the highest quality of white winter wheat, at extra cost, as does the respondent, and who would not use the same expensive precautions to assure purity and cleanliness of their product. The whole success of "Shredded Wheat" has been due to this scrupulous care in its manufacture.

The actual issue in this case is not, as contended for by petitioner, whether respondent is seeking a perpetual "monopoly" in a patent-expired product or whether the expression "Shredded Wheat" is descriptive and open to appropriation by anyone; but, as pointed out at the outset of this brief, the real question and the only one is whether the petitioner by its inequitable and fraudulent conduct has been guilty of "misappropriation of what equitably belongs to a competitor". *Schechter Poultry Corporation* vs. *United States*, 295 U. S. 495, at page 532. It is not the respondent alone who is entitled to protection in such a case, but the consuming public as well, which has learned through many years of constant excellence in service to expect a certain product when called for by a certain name. The respondent is entitled to continue to render to the public the service which the public has learned to expect.

Keeping in mind this simple question, we proceed to point out what the evidence in this case discloses.

1. The History of Shredded Wheat.

"Shredded Wheat" was first produced in 1893 by Henry D. Perky (R. vol. I, p. 195). It was put forth as a new method of making bread out of whole wheat. In the specifications for the patent granted to him on October 15th, 1895 (R. vol. IV, p. 207) the object of the invention is described as follows:

> "An object of the invention is the production of an article of food or bread, consisting of externally-rough porous threads or filaments of wheat or similar grain, having the outer nutrition bran and gluten of the entire berry visibly mingled with the interior starchy portion thereof and adapted by their composition of entire grain-berries and their rough and porous thread-like or shred-like form to constitute, without other shortening or aeration, bread of especially light and wholesome character.

> "A further object of the invention consists in the novel art or method of preparing the grain or berry and reducing it to form without taking from the grain any of the beneficial qualities provided by nature and presenting the same in convenient form for service as a superior article of food without the aid of experts or skilled labor now required to produce palatable bread."

The practice adopted by the inventor to attain his object consisted in first cleaning the wheat in berry form and then boiling it until cooked without destroying its form. The wheat was then allowed to dry for some hours during which it was agitated or stirred until enough of the moisture was thrown off to give consistency to the substance of the berrics. They were then passed between steel rolls at high pressure, one of which had a plane surface and the other a grooved surface. The result was a complete crushing and intermingling of the various component parts of the wheat berry and their extrusion from the rolls in long filaments or threads of wheat. Perky's patent stated that *"the food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways"* (R. vol. IV, p. 207).

In practice Perky and his successors, including the respondent, as well as various competitors of the respondent, have all used a series of rolls which deposit the filaments upon a moving belt (or in some cases upon a revolving spindle). Up to this point in the process everyone has been, since the expiration of the patents, and is today free to use Perky's methods. The respondent asserts no right to any protection against such use.

It is important to note that the process just referred to does not produce "Shredded Wheat" biscuit.

After a sufficient number of filaments have been collected upon the moving belt,* or spindle, various manufacturers of the product cut the mass into different shapes prepara-

* See for example the illustration, R. vol. IV, p. 87.

tory to the final process of baking. Perky and his successors, including the respondent, have *always* used the familiar pillow form of the biscuit. Other competitors, such as The Quaker Oats Company and The Loose-Wiles Biscuit Company, have adopted other forms readily distinguishable from the respondent's pillow shape, as will be more fully shown hereafter. In all cases the custom has been to take the biscuit thus formed and to bake it until most of its moisture is expelled, after which by a further drying process the biscuit is rendered practically bone-dry and is ready for the market.

Perky began the sale of "Shredded Wheat" in Denver about 1893. The industry had an humble beginning and as the product became known it was the butt of ridicule wherever introduced (R. vol. III, p. 1658). Nevertheless by 1901 sufficient capital had been raised to erect a plant at Niagara Falls, which is still in use. The growth of the business is graphically shown in respondent's Exhibit 150 (R. vol. IV, p. 51) where appear the sales year by year. Voluminous exhibits, showing the annual expenditures, classified as to the nature of the advertising, will be found in the record, vol. IV, pp. 11 to 52; and the deposition of Truman A. DeWeese (R. vol. I, pp. 558 *et seq.*) portrays graphically the advertising methods used. To the time of bringing this suit more than thirty-five million dollars was thus expended and the sales increased from 37,172 cases in 1896 to a peak of 2,521,751 cases in 1928.* By the year 1922 over 45,000,000 cases had been sold, containing in all nearly twenty billion biscuits.

This astonishing growth was due not alone to the large amount of money spent in advertising, but to the great care and skill exercised by the respondent and its predecessors in the selection of materials and the painstaking attention to processing. Only Number One white winter wheat is used. It is all carefully graded and inspected by a United States Inspector. The respondent maintains a

* Each case contains 36 cartons, each carton 12 biscuits.

wheat research bureau and has financed State agricultural colleges in the development of the highest type of white wheat for the purpose of use in this product (R. vol. I, 259-260).*

The company which began operations in 1901 was a New York corporation known as "Natural Food Company". In 1908 its name was changed to "The Shredded Wheat Company", and it continued to operate as such until the year 1930 when the properties and good will of the business were sold to the present respondent, National Biscuit Company.** The product has been called by the manufacturer "Shredded Whole Wheat Biscuit", "Shredded Wheat Biscuit" and "Shredded Wheat", but the last name is the one which has been accepted by the public. Millions of Americans use it at their breakfast tables. It is safe to say that there is not a restaurant, café or dining car in the United States in which a call for "Shredded Wheat" will not quickly produce respondent's biscuit—except insofar as petitioner by its conduct about to be narrated, has succeeded in raiding the good will of the respondent by adopting the name and form for an imitation biscuit.

2. The Conduct of Various Competitors.

Perky's patent to which we have referred expired in 1912 and all of the patents covering the machinery and various other forms for shaping the product expired soon after. Since that time there have been at least four competing manufacturers who have undertaken to market whole wheat processed according to the disclosure of the patent; namely, the Ross Biscuit Company in 1915, the

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* Immediately following the reference just given will be found a detailed description of the process employed and the great care used to produce a product of uniform excellence.

** The use of the words "petitioner" and "respondent" herein will be understood, unless otherwise stated, to include the respective predecessors of the parties.

Quaker Oats Company since 1923, the petitioner Kellogg Company for a short period in 1922 and again since 1927, and the Loose-Wiles Biscuit Company since 1932.

The Ross Biscuit Company, organized by three former employees of The Shredded Wheat Company, in 1915 started marketing a product in exact facsimile of respondent's "Shredded Wheat" biscuit under the name "Ross's Whole Wheat Biscuit". Suit was brought against a distributor of this product in the District Court for Connecticut and an injunction was issued against sales of the biscuit in the form and shape of respondent's biscuit. Judge Thomas held that the appearance of the biscuit had *then* acquired secondary significance distinctive of the plaintiff's manufacture (244 Fed. 508). This judgment was affirmed with modification by the Circuit Court of Appeals for the Second Circuit (250 Fed. 960). It should be noted that Ross did not appropriate the name "Shredded Wheat" but only the shape of the biscuit. A photograph of Ross' carton will be found at page 124 of this brief.

The Quaker Oats Company makes use of the process disclosed by Perky in his patent but has found it unnecessary to appropriate either the name "Shredded Wheat" or the shape of the biscuit. It makes a round biscuit and calls it "Muffets". It is manufactured and sold in substantial volume in competition with "Shredded Wheat". A photograph of the "Muffets" carton will be found at page 125 of this brief.

The Loose-Wiles Biscuit Company manufactures a biscuit according to the disclosure of the patent, but in a shape totally different from that of the respondent's. It calls its product "Rippled Wheat", and sells it in competition with "Shredded Wheat". A photograph of the "Rippled Wheat" carton will be found at page 126 of this brief.

The statement on page 21 of petitioner's brief that "neither Muffets nor Rippled Wheat is a shredded wheat

product'' is incorrect. The contrary is established by the testimony of Doctor Oakes (R. vol. I, pp. 285-287) and by a reading of the patents themselves. The specifications of the patents show that the rolls by which the threads of the processed wheat are extruded, are pressed together under several thousand pounds of pressure. The amount of pressure is determined by the adjustment of set screws provided for that purpose. The pressure is so great that no particle of a wheat berry escapes being pressed into one of the grooves and thus becoming a string. If, however, the pressure of the set screws is relaxed so that the rolls are not in such heavy contact, the product coming from the rolls is more like a ribbon or lace, as specified in the very first patent covering the machine comprising the rolls (R. vol. V, p. 3) in which the inventor says, referring to the rolls:

> ''The grain * * * is fed in any convenient manner between the rolls B and B′ at O by which it is compressed into the grooves on roll B from which the product *in the form of threads, lace, or ribbons, or sheets, etc.*, (the form of which depending on the contact or proximity of rolls B and B′) is removed by scraper D.''

3. The Conduct of the Petitioner.

About the time the Perky patent expired in 1912, the petitioner began the manufacture of a whole wheat biscuit which it called ''Kellogg's Toasted Wheat Biscuit''. A photograph of its carton will be found at page 118 of this brief. Although the petitioner continued the manufacture of this biscuit for years it was unable to make much headway against ''Shredded Wheat'' and in 1919 gave up its manufacture entirely. Meanwhile respondent's business had grown greatly. Its product was increasingly welcomed by the public. From 889,000 cases in 1912, its sales had increased to 2,035,000 cases in 1922. The petitioner prides itself on being ''the largest manufacturer of cereals in the country''

and it must have regarded this growing competitor with apprehension, as also it longed to share in the trade which respondent had built up. Thereupon, in striking contrast to its own earlier conduct and to the conduct of the other competitors, the petitioner in 1922 started what now appears to have been a studied and deliberate raid on the good will of The Shredded Wheat Company. In January 1922 it began to market a biscuit in a form almost exactly imitative of the familiar pillow-shape of respondent's biscuit, except only that it is slightly shorter.* It named this biscuit "Kellogg's Shredded Whole Wheat Biscuit". In large red letters it stated on the carton "The Original has this Signature W. K. Kellogg" (see photograph at page 119 of this brief). It was notified by The Shredded Wheat Company to desist, and in October 1922 petitioner ceased manufacturing the imitation biscuit (R. vol. I, p. 67).

For five years the petitioner waited, without further effort to compete with "Shredded Wheat". Meanwhile respondent increased its advertising efforts, expending in those years more than $8,800,000, and its business grew to 2,477,000 cases in 1927. In that year petitioner resumed the manufacture of the imitative biscuit under the same name, and declined to recognize any rights in the respondent to protection from this unfair competition. A suit was thereupon brought by The Shredded Wheat Company in the District of Connecticut in 1928 and testimony was taken by way of deposition. Faced with this suit, the petitioner in 1930 abandoned its use of

* How much shorter is the subject of rather wild guesses by the District Court, by the petitioner and by the British Court of Appeals. The District Court says at R. vol. I, p. 203 that petitioner's biscuit is "less than two-thirds" the size of respondent's; the petitioner's brief (page 26) now repeats this statement, and the British Court says (petitioner's brief, page 129) it was "some 25 per cent shorter". As a matter of fact, it is just 17 per cent shorter. In width and thickness it is the same.

the words "Shredded Wheat" and began the use of the name "Kellogg's Whole Wheat Biscuit", a name to which the respondent had and can have no objection. In view of this the Connecticut suit was discontinued without prejudice (Ex. 251, R. vol. IV, p. 127).

No sooner, however, had petitioner given up the use of respondent's trade name than the petitioner put on the face of its package an imitation of respondent's registered trade mark, consisting of two biscuit in a bowl of milk (R. vol. IV, p. 205). Reproductions of this carton will be found in the opinion of the District Court (R. vol. I, p. 215); in the interrogatories (R. vol. I, pp. 138-154, 155); and in this brief (*infra*, p. 122). Not content with this misrepresentation, it placed upon the ends of the same carton the words "A Shredded Wheat Product" and "Shredded Wheat in its Most Delicious Form" (R. vol. I, p. 219).

Almost simultaneously the petitioner adopted a carton for its biscuit which contained a cellophane window so placed as to display to the purchaser the *ends* of the biscuit (identical in width and thickness with respondent's), thus completing the deceptive simulation of the respondent's biscuit. A photograph of this carton appears at page 123 of this brief.

On many thousands of packages it placed in a prominent position the expression "The Original has this Signature W. K. Kellogg", thus representing, as the Circuit Court of Appeals found, that *its* product was the original, and by implication that the respondent's was an imitation. (One of these cartons is pictured at R. vol. IV, p. 1).

The petitioner asserts that although it has copied respondent's trade name and the shape of respondent's biscuit, and although it has used the other devices above described, there has in fact been no deception of the public, that there has been and can be no confusion between the products and that there is a complete absence of any passing off or of the likelihood thereof. *The evidence to the contrary is overwhelming.* As we shall show more

fully hereafter (page 24 *et seq.*), and as the Court will readily see by a mere glance at the testimony of numerous witnesses for both parties appearing in Appendices B (p. 72, *infra*) and D (p. 93, *infra*), confusion and passing off are not only possible, but have been abundantly proven.

In 1932 it began its third invasion of respondent's good will. Completely ignoring the assurance of fairness implicit in its abandonment of the use of respondent's trade name in 1930, petitioner, in the early part of 1932, launched an advertising campaign in which it flooded the country with announcements of an imitation biscuit which in bold type it called "Shredded Biscuit" and "Shredded Wheat Biscuit" (See Interrogatories No. 82 and No. 83 and the related Exhibits, R. vol. I, pp. 92-101, 111 *et seq.*).

The present action was thereupon brought in the District Court of Delaware in June of 1932.

The Decisions Appealed From

1. The Decision on Rehearing.

In its first opinion, delivered *per curiam* in January 1936, the Circuit Court of Appeals affirmed the District Court's holding that the name "Shredded Wheat" was descriptive and that upon the expiration of the process patent No. 548,086 the name passed into the public domain and remained there and became public property.

A rehearing was asked for on the ground that the decision of the Court was not in harmony with the modern doctrine of unfair competition as defined by this Court in *Schechter Poultry Corp.* vs. *United States*, 295 U. S. 495, at p. 532 (see *infra*, p. 33). This decision had not been called to the Court's attention at the first hearing. The rehearing was granted.

Upon rehearing, the Court reconsidered its earlier opinion, and held that although the petitioner might have been free to use the name "Shredded Wheat" and the form of the biscuit under proper restrictions, had it done so

within a reasonable time after the expiration of the Perky patents, it was no longer free to do so after the respondent and other competitors had stood by for fifteen years,* and allowed the petitioner "at great expense to make 'Shredded Wheat' a household word and the form of its biscuit known throughout the world as its own product" (R. vol. III-a, p. 2087).

The Circuit Court of Appeals found that during that fifteen year period respondent and its predecessors spent more than $17,000,000 in advertising and built up a large business and a very valuable good-will. It also found that:

> "It is undisputed that at the time defendant adopted the name 'Shredded Wheat', and the trade mark of the plaintiff to designate its product, the trade and consumers generally had come to regard the name and trade mark as identifying plaintiff's biscuit" (R. vol. III-a, p. 2086; 91 F. (2d) 150, 152).**

The Circuit Court of Appeals then proceeded to find that the term "Shredded Wheat" was not purely descriptive of the respondent's product; and after reviewing the nature of the process by which the wheat is spun into long filaments, it held that the name is at most only suggestive and, therefore, capable of constituting a valid trade mark under the authorities cited by the Court (see R. vol. III-a, pp. 2086 *et seq.*; 91 F. (2d) at p. 153).

The Court then called attention to the fact that other competitors, *including the petitioner*, sold the product

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* Petitioner did use the name "Shredded Wheat" for a very short period some ten years after the Perky patents had expired, but abandoned this use at the demand of the respondent. (See this brief, p. 11, *supra*.) In 1915 the Ross Company imitated the form of respondent's biscuit, but did not use the name. It was enjoined (see *supra*, p. 9).

** The trade mark referred to is the so-called dish trade mark showing two biscuits, which was imitated by the petitioner at the time it elected to call its product "Kellogg's Whole Wheat Biscuit" (R. vol. IV, p. 205).

manufactured pursuant to the process patent under distinctive names. It then said:

> "But this did not enable the defendant to get the property which the plaintiff had built up in the name of 'Shredded Wheat', and so it abandoned its effort to sell its product as 'Kellogg's Whole Wheat Biscuit'" (R. vol. III-a, pp. 2087-2088).
>
> "The adoption by anyone of the name and form of an article under which a competitor has been selling it carries with it the presumption that he expects to derive benefit from this adoption and intends to mislead the public with probability of success" (*ibid*, p. 2088).

The Court then recognized the most important feature of this case, namely, that it is a case of unfair competition in which the petitioner is charged with intentional fraudulent conduct and not a mere case of patent or trade mark infringement, to be dealt with upon rigid technical considerations.

Then, referring to the case of *Barton vs. Rex-Oil Co.*, 29 F. (2d) 474 (C. C. A. 3, 1928), in which the same Court, speaking through Judge Woolley, had dealt with the word "Dyanshine", the Court said:

> "We held that the defendant was guilty of unfair competition and enjoined it 'from using the words "dye and shine" in any way, form, arrangement, or manner of spelling as the name, or as resembling a name, of its product, leaving it free, of course, to use these words merely and exclusively in describing the qualities and characteristics of the product.' *This the defendant in the case at bar is free to do, but may not, as it has been doing, use the words 'Shredded Wheat' as a trade-name of its product*" (*ibid.*, pp. 2089-2090).*

The italicized portion of the above quotation is a complete answer to the claim of the petitioner in this case

* Unless otherwise stated, all italics in this brief are supplied by us.

that it is forbidden from describing its product. The petitioner does not wish to use the words as part of the description of its product, but boldly as a *trade mark*.

Dealing with the form and shape of "Shredded Wheat" biscuit, which the petitioner also appropriated, the Court applied the same rule as it had with respect to the name, holding that a former design patent, held invalid in 1908, would not permit the petitioner to appropriate the form and appearance of the biscuit which had characterized it for forty years, saying:

> "The case stands as it would have stood if there had been no patent and the plaintiff had started with a new and unpatented product in 1912, calling it by the trade-name of 'Shredded Wheat' which it had sold in a particular form and for fifteen years had spent $17,000,000 in advertising it and had built up an invaluable good-will in the name which it had exclusively used" (*ibid.*, p. 2092).

One more act of unfair competition is cited in the Court's opinion, namely, the placing by the petitioner on many of its packages the words "The Original has this Signature W. K. Kellogg". This the Court found was an intentional misrepresentation that the *petitioner's* was the original product and respondent's an imitation. The Court said:

> "There could have been but one object for doing this, and that was, by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff. This equity will prevent by injunction" (*ibid.*, p. 2092).

The closing paragraph of the Court's opinion is as follows:

> "In view of the fact that 'Shredded Wheat' is the plaintiff's trade-name, that defendant deliberately started out to acquire by unfair competition and misstatements the trade which equitably belonged to the plaintiff, and that it is practically impossible for

the defendant to use the name and form of plaintiff's biscuit to designate its product without confusion, deception of the public, and unfair competition with the plaintiff, a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant *from the use of the name 'Shredded Wheat' as its trade-name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark;* and with further directions to order an accounting for damages and profits" (*ibid.*, 2093).

2. The Opinion Clarifying the Mandate.

The italicized portion of the above quotation was contained in the mandate of the Circuit Court of Appeals to the District Court and was retained by the District Court in its interlocutory decree and in the writ of injunction, without the addition of any other than formal words.

In its petition for rehearing and in all of its applications to this Court during the October 1937 Term, the petitioner insisted that the injunction directed by the Circuit Court of Appeals, and issued by the District Court, forbade it from using the term "Shredded Wheat" as its trade name, from making the biscuit in the form and shape of respondent's, or from using the dish trade mark. After the mandate had come down, petitioner for the first time adopted the view that the decree was conjunctive and forbade it only from doing the three things *concurrently;* and that it might continue to make the biscuit in the same form as the respondent's biscuit and even to call it "Shredded Wheat", provided it did not use the dish trade mark. The District Court appearing to have some doubt on this point, the respondent found it necessary to ask the Circuit Court of Appeals to recall and clarify its mandate in order to remove all doubt (R. vol. III-a, p. 2248). This application was presented at length to the Circuit Court of Appeals and resulted in the

opinion of May 5th, 1938 (R. vol. III-a, p. 2282; 96 F. (2d) 873) in which the circumstances are fully recited. The Court said:

> "We thought that, when our opinion was read as a whole, we had made it perfectly clear that what we intended to enjoin was the use of the name 'Shredded Wheat' as a trade-name and the advertising and selling of biscuits in the pillow-shape form, irrespective of whether the two-biscuit-in-a-dish trade-mark were employed in connection with either the use of the name or the sale or advertising of the biscuit in the pillow-shape form. This was the construction which the appellee placed on the opinion and order of April 12, 1937, in its petition for rehearing to this court and appellant says that it placed the same construction upon them in its various petitions to the Supreme Court. It so admitted before this court at the hearing to recall the mandate. Appellee in those petitions doubtless placed upon the mandate what it believed to be its proper construction and its changed view adopted after the mandate of this court had issued was apparently due to the exigencies of its position rather than to any real belief that the opinion of this court left any doubt as to what was meant. The language at the end of the opinion and in the order and mandate is poorly phrased. We intended to enjoin the use of the words 'Shredded Wheat' as a trade-name, the advertising and sale of biscuits in the pillow-shape form, and the use of the two-biscuit-in-a-dish trade-mark, separately or together."

Counter-Statement of Question Involved

Is petitioner's whole course of conduct in competition with respondent so unconscionable and unfair as to warrant a court of equity in granting the relief that the court below gave?

ARGUMENT

I

The Petitioner's Competition is Unfair and Calls for Equitable Relief

The behavior of the petitioner, of the respondent and of the other competitors in the industry since the expiration of the patents in 1912, must be considered as a whole if a true picture of the competitive situation is to be obtained. To treat the case piecemeal, as the petitioner has done in its brief, is to obscure the whole history of the matter and to prevent the Court from understanding the vivid contrast between the unconscionable and unfair behavior of the petitioner and the wholly fair behavior of the other competitors in this industry, who likewise have used the expired Perky patents to make competing whole wheat biscuits.

Let us take then the situation that obtained in 1912, when Perky's machinery and process became open to use by all the world. This respondent has never at any time since then claimed any right to exercise a "monopoly" in the manufacture or sale of these whole wheat biscuits. It asserts no right except that enjoyed by every member of the public, to wit: to be protected against unfair competition. There has been practically constant competition in the manufacture of such whole wheat biscuits since 1912 and of this respondent makes no complaint except in the isolated case of the petitioner's efforts to compete unfairly.

Beginning in 1912 the petitioner began to manufacture and sell a product which it called "Kellogg's Toasted Wheat Biscuit" (R. vol. II, p. 1046 *et seq.*). The process of manufacture differed from Perky's process only in that the wheat was reduced to a dough and flavored before being passed through the Perky rolls (R. vol. II, pp. 1046, 1048).

The product was forced out from the rolls in thread-like form, collected upon a moving belt and cut into biscuit form in the manner that had been used by Perky, and it was baked and dried in the manner that Perky had followed. The result was a biscuit which entered directly into competition with "Shredded Wheat". The carton in which it was sold and which contains a picture of this biscuit appears hereafter at page 118 of this brief.

Of this competition, in which the petitioner used a different name and a distinguishing form of biscuit, this respondent could reasonably have made no complaint and in fact did make no complaint.

Seven years of competition between these products then ensued. The respondent's "Shredded Wheat" continued to grow in popularity, thanks first to the unvaried maintenance of its quality, purity and cleanliness and thanks second to the diligence with which it was advertised by the respondent. During these seven years respondent spent in advertising "Shredded Wheat" upwards of $5,000,000 (R. vol. IV, p. 51). Its sales of "Shredded Wheat" increased from 889,623 cases in 1912 to 1,790,830 cases in 1919.* In 1919 the petitioner voluntarily abandoned its production of "Kellogg's Toasted Wheat Biscuits" (R. vol. II, p. 1048).

Meanwhile in 1915 another competitor had appeared. One Ross, a former employee of The Shredded Wheat Company, commenced to make "Ross's Whole Wheat Biscuit". While Ross apparently did not dare to imitate the respondent's trade name for the biscuit, he nevertheless made a biscuit which was in form an exact imitation of "Shredded Wheat". A photograph of his carton appears hereafter at page 124 of this brief and in this photograph the biscuit itself is shown. Immediately suit was brought against Ross and his Connecticut distributor by The Shredded Wheat Company and he was enjoined by the District Court of Connecticut from making a biscuit of

* Each case contains 36 cartons—each carton 12 biscuits.

the same shape as "Shredded Wheat" unless each biscuit be banded or otherwise distinguished from respondent's "Shredded Wheat". *Shredded Wheat Co.* vs. *Humphrey-Cornell Co.*, 244 Fed. 508 (D. Conn., 1917). In this matter the District Court found that both the name "Shredded Wheat" and the form of the biscuit had acquired secondary significance. After appeal had been taken to the Circuit Court of Appeals, and the order of the District Court, had been modified and affirmed, 250 Fed. 960 (C. C. A. 2, 1918), the District Court entered its order on the mandate (R. vol. IV, p. 57). In that order is embodied the finding (*ibid*, p. 59), "That the said form, shape, size and color of the said biscuit *have come through long and exclusive use and advertisement, to have the meaning and significance only of the product and biscuit of the complainant*". The only respect in which the Circuit Court of Appeals modified the injunction originally issued by the District Court was to require banding or distinguishing marks only upon those biscuits which reached the ultimate consumer outside the cartons. Shortly after this decision Ross' company came into financial difficulties and abandoned its effort to compete in this product.

From 1919 until January 1922 the Kellogg Company made no effort to re-enter the field. Meanwhile during 1920 and 1921 the respondent continued its extensive advertising. In those two years it expended upwards of $1,500,000 in advertising and its sales rose from 1,790,830 cases in 1919 to 1,949,310 in 1921. In January 1922 the Kellogg Company resumed unrestrained competition and announced the forthcoming production of "Kellogg's Shredded Whole Wheat Biscuit"—a biscuit of the identical pillow shape form of "Shredded Wheat". This biscuit, like the one now being made, is, on close examination, found to be exactly 83 per cent of the length of the true "Shredded Wheat" biscuit. But in the record it is shown that in a multitude of cases petitioner's present biscuit has been mistaken for "Shredded Wheat" by the ultimate consumer (See Appendix B, pp. 72, 77, *infra*). As if

to aggravate the offense, petitioner placed upon the carton in large letters the words "The Original Has This Signature W. K. Kellogg". A photograph of the carton of January 1922 appears hereafter at page 119 of this brief. The record is replete with evidence that the use of this phrase operated to deceive both retailers and consumers, for it has been shown that many grocers assured their customers that the Kellogg biscuit was the original and inferentially that the respondent's biscuit was but an imitation (see the numerous extracts quoted in Appendix B, p. 72, *infra*). At once The Shredded Wheat Company took action and demanded that this unfair competition be stopped (R. vol. I, p. 103). Apparently conscious that the use of respondent's trade name and the imitation of the form of respondent's biscuit were indefensible, the petitioner in October of the same year ceased to make and sell the offending biscuit (R. vol. I, p. 67).

After petitioner discontinued the production of its imitation "Shredded Wheat" biscuit in October, 1922, it again remained out this field until the year 1927. Meanwhile the respon t's business had continued to increase and from a production of 2,035,922 cases in 1922 had grown to 2,477,262 cases in 1927. It had spent in advertising during this period upwards of $8,800,000.

In 1927 the Kellogg Company could boast that it was the largest manufacturer of breakfast cereals in this country (R. vol. I, p. 203). The field occupied by "Shredded Wheat" must have been tempting and the growth of the respondent's business disquieting, for in 1927 the petitioner made its third attack upon this field. Its earlier "Kellogg's Toasted Wheat Biscuit" had failed in competition. Its 1922 invasion of the trade name and of the shape, and its claim that its biscuit was the original, had been abandoned upon demand of The Shredded Wheat Company. But in 1927 it started again to produce a biscuit in the pillow shape form and to give it the name of "Kellogg's Shredded Whole Wheat Biscuit". A photograph of the carton used at this time appears at page 121, *infra*.

In 1928 The Shredded Wheat Company brought suit to restrain this fresh outburst of unfair competition, commencing an action in the United States District Court for the District of Connecticut against the Kellogg Company and certain of its distributors. After some depositions had been taken in this action, but before trial, the Kellogg Company in 1930 again surrendered and indicated its intention thereafter to call its product "Kellogg's Whole Wheat Biscuit". Thereupon the action in Connecticut was discontinued without prejudice (R. vol. IV, p. 127).

But petitioner's retreat was grudging. It did for a time discontinue the use of the words "Shredded Wheat" on the face of its cartons, but it adopted several other expedients to confuse:

It continued the use of the pillow shape form, only slightly shorter than the true "Shredded Wheat";

It imitated the respondent's registered trade-mark of two "Shredded Wheat" biscuits with cream in a dish (Compare the reproduction of the trade-mark, R. vol. IV, p. 205, and the manner in which it is used on respondent's current carton, R. vol. I, p. 207, with the photograph of petitioner's carton, p. 122, *infra*);

It placed a cellophane window in the front of its carton which showed only the ends of its biscuits and thereby rendered confusion inevitable between them and the true "Shredded Wheat" (See the photograph, p. 123, *infra*);

It used the phrases "A Shredded Wheat Product" and "Shredded Wheat in its Most Delicious Form" upon the ends of its carton (See R. vol. I, p. 219);

It revived again the false assertion used in 1922 that "The Original Has This Signature W. K. Kellogg" (See R. vol. IV, p. 1).

In an effort to show that this claim of being the original biscuit is "trivial", the petitioner prints opposite page 35 of its brief a supposed reproduction of one of its two-biscuit cartons in which the phrase is in type almost too tiny to be legible, wholly ignoring the fact that it was proved that the cartons of this size which were in use in 1932 carried the legend in substantially larger and perfectly legible type (R. vol. IV, p. 1). We have already called attention to the testimony quoted in our Appendix B, page 72, to the effect that the result of the use of these devices was a general deception of the trade and of the consumers as to which biscuit was the original and which the imitation.

Despite all these handicaps, "Shredded Wheat" continued to prosper, probably because during the depression the respondent continued its active advertising campaign, spending upwards of $2,500,000 during 1930 and 1931. In 1932 the Kellogg Company for the third time attempted to pirate the trade name, and in spite of its withdrawal of 1930, the company and its dealers came out with an advertising campaign in hundreds of newspapers throughout the country (R. vol. I, pp. 92 to 100) in which it paraded first its "Shredded Biscuit" (*ibid*, pp. 111 *et seq.*) and then "Shredded Wheat Biscuit" (*ibid*, pp. 176 *et seq.*).

Thereupon the present action was brought.

1. Petitioner's Conduct Has Led Inevitably to Confusion and Passing Off.

The petitioner's brief contains (p. 55 *et seq.*) the surprising statements that "There has been no deception of the public as to the origin of the respondent's and petitioner's products"; that "There has been and can be no confusion between them" and that there is "an absence of any passing off or likelihood thereof". These statements are gravely in error. The record abounds with evidence of confusion and passing off, *despite the difference in the*

cartons, upon which petitioner so heavily relies. A large number of instances are collected in Appendix B, page 72, *infra.*

Confusion and passing off are especially likely when the biscuit of petitioner is served to a consumer outside the carton, in a dish or bowl, as it frequently is in restaurants, cafés or hotels, and as it almost always is in private homes or boarding houses. Petitioner seeks to minimize this important fact by asserting that only two per cent. of those of its biscuits which are sold in restaurants, etc., are served to the customer outside individual cartons, so that "only approximately one in 5,000 biscuits sold by petitioner is served apart from the carton". (See petitioner's brief, p. 6. The same statement is repeated in various forms at pp. 32, 46 and 55-56). This assertion is based upon a finding of the District Judge to that effect (R. vol. I, p. 204).

The importance of this finding is manifest. *And yet the finding is wholly unsupported by the evidence.* In the first place, the District Judge's calculation is incorrect on its face. As is admitted in the petitioner's brief (footnote, p. 6), the premise that only two per cent. of the restaurant sales are made outside the carton, leads to the conclusion that approximately one in 2,000 (not 5,000) of petitioner's total sales is so made. But secondly, the premise itself is quite lacking in any substantial foundation in the evidence.* The testimony is, in fact, to the contrary. Many of the witnesses who were called in this case either by the petitioner or the respondent testified to the manner in which they served or received petitioner's biscuits in seventy-five different public eating places throughout the country. In *nineteen* of these seventy-five places the biscuits were served *without* the carton. The testimony of these wit-

* Judge Nields apparently took the figures, as well as the miscalculation, from the petitioner's answer to respondent's Interrogatory No. 33 (R. vol. I, p. 73). The "estimate" contained in this answer in turn has no foundation other than the unsupported guess of a single witness (R. vol. II, p. 1075).

nesses is presented in tabular form in Appendix C, p. 87, *infra*.

In other words, *over twenty-five per cent.* of them served the biscuits apart from any carton; and the evidence shows that *many of the consumers were confused* as to the origin of the biscuits that were served to them (Appendix B, pp. 81, 83). If the same percentage of uncovered biscuits were served throughout the nation, as appears to have been served by or to the many witnesses who testified in this case, then about 270,000,000 of respondent's biscuits are annually served to the ultimate consumer apart from their carton. Assuming further that each customer receives two biscuits, there is opportunity for about 135,000,000 deceptive substitutions of petitioner's biscuit. But even if Judge Nields' guess were taken to be correct and the proportion stated *by the petitioner* were to be applied to the respondent's sales in the year 1928 of 2,500,000 cases,* the resultant computation would show that not less than 540,000 of respondent's biscuits were in that year served without production of the carton.

The record shows conclusively that not only were intending purchasers of respondent's product often unable to tell whether they were getting what they desired, when supplied with petitioner's biscuit, but that in many instances actual falsehoods were used to reassure them.

Thus doubting customers were told variously that the Kellogg Company had sold out to the National Biscuit Company; that the Kellogg Company had purchased the Shredded Wheat Company and was putting out the biscuit in the package tendered; that the Kellogg biscuit was Shredded Wheat, made at Niagara Falls; that it was National Biscuit Shredded Wheat; that it was the original Shredded Wheat; and that Kellogg was the first to manufacture Shredded Wheat. Quotations from the testimony on this score appears in Appendix B at pages 72-76, *infra*. Although this testimony presents a graphic picture

* The figures of petitioner's sales are not in evidence.

of misrepresentation and unfairness, to the petitioner it is merely "open and honest competition fairly and actively waged".

The record also contains many other instances of passing off. We have collected some of the testimony on the subject in Appendix B, page 72, *infra*, at pages 76-77. On each occasion the customer had ordered Shredded Wheat, expecting to receive respondent's biscuit, but was supplied with petitioner's Whole Wheat Biscuit. It is interesting to note that at times the customers' doubts were allayed by having the dish picture on the carton called to their attention (*ibid*, at pp. 76, 78, 79), or by an assurance that the package was the original Shredded Wheat (*ibid*, at pp. 73-75), or that sometimes it came marked one way and sometimes another way (*ibid*, at p. 76).

In the matter of confusion there is considerable proof that customers selected or accepted petitioner's carton in the belief they were getting that of the respondent, only to discover the substitition when paying for the goods, or after they had left the store or had arrived home. At times the mistake was occasioned by the customer's noticing on the carton the familiar picture of two biscuits in a dish; at other times it was due to his catching sight of the biscuit ends through the cellophane window in the package. Testimony on this score is printed in Appendix B, page 72, *infra*, at pages 77-80.

Petitioner's assertion that no consumer has ever taken petitioner's product believing he was receiving respondent's is completely disproved by the statements of many witnesses. We need only point to testimony like that of Mrs. Grace Darling (R. vol. I, pp. 393, 394), who first discovered the substitution on the day following her purchase; of George Schapansky, who in one instance was unaware that he had the wrong carton until he came to pay for it (R. vol. I, pp. 717, 718), and, in another, until after he had left the store (R. vol. I, pp. 722, 723); and of Mrs. Jessie Fatjo, who had driven away from the store before she

learned of the substitution (R. vol. I, p. 745). Other witnesses who at the time of purchase believed they had received respondent's goods are Mrs. Caroline Cavalier (R. vol. I, p. 612); Mrs. Florida McCabe (R. vol. I, pp. 366, 367); Samuel A. Leonard (R. vol. I, p. 640); and Mrs. Dorothy McFarland (R. vol. I, p. 783). The testimony of all of the witnesses mentioned is contained in Appendix B, page 72 *infra*.

Numerous restaurant patrons were shown to have been served with petitioner's biscuit after ordering Shredded Wheat, and without the substitution having been excused or even mentioned. Frequently the patron was unable to tell whose product was being placed before him, the biscuit having been removed from the carton before being served. Typical examples will be found in Appendix B, page 72, *infra*, at pages 81-83.

The record also abounds with the opinions of dealers and others that petitioner's biscuit can be passed off on unwary customers as respondent's Shredded Wheat, especially when served without the carton. Representative examples of such opinion evidence have been set forth at pages 84 *et seq.* of Appendix B. In view of the proofs of actual substitution and passing off, the correctness of the opinions quoted has been fully confirmed.

The petitioner has remarked upon the large number of witnesses who testified that they had no difficulty in distinguishing between the two biscuits. It is worth noting that considerably more than a majority of these witnesses were grocers, employees of food firms or persons otherwise connected with the marketing of foodstuffs, and hence thoroughly familiar with the products of the various manufacturers. As to such persons being deceived, Judge Lacombe aptly remarked in *National Biscuit Co.* v. *Baker*, 95 Fed. 135 (S. D. N. Y., 1899), "No one expects that they will be". Where the charge is of simulation resulting in deception and confusion, the fact that dealers are not

deceived, is immaterial. As this Court said in *Warner & Co.* vs. *Eli Lilly & Co.*, 265 U. S. 526, 530,

> "That no deception was practiced on the retail dealers, and that they knew exactly what they were getting is of no consequence. The wrong was in designedly enabling the dealers to palm off the preparation as that of the respondent."

To the same effect is *Federal Trade Commission* vs. *Winsted Co.*, 258 U. S. 483, 493, 494.

Moreover, proof that one purchaser *was* deceived far outweighs proof that a dozen others were *not*. The fact is, as the evidence demonstrates, that customers all over the country are having petitioner's biscuit put off on them when they suppose they are getting respondent's.

In addition, it is the deception, not only of *old* customers, but of possible *future* customers as well, that equity seeks to prevent. This has been well expressed by Judge Learned Hand in *Lambert Pharmacal Co.* vs. *Bolton Chemical Corp.*, 219 Fed. 325, 326 (S. D. N. Y. 1915):

> "There is always a fringe of possible customers, next year's for instance, with whom such opportunities are not to be disregarded, people who have heard vaguely the old name or seen it in advertisements and who fail to carry it with accuracy in their memory. Among these confusion is eminently possible, and that possibility, if not a remote speculation, is quite enough."

2. Others Have Had No Difficulty in Competing Fairly.

We cannot reiterate too frequently the statement that we seek no "monopoly" in the manufacture or sale of whole wheat biscuit made in accordance with the Perky patents. Nor do we or can we object to the petitioner's use of a fair *description* (as distinguished from a trade name) of the nature of its product. We do, however, object to a competitor's use of our name; to his imitation

of our trade mark, showing two biscuits in a dish; and to his imitation of the characteristic shape of our product.

That other competitors do manufacture and sell whole wheat biscuit produced in accordance with the Perky patents, that they have no difficulty in finding a distinctive name and shape for their product, and that they are not hampered in fair competition, is demonstrated by the conduct of the Quaker Oats Company and of the Loose-Wiles Biscuit Company. The Quaker Oats Company uses the Perky process and the Perky machines and produces a whole wheat biscuit to which it gives the trade name of "Muffets". In form "Muffets" bears no resemblance to "Shredded Wheat". Perky had pointed out in his patent application that instead of extruding the threads of wheat upon a belt they might be drawn upon a revolving spindle and some of his expired patents had shown the machinery for the operation of his process in this fashion (R. vol. V, p. 3). In this same patent Perky had likewise pointed out that as the pressure upon the rolls was increased or diminished, the out-pouring stream of wheat might appear "in the form of threads, lace or ribbons or sheets, &c." (*ibid*). A photograph of the "Muffets" carton which contains a picture of the biscuit appears hereafter at page 125 of this brief. It thus appears that an aggressive and intelligent competitor such as the Quaker Oats Company has found no necessity for using the respondent's trade name or for imitating the shape of its biscuit, while at the same time enjoying the teaching of the Perky patents and the use of Perky's formerly patented machinery.

"Muffets" is still being made in large quantities and is being sold by the Quaker Oats Company in active competition with "Shredded Wheat" at the present time.

The Loose-Wiles Biscuit Company, another competitor of the respondent and of the petitioner, manufactures a competing biscuit produced according to the Perky process and on the machinery which Perky had once patented. Compared with the fairness of the competition

of the Loose-Wiles Company, the actions of the petitioner furnish a background which is dark indeed. The Loose-Wiles Company found no need to copy the trade name of "Shredded Wheat" in introducing its Perky process whole wheat biscuit, nor did it find any necessity for claiming that its biscuit was the original, nor did it find it necessary to adopt the form in which "Shredded Wheat" has always been made. It called its product "Rippled Wheat". It assembled the threads of wheat into a form easily distinguishable from "Shredded Wheat". Its carton, containing a picture of the product, is reproduced in color at page 126 of this brief.

At page 21 of its brief, petitioner states that "neither Muffets nor Rippled Wheat is a shredded wheat product". We have already shown (pp. 9-10, *supra*) that this statement is in error. Conscious of the contrast between the competition of "Muffets" and "Rippled Wheat" and the competition of the Kellogg biscuit, the petitioner seeks to brush this aside in a single short paragraph of its brief. But it is one of the factors of the case that will not down in any fair appraisal of petitioner's behavior.

The recent actions of the petitioner, when contrasted with its behavior during the early years of its competition, and when contrasted particularly with the consistent fairness of the Quaker Oats Company and of the Loose-Wiles Company, speak more loudly than words of the unfairness of its conduct. But if conclusive proof were wanted of the unfairness of its competition, we can ask no better evidence than the testimony of the president of still another competitor. At Record vol. II, page 950, Mr. James F. Bell, president of General Mills, Inc., a large producer of cereal foods, was asked how far in his judgment it was necessary for a fair competitor to invade the trade name and the established form of "Shredded Wheat." He answered:

> "I would say that, if it was a shredded wheat biscuit, it would either be made by the National Biscuit Com-

pany or its predecessor company, or it would be an imitation. If it were genuine whole wheat biscuit put through a shredding machine, I would not say it was a shredded wheat biscuit. Shredded wheat, as I have already testified, is a product of the National Biscuit Company or its predecessors. I identified that in three ways: as a name, a product and a shape. Apparently, they have erected in the minds of the public this product in the most desirable ways of coverage that I can conceive of, being in the cereal business, because they have a three-way coverage, as far as the public mind is concerned: name, product, and form. No one else has any right, in my opinion, to use either the name or the shape. I think those rights would be exclusive. They have promoted all those three phases over a long period of time; and they have so identified them in the public mind that I think it would not be fair if they did not have proper protection in all three of them. By that I mean the complete exclusion of anyone else, in the name, shape, or form of the biscuit. That would not be a complete monopoly, in my opinion. As long as the patents have run out, if you made other products of wheat, assuming the right existed on the expiration of the patents to use this vermicelli form of product, it could be put into other shapes."

Mr. Bell's statement is obviously a statement against interest, for nothing could be more advantageous to his company than the free privilege of using respondent's established trade name and long recognized form.

Fairness or unfairness of competition in most cases has had to be developed argumentatively. This case is unusual, if not unique, in having the two extremes illustrated over a long period of years by the actual conduct of the different factors in the industry.

3. The Authorities Support Respondent's Right to Relief.

In modern times, the doctrine of unfair competition has been markedly extended, so as to protect merchants and business men against the more subtle forms of unfair busi-

ness dealing to which modern business conditions and lack of business ethics seem continuously to give birth. In *Schechter Poultry Corporation* vs. *United States*, 295 U. S. 495 at page 532, Chief Justice Hughes, referring to the doctrine, said:

> "*In recent years, its scope has been extended.* It has been held to apply to *misappropriation* as well as misrepresentation, to the selling of another's goods as one's own—to *misappropriation of what equitably belongs to a competitor.*"

This extension was applied by this Court in *International News Service* vs. *Associated Press*, 248 U. S. 215, where unauthorized use of news releases obtained by the industry of the Associated Press was enjoined as unfair practice, although the act was not "passing off", as the term has been understood in the law of unfair competition.

A similar ruling, based upon the *International News* case, *supra*, is found in *Motor Improvements, Inc.* vs. *A. C. Spark Plug Co.*, 80 F. (2d) 385 (C. C. A. 6, 1936), in which injunctive relief was given to prevent the defendant from representing its filter as being the same as one which had been adjudged to infringe the plaintiff's patent. The Court there recognized that *passing off* is not the sole test of unfair competition and said (p. 386):

> "That it will enjoin the bringing about of the same wrongful results by *other* means or practices is exemplified in *International News Service* vs. *Associated Press*" (*supra*).

In *Wall* vs. *Rolls-Royce of America, Inc.*, 4 F. (2d) 333, (C. C. A. 3, 1925), the Court, in dealing with a defendant who used the name Rolls Royce (the name given by plaintiff to its automobiles) in connection with radio tubes, *two as widely different articles as can well be imagined*, said (p. 334):

> "Indeed, from the standpoint of commercial integrity, fair business, and trade equity, we feel the court

below, sitting in equity, was justified in preventing the defendant from veiling his business under the name of 'Rolls-Royce', for he had, and could have had, but one object in view, namely, to commercially use as his own a commercial asset that belonged to others, the continued use and abstraction of which is so fraught with such possibilities of irremediable injury, that the only way to remedy it is to stop it at the start."

In *Aunt Jemima Mills Co.* vs. *Rigney & Co.*, 247 Fed. 407 (C. C. A. 2, 1917), the Circuit Court of Appeals reached a similar conclusion with respect to a trade mark sought to be used upon *syrup* and identical with one used for many years on *pancake* flour. In answer to the contention that *no one could be confused between the two articles,* the court said (p. 410):

"Obviously the public, or a large part of it, seeing this trade-mark on a syrup, would conclude that it was made by the complainant. Perhaps they might not do so, if it were used for flatirons. In this way the complainant's reputation is put in the hands of the defendants. *It will enable them to get the benefit of the complainant's reputation and advertisement. These, we think are property rights which should be protected in equity.*"

In *Yale Electric Corporation* vs. *Robertson,* 26 F. (2d) 972 (C. C. A. 2, 1928), Judge Learned Hand recognizes the rule as follows (at p. 974):

"However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor

and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful."

If, as we confidently believe, the Court must be of the opinion, not only that unfair competition by the petitioner has been clearly established, but that the law on that subject as it has been expanded by this Court requires relief from the peculiarly subtle type of unfair competition here found, it remains to consider, first, the justification proffered by the petitioner—for the petitioner's brief is essentially one of confession and avoidance—and secondly, the nature and extent of the relief to which the respondent is entitled.

II

Petitioner's Excuses for its Conduct are Untenable.

In essence, petitioner bases its claim to a right to use the name "Shredded Wheat", and to copy respondent's pillow shape, upon the assertion that, since all of the Perky patents have expired, the doctrine of *Singer* vs. *June** and of the cases which follow it, confers that right upon all the world.

We do not question the doctrine of any of those cases. We think that it is clear, however, that the facts in the present case furnish no basis for the application of that doctrine.

Petitioner's argument is founded largely upon four erroneous assertions: (1) that the decree of the Court below will confer a "monopoly" upon the respondent; (2) that the trade name "Shredded Wheat" is the only name which petitioner can apply to its product; (3) that the form and appearance of the biscuit as made by the

* *Singer Manufacturing Co.* vs. *June Manufacturing Co.*, 163 U. S. 169.

respondent for more than forty years is the only practical form in which it can be made; and (4) that no confusion between the petitioner's product and that of the respondent has been shown or is possible.

Each of these premises is erroneous, as will be found upon reading the portions of the evidence to which we shall refer. With the demolition of these premises, petitioner's case falls.

1. Respondent Seeks No "Monopoly" and the Decision of the Court Below Does Not and Cannot Give it One.

In its brief the petitioner asserts repeatedly that the decision of the Circuit Court of Appeals vests in the respondent a perpetual "monopoly" of the patented process and of the generic name by which the product is called.

"Monopoly" has a sinister sound in American ears. If use of the word is warranted at all, it must inevitably arouse distrust and suspicion against him who is charged with seeking to monopolize. We cannot too strongly assert nor too often reiterate that respondent has no "monopoly" and seeks no "monopoly". Nor could it get a "monopoly" if it tried. When the Perky patents expired in 1912 their disclosures lay in the public domain, free for every one to use to the same extent as if they had never been patented. This respondent at that time occupied no privileged position. It had the same rights, but no greater rights, than any other citizen of the nation. It had a right to follow the Perky process and to be protected against unfair competition in its endeavors; but every other person had exactly the same right. For another competitor to use respondent's trade name of "Shredded Wheat" is unfair; but similarly it would be unfair for a competitor to use petitioner's trade name of "Kellogg's", or Quaker Oats' trade name of "Muffets", or Loose-Wiles' trade name of "Rippled Wheat". None of these can be said in truth to constitute "monopoly". The reckless use of such a term merely serves to becloud and obscure the issue.

2. "Shredded Wheat" is neither the only name nor the generic name of the product.

Petitioner, sometimes by implication, sometimes by assertion, claims that respondent's trade name "Shredded Wheat" is but the generic term denoting a biscuit of the kind in which we are competing; and points to the fact that "Shredded Wheat" is found in some recently published dictionaries. It would have the Court believe that following the doctrine of the *"Linoleum"*[*] and *"Singer vs. June"* cases these words must necessarily be used to designate the patented product, since there is no other name for it.

The occurrence of this expression in dictionaries is but a recognition of the respondent's success in publicizing its product. For nearly half a century the respondent and its predecessors have done their utmost to make the trade name of "Shredded Wheat" a household word. They have done more than this, however. They have succeeded in teaching the public to know that "Shredded Wheat" denotes not only a wholesome breakfast cereal, *but also the respondent as its maker.* The evidence that the name has acquired secondary significance is overwhelming. Some typical extracts will be found in Appendix A (p. 61, *infra*) and in Appendix D (p. 93, *infra*).

The petitioner's real complaint is that this enormous outlay and this persistent effort have been successful. It might as well complain that "Kodak" has become a part of the world's vocabulary through the efforts of the Eastman Kodak Company, or that "Vaseline" has forced its way into the dictionary because the producers of that particular type of petroleum jelly have advertised it persistently for sixty years. *Chesebrough Mfg. Co.* vs. *Old Gold Chem. Co.*, 70 F. (2d) 383 (C. C. A. 6, 1934).

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[*] *Linoleum Mfg. Co.* v. *Nairn*, 7 Ch. Div. 834.

The petitioner claims that, like "Linoleum", there is no other name than "shredded wheat" by which the patented product can be called, and that therefore the name as well as the product lie free in the public domain. But that this is not so is shown not only by the conduct of every competitor of the respondent, including the petitioner, but also by the testimony of many of petitioner's own witnesses.

Ross in 1915, without urging by respondent, called his product "Ross's Whole Wheat Biscuit"; the Quaker Oats Company calls its product a whole wheat biscuit, and gives it the fanciful name of "Muffets"; the Loose-Wiles Biscuit Company calls its product a whole wheat biscuit and sells it under the fanciful name of "Rippled Wheat". Petitioner itself in 1912 called its competing product "Kellogg's Toasted Wheat Biscuit" at a time when no pressure was exerted upon it by respondent to influence its adoption of that name for its Perky process breakfast food. Again in 1930, after suit had been brought to restrain its appropriation of the respondent's trade name, the petitioner found no difficulty in reverting to the generally recognized generic name to produce the title, "Kellogg's Whole Wheat Biscuit".

It is clear from the testimony that "shredded wheat" is not the generic name, and certainly is not the only name, by which a product produced in accordance with the Perky patents is or can be called. The truth is that the generic name of the product in its biscuit form is "whole wheat biscuit". Among many other statements which may be found throughout the Record, witness the following by petitioner's own witnesses:

> "I should say our consumers recognize there are two brands of whole wheat on the market, because some will call for Shredded Wheat and some for Kellogg's Whole Wheat. The people that have used shredded wheat have shifted from shredded wheat to Kellogg's Whole Wheat Biscuit, * * *"
>
> D. D. Kay, R. vol. III, p. 1751.

"If a customer calls for shredded wheat, we give her shredded wheat. If she calls for Kellogg's Whole Wheat Biscuit, we give her Kellogg's Whole Wheat Biscuit. If a customer said she wanted Kellogg's shredded wheat, I would say that Kellogg's is not shredded wheat but is Whole Wheat Biscuit."

Isadore Cohen, R. vol. III, p. 1860.

"When a consumer asks for Kellogg's product, they generally ask for it as Kellogg's Whole Wheat Biscuit. The other product is known as shredded wheat. If a customer asks me for shredded wheat, she gets the Niagara Shredded wheat. If she asks for whole wheat, she gets Kellogg's Whole Wheat. If she would ask for Kellogg's shredded wheat, I would have to ask her if she wanted Kellogg's Whole Wheat or shredded wheat, because there is a difference there."

W. P. Welton, R. vol. III, p. 1645.

"I do not think we handle any whole wheat biscuit except this Kellogg biscuit."

R. J. Morrison, R. vol. III, p. 1833.

"I do not think the entry of the Kellogg Company into the whole wheat biscuit line has decreased the general volume of demand for that sort of product in any way. The increased sale of dry cereals in contrast to those which have to be cooked, has been very marked. There are so many different brands on the market, it is hard to say whether this type of biscuit has definitely increased or not. I am inclined to think it has. Much has been said about the advantages of whole wheat as a proper food, in national talks on health. I think that has helped the entire business.

"Since the first introduction of the product, the Kellogg Company has, I think, succeeded in impressing that new whole wheat biscuit on our type of customer, teaching them to ask for it."

P. W. Witherell, R. vol. III, p. 1762.

"The majority of my customers, when they want whole wheat, ask me for Kellogg's biscuits. A few ask for Shredded Wheat."

George Miller, R. vol. III, p. 1452.

We need not take the time of the Court in quibbling about the dictionary definition of the word "shred", although accurate English seems to prevent our use of that word to denote an article which is not torn into fragments but is extruded from a pair of rolls. Perky treated wheat as the rolling mill treats a steel bar or a copper rod, yet no one would dream of calling a steel bar "shredded steel" or a copper rod "shredded copper", as the Court below observed.

We are handicapped by our familiarity with "Shredded Wheat". We get a better realization of the fanciful quality of the phrase if we will try to project ourselves back to 1893 when Perky first used it to characterize the strange looking cereal which he was trying to sell. It is true that Perky, whose life from 1893 until his death in 1905 was occupied wholly with his new industry and who thought and dreamed of nothing but "Shredded Wheat" and the machinery by which it was produced, came to speak of it in some of his patent applications and in his advertising as if the whole world knew the article that he had in mind by those terms. But it is no more than natural that his mind should have worked in that fashion. The fact still remains that, unlike the classic "Linoleum", this was not the only term by which the product could be described and the usage of the various competitors after 1912 is the best evidence of that fact.

3. The Pillow Shape is Neither Functional Nor is it the Only or Best Shape for the Product.

At page 46 of petitioner's brief it is claimed that the pillow shaped form of biscuit "inevitably results" from the Perky process of manufacture; and at pages 8-9 it is asserted, "Indeed respondent's chief chemist, who was formerly the production manager of The Shredded Wheat Bakeries, admitted that respondent's machines constructed according to the expired Perky patents 'cannot produce anything else except the pillow-shaped form of biscuit' ".

In this petitioner is in error. The truth is that the testimony of Oakes, found in the eleven words quoted, referred to machines of improved construction, as they were then being used at respondent's Niagara Falls plant, not to what could or could not be made with machines constructed as shown in the Perky patents. This is clear in the record (R. vol. I, pp. 289-291). Moreover, Oakes showed that many different forms of biscuit could be made on the Perky machines. His testimony on this was, "as many as you can think of, I should say" (R. vol. I, p. 270), and this without changing the machine except for substituting one form of cutter for another. He produced various forms of biscuit which were exhibited in the lower court. Photographs of them will be found in R. vol. IV, pp. 111 to 121.

In respect to the Perky patents referred to on page 8 of petitioner's brief, it is true that in several of them cutters are shown which can be used to make the pillow shaped form of biscuit, but there are no *claims* in these patents upon pillow shaped forms or upon any of the many forms in which the filaments may be arranged. Cutters may be conformed to cut any shape desired. Any form of cutter might have been illustrated. For instance the now expired patent to Anderson No. 1,334,249 (R. vol. V, p. 232), illustrates cutters to cut *round* biscuit, for use with Perky apparatus. The Williams patent No. 991,584 (R. vol. V, p. 490), also expired, illustrates a rotary cutter that may be used in such an apparatus to cut a band of filaments or threads into *diagonal* biscuits.

Where, as here, the shape of the article is not functional, its imitation will be restrained: *Rushmore* vs. *Badger Brass Mfg. Co.*, 198 Fed. 379 (C. C. A. 2, 1912). The applicable principles cannot be better stated than they were in *Enterprise Mfg. Co. of Pennsylvania* vs. *Landers, Frary & Clark*, 124 Fed. 923; 926, 928 (D. Conn., 1903; affirmed, 131 Fed. 240, C. C. A. 2, 1904):

> "The plaintiff claims no monopoly in the manufacture and sale of coffee mills. The world at large and its

products are open to the defendant. It can ransack the universe, and, avoiding possible patents, put together and market what it will in the way of coffee mills, with this one exception, it shall not so arrange its materials and so dress its goods as to produce and market a coffee mill which will be liable to be mistaken for the mills upon which, by long and persistent effort, the plaintiff has been enabled to obtain a distinctive reputation" (p. 926).

* * * * * *

"When the first glance of the eye fixes the idea of origin firmly upon the mind, a minor detail must in the ordinary case pass unnoticed. By dint of comparison and constant repetition in the quiet of the courtroom, such a detail may grow distinct and exceedingly luminous, but in the crowded store, in the rush and hurly-burly of everyday business life, it would fade into nothingness when opposed to the general attractiveness of the entire structure. That the defendant puts into the hands of the retailer or jobber the means of deceiving, whether with or without intention, is too obvious to deserve further discussion" (p. 928).

But the conclusive answer to this claim of the petitioner is that the other competitors of respondent have had no difficulty in using the Perky process and Perky machines to make biscuits of a form wholly different from "Shredded Wheat". Nor did petitioner itself find any such difficulty during the years from 1912 to 1919, while it was manufacturing "Kellogg's Toasted Wheat Biscuit."

4. The Effect of Petitioner's Delay in Trying to Appropriate the Name and Form.

The conscience of the Chancellor can not fail to be touched by the fact that the respondent in the best of good faith has poured out its funds year after year in a consistent effort to make its trade name a household word, identifying the product with its manufacturer. In all, more than $17,000,000 was thus expended between the

expiration of the patents and the year 1927, when petitioner made its first serious effort to use the trade name "Shredded Wheat". The Chancellor must remember too that throughout that period of fifteen years no competitor challenged the respondent's property right in this trade name, with the exception of the petitioner's abortive effort for a few months in the year 1922. The fact that petitioner, the largest producer of breakfast cereals in the country, stood by throughout that entire period and allowed the respondent to spend these vast sums in building up a good will for "Shredded Wheat", would of itself make a court of equity slow to hand over a part of that good will to a competitor who has spent neither money nor effort to create it. As Judge Davis said, speaking for the Court below:

> "When a person, after the expiration of a patent, has spent such enormous amounts of money during a period of fifteen years to create a valuable property right in the name and form of his product, equity today will not permit another to apply the name and form of the merchandise to his product and thus appropriate it to his own use and advantage and to the injury of the one who has created the good-will" R. vol. III-a, p. 2088; 91 F. (2d) 150, 153).

That rights in a trade name otherwise invalid may be acquired by user over a period of years was recognized by Congress when it added the so-called ten-year proviso to Section 5 of the Trade Mark Act of 1905.* In *Thaddeus Davids Co.* vs. *Davids*, 233 U. S. 461, this Court speaking through Mr. Justice Hughes said (at pp. 468, 470):

> "Marks of this sort, *notwithstanding the general prohibition*, were made registrable when the applicant or his predecessors had used them, actually and exclusively, as trade-marks for the described period."
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> * * * * * * *

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* Copy of Section 5 of the Trade Mark Act of 1905, containing the so-called ten-year clause in italics, will be found in Appendix II, *post*, p. 100.

> "Their exclusive use as trade-marks for the stated period was deemed in the judgment of Congress a sufficient assurance that they had acquired a secondary meaning as the designation of the origin or ownership of the merchandise to which they were affixed."

Some recognition of the equities arising from a situation such as this is found in the decision of the Circuit Court of Appeals for the Second Circuit in *Scandinavia Belting Co.* vs. *Asbestos & Rubber Works*, 257 Fed. 937 (C. C. A. 2, 1919), in which it was contended by the defendant that the trade mark "Scandinavia", in addition to being invalid because geographical, had become public property upon the expiration of the patent covering the product to which the trade mark had been applied during the life of the patent. In dealing with this contention the Circuit Court of Appeals said (at p. 960):

> "But there is another and conclusive reason why this claim that the name 'Scandinavia' became open to the public on the expiration of the patent is of no avail to the defendant, for if it were to be conceded that the doctrine of the *Singer* case originally applied the evidence shows *that the public did not avail itself of the right*, and that now because of the registration of the trade-mark under the ten years' clause it is *not at liberty to violate the plaintiff's exclusive right.*"

A similar ruling is found in *McKesson & Robbins* vs. *Charles H. Phillips Chemical Co.*, 23 F. (2d) 763 (Ct. App. D C., 1927), in which the Court of Appeals for the District of Columbia, dealing with the trade mark "Milk of Magnesia" said (at p. 764):

> "*Where the public fails to avail itself* of the right to manufacture the patented article and *use the name by which it was designated*, and 10 years' exclusive use of the mark intervenes prior to the Trade-Mark Act of 1905, the party using the mark is entitled to registration under the 10-year clause of the Act."

Both the above cases held that the ten-year clause applies to cases otherwise within the doctrine of *Singer* vs. *June*, although none of the clauses specified in Section 5 of the Trade Mark Act of 1905 covers the cases coming within that doctrine. Thus these decisions have extended the ten-year clause of the statute beyond its terms and the only justification for so doing is that the clause was in effect declaratory of a public policy, or that equitable considerations growing out of the exclusive use of a given trade mark by one person for a period of ten years or more after the expiration of a patent entitle that user to protection against its use as a trade mark or a trade name thereafter.

Moreover, there is a well settled rule of law which precludes the petitioner, under the circumstances of this case, from asserting that it has an absolute *legal right* to use the words "Shredded Wheat". The holding in *Singer* vs. *June* that the generic name of a patented article falls into the public domain upon the expiration of the patent, rests upon an *implied dedication*. It is a well settled rule of law that a non-statutory dedication to the public must, in order to be effective, *be accepted;* and, where no time for acceptance is expressed in the dedication, the acceptance must be *within a reasonable time*. (See 18 *C. J.* p. 72, sec. 67; p. 74, sec. 70, and cases there cited). The courts, in formulating rules pertaining to patents, have applied the rules pertaining to real estate and other property in analogous situations. *Cf. Edison Electric Light Co.* vs. *Peninsular Light, Power & Heat Co.*, 101 Fed. 831 (C. C. A. 6, 1900); *Indiana Mfg. Co.* vs. *Nichols & Shepard Co.*, 190 Fed. 579, 584 (Circ. Ct., D. Mich. 1910); *Co:ptograph Co.* vs. *Bur oughs Adding Machine Co.*, 183 Fed. 321, 325 (C. C. A. 7, 1910).

Certainly it could not conceivably be held that there had been an acceptance within a reasonable time here, when neither the petitioner nor anyone else had attempted to use the words for 15 years, during all of which time respondent had used them exclusively as an indication of the source of the product.

In the present case the respondent had the unchallenged use of the words "Shredded Wheat" as its trade name for fifteen years after the expiration of the Perky patent (with the exception of a short period in 1922 during which the petitioner started to use the term but abandoned it upon demand). We therefore earnestly submit that in view of the extension of the doctrine of unfair competition by this Court to meet modern commercial conditions, to which we have already referred, the respondent is clearly entitled to the protection of a court of equity in its use of the name "Shredded Wheat" as a trade name. This was exactly what the Circuit Court of Appeals determined in this case.

5. "Shredded Wheat" is a Valid Trade Mark.

The foregoing considerations show that as a matter of fair trade, the petitioner should not be allowed to designate its product "Shredded Wheat". Respondent submits that the same result must be reached on a further ground, to wit: "Shredded Wheat" is a valid common law trade mark for respondent's whole wheat biscuit. It was so used by Perky beginning in 1893, nearly half a century ago.

This use began long before any Perky patents were applied for and more than two years before any issued (R. vol. I, pp. 959, 971, 980). The record is clear that it has been used continuously as a trade mark since 1905. The patents did not give it genesis: *Batcheller* vs. *Thomson,* 93 Fed. 660 (C. C. A. 2, 1899); *President Suspender Co.* vs. *McWilliam,* 238 Fed. 159, 163 (C. C. A. 2, 1916).

Petitioner contends that the words are truly descriptive rather than suggestive as the Court below held. An answer to this contention will be found on page 40, *supra.*

Petitioner attempts to make the point (Brief, pp. 11 and 106) that respondent *disclaimed* the words "Shredded Wheat" as a trade-mark by reason of statements in certain registrations of othe trade-marks. Neither of the lower Courts has paid any attention to this argument.

The facts are plain enough: at R. vol. IV, p. 197, appears a registration of a picture of a dish with a spoon, milk and a biscuit in it. The disclaimer means only that respondent does not claim the biscuit alone but, in that particular mark, only in conjunction with the spoon and the milk.

Similarly, at R. vol. IV, p. 199, is a registration of a picture of the factory, accompanied by the statement,

> "no claim is made *herein* to the words 'The Home of Shredded Wheat'."—

which merely signified that that mark, like the preceding one, was claimed irrespective of the text.

The third was similar to the first in every way (R. vol. IV, p. 205). A disk with two biscuit was shown, and it was said that *that* mark did not include the representation of two biscuit "*apart* from the mark shown in the drawing".

There was no disclaimer of rights to either "Shredded Wheat" or the form of the biscuit; but the effect was to claim the marks shown, whether or not the other indicia were present.

Respondent at all times material to the issue has had registrations of "Shredded Wheat" as its trade-mark in most of the states (R. vol. I, p. 315). It has also, since 1921, had registrations thereof in the United States Patent Office (R. vol. IV, p. 179).

The two cases cited by petitioner do not support its point of law (Brief, pp. 106-7).

In *Beckwith* v. *Commissioner of Patents*, 252 U. S. 538, the case was on appeal from the District Court of Appeals, which had affirmed a decision of the Patent Office that certain descriptive words should be canceled from the face of an arbitrary mark before it could be registered. This Court reversed and held that they should *not* be eliminated, but the mark should be registered with them on it; the Court noting that the "disclaimer" of the words *apart from the mark* was enough.

In *Holzapfel's Co.* v. *Rahtjen's Co.*, 183 U. S. 1, 11, the Court noted that there had been an explicit "disclaimer on the part of the applicants *of the right to the exclusive use of*" the words "Rahtjen's Patent Composition" in the only registration before the Court. These words, it was said, were improper because there was no patent.* The case was decided upon the point that the plaintiff had not shown an exclusive right to the name "Rahtjen's Composition".

III

Singer vs. *June* Recognizes That Respondent Must be Protected from Unfair Competition by Imitation of the Name and Form of its Biscuit.

In every case of this nature the defendant invariably relies most heavily upon the decision of this Court in *Singer* vs. *June*, 163 U. S. 169. We hope that it will be understood that we do not in any way question the soundness of the doctrine enunciated in that case. In fact, the respondent relies upon the rule there laid down and reiterated in *Warner & Co.* vs. *Eli Lilly & Co.*, 265 U. S. 526. In *Singer* vs. *June*, this Court found that Singer was the generic name of the formerly patented article, and the Court followed the *Linoleum** case by holding that the defendant was free to use that name, since there was no other word aptly descriptive of the article. Here, upon the undisputed facts, the Court below has found the exact contrary, and the long history of the whole wheat biscuit industry shows that fair competitors never have found it necessary to use this trade name to describe their competitive products. Such being the case, it will be seen that the facts here are wholly different from those in *Singer* vs. *June*.

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* *Linoleum Mfg. Co.* vs. *Nairn*, 7 Ch. Div. 834.

It must be noted too that the decree of this Court in *Singer* vs. *June* required the marking of each article so that the ultimate consumer or purchaser would be advised that it was the product, not of the complainant, but of the defendant. In this case the undisputed fact is, as proved by the petitioner itself, that the article which reaches the ultimate consumer is incapable of branding, marking or banding, the expense being such as to make these distinguishing marks commercially impracticable.

In considering the applicability of *Singer* vs. *June*, we must always be mindful of the fact that the June Company commenced the manufacture of its competitive product almost as soon as the patent had expired, whereas in the present case a long period intervened after the expiration of the patent, during which the trade as a whole showed by its course of conduct that use of the words "Shredded Wheat" was not necessary to designate the product of the patent.

Not only do we rely upon the fundamental principles enunciated in *Singer* vs. *June*, but we believe that the language of Mr. Justice White in that case states vividly the situation in which a former patentee finds himself at the expiration of his patent. He said (at p. 187):

> "To say that a person who has manufactured machines under a patented monopoly can acquire no good will, by the excellence of his work, or the development of his business, during the patent, would be to seriously ignore rights of private property, and would be against public policy, since it would deprive the one enjoying the patent of all incentive to make a machine of a good quality, because at its termination all the reputation or good will resulting from meritorious work would be subject to appropriation by every one."

It is precisely this point upon which we insist, for it seems to us manifest that the petitioner in 1932 was endeavoring to appropriate the good will which the respon-

dent had built up during the life of the patent and during the twenty years that followed its expiration. Surely in a court of equity such effort must fail. We can have no doubt that if the record before this Court in *Singer* vs. *June* had resembled the record now before it, the conclusion would have favored the plaintiff in that action without qualification.

In the recent case of *Nu-Enamel Corporation* vs. *Armstrong Paint and Varnish Works*, 81 F. (2d) 1 (C. C. A. 7, 1935), Judge Evans in the Circuit Court of Appeals for the Seventh Circuit, used language that is most pertinent to the present situation. He said (at p. 3):

> "The manufacturer or merchant who holds or who once held a patent monopoly which has expired is entitled to protection against unfair methods of trade just as any other manufacturer. * * * *In considering an unfair trade method case, we must dismiss as of no bearing the fact that the party seeking relief previously held a valid or an invalid patent* * * * He is in a court of equity as one who is honestly engaged in commerce and seeking protection against another who is, by methods which are unfair, passing off its goods for those of another. He merely asks the court to stop a business competitor from unfair trade practices. *We confuse the issue when we color appellant's right to relief by the Government grant of monopoly and assume that the right to relief ceases, or is lessened, when the grant expires.*"

1. The Evidence Shows That the Name and Form of Respondent's Biscuit Have Acquired Secondary Significance.

If, as we believe, the words "Shredded Wheat" are not the only name for the product, but constitute the trade name of the respondent, entitled to protection as was found by the Circuit Court of Appeals, the use of which by a competitor would constitute unfair competition, then we are not concerned to inquire whether the words have acquired a secondary significance, denoting the respondent as the manufacturer of the product.

But if the Court should be persuaded by the petitioner that "Shredded Wheat" is the generic term of the product, then the petitioner is impaled upon the other horn of the dilemma, for the record is replete with evidence that the words throughout the years have acquired a secondary significance denoting the respondent as the manufacturer of the product. This was found by the District Court in 1915 in the *Humphrey-Cornell* case.* If secondary significance existed in 1915, we may be sure that it is even more certain to exist today.

Both respondent and petitioner took depositions of grocers and other dealers and of consumers of "Shredded Wheat" in many of the principal cities of the United States. In all more than 300 witnesses testified by deposition on the subjects of secondary significance and confusion.

This testimony establishes beyond peradventure that the name "Shredded Wheat" and the appearance of the biscuit have both become so well known throughout the forty and more years during which they have been before the public as to have acquired a definite meaning distinctive of the respondent and its predecessors as the source. Indeed, as early as 1915 Judge Thomas of the Connecticut District Court found that at that time both name and shape had become distinctive of the respondent's product (244 Fed. 508), which finding was not disturbed by the Circuit Court of Appeals and was incorporated in the judgment entered upon the mandate of that Court (Plff's. Ex. 237, R. vol. IV, pp. 58-59).

Whether or not the words were once descriptive and hence could not have been registered thus becomes unimportant in view of the overwhelming proof by dealers and consumers, testifying both on behalf of the respondent and of the petitioner, that "Shredded Wheat" to the buying public and to the trade connotes respondent's product.

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* *Shredded Wheat Co.* vs. *Humphrey-Cornell Co.*, 244 Fed. 508 (D. Conn., 1917) 518-519, affirmed, 250 Fed. 960 (C. C. A. 2, 1918).

The proofs are that when grocers or other retailers order respondent's product from wholesale grocery houses, they customarily call for "Shredded Wheat", without further designation; and that this is sufficient to indicate to the dealer that they are ordering respondent's goods and not those of petitioner. Likewise, when housewives and other consumers ask their grocer or restaurant proprietor for "Shredded Wheat", the latter knows respondent's product is intended, and he fills the order accordingly, unless he happens to have on hand only petitioner's goods, in which case, some boldly substitute petitioner's package without explanation. There is ample proof by food merchants, both wholesale and retail, that to the trade "Shredded Wheat" signifies a product of respondent's manufacture, and has all the significance of a trade name. Numerous examples of the foregoing character are collected in Appendix A, p. 61 *infra*. Compare also the quotations assembled in Appendix D, p. 93, *infra*.

The same authorities testified convincingly to the fact that in the minds of the purchasing public the name "Shredded Wheat" refers to a wheat biscuit produced by respondent or by its predecessor. Indeed, some retail dealers refused to concede that petitioner manufactures "Shredded Wheat", but gave as their opinion that it is made by respondent alone, and that petitioner's biscuit is an imitation (see, *e. g.*, the testimony of the witnesses Leighton, pp. 63-4; Born, p. 65; Dingee, pp. 65-6; Siebert, p. 66; Steen, pp. 66-67; Collected in Appendix A, *infra*, p. 61).

Moreover, the testimony belies petitioner's assertion that the term "Shredded Wheat" was used by consumers to denote respondent's biscuit only so long as respondent was the sole producer. The Quaker Oats Company and the Loose-Wiles Company have been marketing a whole wheat biscuit for years. Likewise the petitioner, Kellogg Company, has been manufacturing a whole wheat biscuit

almost continuously since 1912. Proof as to the secondary significance of "Shredded Wheat" was not limited to the period before 1912—or even before 1923. It not only covered the whole period of respondent's manufacture, after as well as before the advent of rival producers, but there is specific evidence that the public's association of the name with respondent as the source of manufacture has continued, notwithstanding the petitioner has entered the same field and has adopted the identical name.

All of the proofs which we have summarized above were before the Court below and form the basis for its statement (R. vol. III-a, p. 2086):

> "It is undisputed that at the time defendant adopted the name 'Shredded Wheat', and the trade mark of the plaintiff to designate its product, the trade and consumers generally had come to regard the name and trade mark as identifying the plaintiff's biscuit."

This is an unequivocal finding of fact, based upon clear proof, in the face of which it is idle for petitioner to argue that secondary meaning has not been established.

The evidence of secondary significance in the record now before the Court is so clear that we do not understand the petitioner seriously to argue that secondary significance has not been proved. In addition to statements such as those collected in Appendix A, the Court should note how dozens of petitioner's own witnesses unconsciously used the term "Shredded Wheat" to denote the product of respondent's manufacture. Their testimony is given in Appendix D, page 93 of this brief. Confronted with this mass of evidence, petitioner falls back on the statement on page 94 of its brief that secondary significance has justified an injunction against the use of a trade name only in cases where "the words enjoined were not in any sense commercially indispensible to free and fair competition". The petitioner evidently forgets that no competitor has found this trade name "commercially indispensible" excepting only the petitioner itself, and then only for a

small part of the period during which it has been competing.

The net result of the testimony as to secondary significance is to demonstrate a situation with respect to the name "Shredded Wheat" which is identical with that of the name "Coca-Cola", as described by Mr. Justice Holmes in *Coca-Cola Co.* vs. *Koke Co. of America*, 254 U. S. 143, 146:

> "• • • The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words Coca-Cola probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. Although the fact did not appear in United States v. Coca-Cola Co., 241 U. S. 265, 289, we see no reason to doubt that, as we have said, it has acquired a secondary meaning in which perhaps the product is more emphasized than the producer but to which the producer is entitled."

IV

The Canadian and British Decisions

Emphasis is placed by the petitioner in its brief upon the fact that in the case arising in Canada between subsidiaries of the parties here, the Privy Council in London rendered a decision adverse to the registration under the trade mark statute of Canada; and also that the Court of Appeals in England has recently reversed a judgment of the High Court of Justice in an application by the British subsidiary of petitioner to strike from the Registry the trade mark "Shredded Wheat", previously registered by the respondent under the British Trade Mark Law. Both the controlling law and the facts proven in those two cases are wholly unlike the law and the facts now under consideration by this Court in the case at bar.

If the facts were the same and if the controlling statutes were the same, we freely concede that the judgments of those courts would be entitled to the utmost respect, but that is not the case.

The Canadian case reached the Judicial Committee of the Privy Council upon a record quite different from that in the case at bar. Specifically, only a single sale of the Kellogg biscuit was proved to have been made in Canada. There was no evidence of actual confusion or passing off. The question involved was the correctness of the action of the Registrar in placing the trade mark "Shredded Wheat" upon the Registry in 1928 and 1929. The correctness of that action hung upon the peculiar wording of the Canadian statute, and the decision of the Privy Council goes no further than to hold that the evidence which the Canadian Shredded Wheat Company was able to produce fell short of establishing that at the time of registration the words (which the Privy Council thought to be indicative of the character and quality of the product) had *at that time* acquired secondary significance *in Canada*.

Moreover, the judgment of Lord Russell, speaking for the Privy Council, recognizes the rules of law for which we contend in this case: namely, first, that even a descriptive word may acquire secondary meaning and come to mean that the goods in connection with which it is used are the goods of a particular manufacturer, and secondly, that even in the case of an expired patent it is possible for evidence to establish that the name has become distinctive of a particular manufacturer rather than merely descriptive of the goods. The ruling of the Privy Council was simply that the evidence adduced in that case did not meet this requirement.

The case arising in England was one brought by the English subsidiary of the petitioner here to "correct the Register" by striking from it the trade mark "Shredded Wheat", registered in 1929 by the British subsidiary of the respondent. After a trial of the issues raised by that application, which consumed twelve days of the time of

Mr. Justice Bennett in the High Court of Justice, he ruled as follows:

> "There is not a shred of evidence to support the argument that the words meant or were understood by anyone to mean that the article to which they were applied was an article made in accordance with Perky's specification. To my mind the evidence afforded by a consideration of the advertisements put out by the Respondents, in which the words 'Shredded Wheat' have always been the most prominent feature, and of the cartons and the wording upon them, and in particular of the use thereon of the words 'Shredded Wheat' is conclusive that the words 'Shredded Wheat' have, since the beginning of 1926, been used by the Respondents for the purpose of indicating that the biscuits in connection with which the words have been used were manufactured by the Respondents at their Welwyn Garden City factory" (p. 109, *infra*).
>
> * * * * * *
>
> "In fact the evidence in my judgment establishes that Shredded Wheat is as much a household word as Bovril or Oxo or Hovis. Every trader knows it to mean the Respondents' biscuits, and in every household in which they are eaten the biscuits are known as Shredded Wheat, and known by that name as being of the Respondents' manufacture" (p. 114, *infra*).
>
> * * * * * *
>
> "I was also satisfied that if there were today to be put on the market similar goods made by another manufacturer which might be called Shredded Wheat passing off would not be merely possible but probable, particularly in hotels and boarding houses, where the customer never sees the carton or package from which the biscuit offered to him has been taken.
>
> "For these reasons I hold that the mark was properly put upon the register and that the motion to expunge it fails" (p. 115, *infra*).

An appeal was taken from this decision and the Court of Appeals, brushing aside as of minor importance the clear and unequivocal findings of fact just recited, reversed

the judgment of Justice Bennett upon a purely technical construction of a technical English trade mark statute, and based its decision largely upon language printed on a carton in use prior to the year 1926.

An appeal has been taken to the House of Lords, seeking reversal of the judgment of the Court of Appeals and the reinstatement of that of Justice Bennett.

For the convenience of the Court a copy of Justice Bennett's decision is appended to this brief in Appendix F, *post* page 102.

V

Respondent is Entitled to Effective Relief

Having now established, as we confidently believe, that the conduct of the petitioner, in the light of the broad doctrine of unfair competition now prevailing—a doctrine which would be better denominated as the doctrine of unfair trade—calls for equitable relief, it follows necessarily that the respondent is entitled to effective relief. This Court, speaking through Mr. Justice Sutherland in *Warner & Co.* vs. *Eli Lilly & Co.*, 265 U. S. 526 at page 532, says:

> "But respondent being entitled to relief, is entitled to effective relief; and any doubt in respect of the extent thereof must be resolved in its favor as the innocent producer and against the petitioner, which has shown by its conduct that it is not to be trusted."

The only effective relief, that is, relief which will for all time put an end to and prevent the possibility of confusion of the public as to the origin of the respective parties' products, is that prescribed in the decision appealed from. With respect to the name, it will be noted that the opinion of the Circuit Court of Appeals refers to the case of *Barton* vs. *Rex Oil Co.*, 29 F. (2d) 474 (C. C. A. 3, 1928), decided by that Court. The proof of secondary significance and of confusion in that case was held to be so

cogent as to require an injunction against the use of the descriptive "Dye-and-Shine" as a part of a product name "as distinguished from their use in describing it". So in the case at bar, the Circuit Court of Appeals held that while the petitioner is free to use them *to describe the qualities and characteristics of its product*, it may not use the words "Shredded Wheat" as its trade name.

The petitioner in 1930 undertook to call its product "Kellogg's Whole Wheat Biscuit"—prefacing the generic name of the product with its own trade-name. It now asserts that it cannot succeed commercially unless it calls its product by the respondent's name. It says this although three other competitors, two of which are still in business, have not found it necessary to do so. Obviously the petitioner wishes to call its product "Shredded Wheat" because by doing so it can sell more of it. Hence, respondent cannot be protected unless the injunction against the use of the words as part of the trade name be sustained.*

The same is true as to the form of the biscuit. We have already pointed out both in the argument and in Appendix B of this brief that the petitioner's biscuit served upon a call for "Shredded Wheat" has resulted in confusion and passing off. Even as early as 1915, in the *Humphrey-Cornell* case** the Court could find that the appearance of the respondent's biscuit had acquired secondary significance as meaning only the biscuit made by the respondent (R. vol. IV, p. 59); and this finding was not only retained in the modified mandate (*ibid*) but was expressly and emphatically recognized by Judge Learned Hand in his opinion written for the Circuit Court of Appeals in the same case (250 Fed. 960).

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* For petitioner to use the words "Shredded Wheat", succeeded by its name "Kellogg's", would be "...n aggravation and not a justification". *Menendez* vs. *Holt*, 128 U. S. 514, 521; *Jacobs* vs. *Beecham*, 221 U. S. 263, 272.

** *Shredded Wheat Co.* vs. *Humphrey-Cornell Co.*, 244 Fed. 508.

It is true that the relief ultimately granted in that case was limited to the marking of such biscuits as reached the ultimate consumer outside the package, but a little reflection will show the futility and ineffectiveness of such an injunction, for the manufacturer is wholly unable to determine, when biscuits are being packed, which ones will be delivered without the package. Moreover, the petitioner in this case, with the aid of Andrew Ross, the real defendant in the *Humphrey-Cornell* case (R. vol. III, p. 1996) as well as with the testimony of its own technical employees (R. vol. II, p. 1122), has established and asserts that the biscuits cannot be individually branded. In the face of such assertion the portion of the judgment appealed from, which enjoins the petitioner from making its biscuit in the form and shape of the respondent's biscuit, was inevitable; for not otherwise could effective relief be granted.

A court of equity is a practical court—its genesis was in affording suitors practical relief where the rigid law courts denied it. We have heretofore shown that the petitioner can fully enjoy all rights which passed to it and the public upon the expiry of the patent without any necessity for destroying respondent's good will. It is the protection of that good will which the respondent now seeks.

VI

The Public Has a Real Interest in This Case

It is obvious that if the petitioner has the right to make an imitation of "Shredded Wheat", using the pillow shape form and using the words "Shredded Wheat" as part of the name of its product, then every other citizen of the United States has a similar right. There is nothing in this record that would warrant us in charging that the petitioner's standards of purity and cleanliness are not high, nor is there any evidence that petitioner does not.

use the same expensive quality of wheat as is used by the respondent. It is, however, self-evident that all manufacturers will not be so scrupulous in the maintenance of these high standards. Certainly not all persons would be willing to pay the premium which must be paid to secure Number One grade white winter wheat, such as has been used by the respondent throughout the manufacture of "Shredded Wheat", nor would all persons use the same expensive precautions to insure cleanliness in manufacture and absolute purity of product.

Today the nation knows that respondent's "Shredded Wheat" is wholesome, clean and pure. It is in the public interest that these high standards be preserved and that a call for "Shredded Wheat" in any town in the country will always produce a product of such high quality. It surely is not in the public interest to open the door to substitution of products which may be of inferior quality. Even if the equities between petitioner and respondent were evenly balanced, this factor of the public interest should shift the balance so as to require an affirmance of the decree of the Court below.

We confidently submit that the decree of the Circuit Court of Appeals does no more than simple justice. We respectfully ask that it be affirmed *in toto*.

Respectfully submitted,

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of Counsel.

Appendix A

Specimens of Testimony Showing Secondary Significance.

(See also Appendix D, *infra*, p. 93).

HARRY J. HELMERS, a wholesale grocer of Cincinnati, Ohio, and a witness for *petitioner*, said on cross-examination (R. 1567):

> "When our customers ask for shredded wheat, we know what they want and give them what they want, because we do not classify Kellogg's Whole Wheat Biscuit as shredded wheat. I just feel like either one of them is a name. I imagine shredded wheat would be a trade name; of course, the same as Whole Wheat Biscuit. *Shredded wheat has been a sort of household word so many years it is associated with this biscuit now made by the National Biscuit Company, in the minds of the public.* That is the reason. When an order is taken, if you want to call it a biscuit, all right; *but, if they say Shredded Wheat, that is all is said on the order. One case shredded wheat is the way the salesmen order it. It is not necessary to say National or Niagara Falls; it is just shredded wheat. I believe that has been so as long as I can remember in the business.*"

He was corroborated by CHARLES T. WARD, president of Francis H. Leggett & Company, an old and well-known wholesale grocery house of New York, who stated (R. pp. 684, 685):

> "The term Shredded Wheat means to me a proprietary item of some sort, or brand, owned by the Shredded Wheat Company formerly, I think, and now by the National Biscuit Company.
>
> By the term 'proprietary article' I mean to convey some item that is owned individually by somebody.
>
> * * * * * * *
>
> *In my opinion as a merchant, I do not think there is any question in my mind about the fact that the advertising and the sales of Shredded Wheat, as I know it, resulted in identifying Shredded Wheat as a proprietary article.*"

The witness EDWARD E. SWEET, at one time connected with the *petitioner* corporation as a salesman and having had great experience in the sales departments of large food corporations for a period of twenty years or more, testified as follows (R. 332):

> "I certainly have had an education in cereals that would probably permit me to be more critical than the ordinary consumer. For that reason, I am probably very critical of the cereals and the comparisons that I make when I select them and eat them. When I find a biscuit like that in Plaintiff's Exhibit 1, I can not think of anything but Shredded Wheat. *When I think of Shredded Wheat the thought I get is concerned entirely with the product, manufactured by the National Biscuit Company at Niagara Falls.*"

WILLIAM A. HANNIGAN, President of J. D. Sissler Company of Wilmington, Delaware, and in the wholesale grocery business for twenty-seven years, testified (R. 295):

> "During all the twenty-seven years we have handled a product known as Shredded Wheat. Originally we knew of Shredded Wheat as being made at Niagara Falls.
>
> Plaintiff's Exhibit 1, which you hand me is the package that I referred to a moment ago as Shredded Wheat. When we ordered or desired that product from the manufacturer we ordered so many cases of Shredded Wheat. Shredded Wheat I think it commonly went as. It was known to the trade as Shredded Wheat. *The product was ordered from us by the retailer as Shredded Wheat. That term indicated to me, one of the members of the trade, the source or origin of that product.*"

HARRY W. FRAZIER, for thirty-nine years a retail grocer at Wilmington, testified (R. 298):

> "I know what Shredded Wheat is from the selling of it. The package marked 'Plaintiff's Exhibit 1' is the package we sell as Shredded Wheat. I cannot say exactly how long I have known Shredded Wheat, but I venture to say 30 or 35 years.

When we ordered the product in the carton similar to Plaintiff's Exhibit 1, we ordered Shredded Wheat and when customers asked for Shredded Wheat we supplied Plaintiff's Exhibit 1—this package of Shredded Wheat."

The witness HAMILTON, a Boston Grocer, testified (R. 353):

"When a customer says shredded wheat, it means a package like Plaintiff's Exhibit 1. When a customer orders it, that is the package I supply her. Many of my customers order by telephone. They order this product as Shredded Wheat. When we get such an order, we supply this shredded wheat; have never supplied any other."

JOHN A. ORR, a grocer of long experience in Pittsburgh, Pennsylvania, testified (R. 448):

"Shredded Wheat to me means a national product which we are selling to the public every day and it means but one article. The purchasing public come in and ask for it and we give them Shredded Wheat, which is what they want. It has a positively established reputation and a lot of good will attached to it."

HARRY C. ROHN, of Cleveland (R. 473), complained because he had had the Kellogg product served outside of the package in a bowl upon a request for Shredded Wheat. On *recross-examination* he said:

"RXQ. 67. Mr. Rohn, if you went into a restaurant from now on and wanted to get this large biscuit, would it not occur to you to ask for the Niagara Falls Shredded Wheat?

A. Well, I do not know. With me, shredded wheat is Shredded Wheat."

FRED LEIGHTON, of Cleveland, said (R. 478):

"RXQ. 95. Mr. Leighton, it is true, is it not, that you, as a grocer, now know that there are two distinct brands of shredded wheat on the market; one made by the Kellogg Company at Battle Creek,

and the other made by the National Biscuit Company at Niagara Falls?

A. No, I know only one. There is only one Shredded Wheat."

HARRY E. SCHLOESSER, a grocer, of Chicago, said (R. 511):

"I think that what Frigidaire* has come to mean to electric refrigerators, Shredded Wheat has come to mean to products of that type—just as a Kodak applies to cameras and Kellogg is a special name for Corn Flakes."

ELMER R. JONES, a retail grocer of Washington, D. C., testified (R. 537):

"From my experience I would say that the name 'shredded wheat' has acquired a reputation among the purchasing public. When the purchasing public ask for Shredded Wheat, they know what they are asking for. How they know is probably not for me to say. It might be probably through advertising purposes, the same as they would ask for a certain brand of canned goods, like the Del Monte brand. They have probably tried or seen it through the advertisements, or it might be a by-word on their tongue, like when anybody asks for a cracker, they would ask for a package of Uneedas."

MICHAEL WEINSTOCK, a wholesale grocer of New York City, testified (R. 663):

"In the trade, the expression 'Shredded Wheat' has the significance of a trade name, as to a particular product of particular origin. The way I understand it, it is an item that has been named as Shredded Wheat, and the name has been registered."

GEORGE J. BORN of San Francisco, a retail grocer of thirty-one years experience, says (R. 748):

"From my experience in grocery merchandising and dealings with the public, as to whether this expression Shredded Wheat has any particular associa-

* Frigidaire is a General Motors trade name for its electric refrigerator.

tion or meaning in the minds of the general public, I think that, in most people's minds, there is only one Shredded Wheat. Nothing else will take its place. It is like Palmolive Soap or Dutch Cleanser that we sell. Those names refer to particular makes of soap and cleanser. I regard Shredded Wheat as a trade name. I guess I mean by that; if people ask for Shredded Wheat, they want Shredded Wheat only."

And again on recross-examination he says (R. 751):

"If it was put direct to me, I think I would explain that Shredded Wheat was the only Shredded Wheat. I would not use the expression that Kellogg's was another make of shredded wheat. I would not even say that shredded wheat or shredded wheat biscuit were being made by two manufacturers: one at Niagara Falls and the other at Battle Creek. I would simply tell the customer that, as far as I know, there is only one kind of Shredded Wheat on the market, the Niagara Falls product."

R. L. Waugh, operating a self-service store in Los Angeles, says (R. 850):

"Q. What have you to say about the expression Shredded Wheat? Has it acquired any definite meaning in the minds of the public, in your opinion?

"A. Well, the word Shredded Wheat is a household word, and it really—referring, always, to the original Shredded Wheat.

"Q. 49. When you call it a household word, do you mean by that that it has become attached to that particular product in the minds of the public?

"A. Absolutely.

"Q. 50. Do you believe that to be the case?

"A. I do.

"Q. 51. From your thirty years' experience?

"A. Yes sir."

Henry L. Dingee, operating a service store in Fort Worth, Texas, said (R. 861):

"In my opinion, there is only one Shredded Wheat. When a customer comes in and asks for Shredded Wheat, that is the first think I think of, the only

thing. To me, just Shredded Wheat is the name of a product, like saying the Cadillac made by General Motors. I think Shredded Wheat is made by this Uneeda* Biscuit Company, or whatever you want to call it. * * * I regard it as a proprietary name, a trade name."

PAUL W. SIEBERT, a retail grocer for some twenty years in Dallas, Texas, stated (R. 896):

"If the Kellogg Company puts on the side of the package this little phrase which I did not notice before, in which it is called a shredded wheat product, I think it is a lie, in this way, because it is not a shredded wheat product, in my opinion; because a shredded wheat product would mean a product from this particular company, in my estimation. Shredded Wheat means a biscuit made by the Shredded Wheat Company."

HENRY F. STEEN, for many years connected with the plaintiff company and later in the grocery business at Kansas City, Missouri, testified (R. 921):

"I would say that it is fair to say, in my opinion, at least, that the term shredded wheat is entirely connected with the Niagara Falls product. I would regard it as a trade name and as the descriptive name of the original Shredded Wheat Biscuit."

and on cross-examination he said (R. 927):

"If I were asked whether Kellogg was manufacturing a shredded whole wheat biscuit, I believe I would say no, that they are just manufacturing an imitation of it. It is nothing else but an imitation of the original Shredded Wheat Biscuit."

He set forth on redirect-examination after a long and searching cross-examination (R. 929):

"The gist of the discussion is that I have known the original Shredded Wheat, the old name, as Shredded Wheat, for many, many years; that it

*"Uneeda" is a well known trade-mark of respondent for crackers.

has acquired a reputation with the public, and that the expression shredded wheat is attached to the National product in the minds of the public. That is why I say that the Kellogg product is an imitation of it."

PAUL R. WATKINS, a grocer of Washington, D. C., said (R. 547):

"I do not think they (petitioner) have the right to call that shredded wheat. That is not shredded wheat. That is the National Biscuit Company's Shredded Wheat. That is what I think about it. I think they have a trade name, Shredded Wheat; and I do not think there should be another biscuit made that looks anything like it."

Miss BESS EVANS, a demonstrator, stated (R. 648):

"*It is my experience and observation that, when people call for or desire Shredded Wheat, they desire the product of a particular concern.* When a person gets used to a product and it has been used for years and years, if they put something like it on the market, it is an imitation. You know it does not come up to the original product."

H. B. RICKARD, a retail grocer of Los Angeles, testified (R. 822):

"We receive occasional telephone orders for Shredded Wheat and we supply Shredded Wheat. I know the Kellogg's Whole Wheat Biscuit. We carry that. When a customer asks for Shredded Wheat Biscuit, I have never supplied the Kellogg's biscuit, unless they specially ask for Kellogg's. We always send them Shredded Wheat".

MAXINE REYNOLDS, a consumer of Dallas, Texas, testified (R. 902):

"When I ask for it, I ask for Shredded Wheat. I have in mind definitely that I expect to receive Shredded Wheat Biscuit, which is known as Shredded Wheat and is put out by the National Biscuit Company. I have never called it a National Biscuit product; but I have always taken for granted that it was their product, in asking for it. Shredded Wheat means that particular product to me."

LESTER S. GUTHRIE, in the farm machinery business at Kansas City, Missouri, said (R. 936):

> "I have had occasion to purchase Shredded Wheat. I ask for Shredded Wheat and I have in mind that I would like to get the Niagara Falls brand of Shredded Wheat; but I often get the Kellogg brand of Whole Wheat, lately."

Mrs. JESSIE M. FATJO, of San Francisco, California, explained (R. 742):

> "The expression Shredded Wheat represents to me the National Biscuit Shredded Wheat, which we have for breakfast."

Mrs. EMILY HERRON, a housewife of Cleveland, Ohio, said (R. 464):

> "When I ask for a package of shredded wheat I expect to get the product made at Niagara Falls and which I have seen made."

HAROLD O. YORKE, of Detroit, a customer, stated (R. 483):

> "Shredded Wheat conveys to me a biscuit made at Niagara Falls."

LOUIS RICHARD SCHMIDT of Washington, D. C. stated (R. 532):

> "If I go into a store and ask for shredded wheat I expect to receive shredded wheat biscuit; I mean the product that is made at Niagara Falls."

Mrs. DOROTHY MCFARLAND, housewife of Los Angeles, testified (R. 783):

> "When I buy it at a service store, I ask for Shredded Wheat and I expect to get the National Biscuit Company's Shredded Wheat."

ELBERT KIRKLAND, a retail grocer at San Francisco, said (R. 770):

> "If anybody speaks of Shredded Wheat, I do not associate it with anything else but Uneeda. I do not believe the customers do either, from the way they

buy. When the purchasing public speak of Shredded Wheat, they think of Uneeda. By the word Uneeda they mean the Shredded Wheat made by the National Biscuit Company."

Horart W. Mears, purchasing agent of Matson Navigation Company in San Francisco, testifying for *petitioner*, said, in speaking of plaintiff's Exhibit 1 (R. 1197):

"I have known that all my life. *If Shredded Wheat is mentioned, that famous Shredded Wheat Biscuit is called up in my mind.* There is no question about it."

Joseph G. Cohen, a wholesale grocer of San Francisco, also testifying for *petitioner*, said (R. 1200):

"*I would say that, even when Kellogg's was known as Kellogg's Shredded Whole Wheat, if an order came in for Shredded Wheat, the National Biscuit Company's product would be sent out on the order. That has been so before and after the Kellogg people got into this line with the biscuit.*"

L. P. Schmidt, operating a chain of grocery stores in San Francisco, and a witness for *petitioner*, said on cross-examination (R. 1212):

"I have been familiar with Shredded Wheat for a great many years, nearly as long as I can remember. It has always been known as Shredded Wheat and always looked the same as it looked today, a small-sized pillow-shaped biscuit. When I started to describe the Kellogg biscuit, in answer to Mr. Clarke's question, I started to say it was a shredded wheat biscuit. That was the first thing that came into my mind. *If my customers ask for shredded wheat I give them Shredded Wheat, the product sold by the National Biscuit Company. I would not offer such a customer Kellogg's Whole Wheat Biscuit. I would consider that substitution.*"

Carl Dunac, operating a restaurant in San Francisco, said (R. 1235):

"When I speak of shredded wheat, I have in mind that shredded wheat there, Plaintiff's Exhibit No. 1, one of these pillow-shaped biscuits. That is what I mean by shredded wheat."

JOSEPH L. MOULTON, a wholesale grocer, of Detroit, Michigan, *called by petitioner*, testified on cross-examination (R. 1487-8):

> "Having been in the grocery business since 1906 I knew shredded wheat almost from the start. I have handled a lot of it. Before National took it over, we handled it very extensively all the time. *It was a very well-known product, and, if anyone asked for shredded wheat, there was never any doubt that they meant shredded wheat, like Plaintiff's Exhibit 1.* I would say that it is fair to say that shredded wheat, during the first twenty-seven years of this century, became a household word known throughout the country.
>
> "XQ. 45. My question now is: You find that the Kellogg Whole Wheat finds ready substitute for shredded wheat; do you not?
>
> "A. Yes, that furnishes a substitute."

And again (R. 1488):

> "*I have not told them this is shredded wheat made by the Kellogg Company. We could not get by with that.*"

MILTON A. GALLUP, Minneapolis representative of Griggs, Cooper Company, wholesale grocers, testifying for the *petitioner*, said on cross-examination (R. 1885):

> "XQ. 71. It has never occurred to you, probably, Mr. Gallup, that the expression *shredded wheat* has acquired a proprietary or trade-mark meaning, as designating the product that the Shredded Wheat Company had made for so many years, has it?
>
> A. *Yes, I think it has. That is what I say. We still call it shredded wheat biscuit, and, when they call for shredded wheat biscuit, we sell it for that.*
>
> THE WITNESS: *We sell it as the trade name designating the National's shredded wheat biscuit*, because that is the only way it is listed. The other we call Whole Wheat Biscuit, although I very quickly say it is shredded wheat when I am asked."

Harry L. Snyder, a grocer of Pittsburgh, Pennsylvania, testifying for *petitioner*, said on cross-examination (R. 851):

> "People have called for that product, throughout my entire experience, by the name shredded wheat, as far as I can remember. I never knew it to be called for by any other name. *I would think it is a name very familiar to the public, and I would suppose it has always meant this product made at Niagara Falls.* I know of no reason why it would not. It might be possible some people would not know it was made there. *It means that product to the public, however, and it still means it.*"

The extracts herein quoted are by no means the whole estimony as to secondary significance. They are merely lustrative of the substance of proof given by scores of ersons who testified in the case.

Appendix B

Evidence of Substitution, Passing-Off and Confusion.

1. Instances of Substitution Accompanied by False Representations.

Testimony of EDWARD E. SWEET (R. 325, 326):

I ordered a shredded wheat from the menu in the Providence Biltmore Hotel in their lunch room.

Yes, at the Providence Biltmore Hotel, in their lunch room; and a small package, such as might indicate that it was an individual package—or at least two biscuits were exposed during delivery of the food; and, because I was dividing my attention between the package and a newspaper, I just automatically removed one of the biscuits, as I always do when I receive an individual package, and started to eat it. Eating two or three portions convinced me that there was some sort of change in the biscuit, so I paused in my reading long enough to examine the package more closely; and I discovered that it was not shredded wheat, but that it was a product known as Kellogg's Whole Wheat Biscuit. • • • I called the waitress and, if my memory serves me right, I said to her: "This is not shredded wheat."

And she said: "What is it?"

And I said,—if I remember correctly, "This is Kellogg's Whole Wheat Biscuit."

"Well," she said, "*they have sold out to the National Biscuit Company.*"

W. A. DOYLE testified (R. 388):

Mr. Kenney and I were at breakfast in Doukas Cafe, Keene, New Hampshire. We ordered shredded wheat. A gentleman who I think was the proprietor brought a serving of Kellogg's biscuit. We objected to it and said it was not shredded wheat. It was in the package. He insisted it was shredded wheat. We went into lengthy detail about it. *He also stated Kellogg had bought out Shredded Wheat Company and that that was the shredded wheat.*

We did not succeed in getting anything else.

He was corroborated by THOS. R. KENNEY, who stated (R. 390):

> In August of this year I was in Doukas Cafe, Keene, New Hampshire, asked for shredded wheat, and was served Kellogg's biscuit. I told the waiter that was not shredded wheat, was not what I wanted. He insisted it was shredded wheat, the only shredded wheat he had. To convince me it was, *he told me the Kellogg Company had bought out the Shredded Wheat Company and was now putting the biscuit out in this package and in this form.*

Testimony of Mrs. FLORENCE L. COWLES, R. 491:

> I walked in the store and asked for several articles, among them Shredded Wheat. She placed a box of Kellogg's Whole Wheat on the counter and I said, "Is this Shredded Wheat?" and the lady said "Yes." I said, "I thought the Shredded Wheat had a picture of Niagara Falls on it." *And she said, "Well, this comes from Niagara Falls,"—meaning the Kellogg package which she placed on the counter.*

Testimony of CLAYTON K. BRACE, R. 987:

> I remember particularly Mr. Thoms having breakfast with me and three or four other men. In that case, *I particularly asked the girl if she had Shredded Wheat, the original Shredded Wheat, and she said she had.* I told her I would take it. *When she delivered it to me in the bowl, not in the package, it was the Kellogg product.* I recall that instance, because Mr. Thoms became quite excited and called over the manager of the restaurant.

Testimony of SAMUEL A. LEONARD, R. 639, 640:

> I recently went to the store of V. Pettrolala, Belleville, New Jersey, and said: "I would like to have a box of National Biscuit Shredded Wheat." He was standing behind the desk. In back of him there was a well-dressed fellow, Italian, and he began to look around. My son, who was with me, said he did not have any in the place. The fellow who stood on the opposite side of the desk said: "Right up there." He

said, "Oh, yes," and pulled down one of these Whole Wheat packages.

I said, "That is not the National Biscuit, is it?" He says, "Yes." "Well," I said, "it does not say so." Well, he says, "It is Shredded Wheat." "All right," I said, "I will take a box of it."

Testimony of MRS. DOROTHY MCFARLAND, R. 783:

On November the twenty-first, I bought shredded wheat at Walter's Market, 1050 East Anaheim, Long Beach. I asked for Shredded Wheat and I got Kellogg's Wheat Biscuit. Plaintiff's Exhibit 174 is the package I got at that time.

I asked the grocer for Shredded Wheat, and he gave me that package. I did not think that was the kind I wanted. It was not the kind I had been buying. *I asked him if it was Shredded Wheat; and he insisted it was; that it was the original Shredded Wheat; that the Kelloggs were the first people that made the Shredded Wheat* and they made the Shredded Wheat, and that was what it was. So I bought it. *The grocer told me that Kellogg's were the first people that made Shredded Wheat, that they made the original Shredded Wheat.*

Testimony of CLARA M. TUTT, R. 900:

Recently, I went into the store of Phipps, on the north side, a store at which I do not regularly trade, and asked for Shredded Wheat. They brought me this package. I was asked to do that by somebody connected with the National Biscuit Company. I said, "This is not the original Shredded Wheat." He said, "Oh, yes, it is." He called a manager and said, "Mr. Phipps, is that the original Shredded Wheat?" He said, "Yes." I said, "This is not what I have been buying." *He said, "This is the original Shredded Wheat."* I took it and paid for it. This happened yesterday. The box they gave me was Plaintiff's Exhibit 185. I did not even know there was a Kellogg's on the market until I saw this package.

Mrs. R. K. Stalcup testified (R. 904):

I went in the store and asked him if he had some Shredded Wheat. He said, "Yes, ma'am, I do have." We both glanced at the same time up to the shelf. He said, "I have the Kellogg's shredded wheat." *I said, "Is this the original shredded wheat?" He said, "Yes, ma'am."* I said, "I want to be sure. I am buying this for someone else." He said, "Yes they will never know the difference. *This is the original Shredded Wheat.*"

Testimony of Nora G. Evans, R. 651, 652:

I recently had an experience in ordering Shredded Wheat and obtaining something else. I went into a cafeteria and ordered Shredded Wheat. They brought this Whole Wheat and fixed it in the bowl, where it looked like a long biscuit. I said, "That does not look like Shredded Wheat to me. Bring me the box. I want to see." She did not bring the box. I suppose she told a story and she did not want to get caught. After I tasted a little bit, I said "Bring another one and bring the box with it." She brought the box. I said, "That is not Shredded Wheat. That must be a new biscuit that is put out. I never saw it before." She said, "It is just the same." I said, "You are mistaken. It is not." This was at The Meadow Cafeteria, 72 Henry Street, Brooklyn. * * * I placed the order with the waitress. I said, "I want an order of Shredded Wheat Biscuit." *She brought this Whole Wheat Biscuit. I did not know what it was at the time. She had it in a bowl.* It looked just like the original Shredded Wheat. She did not bring the original container I called for. I ordered another order of it, and then she brought another container, which I have produced here, Plaintiff's Exhibit 145. I ate part of one, and the other biscuit is in there. The biscuit I first had and this are the same biscuit.

(Stipulated that the biscuit produced by the witness is a Kellogg biscuit.)

2. Instances of Passing Off.

Testimony of Mrs. Florida P. McCabe, R. 366, 367:

I needed shredded wheat and I went into the store of Fontaine, at Castle Hill, Salem, Massachusetts, about a month ago. I asked the clerk for a package of cigarettes, and he gave them to me. Then I asked for a package of shredded wheat. He handed me this package, Plaintiff's Exhibit 15, which did not look like shredded wheat to me that I have been using. I asked him if it was shredded wheat, and he said yes. I said, "It does not look like shredded wheat I have been using." He said, "It is positively the same thing, except it is a smaller biscuit." I said, "I want to make sure that, when I call for anything, I find what I want." He said, "That will be the same." I took the package.

Testimony of W. A. Doyle, R. 552:

On the nineteenth day of December, about 8:30 A. M. I went into the Lull grocery store, 410 East Dutton Street, Kalamazoo, Michigan, and asked for a package of Shredded Wheat. The grocer handed me Plaintiff's Exhibit 74. I replied, "That is not Shredded Wheat." He said, "*That is shredded wheat. See the biscuits in the dish?*" I took it and went out.

Lester S. Guthrie testified (R. 936):

I remember especially September 7th, in Wichita, at P. O. Weltner's, 3060 East Douglas Street, a grocery store. I bought some other groceries and asked for some Shredded Wheat Biscuit. He gave me a box of Kellogg's Whole Wheat Biscuit. I told him it was not what I wanted. He said, "*That is just the same thing. One time they come marked one way; and one time they come marked another.*" He said it was all one and the same.

Testimony of Elizabeth C. Barrett, R. 361:

At the Hawthorne Hotel in Salem, Massachusetts, about three weeks ago, I asked for shredded wheat, and they brought me some biscuit that looked similar to a

shredded wheat biscuit, not as large, came in a package marked Kellogg's Wheat Biscuit or something like that. I called the waitress and asked if it was shredded wheat. She said yes. There was a package with two biscuit, and I said, "This is not shredded wheat." She said, "Yes, it is." I said, "Does it say so on the package?" She said, "No. Well, it is, just the same." She did not take the package back. I finally accepted it.

3. Instances of Confusion.

R. L. WAUGH testified (R. 852, 853, 854):

My customers or one of them picked up Kellogg's Whole Wheat Biscuit off the shelf and came to my checker to pay for it. I do my own checking-out, mostly. I would say to the customer, "What do you think you have got in this package here?" She would say, "Is that not Shredded Wheat," and I would say, "No, that is not Shredded Wheat." She said, "What is this, then?" I said, "This is Kellogg's. That is the new product that is put out by Kellogg's." I may have told her it was Kellogg's shredded wheat, *and she said, "Oh, well, that is not the package I wanted. I wanted this package here," when, probably, she thought that the Shredded Wheat Company had put in this window package.* • • • I do not want them to take that package home thinking they are taking the other package. When they bring me the package, it is not wrapped; it is in the basket.

I think they are more likely to find out when they get home that this package is not what they wanted, than they would in my store. *When they take it off the shelf, they may think it is one thing. When they get home and think about it, they finally realize that it is not what they intended taking.* • • •

I think the cellophane front in there has a lot to do with increasing sales of the Kellogg package. I would say that the cellophane front has the effect of suggesting the other, the old Shredded Wheat package. In other words, in my mind, the old Shredded Wheat package looms up as though it had a cellophane front

in it. * * * With the Kellogg package and the National Biscuit package, I do not think they stop to look at the name. They just simply see the Shredded Wheat through the package, and they grab it and go.

Testimony of PAUL W. SIEBERT (R. 893):

A lady came and said, "Will you sell me two packages of Shredded Wheat and give me one? They are selling them off the wagon that way." I said, "I am sure it is not Shredded Wheat." She said, "I am sure it is." So she went so far as to look on my shelf and go and look at her package and came back and apologized to me. *She was getting Kellogg's and thought she was getting Shredded Wheat.*

Testimony of GEORGE SCHAPANSKY, R. 721, 722, 723:

I was on my way; it dawned on me I was to get a package of Shredded Wheat; and I walked into the store and asked for it. Mrs. Reeder met me at the door and talked to me. We conversed a few minutes. I said, "I want a package of Shredded Wheat." She told me to help myself. I reached for it, took it down, paid for it, and walked out. * * *

When she pointed out this package of Kellogg's to me on the shelf, there was no window on the package. This was on the shelf there just like that, and I reached up and took it down.

All I saw was just the plate with the Shredded Wheat biscuit. I did not see the name Kellogg's. I did not even look at it, did not even pay any attention to it. After I got it down, I said, "Is that Shredded Wheat?" Then I did look at the package, and I turned it around a couple of times and walked out with it, after I had paid for it and said no more about it.

When I looked at it, it just seemed like it was just a different package all at once. To my own mind, I said, "I guess they have changed packages and changed the size of their package," never making any statement to anybody.

Testimony of JESSIE M. FATJO, R. 742, 743:

I asked for a package of Shredded Wheat at Miller's Station, Miller's store, which is on the road from

Cupertino to Saratoga. They gave me Kellogg's package. It did not look quite familiar to me, so I asked the woman, "Is that Shredded Wheat?" and she said, "Yes."

* * * * * *

This took place on November 25th, in the afternoon. I did not particularly inspect the package at the time I bought it in the store. *I just glanced at it and saw a biscuit on it. I have been accustomed to seeing a biscuit on Shredded Wheat, the picture of a biscuit.* I said, "Is that Shredded Wheat?" I thought maybe they had changed their package. She said, "Yes," so I took it. When I got out in the machine, I put it in the back, and the youngsters said, "Mama, this is not the kind of Shredded Wheat we have been accustomed to getting." So I looked at it, and then I recognized it was not. That was my first knowledge that it was not Shredded Wheat. I had no idea anyone else had more or less the same package. When I looked at the package in the store, I did not read the name Kellogg on it. I just saw the biscuit, the wheat biscuit, and then I thought that is what it is.

Mrs. Caroline Cavalier testified (R. 612):

I recently had an experience in purchasing Shredded Wheat in a store in South Norwalk on East Avenue, A. Greene's. I asked for Shredded Wheat, expecting they would give me Shredded Wheat, but they gave me Kellogg's Whole Wheat. I did not stop to think or look at it until I got home. I saw the package when it was handed to me. I was buying three or four items at the time. *When I got home, I noticed it was Whole Wheat.* Plaintiff's Exhibit 80 is the package. That is my only experience of that kind. I had never seen Kellogg's Whole Wheat Biscuit before. I did not open this package.

Mrs. Grace Darling testified (R. 393):

In October of this year, I went to the Quincy Market, as I do Saturdays. As I went up the aisle, a clerk held a package out. I did not see the name but what I supposed was shedded wheat. I was out of

shedded wheat, and I wanted some, because I am never, never without it. I gave him my traveler and said, "Send it up," and thought no more about it.

Q. 13. Let me ask you this: When you say you saw what you thought was shredded wheat, do you mean that the words *shredded wheat* were on it?

A. No. *I saw this picture there, and I supposed it was shedded wheat. I did not see the name.*

Testimony of R. L. WAUGH, a grocer, R. 850:

Yes, occasionally we have a party who will bring up a package of Shredded Wheat, and I have asked them if they thought that was the Shredded Wheat. They said, "Is that not Shredded Wheat," and I said, "That is Kellogg's Whole Wheat Biscuit." *"Oh, I thought that was Shredded Wheat," and they would point to the window package* and then walk back and get the other package, and they said, "This is what I want," meaning Plaintiff's Exhibit 1.

THE WITNESS: That has occurred several times, in connection with the package with the window in it, Plaintiff's Exhibit 168, the package of Kellogg Whole Wheat Biscuit that shows the biscuit through a cellophane window. *The customers have picked that up in my store, under the impression that it was Shredded Wheat.*

Testimony of W. D. VAN ARSDALE, a grocer, R. 762:

There is one instance I can state exactly. There was a lady sent her twelve-year-old boy for a pack of Shredded Wheat. He picked out a package of Kellogg's, with the open face. I do not know that he stopped to read it. He took it home. She called me on the 'phone, told me she was sending him back, that he got the wrong package. We changed it for Shredded Wheat. * * *

I think that the cellophane opening feature on Plaintiff's Exhibit 153 is the one that would offer the most confusion, because it resembles the regular Shredded Wheat, the genuine Shredded Wheat. I think the picture of two biscuit also has a tendency to confuse to a certain extent, but not so much as the other one.

4. Instances of Substitution in Restaurant Sales.

LAWRENCE SKEWES testified (R. 520):

At Davie's Lunch, on Forty-seventh Street, Chicago, I asked for Shredded Wheat as it was listed on the menu. Two small biscuit were served to me in a dish. *After I had eaten one of the biscuit I discovered it was not the original Shredded Wheat.* I purchased another package to take away with me, and I put my initials on it. (The box referred to was received in evidence and marked "Plaintiff's Exhibit No. 62.")

Testimony of HARRY C. ROHN, R. 472:

Yes, I have asked for shredded wheat and have received something else. This happened last week Saturday at Huf's restaurant. I asked for an order of shredded wheat and received Kellogg's. It was served to me in a bowl, but I happened to see the package that it came out of before it was served to me in the bowl and I said "This is not shredded wheat." And, the waitress replied, "Sure it is. Doesn't it look like it?" She also said, "That is what we serve for shredded wheat." There were two biscuits served—I ate one of them. I asked for the carton they were served in and have same with me.

STANLEY A. MICHALAK testified (R. 499):

I often order Shredded Wheat and cream for my lunch in restaurants. Recently, at Pixley & Ehlers, a restaurant located at 68 South State Street, Chicago, I asked for a bowl of Shredded Wheat and a cup of coffee. The counter clerk reached down under the counter (I had noticed that it had not been the National Biscuit Shredded Wheat that I had been receiving—it was a different type of package) and as he was doing that, he seemed to try to conceal something. He had his back facing me. Just as he slit open the package and was going to empty it into the bowl, I said, "Hold everything. That does not look like the thing I want."

The clerk tipped it out in the bowl, and he said, "Sure, that is the thing." And then he tried to explain to me what the difference was. He said that was Shredded Wheat and that was the thing.

Testimony of JOSEPH F. BECK, R. 701:

I, along with two other fellows who were having breakfast, ordered Shredded Wheat, in the little coffee shop right off the main lobby. I just asked for Shredded Wheat, and the package that was brought out was that particular Kellogg package, with just the top off, like Plaintiff's Exhibit 71.

I remarked to the waitress that I had ordered Shredded Wheat and that was all that came back to me. Her little comment was "This is Shredded Wheat." So I let it go at that. There was no time for arguing with her. We were in a hurry.

Testimony of EARL K. BURKNER, R. 732:

When I ask for Shredded Wheat in a restaurant, it is usually served in a dish, and without the package, as a rule.

I have had experience recently in ordering Shredded Wheat in a restaurant, at Smithie's Coffee Cup, in Stockton, approximately two months ago or three; some time in the fall. I ordered Shredded Wheat, and the waitress served me with Whole Wheat Biscuit; so I called her attention to it. I said, "Hold on; you are not giving me Shredded Wheat." She said, "Oh, yes; I am." I said, "You are not. You are giving me some Whole Wheat Biscuits." She said, "That is all we have. We sell that for Shredded Wheat right along."

Testimony of EVELYN LOUGHLIN, R. 502:

When I order Shredded Wheat in restaurants and in stores I always ask for the Shredded Wheat that I am accustomed to having, and I expect to get it. I generally always receive what I ask for, but yesterday there was an exception. I went to the Y. M. C. A. on Chicago Avenue, to the grill, and ordered Shredded Wheat. They brought me Shredded

Wheat in a dish, and I ate it; then I asked for another package to take out with me and they brought me this package of Kellogg's.

Testimony of HOWARD P. BURKE, R. 884, 885:

I have purchased Shredded Wheat at restaurants sometimes. I ask for Shredded Wheat. In one instance, when I did that, the young lady brought me a box of Kellogg's Whole Wheat Biscuit. I had asked for Shredded Wheat, so I asked her, "Is that Shredded Wheat?" She said, "Yes, sir." I looked at the box. I said, "It says 'Kellogg's Whole Wheat Biscuit.'" She said, "It is the same thing." I said, "Is it?" She said, "Yes, sir," and I ate it. This occurred yesterday at the Texas Hotel Coffee Shop, Fort Worth. That is the only experience of that kind I have had, to my knowledge, when I was looking for that product. I was always under the impression I was getting Shredded Wheat when I bought it. • • •

Yesterday was the first time I was ever conscious at the time of getting Kellogg's biscuit. *After getting it yesterday, I knew that I had gotten the Kellogg biscuit a number of times before but had not realized it.*

Testimony of ELMER J. KLEEMANN, R. 527, 528:

Last week I went into the Ennis restaurant, which is located on "F" Street, by Seventh, and ordered a portion of Shredded Wheat with bananas. After a consultation with the counter man, the waitress came to me—I was sitting at the counter—and said, "We do not have any." I said, "You do not have any what?" She said, "Bananas." "Well," I said, "I will take the Shredded Wheat with milk." She went to the rear of the restaurant, behind this same counter, and *came back with two biscuit in a bowl of milk;* but they neither looked like Shredded Wheat nor tasted like it to me. I asked her what she had served me. She said, "Shredded Wheat."

And I said to her, "This is not Shredded Wheat."

Well, she said, "That is what we always call shredded wheat."

I said, "I would like to see the package."

She said, "Oh, I have thrown the package in the waste-basket."

I said, "Well, I would like to see the package, anyway." So she went back to the kitchen and she came back with a small squarish package that bore the name of Kellogg's Whole Wheat Biscuit.

5. Opinions as to the Likelihood of Confusion.

WILLIAM J. BOHNET, a grocer of long experience, testified (R. 646):

I think, in a lot of places, they can pass off Kellogg's Whole Wheat Biscuit for Shredded Wheat Biscuit, if they have it on hand and shove it over, saying it is the same thing. Some women are shrewd buyers. They can see right away or when they get it home that it is not the same thing. I think there is a possibility of a grocer passing it off one for the other.

MICHAEL WEINSTOCK, wholesale grocer of New York City, testified (R. 664):

I would say it would be possible for a grocer to sell an unwary customer Whole Wheat for Shredded Wheat.

ELMER R. JONES, a retail grocer of Washington, D. C., said (R. 543):

If a customer in a self-service store or a chain store, having in mind that she needed Shredded Wheat, saw that package there with the picture of the dish on it and two biscuit in the dish (Defendant's Exhibit No. 6) I would think it possible that the customer, or any average customer, would be led to pick up that package thinking it was Shredded Wheat—a lot of them would. I would say that others would ask "Is this the same as Shredded Wheat."

HENRY B. RICKARD, a Los Angeles retail grocer, testified (R. 822):

I would say that the presence of the window shows that it is a shredded wheat biscuit. It is very similar

to the other. *I think Kellogg's Whole Wheat Biscuit could be sold as Shredded Wheat biscuit.* I have noticed our customers pick up the Kellogg package and then "I do not believe this is what I want," and they will go back and change it, or vice-versa.

HENRY L. DINGEE, a retail grocer of Fort Worth, Texas, testified (R. 862):

Plaintiff's Exhibit 161, with the windew in it, is the first package of that kind I recall seeing. When I see that product back of the window, it looks to me like a package of Shredded Wheat. The package looks to me like an imitation of Shredded Wheat. *I believe that, with this package on the shelf, there might be confusion in the public mind.*

I think the Kellogg package, like Plaintiff's Exhibit 161, might and would be sold as Shredded Wheat. Looking at the printing on one end, it says, "Shredded Wheat in its most delicious form," and, on the other end, "A shredded wheat product." It looks to me as if they are trying to sell it as Shredded Wheat. I think Kellogg's Whole Wheat Biscuit could be sold more readily as a shredded wheat biscuit than as a new product.

Petitioner's witness, GEORGE W. CRENSHTON, buyer for a grocery firm at Dallas, Texas, testified (R. 1306):

Personally, I think the window package is a factor in the sale of that biscuit. The sight of it through that window has some sales appeal, I think. It looks like shredded wheat, which makes it an easier seller. It looks like shredded wheat. I think it is a shredded wheat. As I said, I can describe it no better than by calling it shredded wheat. It could be sold to a customer who asked for shredded wheat, and he would think he was getting shredded wheat.

EDWARD E. SWEET, R. 333:

"Assuming that Kellogg's Whole Wheat Biscuit is served out of the package in a restaurant without accompanying identification of the package, I think it would pass very acceptably as shredded wheat."

Mrs. Irma Colliflower, R. 428:

"As to the shredded wheat package one could easily be misled, if in a hurry, into thinking that Kellogg's package was the Niagara Falls Shredded Wheat. Of course, if one is expecting that they may get a substitution you would be most careful to see what you were getting, whereas if you were in a hurry you might receive another package without noticing the difference until you arrived home."

Harry Adrian, R. 385:

"If I had a Kellogg's biscuit on the table outside the package, I would think it was a Shredded Wheat Biscuit. It would be hard to differentiate them without the box"

Appendix C

List of all hotels, restaurants, lunch rooms, etc., specifically referred in testimony, showing whether Petitioner's or Respondent's product was or is served in the individual package, or outside the package, from a bowl.

RESPONDENT'S WITNESSES.

Place	Name of Witness	Record Page	How Served: In Package	How Served: Out of Package
Penn Harris Hotel, Harrisburg, Pa.	Chapman	247	•	
Green Brier Hotel, White Sulphur Springs, Va.	Chapman	250.		•
Union News Stand, Pa. Station, Wilmington, Del.	Duane	301	•	
Providence Biltmore Hotel, Providence, R. I.	Sweet Doyle	325–328 387–388	•	
Hawthorne Hotel, Salem, Mass.	Barrett	361	•	
Doukas Cafe, Keene, N. H.	Doyle Kenney	388 390	•	
(Restaurant, not identified), Burlington, Vt.	Sharpley	401	•	
Vermont Lunch, Burlington, Vt.	Thayer	405	•	
Montpelier Tavern, Burlington, Vt.	Bradbury	407	•	
Dorn's Cafe, New Sherwood Hotel, Burlington, Vt.	Bradbury	408, 409		•

RESPONDENT'S WITNESSES—(*continued*).

Place	Name of Witness	Record Page	How S: In Package
(Restaurant, not identified).....	Black	439	•
(Restaurant, not identified).....	Black	439	•
The Grayboro (near Pittsburgh).....	Pialet	441	•
Isaly Dairy Co. (lunch counter), Pittsburgh, Pa.....	Trescher	444, 445	•
(Restaurant, not identified).....	Barneman	446	•
Isaly Dairy Co. (lunch counter), Steubenville, O.....	Keeder	451	•
Kresge's (lunch counter), Steubenville, O.....	Keenan	452	•
Sunnybright Restaurant, Cleveland, O.....	Cohen	458	•
Harvey's Restaurant, Cleveland, O.....	Fisher	463	•
Huff's Restaurant, Cleveland, O.....	Rohn	472	•
(Restaurant, not identified), Cleveland, O.....	Pyros	479	•
College Inn Cafe, Flint, Mich.....	Harris	482	•
Victory Lunch, Detroit, Mich.....	Greene	489	
Cunningham's Drug Store, Detroit, Mich.....	Greene	489	

RESPONDENT'S WITNESSES—(*continued*).

Place	Name of Witness	Record Page	How Served: In Package	How Served: Out of Package
Pixley & Ehlers, Chicago, Ill.	Michalak	499		•
Y. M. C. A. Grill Room, Chicago, Ill.	Loughlin	502		•
Raklio's Restaurant, Chicago, Ill.	Holmer	503	•	
Davie's Lunch, Chicago, Ill.	Skewes	520		•
Ennis Restaurant, Washington, D. C.	Kleemann	527-8		•
Mrs. Dixon's Restaurant, Hagerstown, Md.	Schmidt	533	•	
Vanderew's Restaurant, Chambersburg, Pa.	Ludwig	535	•	
(Restaurant, not identified), Baltimore, Md.	Johnson	549		•
New Burdick Hotel, Kalamazoo, Mich.	Doyle	554		•
(Lunch room, not identified), Chicago, Ill.	Doyle	557		•
Waldorf Restaurant, Newark, N. J.	Fagan	635	•	
Steuer Restaurant, Hempstead, N. Y.	Parnell	641	•	
(Cafeteria, not identified), New York City	Evans	651-652		•

RESPONDENT'S WITNESSES—(*continued*).

Place	Name of Witness	Record Page	How In Package
Hanover Cafeteria, New York City	MacKay	681	•
Hilton Hotel, Waco, Tex.	Beck	700	•
Mayo Hotel, Tulsa, Okla.	Beck	701	•
Blackstone Hotel, Fort Worth, Tex.	Beck Reynolds	702 902	•
Roosevelt Hotel, New Orleans, La.	Beck	702	•
(Restaurant, not identified), Fresno, Cal.	Schapansky	715	•
(Restaurant, not identified), San Francisco, Cal.	Schapansky	716–717	
Hotel Barry Coffee Shop, Sacramento, Cal.	Sowles	726	•
Smithie's Coffee Shop, Stockton, Cal.	Burkner	732	•
Foster Lunch System, San Francisco, Cal.	Baird	735	•
Byron's Coffee Shop, Long Beach, Cal.	Lierley	798	
Texas Hotel Coffee Shop, Fort Worth, Tex.	Burke	884	•
(Restaurant, not identified)	Hunsaker	909	
Alice Hotel Lunch Room, Kansas City, Mo.	Guthrie	937	•

RESPONDENT'S WITNESSES—(*continued*).

Place	Name of Witness	Record Page	How Served: In Package	How Served: Out of Package
(Restaurant, not identified), Albuquerque, N. Mex.	Brace	986		•
Franciscan Hotel, Albuquerque, N. Mex.	Brace	986	•	
(Hotel, not identified), Omaha, Neb.	Brace	987		•
PETITIONER'S WITNESSES.				
Matson Line Steamships	Mears	1196	•	
Ambassador Hotel, San Francisco, Cal.	Loughlin	1224	•	
Busy Bee Restaurant, San Francisco, Cal.	Dubac	1233		•
(Restaurant, not identified), Los Angeles, Cal.	Lee	1253	•	
(Restaurant, not identified), Long Beach, Cal.	Fierstine	1256	•	
Topic Cafe, Dallas, Tex.	Williams	1360	•	
(Cafe, not identified), Dallas, Tex.	Inman	1362	•	
Y. W. C. A., Milwaukee, Wis.	Tyler	1445	•	
Wrigley's Restaurant, Milwaukee, Wis.	Benedict	1450	•	
Miller Brothers Restaurant, Detroit, Mich.	Miller	1452	•	

PETITIONER'S WITNESSES—(*continued*).

Place	Name of Witness	Record Page	How Served: In Package
Onondaga Hotel Cafeteria, Syracuse, N. Y.	Gray	1529	•
(Restaurant, not identified), Cincinnati, O.	Friedman	1623	•
Kingfish Restaurant, Cincinnati, O.	King	1625	•
Ehrman's Luncheonette, Cincinnati, O.	Ehrman	1628	•
(Restaurant, not identified), Pittsburgh, Pa.	Harvey	1669	•
Schenley Hotel, Pittsburgh, Pa.	Maga	1684	•
Fourth Street Cafeteria, Philadelphia, Pa.	Grobel	1782	•
Quality Tea Rooms Cafeteria, St. Paul, Minn.	Stearns	1919	•
Williams Cafe, Minneapolis, Minn.	Williams	1922	•
Paxton Hotel, Omaha, Neb.	Dubois	1946	•
W. O. W. Cafeteria, Omaha, Neb.	Hosman	1949	•

Total Number of Places Described, in which the Biscuit c Served—

In the carton	56
Outside the carton	18
Both ways	1

Appendix D

Evidence of Secondary Significance Unconsciously given by Petitioner's Counsel and Witnesses.

The following statements by sixty-eight *witnesses for the petitioner* are cited to demonstrate that the public habitually uses the words "Shredded Wheat" to designate respondent's product. In each instance the witness was testifying in either 1932 or 1933, when both Shredded Wheat and Kellogg's Whole Wheat Biscuit were on the market. Even Mr. Clarke, counsel for petitioner, unconsciously contributed to the proof of secondary significance as the following extract from the record (p. 1631) will show.

> MR. CLARKE: This morning, in the cafeteria of the William Penn Hotel, on the long counter, was a display, including a number of cereals, each in an individual carton, and each carton being in a plate of its own.
>
> *The last two cereals on the counter were a package of shredded wheat and a package of Kellogg's Whole Wheat Biscuit.*
>
> * * * I make this statement through the courtesy of Mr. Vilas, and *I offer in evidence the Kellogg package as a defendant's exhibit.* * * *
>
> MR. CLARKE: *And I also offer the shredded wheat package in evidence.* * * *
>
> MR. VILAS: Mr. Clarke's statement is accepted as a statement of fact.

We now list the statements of petitioner's witnesses.

"I thought it (the Kellogg biscuit) was quite similar to Shredded Wheat".

Mrs. Harold L. Mac Millan, R. 1208.

"It (the Kellogg biscuit) * * * is a crisper biscuit than Shredded Wheat".

Thos. W. Laughlin, R. 1226.

"As far as I know, the dealer makes a little more on the Kellogg Biscuit than he does on Shredded Wheat".

Lee W. Thompson, R. 1283.

"We get eleven cents on shredded wheat and ten cents on Whole Wheat".

Chas. F. Florine, R. 1310, 1311.

"I sell some Shredded Wheat and some Whole Wheat Biscuit to restaurants in the large package".

David H. Bergey, R. 1366.

"We bring the package of Shredded Wheat out and we bring one of the Whole Wheat Biscuit out".

Roy B. Laverin, R. 1382.

"Kellogg's Whole Wheat Biscuit in our store sells at least three to one against shredded wheat".

Alexander Wilson, R. 1387.

"We do not, as a rule, attempt to offer Kellogg's Whole Wheat Biscuit, or Shredded Wheat, one in preference to the other".

Leo Keil, R. 1391.

"Shredded Wheat has more of a flat flavor: but Whole Wheat has a different flavor, sort of sweet".

Mrs. O. W. Dunner, R. 1430.

"Kellogg's Whole Wheat Biscuit did not take any customers from shredded wheat that I know of".

Maurice Fishkin, R. 1436.

"We handle both Kellogg's Whole Wheat Biscuit and shredded wheat".

Mrs. Grace Hatfield, R. 1444.

"We handle Kellogg's Whole Wheat Biscuit in the individual cartons, * * * I have ceased buying shredded wheat".

Mrs. Margaret Tyler, R. 1446.

"Both the Kellogg's biscuit and shredded wheat were on display".

Clayton Kolvoord, R. 1448.

"Shredded wheat is outselling Whole Wheat immensely".

Morris Gourwitz, R. 1455.

"Prior to that, shredded wheat out sold Kellogg's or may have been even with it".
Douglas Rumball, R. 1459.

"Since then we have not bought shredded wheat, but we have bought Kellogg's".
Mrs. Harriet Young, R. 1466.

"Prior to the time I used Kellogg's biscuit, I had been eating shredded wheat".
Chester W. Carr, R. 1468.

"Then I saw the Kellogg product on a shelf, tried it, and liked it better. Since then, I have not bought any shredded wheat".
Mrs. Marguerite Brown, A. 1471.

"I would expect to have some former users of shredded wheat among the users of our Kellogg's Whole Wheat Biscuit".
Frank W. Mahan, R. 1475.

"I have ceased buying shredded wheat and turned over to Kellogg's biscuit".
Mrs. Helen Waugh, R. 1482.

"So, from then on, I became a user of the Kellogg product. I am no longer a user of shredded wheat".
Mrs. Mabel Pocock, R. 1483.

"At that time we tried to substitute Kellogg's Whole Wheat Biscuit for shredded wheat".
Jos. L. Molitor, R. 1487.

"I will sell three of shredded wheat to one of Kellogg's biscuit".
C. C. Braunhardt, R. 1494, 1495.

"We have, for some time, sold Kellogg's a cent cheaper than shredded wheat".
Chas. E. Denison, R. 1500.

"Nevertheless, in this instance, we have both Shredded Wheat and Kellogg's biscuit".
Burton A. Miller, R. 1506.

"I think there is no doubt about the Kellogg product having gotton some of the trade that shredded wheat formerly had".

Arthur J. Twentyman, R. 1511.

"Some of my customers are now buying Kellogg's instead of shredded wheat".

John A. De Mallie, R. 1524.

"We use more shredded wheat than Whole Wheat Biscuit".

William J. Gray, R. 1530.

"Whole Wheat Biscuit and shredded wheat encounter competition of other cereal products".

Jos. T. Lewis, R. 1534.

"I think our sale of Kellogg's is more than of shredded wheat".

Robert H. Moses, R. 1548.

"It is natural to assume that we have converted some over from shredded wheat to Kellogg's Whole Wheat Biscuit".

Clarence P. Peterson, R. 1558.

"We sell about three-quarters as much Whole Wheat as we do shredded wheat".

Norbert Thiemann, R. 1571.

"We sell five to six cases a month of Whole Wheat Biscuit to one of shredded wheat in my store".

Nicholas Diehl, R. 1576.

"At present I am using Kellogg's Whole Wheat Biscuit instead of shredded wheat".

Mrs. Vera Walters, R. 1604.

"After I started buying Kellogg's biscuit I did not go back to shredded wheat".

Mrs. Lillian Saur, R. 1606.

"Before I picked up Kellogg's biscuit, I bought shredded wheat for my husband".

Mrs. Maude Dedrich, R. 1607.

"I used Shredded Wheat before I used Kellogg's biscuit".

Mrs. Luella Kuhr, R. 1610.

"Three or four months ago, the pamphlet he sent me said it was new Whole Wheat Biscuit and smaller in size than shredded wheat".

Mrs. Sarah Owens, R. 1613.

"We sell Kellogg's biscuit for ten cents and get eleven cents for shredded wheat".

Nat. C. Reis, R. 1616.

"To a large extent Whole Wheat Biscuit has forged ahead of shredded wheat in our store".

Wm. M. Stephens, R. 1621.

"Before I carried Whole Wheat Biscuit I had shredded wheat in large packages".

Sam J. Friedman, R. 1623.

"Kellogg's Whole Wheat Biscuit is the far superior seller * * * my customers ask for it by name, as Kellogg's Whole Wheat Biscuit. If he wants shredded wheat, we give him shredded wheat".

Jennings Atkins, R. 1629.

"We sell shredded wheat at twelve cents and Kellogg's Biscuit at ten".

C. B. Trumick, R. 1655.

"We get nine cents for shredded wheat and ten cents for Kellogg's Whole Wheat Biscuit".

Albert T. Tomsko, R. 1674.

"Kellogg's Whole Wheat Biscuit has been outselling shredded wheat for probably the last six months".

Jos. F. Maga, R. 1685.

"I sell shredded wheat for twelve cents and Whole Wheat for ten".

Harry Farber, R. 1691.

"I got a sample of Kellogg's Whole Wheat Biscuit a few months ago and thought I liked it better than shredded wheat".

Mrs. Ada White, R. 1697.

"Kellogg's biscuit has taken the place of shredded wheat in our household".

Mrs. W. Clotworthy, R. 1700.

"I prefer to use Kellogg's Whole Wheat Biscuit, and so do my grandchildren. I used to give them shredded wheat".

Mrs. Elizabeth Amann, R. 1703.

"After we got this sample, I bought Kellogg's and now I buy that instead of shredded wheat".

Mrs. Betsy James, R. 1734.

"We have used Kellogg's Whole Wheat Biscuit to supplant shredded wheat in our stores".

Harry Maxman, R. 1747.

"I have not had a package of shredded wheat in the house since I first tried Kellogg's Biscuit".

A. B. Craft, R. 1772.

"Ever since that time I have used Kellogg's biscuit instead of shredded wheat".

Mrs. Wm. T. Wescott, R. 1781.

"Kellogg's has taken the place of shredded wheat in my household".

Mrs. Wm. C. Stokes, R. 1783.

"I switched from shredded wheat to Kellogg's biscuit".

Mrs. Walter Grimm, R. 1787.

"Since then I have used Kellogg's biscuit and have never used any more shredded wheat".

Mrs. Edgar F. Chew, R. 1807.

"I used to get shredded wheat for the summer. He likes the Kellogg's Whole Wheat better. He does not want the shredded wheat now."

Mrs. F. M. Shollengerger, R. 1809, 1810.

"We have eaten Shredded Wheat when the grocer was out of Kellogg's.

Wm. W. Shaw, R. 1812.

"I could not say whether they sell more of Kellogg's biscuit than Shredded Wheat".

Frederick Hall, R. 1822.

"I would say shredded wheat sells more than Kellogg's Whole Wheat".

Wm. E. Skellenger, R. 1827.

"Many of them used shredded wheat and are now using Kellogg's Whole Wheat Biscuit through my effort".

Clarence A. Morrison, R. 1838.

"70 percent. of the people that formerly used shredded wheat are now using Kellogg's Whole Wheat Biscuit".

Geo. W. Moyer, R. 1852.

"I made a purchase of shredded wheat when they did not have the Whole Wheat".

Mrs. Wm. Boyer, R. 1853.

"I would say my house sells considerably more shredded wheat than it does Kellogg's Whole Wheat Biscuit".

Clifford F. Guyer, R. 1897.

"The customers usually call them shredded wheat and Kellogg's Whole Wheat Biscuit".

Jos. E. Kroemer, R. 1917.

"Since then I have not ordered any more shredded wheat, but have used Kellogg's Whole Wheat Biscuit".

Mrs. Edith M. Williams, R. 1923.

"We swung to Kellogg's and bought no more shredded wheat since".

Chas. L. Thompson, R. 1945.

"There have been times when I have been out of shredded wheat and also times when I have been out of Kellogg's biscuit".

B. F. Hosman, R. 1949.

Appendix E

Section 5 of the Trade Mark Act of 1905. (15 U. S. C. A. 85)

United States Code, Title 15, Section 85 (Section 5 of the Trade Mark Act of 1905):

"Sec. 85. *Trade marks which may be registered.* No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade mark on account of the nature of such mark unless such mark—

"(a) Consists of or comprises immoral or scandalous matter.

"(b) Consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any State or municipality or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem, or of any name, distinguishing mark, character, emblem, colors, flag, or banner adopted by any institution, organization, club, or society which was incorporated in any State in the United States prior to the date of the adoption and use by the applicant: *Provided*, That said name, distinguishing mark, character, emblem, colors, flag, or banner was adopted and publicly used by said institution, organization, club, or society prior to the date of adoption and use by the applicant; *Provided*, That trade marks which are identical with a registered or known trade mark owned and in use by another and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade mark owned and in use by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be registered: *Provided*, That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner, or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or

merely a geographical name or term, shall be registered under the terms of this subdivision of this chapter: *Provided further*, That no portrait of a living individual may be registered as a trade mark except by the consent of such individual, evidenced by an instrument in writing, nor may the portrait of any deceased President of the United States be registered during the life of his widow, if any, except by the consent of the widow evidenced in such manner: *And provided further, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States or with Indian tribes, which was in actual and exclusive use as a trade mark of the applicant, or his predecessors from whom he derived title, for ten years next preceding February 20, 1905: Provided further*, That nothing herein shall prevent the registration of a trade mark otherwise registrable because of its being the name of the applicant or a portion thereof. And if any person or corporation shall have so registered a mark upon the ground of said use for ten years preceding February 20, 1905, as to certain articles or classes of articles to which said mark shall have been applied for said period, and shall have thereafter and subsequently extended his business so as to include other articles not manufactured by said applicant for ten years next preceding February 20, 1905, nothing herein shall prevent the registration of said trade mark in the additional classes to which said new additional articles manufactured by said person or corporation shall apply, after said trade mark has been used on said article in interstate or foreign commerce or with the Indian tribes for at least one year, provided another person or corporation has not adopted and used previously to its adoption and use by the proposed registrant, and for more than one year such trade mark or one so similar as to be likely to deceive in such additional class or classes."

Appendix F

The Judgment of Mr. Justice Bennett.

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Royal Courts of Justice
Tuesday, 21st December, 1937.

Before

MR. JUSTICE BENNETT.

IN THE MATTER OF THE TRADE MARKS ACTS, 1905 to 1919

and

IN THE MATTER OF TRADE MARK No. 500,671 registered in the name of the SHREDDED WHEAT COMPANY, LTD. in Class 42.

JUDGMENT

MR. JUSTICE BENNETT: The application before me is an originating motion issued on the 20th February, 1936, asking for an Order to rectify the Register of Trade Marks by expunging therefrom Trade Mark No. 500,671, registered in the name of the Respondents, the Shredded Wheat Co. Ltd. in class 42.

The mark consists of the words "Shredded Wheat," and it was entered in class 42 in respect of biscuits or crackers made from wheat. The mark was registered on the 5th March, 1929.

The Applicants are an English limited company, the Kellogg Company of Great Britain Ltd.

The relevant facts are as follows: in the year 1895 a Mr. Perky, a citizen of the United States of America, in-

vented a process for the making of bread or food from whole wheat, and machinery for the production of bread or food made in accordance with his process. For this invention he applied for and obtained a grant of letters patent, the letters patent being dated 15th October, 1895, and numbered 19,368 of 1895. Perky describes his process at line 15 of page 1 of his Complete Specification in the following terms: "The object of the invention is the economic production of a cereal food or bread which will be wholesome, inviting in appearance, and palatable; such production being accomplished without the addition of injurious properties or compounds and without taking from the grain any of the beneficial qualities provided by nature, and presenting the same in convenient form for service as a superior article of food, without the aid of experts or skilled labour now required to produce bread. The usual methods practised in the manufacture of flour, and the resultant bread therefrom, are such as to detract from the natural and healthful properties possessed by the grain in its original state, while the addition of leavening or raising material, to render the bread light is also detrimental and the entire method consumes a large amount of time and labour. According to the improved method which I am now about to describe, of preparing grain food, the wheat or other cereal is taken in berry form, and after being cleaned and thoroughly washed, is boiled for about one hour, the grain still remaining in berry form at the close of this operation. The boiling in addition to cooking the grain thoroughly removes therefrom the extreme outer silicious coating and adherent extraneous matter, and also destroys all insect life and removes the traces thereof. Before removal from the boiler, the grain is seasoned with salt. The wheat, still in grain or berry form, is, nevertheless, just after the boiling, quite soft and its interior or starchy portion especially, is watery. It can be easily mashed between the finger and thumb, and is not in condition for proper compression until its inner and outer portions are brought more upon an equality in point of consistency. To which end, the grain being removed from the boiler, is allowed to dry for some hours, from 12 to 20 hours being usually sufficient, until the interior of the berry has, from the loss of some of its water, become more consistent. The

grain should be pretty constantly stirred or agitated during this part of the process, to hasten the drying out action, and to prevent incipient fermentation. I prefer, therefore, to dry out the grain in rotating wire-cloth barrels or cage tumblers, as hereinafter described. The berries should now have sufficient interior consistency to enable their outer and interior portions to be effectively incorporated with each other, such incorporation being accomplished by passing the grain between compression rollers, one or both of which is provided with a series of fine circumferential grooves, whereby the berries are mashed and their outer bran coats, gluten layers, and starchy interior portions thoroughly incorporated together and forced into the grooves of the roller or rollers, whence the resultant food is discharged by means of a comb or scrapper in light, porous and tender threads or filaments into a pan or other receptacle, or upon a moving receiver whereby they may be disposed in layers. The food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways. The food presented is a purely cereal product, and all the parts of the berry are given to the consumer in attractive form. No chemical change is set up therein by the use of ferments or other foreign ingredients, and the percentage of water in the food is much less than in ordinary bread. The article as produced is a food or bread composed of superposed or massed layers or deposits of comparatively dry, externally rough, porous sinuous threads or filaments of cooked whole wheat, containing intermixed the gran, starch and gluten of the entire berry, and which is absolutely free from leavening or raising material or their products".

The Specification then proceeds to describe the machinery to produce the bread or food, and by his claims in the Specification Perky claims as follows: "A food or bread composed of superposed or massed layers or deposits of comparatively dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch and gluten of the entire berry and which is free from leavening or raising material or other products. (2) The process of reducing cereals for food, consisting, first, in cooking the grain with seasoning material, after it has been thoroughly

cleaned, without destroying the whole berry form, second, partially drying the grain with agitation until its interior and exterior portions are of substantially the same consistency and finally, compressing the grain to intimately commingle or incorporate together the outer or bran coats, gluten layers and starchy, interior portions in the form of porous, rough filaments or threads, substantially as specified. (3) Apparatus for the preparation of cereals for food, consisting of a boiler, its rotating mechanism, holding cages or tumblers to be rotated in said boiler, drying frames adapted to receive said cages and rotate the same, and means for transferring the cages from the boiler to the drying frames, together with a reducing machine for reducing the cooked and dried grain to filamentous or thread-like form, substantially as specified".

It is to be noticed that Perky in his Specification gives no name to the food produced by his process. In or about 1895 a company was incorporated under the laws of the State of Colorado in the United States of America under the name of the Cereal Machine Co., and this company started to manufacture in the United States of America biscuits from the threads or filaments of whole wheat made in accordance with the process described in Perky's Specification and by the machinery Perky had invented. The biscuits were made by collecting together a suitable number of the threads of wheat made in accordance with Perky's process and cutting the mass of threads so put together into lengths of 3 or 4 ins. This mass of threads when cut took the shape of a small pillow. This small pillow was then baked and became a kind of brown biscuit. Biscuit so made in the United States of America were imported into this country and sold here by a partnership firm of Ingersoll & Melhuish from about the year 1896 until December, 1908. The biscuits were sold as "Shredded Wheat" not as "Shredded Wheat biscuits". In December, 1908, the Respondent Company was formed, and they took over the business of Ingersoll & Melhuish, and from December, 1908, until the end of 1925 the Respondent Company imported to and sold in this country the biscuits made in the United States of America in the way I have described. They also sold the biscuits under the name "Shredded Wheat". At the end of 1925 a change took place. The Respondent Company erected at

Welwyn Garden City a large factory, and from some date early in 1926 the Respondent Company had made the biscuits in this factory and sold them as "Shredded Wheat". I do not think it is relevant, but it is nevertheless the fact that since the formation of the Respondent Company their share capital has been held by a company formed under the laws of the State of New York, and called the Shredded Wheat Co. Since 1929 the whole of the share capital of the Shredded Wheat Co. has been held by another New York Company named the National Biscuit Co.

The evidence is to the effect that since 1896 biscuits in all respects similar to those now made by the Respondent Company have been sold under the name of "Shredded Wheat". These biscuits have always been made in the same way. In the making of them the process protected by Perky's Letters Patent of 1895, and by the machinery protected by the same Letters Patent, have been used. The evidence is that at all times the biscuits have been sold in cartons, each carton containing 12 biscuits, and that on the cartons the words "Shredded Wheat" have been prominently displayed on at least two sides. The Exhibit "J.G.5" is a specimen of the carton now in use. The evidence was to the effect that since 1926 the cartons have been in this form and have had printed on them substantially the same wording and the same picture. The trade in the biscuits in this country has been steadily growing year by year since 1925. In the year 1925 the Respondents sold 236,205 cases of biscuits at a value of £212,584.10s.0d. In the year 1935 they sold 702,422 cases of a value of £632,179.16s.0d. As each case contains 36 cartons, and each carton contains 12 biscuits, it is plain that the sales have been large, and the evidence shows that they have been widespread throughout England and the South of Scotland. The actual number of cartons sold in 1935 was over 25,000,000, containing over 303,000,000 biscuits. In 1929, the year in which the trade mark sought to be expunged was registered, the number of cartons of biscuits sold by the Respondents was over 15,500,000. Between 1925 and 1935 the Respondents had spent large sums of money in advertising their biscuits. In 1925 the sum spent was, in round figures, £48,000; in 1929 it was £72,000; and in 1935 it was £115,000. All these

figures appear in detail in an affidavit sworn by Mr. Gray, the managing director of the Respondents, on the 1st July, 1936. In paragraph 11 of this affidavit Mr. Gray, referring to the Respondents' advertisements, says as follows: "In all our advertising material, the trade mark 'Shredded Wheat' is prominently displayed and throughout the whole period such advertising has been devoted to making the name 'Shredded Wheat' as prominent as possible and identifying it with the product of the Respondents". As I have already stated, the Respondents' mark was registered on the 5th March, 1929, and the motion to expunge it was launched on the 25th February, 1936.

The Applicants are the Kellogg Company of Great Britain Ltd. The Kellogg Company of Great Britain Ltd. are an English limited company. The whole of their share capital is held by a company incorporated in the United States of America with the name of the Kellogg Company. The Kellogg Company are keen business competitors in the United States of America and Canada of the National Biscuit Co. of New York.

The Applicants assigned a number of grounds for asking for the Order of the Court to expunge the Respondents' trade mark from the Register. These are annexed to the notice of motion and read as follows: "(1) The entry of the said trade mark on the Register was made without sufficient cause and the said trade mark wrongly remains on the Register. (2) The said trade mark was at the date of registration and still is wholly descriptive of the goods in respect of which it is registered and registration was effected contrary to the provisions of Section 9 of the Trade Marks Act 1905. (3) The said trade mark was not at the date of registration and never has been a distinctive trade mark or a mark adapted in fact or in law to distinguish the goods of the registered proprietors from those of other persons. (4) The said trade mark was not at the date of registration and never has been a 'trade mark' within the meaning of the definition in Section 3 of the Trade Marks Act 1905. (5) The said trade mark was at the date of registration and still is the name of the article in respect of which it has been used by the registered proprietors and the said trade mark has been consistently used by the registered proprietors, both prior to and since the date of registration, as the name of the

cereal product manufactured by them and the said trade mark was at the date of registration and still is incapable of registration under the provisions of the Trade Marks Acts 1905-1919. (6) The said trade mark is the name or only practicable name of an article or substance manufactured under letters patent which have expired or determined. (7) The words 'Shredded Wheat' were first applied to describe a new article of food and have ever since been used as descriptive of such food. (8) The said trade mark, if used on a wheat product which has not been shredded, would at the date of registration and still be calculated to deceive. The said trade mark accordingly offended and still offends against the provisions of Section 11 of the Trade Marks Act 1905".

The first question argued was that the words registered as a trade mark were not and never had been a trade mark within the meaning of Section 3 of the Trade Marks Act 1905. The relevant words of the section are: "A 'trade mark' shall mean a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale". The argument that the words registered were not and never had been a trade mark within the meaning of the section was linked up and associated with the objection that the words were at the date of registration and still are the name of the article in respect of which it had been used by the Respondents, and with the objection that the words "Shredded Wheat" were first used to describe a new article of food, and have ever since been used to describe such food. The argument was put in this way: first it was said that the biscuits in connection with which the mark was registered were made in accordince with the invention comprised in Perky's specification, and were new patented articles; secondly, that to these new patented articles the Respondents' predecessors in trade gave the name "Shredded Wheat"; thirdly, that when Perky's Patent expired in October of 1909 and the biscuits continued to be sold under the name of Shredded Wheat, the name was being used merely to describe the article being sold and not in any way to indicate that the goods to which the words were applied were manufactured by the Respond-

ents, or by those who had preceded them as the manufacturers thereof; and lastly, that from October, 1909, down to the date when the trade mark was registered, the words were always used merely to describe the article sold, and never to indicate that the article had been made by the Respondents or their predecessors in its manufacture. The argument was to some extent based on the authority of the decision of Mr. Justice Fry in the *Linoleum* case. *Linoleum Manufacturing* Co. v. *Nairn* (7 Chancery Division, p. 834).

In my view of the facts proved in this case the fallacy lies in the assertion as a matter of fact that the biscuit now made and sold by the Respondents and made and sold by their predecessors is the new article of food for which Perky obtained his Letters Patent. That Patent was limited in its claims to a bread or food made in accordance with the process as described in the specification I have just read, and to a process for mashing cooked whole grains of wheat into a mass, and then converting the mass into threads or filaments. The biscuits which the Respondents and their predecessors have been selling since 1896 have no doubt in them the food made in accordance with Perky's specification, but that food has been subjected to further processes, namely, shaping, cutting and baking, never covered by Perky's specification. No doubt the biscuits could not have been made without infringing Perky's Letters Patent whilst they were in force, but they are not the food described by Perky in his specification.

I apprehend that the real question of fact to be determined for the purpose of deciding the first question argued is whether in 1929 when the mark was registered the words "Shredded Wheat" merely meant an article made in accordance with Perky's specification, or whether they meant an article made by the Respondents. There is not a shred of evidence to support the argument that the words meant or were understood by any one to mean that the article to which they were applied was an article made in accordance with Perky's specification. To my mind the evidence afforded by a consideration of the advertisements put out by the Respondents, in which the words "Shredded Wheat" have always been the most prominent feature, and of the cartons and the wording

upon them, and in particular of the use thereon of the words "Shredded Wheat" is conclusive that the words "Shredded Wheat" have, since the beginning of 1926, been used by the Respondents for the purpose of indicating that the biscuits in connection with which the words have been used were manufactured by the Respondents at their Welwyn Garden City Factory.

This conclusion leads up to the second, and I think the main question argued, namely, that the words had reference to the character of the goods, had never been distinctive of the Respondents' biscuit, and therefore were not registrable as a trade mark. The words have direct reference to the character of the goods in connection with which they are used as a mark, and therefore the requirements of sub-section (5) of Section 9 of the Trade Marks Act of 1905, as amended by the Act of 1919, must be satisfied if the words are to be allowed to remain on the Register. Section 9 of the Act, as amended, reads as follows: "A registrable trade mark must contain or consist of at least one of the following essential particulars: (1) The name of a company, individual, or firm represented in a special or particular manner; (2) The signature of the Applicant for registration or some predecessor in his business; (3) An invented word or invented words; (4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname; (5) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1), (2), (3), and (4), shall not be registrable under the provisions of this Section except on evidence of its distinctiveness. . . . For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. In determining whether a trade mark is so adapted, the Tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered". Since the registered trade mark "Shredded Wheat" has, in my judgment, direct reference to the character of the goods, it could only have been put upon the Register upon evidence of

its distinctiveness, and the only question to be determined, I think, is whether the Court is satisfied upon the evidence that the mark was truly distinctive in the sense in which that word is used in the section.

The principles by which a Court has to be guided have been laid down by Lord Justice Fletcher Moulton in the *Perfection Soap* case (26 Reports of Patent Cases at page 856). The principles he laid down have never been questioned, and I propose to be guided entirely by the principles as he states them. The passage in which the Lord Justice states the principles by which I propose to guide myself begins at line 20 on page 857 of the report, and reads as follows: "Much of the argument before us on the part of the Opponents and the Board of Trade was based on an assumption that there is a natural and innate antagonism between distinctive and descriptive as applied to words, and that if you can show that a word is descriptive you have proved that it cannot be distinctive. To my mind this is a fallacy. Descriptive names may be distinctive, and *vice versa*. No class of words are more directly and intentionally distinctive than proper names, and yet originally they were usually, if not invariably, descriptive in all languages. They still are so among savage peoples, and although among civilised nations the original significations of proper names are not remembered, or regarded, we see that the natural tendency to use descriptive words as names still exists since nick-names—the only names that are now invented—are usually descriptive. There is therefore no natural or necessary incompatibility between distinctiveness and descriptiveness in the case of words used as trade marks. The notion that there is such an incompatibility is confined to lawyers, and is, in my opinion, due to the influence of the earlier Trade Marks Acts. By those Acts, which are now repealed, the fact that words were descriptive of the goods was fatal to their registration as Trade Marks, and thus becoming in the eye of the law distinctive of the goods of a particular maker. But the question whether a word is or is not capable of becoming distinctive of the goods of a particular maker is a question of fact, and is not determined by its being or not being descriptive. The law has never refused to recognize that this is the case, or to give protection to descriptive trade marks when once duly estab-

lished in fact, although—except in the case of old marks—they refused registration, and left the owners to obtain protection in another form of action. This is now changed, and under the provisions of the present Act the Court clearly has power to allow descriptive words to be registered, if a case on the merits is proved before it sufficiently strong to induce it to do so. The language of Section 9, paragraph 5, puts this beyond doubt, but if any doubt upon the point could remain it would be set at rest by the language of Section 44 which provided that: 'No registration under this Act shall interfere with . . . the use by any person of any *bona fide* description of the character or quality of his goods'; clearly indicating that a registered trade mark may have as its essential part words capable of being used descriptively. Having thus established the jurisdiction of the Court to permit the registration of words having a direct reference to the character and quality of the goods as well as geographical terms it remains to consider the principles on which this jurisdiction should be exercised. Nothing that I have said must be taken to imply that I consider the effect of paragraph 5 to be to leave the matter at large so that it is indifferent for the purposes of registration whether a word is within the classes specified in 3 and 4 or not. On the contrary, I am of opinion that the fact, that the legislature has required in these cases a preliminary permission to proceed, evidences that it intends the excepted cases to be carefully considered on their merits before they are pronounced to be eligible to obtain the privileges of registration. The tribunal before whom is brought an application to register a word under paragraph 5 is entitled to regard the word as *prima facie* unsuitable by reason of its being outside the specified classes, and it is for the applicant to show that it is proper to be registered. This he may do by arguments based on the word itself and the nature of the goods with respect to which it is sought to be registered, as I have already indicated in the case of geographical terms. The exact issue is formulated in the paragraph, and if the tribunal is of opinion that the nature of the word is such that it is adapted to distinguish those particular goods of the trader from those of other persons it will be its duty—in the absence of special circumstances—to allow the registration to proceed. But the applicant is not

confined to arguments drawn from the words itself. He may support his application, in the case of a mark already in use, by showing that by user the mark has, in fact, become more or less completely identified with the goods by having been continuously used in connection therewith, and the statute expressly provides that the Court may take this into consideration for the purposes of its decision. To my mind this provision can bear but one interpretation. It recognises that distinctiveness—that is, being adapted, to distinguish the goods from those of other traders—is not necessarily an innate quality of the word. It may be acquired. There may be cases in which the Court might say: 'The word is descriptive of the goods, and cannot be distinctive solely of your make of those goods'. The Applicant may (if he can) reply thereto: 'I will show that it can become distinctive of any make of those goods by showing that it has actually become so either generally or in a particular market'. To use a phrase suggested by Lord Justice Farwell during the argument, the reply is of the type of *Solvitur ambulando*. (It can denote my goods because it actually does now). The extent to which the Court will require the proof of this acquired distinctiveness to go will depend on the nature of the case".

He lays down the law first that words which have a direct reference to the character of the goods are registrable; secondly that such words are *prima facie* unsuitable; thirdly that it is for those who seek to have them registered to show that it is proper that they should be registered; and lastly that if the Court is of opinion that the nature of the words is such that they are adapted to distinguish those particular goods of the trader from those of other persons it will be its duty to allow registration.

The evidence in the present case is really all one way. The biscuits in respect of which the mark was registered in March, 1925, have been sold in this country since 1896, and have throughout that period been linked with the Respondents or their predecessors in business by the words "Shredded Wheat". In 1929 the sales were large and widespread throughout England and the South of Scotland. As I have already said over 15,500,000 cartons were sold in that year and they contained over 156,000,000 biscuits: £72,000 was spent in advertising the Respondents' product in that year, and the principal feature of the advertise-

ments was the trade mark "Shredded Wheat", not merely as the Applicants have contended to describe what was sold, but as a trade mark. A very large number of persons trading or living in different parts of England and the South of Scotland made affidavits, some in support of the Applicants' case and some in support of the Respondents' case. The Deponents included persons engaged in the wholesale trade, persons engaged in the retail trade, consumers and housekeepers. Some of the deponents were cross-examined. The effect of the evidence is clear and establishes beyond all question the following facts: (1) That a wholesaler asked to supply Shredded Wheat supplies as a matter of course the biscuits made by the Respondents, and orders them as a matter of course from the Respondents. To the wholesaler "Shredded Wheat" means the pillow shaped biscuit made by the Respondents and nothing else. (2) That the retailer, when he needs supplies of the Respondents' biscuits, places with his wholesaler an order for Shredded Wheat. He expects to get on giving such an order the Respondents' biscuits. When he is asked, either in his shop or over the telephone, for Shredded Wheat, he always supplies the Respondents' biscuits, knowing that it is the Respondents' biscuits that he is being asked to supply. (3) All the consumers when they ask for Shredded Wheat, and that is all they do ask for, desire when they ask for Shredded Wheat to get the Respondents' biscuits and nothing else. All the housekeepers when they speak of Shredded Wheat mean the biscuit made by the Respondents. In fact the evidence in my judgment establishes that Shredded Wheat is as much a household word as Bovril or Oxo or Hovis. Every trader knows it to mean the Respondents' biscuits, and in every household in which they are eaten the biscuits are known as Shredded Wheat, and known by that name as being of the Respondents' manufacture.

In the course of the years that have elapsed since Ingersoll & Melhuish started the sale of this Shredded Wheat Biscuit in this country an attempt has been made to put upon the English market a whole wheat biscuit made from threads of whole mashed wheat. This biscuit had the name of "Muffets", but there does not seem to have been a great demand for it. At any rate, it was, as one of the witnesses said, not a good seller. The evidence of the Respondents satisfied me that the words "Shredded

Wheat" although they had reference to the character of their goods, had in fact become distinctive of them. I was also satisfied that if there were today to be put on the market similar goods made by another manufacturer which might be called Shredded Wheat passing-off would not be merely possible but probable, particularly in hotels and boarding houses, where the customer never sees the carton or package from which the biscuit offered to him has been taken.

For these reasons I hold that the mark was properly put upon the register and that the motion to expunge it fails.

In the course of the argument it was suggested that the provisions of Section 11 of the Trade Marks Act of 1905 made the registration unlawful because the mark might be used in connection with biscuits or crackers not made of wheat. This, of course, is true if the Respondents were fraudulently minded. But the argument would apply to any trade mark which had reference to the character of the goods in connection with which it was used, and no such mark could ever be registered because the proprietor of it might misuse it. But sub-section (5) of Section 9 recognises that such a mark is registrable. In the absence of any evidence of the mark ever having been used so as to deceive or of any threat so to use it, I do not think that I ought to order the mark to be removed, merely because of the suggestion of a possible misuse of it. I dismiss the motion with costs.

ILLUSTRATIONS

(Reproduction of cartons referred to in this brief)

SHREDDED

NET WEIGHT OF CONTENTS, 12 OUNCES
METRIC EQUIVALENT 340 GRAMMES

SHREDDED

(TRADE MARK)

COPYRIGHT 1911 BY THE SHREDDED WHEAT COMPANY

WHEAT

TWELVE BISCUIT

"IT'S ALL IN THE SHREDS"

How to Serve Shredded Wheat

Shredded Wheat is made of the whole wheat and is made digestible by steam-cooking, shredding and baking.

Contains all the elements necessary for building, nourishing and sustaining the human body.

Shredded Wheat is easily digested but not predigested.

Especially beneficial for those who suffer from indigestion, constipation and kindred complaints.

The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food.

For breakfast heat the Biscuit in the oven to restore crispness, then pour hot or cold milk over it adding a little cream. Salt or sweeten to suit the taste.

Or dip the Biscuit in milk, drain and fry in butter, after which it may be served with cream. If you don't like milk or cream dip the Biscuit quickly in hot salt water and place a chunk of butter on it, allowing the butter to melt into the shreds.

The Biscuit is also delicious when split and heated in oven and eaten with butter or melted cheese the same as any toast.

Shredded Wheat Biscuit is also delicious and nourishing for any meal when served in combination with berries, peaches, bananas, baked apples and other fresh or preserved fruits. Heat the Biscuit in oven, then cover with the fruit prepared as for ordinary serving and serve with cream and sugar to suit the taste.

HEAT THE BISCUIT IN OVEN TO RESTORE CRISPNESS

THE ONLY BREAKFAST FOOD MADE IN BISCUIT FORM

The Shredded Wheat Company

NIAGARA FALLS, N. Y.

S

WHOLE WHE

d Wheat

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cream. Salt or sweeten

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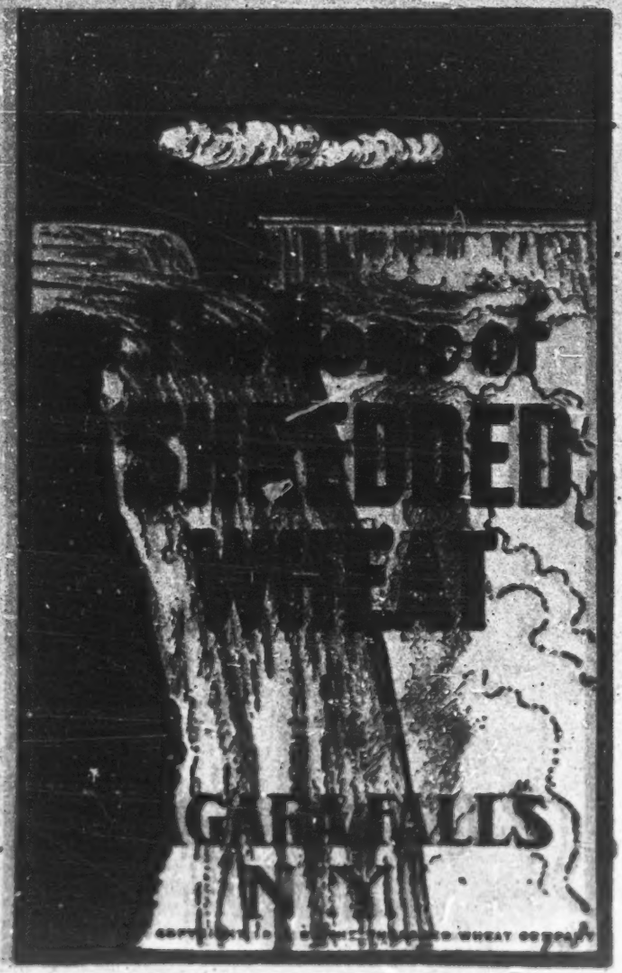
Biscuit is also delicious and
meal when served in com-
peaches, bananas, baked
resh or preserved fruits.
oven, then cover with the
r ordinary serving and
sugar to suit the taste.

CRISPNESS

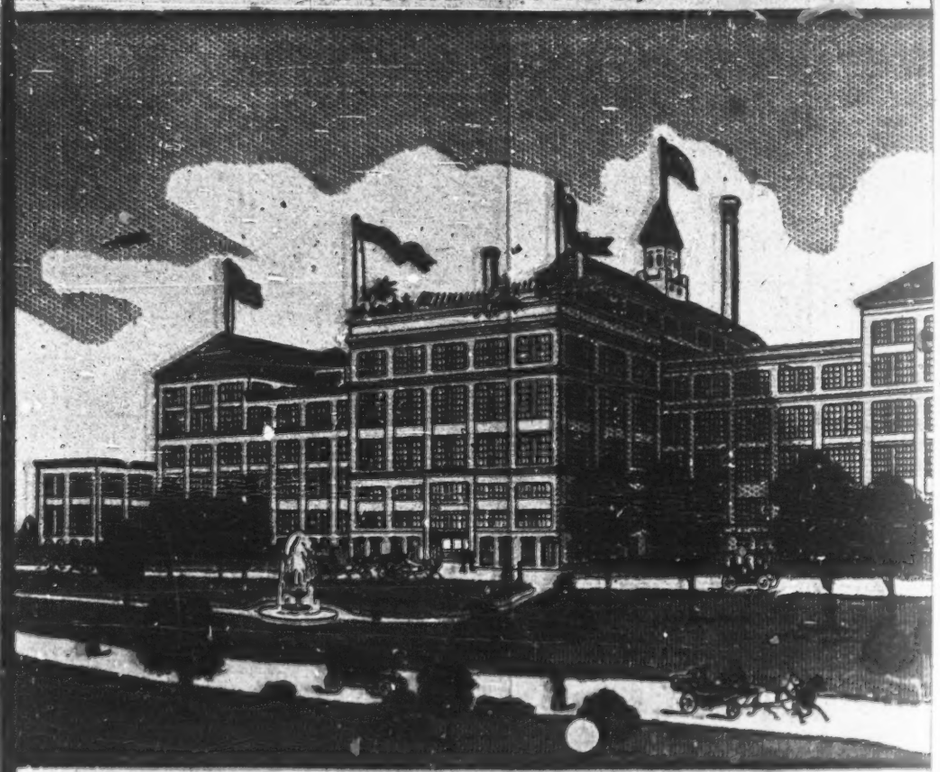
BISCUIT FORM

Company



THE HOME OF SHREDDED

NIAGARA FALLS, NEW YORK.



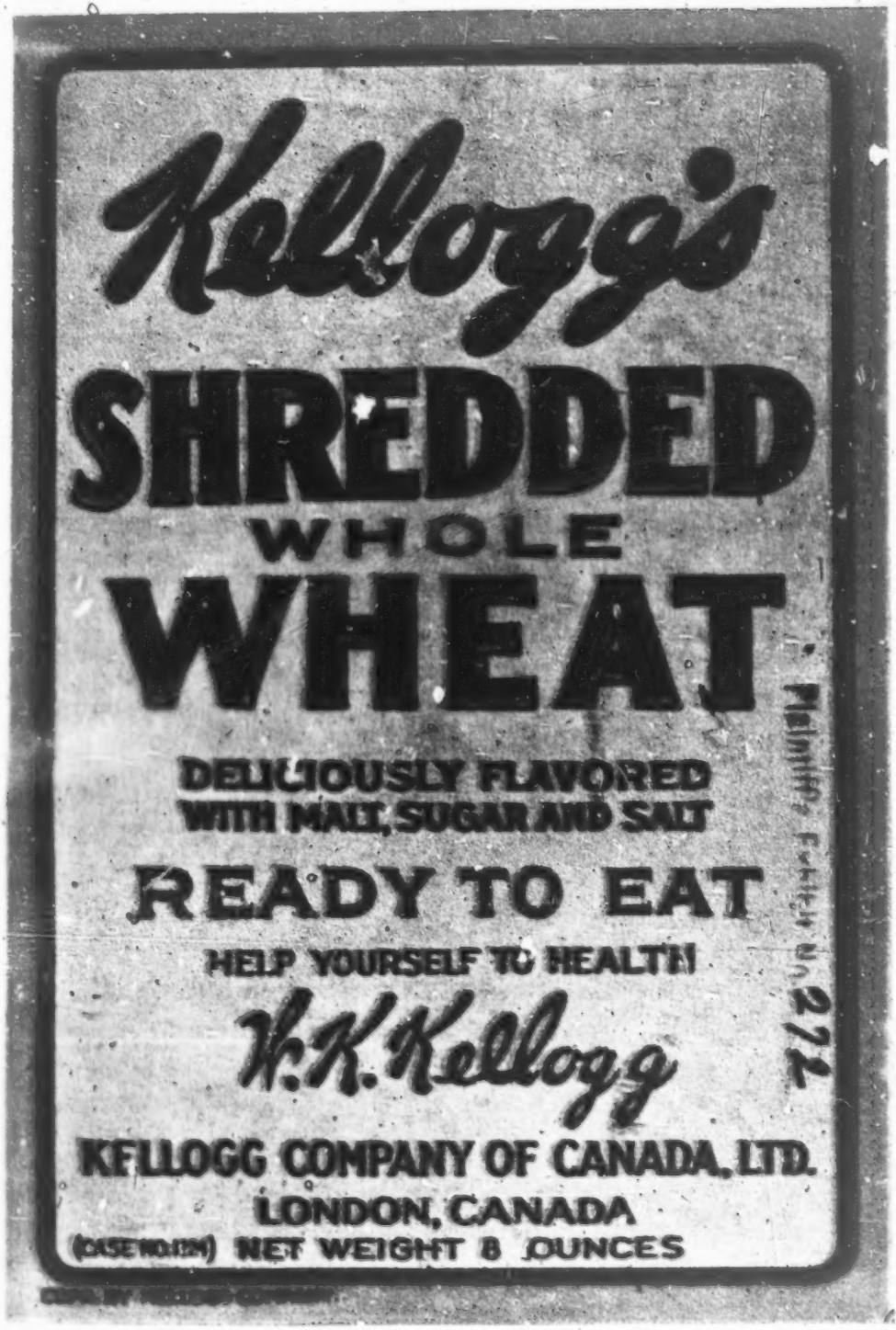
THE CLEANEST, FINEST, MOST HYGIENIC FOOD FACTORY

COPYRIGHT 1911 BY THE SHREDDED WHEAT COMPANY

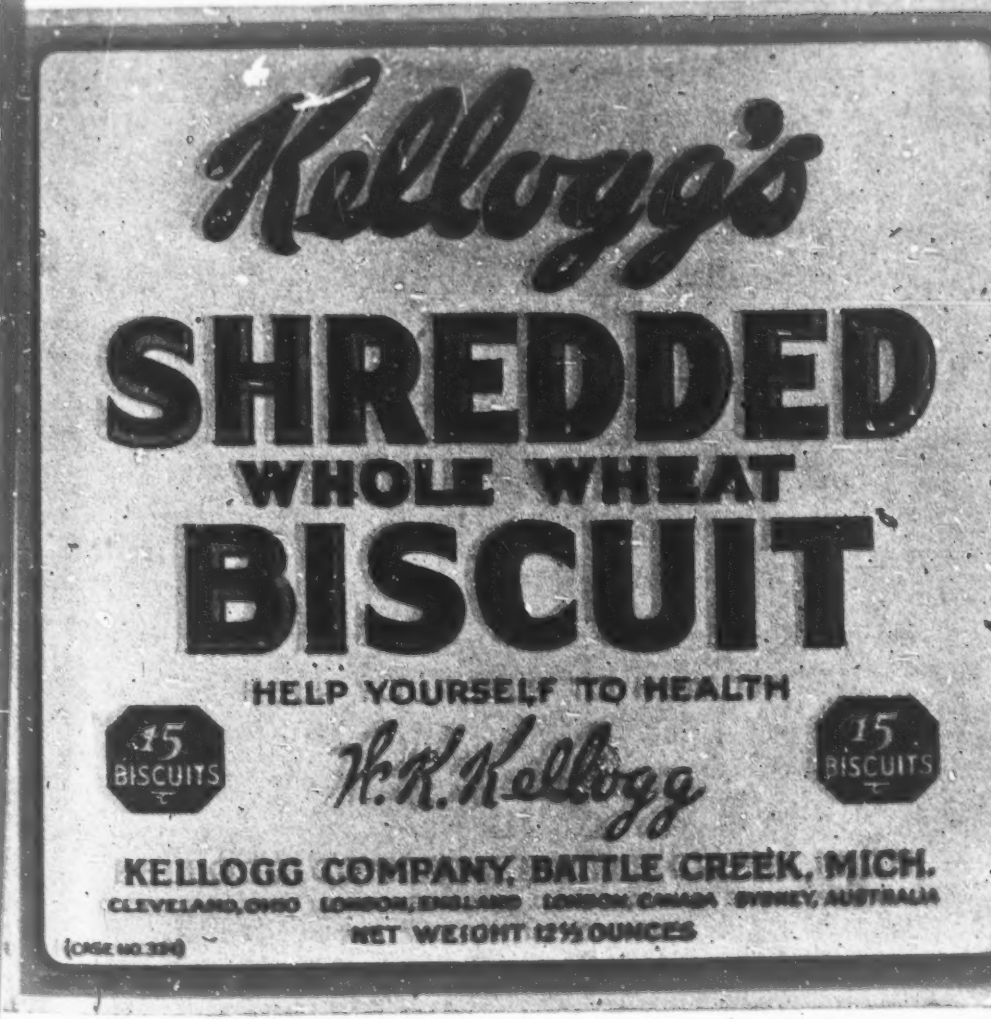
E WHEAT
SHREDDED WHEAT
FALLS, NEW YORK.
HYGIENIC FOOD FACTORY IN THE WORLD

Carton used by Petitioner from 1912 to 1919.

Petitioner's carton of 1922.



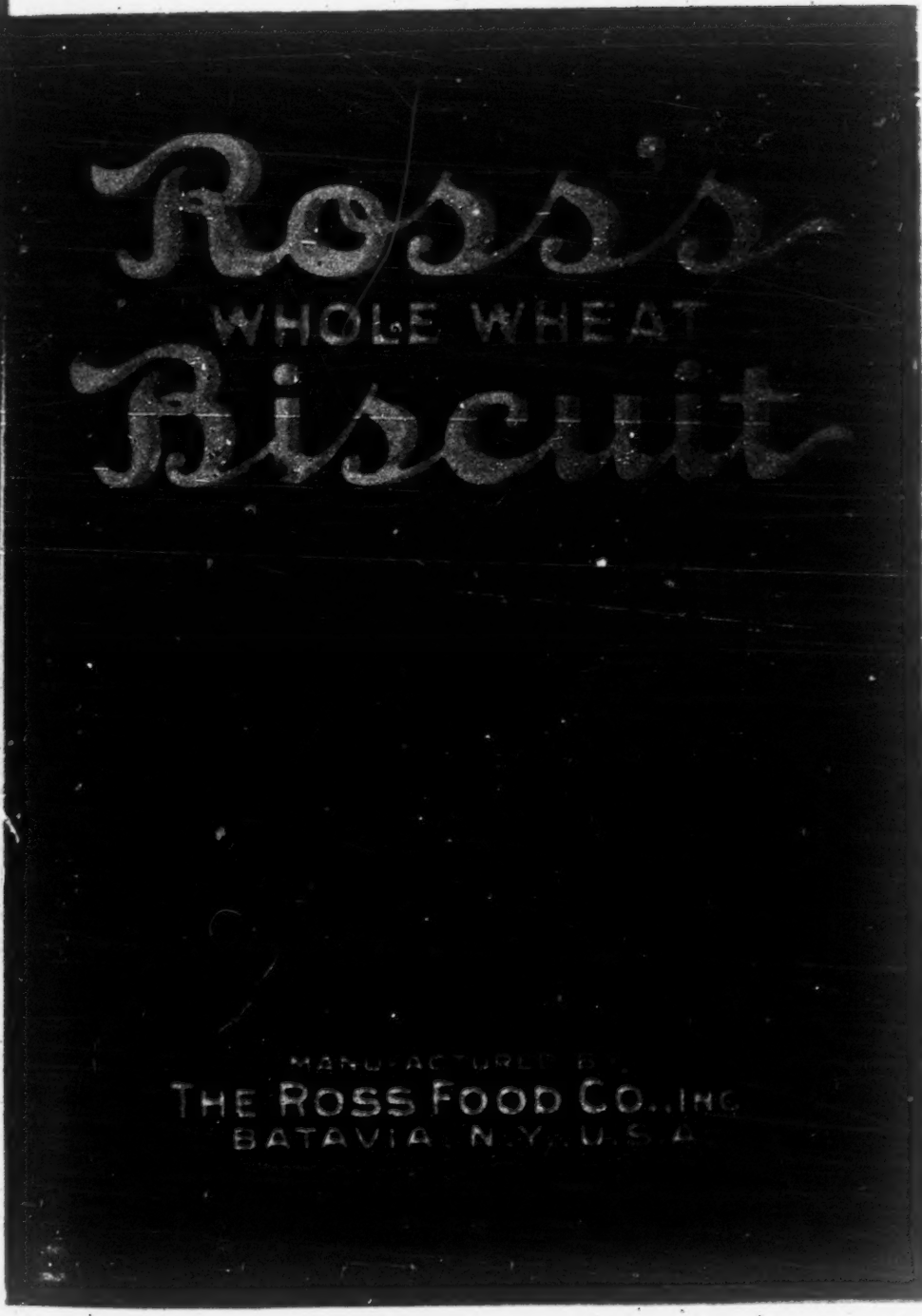
Petitioner's Canadian carton of 1922. A similar carton was also used in the United States. (R. vol. II, p. 1057.)



Petitioner's carton of 1927.

Petitioner's carton of 1930.

Petitioner's cellophane window carton of 1932.



Ross' carton of 1915.

The "Muffets" carton of the Quaker Oats Company.

28 BISCUITS
RIPPLED
WHEAT
Breakfast Food
NET WT
10 OZ.
100% WHOLE WHEAT READY TO EAT
CUT ALONG THIS LINE

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Supreme Court of the United States

OCTOBER TERM 1937.

No. [redacted] 2

KELLOGG COMPANY,
Petitioner-Appellee-Defendant,

against

NATIONAL BISCUIT COMPANY,
Respondent-Appellant-Plaintiff.

PETITION FOR REHEARING AND APPLICATION TO WITHHOLD ORDER DENYING WRIT OF CERTIORARI.

W. H. CRICHTON CLARKE,
EDWARD S. ROGERS,
ROBERT T. McCRACKEN,
Counsel for Petitioner.

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Supreme Court of the United States,

OCTOBER TERM 1937.

No. 396.

KELLOGG COMPANY,
Petitioner-Appellee-Defendant,

against

NATIONAL BISCUIT COMPANY,
Respondent-Appellant-Plaintiff.

PETITION FOR REHEARING AND APPLICATION TO WITHHOLD ORDER DENYING WRIT OF CERTIORARI.

Statement.

Respondent brought this suit in the District Court in Delaware in 1932 for infringement of certain alleged trademarks consisting of (a) the formerly patented design, shape or appearance of the ordinary and well known shredded wheat biscuit which had been protected up until 1912 by forty-one patents on the design of the biscuit, the fabricated product or biscuit itself and the method of and machinery for automatically making and shaping it (b) the words "shredded wheat" which had been used throughout said patents to describe the biscuit and (c) the representation or pictorial description of the biscuit. These three "rights" were claimed as perpetual trademark monopolies by virtue of use since the expiration of the patents and in spite of specific statutory disclaimers by respondent of the representation of the biscuit and of the words shredded wheat as trademarks.

There should be no misapprehension as to the character or scope of the perpetual monopoly claimed and granted by the second decision below. The rectangular, formerly

patented biscuit represents the only known means of marketing shredded wheat. Ribbon wheat can be marketed in other shapes but no other practicable means of making, packing and shipping the fragile product, shredded wheat, is known to Petitioner and none was proved by Respondent.

After trial, Judge Nields in the District Court dismissed the bill on the ground that after the expiration of the patents the defendant had a right to make and illustrate the formerly patented design and product and to describe it as Kellogg's Shredded Wheat, (*Singer* v. *June*, 163 U. S. 169), and that there had been no unfair competition or deception of the public by defendant.

On appeal, the Circuit Court of Appeals for the Third Circuit, composed of Circuit Judges Buffington, Davis and Thompson, unanimously affirmed the District Court, adopting the finding of the Trial Court that:—

> "The testimony of a hundred witnesses from all parts of the country establishes there was no passing off of defendant's biscuit for plaintiff's . . ."

Rehearing was granted and the same judges then unanimously reversed themselves on the law, holding that because no member of the public except respondent had been manufacturing the biscuit in issue in the years from 1919 to 1921 and from 1923 to 1927, the rights of plaintiff had become perpetual and exclusive in the patent expired product and in the pictorial and verbal description thereof.

An accounting was ordered and the mandate and injunction withheld pending a petition for certiorari.

Application for certiorari was made to this honorable Court by petitioner and denied October 25th, 1935.

The order denying certiorari was stayed by Mr. Justice Brandeis until the disposition of this petition for rehearing.

Petitioner hereby respectfully prays for a rehearing of its said application for a writ of certiorari or for a further stay of the order denying the writ.

The grounds of this application are:—

I.

In view of the international situation the writ should be granted or the order denying the same stayed.

A controversy precisely similar to this has arisen in Canada between subsidiaries of these same parties. The Canadian Court of first instance held that the name "shredded wheat" and the form of the biscuit had gone into the public domain as the result of the expiration of the patents and that the Defendant's goods were adequately distinguished as to origin. The Defendant in Canada is using the same package as Petitioner's, the same name and the same form of biscuit. On appeal to the Court of Appeals of Ontario the decision of the Court of first instance dismissing the bill was unanimously affirmed. An appeal has been taken to the Privy Council in London, which is set for argument November 25, 1937.

There is also pending in the High Court of Justice in England a proceeding brought by Petitioner's English subsidiary to rectify the Trade Mark Register by expunging the name "Shredded Wheat" therefrom. This case is set for hearing November 15, 1937. According to English custom and practice the probabilities are that the decisions in the pending cases in England will be announced at the conclusion of the argument or prior to December 1, 1937, so that prompt decision of each of these cases is to be expected.

These judgments by the English courts will govern the manufacture of the patent-expired biscuit and the use of the patent-expired term "shredded wheat" in Great Britain and generally throughout the British Empire, where large amounts of the product are sold and consumed.

The law of dedication of the patented design or product and name by patent expiration, is the same in Canada and England as it was in the United States until the second decision below.

The first decision of the Circuit Court of Appeals of the Third Circuit is in conformity with that of the Court of Appeals of Ontario. The second decision is diametrically opposite.

The law of dedication of product, design and name by patent expiration apparently has long been definitely settled in Canada and is not likely to be changed by the Privy Council.

If the Privy Council should affirm the Court of Appeals of Ontario in *Canadian Shredded Wheat Co.* v. *Kellogg Co. of Canada*, 1936 Ont. Rep. 613, and *Same* v. *Same*, 1936 Ont. Rep. 281, and the High Court of Justice decides in conformity therewith in the proceeding to rectify the register, the position in which petitioner will find itself in the marketing of its product throughout the world will be anomalous in the extreme unless this petition is granted or the order denying the writ stayed. Petitioner could lawfully then, as it can now, sell in foreign countries a formerly patented product which it is perpetually enjoined from selling in any way whatever in its own country. Respondent as a matter of right is appealing to the highest tribunal in Great Britain in a controversy in which Petitioner has been denied by the highest tribunal of its own country a review of the last one of two diametrically opposite decisions of the same judges establishing a wholly new and heretofore unheard of rule of law.

Either petitioner should be free to make and sell at home as well as abroad the formerly patented product in its formerly patented shape or fabricated form, by the formerly patented machinery which shapes it, or petitioner should not be permitted to sell the product anywhere—at least where Anglo-Saxon law prevails—and certainly the domestic part of the business should not be condemned to death while the foreign part is permitted to live.

II.

The case is one of great national and international importance. The public is entitled to competition in the production and sale of a standard article of food. The second decision below, if not reviewed and reversed, will establish a unique American system of perpetual monopolies of formerly patented products and names disguised as trademarks and will thus take the United States out of a well established international body of patent-expiration and trademark law. This Court will also sanction a reversal or disregard of its own long established rulings by refusing either a writ or a stay.

If the second decision of the Circuit Court of Appeals for the Third Circuit is allowed to stand, the Respondent herein will have received a perpetual monopoly in the manufacture and sale of a standard article of food. Respondent, although it and its predecessors enjoyed for the full period allowed by law exclusive patent rights in this product, is now by this decision granted, long after the expiration of its patents, a perpetual monopoly not only in the manufacture and sale of the familiar shredded wheat biscuit, but a perpetual exclusive right to stop everyone else from calling the product by such name or representing the same pictorially upon its cartons and in its advertising.

Such a holding is of great national and international importance and is, we submit, at variance with well established law.

The confirmation of such perpetual monopolistic right is in direct contravention of the Constitution which authorizes patent monopolies to inventors, *for a limited time only.*

This decision is contrary to the long recognized doctrine set forth in Mr. Justice White's opinion in *Singer* v. *June*, *supra*, and Mr. Justice Sutherland's in *Eli Lilly* v. *Warner*, 265 U. S. 526.

These cases have for years defined, limited and denied the right to monopolistic control of patent-expired articles

of commerce and the use of appropriate language to describe them in trade. If this decision of the Circuit Court of Appeals remains unreversed, an entirely new theory and practice of trade monopolies will become law. A multitude of patented articles, though the patent protection may long since have expired, will come under the protection of this ruling. Any number of producers of such articles, in reliance upon it, will claim perpetual monopolistic rights in the functional shape or appearance and in the descriptive names of their products in direct contravention of the Constitution and of previous decisions of this Court.

The second decision below is also directly at variance with the decision of the Second Circuit in *DuPont Cellophane* v. *Waxed Products Co.*, 85 Fed. (2) 75.

The case is also contrary to long established law in that the injunction ordered prohibits even fair competition. Respondent's case failed at first in trial and appellate court alike on both the law and the facts. Both courts held, as law, that unless the defendant was selling its goods as plaintiff's, there could be no relief and as fact, that defendant was not guilty of deception or unfair competition. Then the Court of Appeals below reversed itself, not on the facts but, on the law. It held, as law, that even in the absence of fraud, deceit or misrepresentation by petitioner, a perpetual monopoly of product, design and name had arisen through respondent's exclusive occupation of the market from 1919 to 1921 and from 1923 to 1927. There is no way in which petitioner can avoid the proposed injunction. If it attached a large red Kellogg placard to every biscuit, it would still be enjoined. This ruling that relief can be based on monopoly rights of respondent rather than on wrongs or frauds of petitioner is directly contrary to the rulings of this court in

Delaware and Hudson Canal Co. v. *Clark*, 13 Wall. 311; and

Standard Paint Co. v. *Trinidad Asphalt Mfg. Co.*, 220 U. S. 446.

Briefly stated, the second decision below accomplishes the following unusual and, we submit, erroneous results:

Disregards the ruling of the Second Circuit Court of Appeals that the right of a competitor of plaintiff's to make the patent-expired shredded wheat here in issue is indubitable (*Shredded Wheat Co.* v. *Humphrey Cornell*, 250 Fed. 960); disregards the ruling of the same Court that plaintiff's effort to monopolize the manufacture and sale of shredded wheat is unlawful under the Sherman Anti Trust Act (*Kellogg Company* v. *National Biscuit Company*, 71 Fed. (2d) 662); disregards the ruling of the Court of Appeals of the District of Columbia, that shredded wheat is incapable of exclusive appropriation as a tradename (*Natural Food Company* v. *Williams*, 30 App. D. C. 348); disregards the ruling of the Supreme Court of Ontario that by virtue of patent expirations defendant is free to make shredded wheat and call it Kellogg's Shredded Wheat in Canada; disregards the ruling of this Court holding that after a patent expires anyone is free to make the patented product and call it by its patent name (*Singer* v. *June*, 163 U. S. 169); disregards the ruling of this Court holding that perpetual monopolies may not be set up under the guise of trademarks (*Delaware & Hudson Canal Co.* v. *Clark*, 13 Wall. 311); disregards the ruling of this Court (Mr. Justice Sutherland) holding that relief in fair trade cases cannot exceed the wrongs of the defendant and that even if the defendant there practiced deception, it could not thereby be deprived of its right to combine chocolate and quinine (*Warner* v. *Ely Lilly & Company*, 265 U. S. 526); disregards the ruling of this Court that so-called trademarks, once disclaimed in statutory registrations, cannot thereafter be reclaimed (*Beckwith* v. *Commissioner of Patents*, 252 U. S. 538, *Rahtjens* v. *Holzapfel*, 183 U. S. 1; *Saxlehner* v. *Wagner*, 216 U. S. 375).

Surely such wholesale disregard of long standing and well established precedents and of important principles of law in the fields of patents, trademarks, fair trade and monopoly should receive the scrutiny of this Court.

The results cannot be confined to this case. If the decision stands it is certain to usher in the most sweeping changes in these important fields of public law.

Viewing the case in its narrowest possible light it is still one of large public consequence. The public is a third party with its right to the benefits of competition in the production and sale of an important and standard article of food. The case is not a mere money case.

Shredded wheat cannot be marketed except as a fabricated, baked rectangular biscuit. The product is so fragile that the biscuit must be held on its four edges and cushioned by partitions in the cartons. Ribbon wheat can be fabricated in other shapes but not shredded wheat.

If the judgment below stands, the public will be saddled forever with a shredded wheat monopoly. No matter how narrowly it is viewed, that is a matter of far-reaching public consequence.

III.

The case is not unique or peculiar in its facts. Many patentees have endeavored and will endeavor to convert their patent monopolies, after expiration, into perpetual design, form and name monopolies masquerading as trademarks. The case is unique only in the new law which the second decision below attempts to set up.

The second decision below is the first instance we have been able to find in American or foreign law in which a court of last resort has enjoined the manufacture of a formerly patented product marketed under its patent or descriptive name.

The same court below once perpetually enjoined a defendant from making an ordinary, unpatented product composed of chocolate and quinine but this court granted certiorari and reversed that decree. *William Warner and Co.* v. *Eli Lilly & Co., supra.*

But no court, until now, so far as we know, has ever sought to renew an expired mechanical or design patent and make it perpetual. The decree below gives plaintiff as good protection as its forty-one patents afforded, if not better, and the monopoly is perpetual unless this court intervenes while Petitioner's business is still in being.

All a patentee has to do is to lower the price of his product for a few years after the expiration of his patent. That will discourage competition and give rise to a perpetual monopoly of design, form and name, under the theory of the second decision below.

IV.

No harm can come to Respondent from granting the writ or at least staying the order denying it until the international situation can be treated as a whole.

Petitioner's business is valued in excess of one million dollars. An injunction would ruin it. For this loss no adequate compensation is possible. This controversy commenced in January 1922. Petitioner has never been enjoined in its manufacture and sale of this product.

No harm can result to Respondent by withholding the injunction at this time. Petitioner is an old established concern having been engaged in business through itself and its predecessors for over thirty years, is amply responsible financially and maintains plants, agencies and distributing centers throughout the nation and in Europe, and is fully able to answer for any damages that might result to Respondent if the issuance of the injunction were stayed until final decree or at least until the international situation can be treated as a whole.

In view of the international situation respecting the parties' rights, we urge that if on this rehearing a writ of certiorari be not granted, the order denying the same be

stayed at least until the Privy Council in London decides Respondent's appeal now set for November 25, 1937.

Petitioner therefore respectfully prays this Court for a rehearing of its petition for a writ of certiorari herein and for the granting of the writ at this time or for a withholding of the order denying the writ so that petitioner's United States business may be preserved intact at least until the Privy Council acts on Respondent's Canadian appeal. For a fuller statement of the merits, we refer to the Petition for Certiorari and the brief in support thereof heretofore filed.

Respectfully submitted,

W. H. Crichton Clarke,
Edward S. Rogers,
Robert T. McCracken,
Counsel for Petitioner.

Certificate.

I, W. H. Crichton Clarke, of counsel for Petitioner herein, hereby certify that in my opinion the foregoing petition for a rehearing of the Petition for Certiorari herein and for a further stay of the order denying the same, is sound in law and that the same is presented in good faith and not for the purpose of delay.

W. H. Crichton Clarke.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. [redacted] 2

KELLOGG COMPANY,

Petitioner,

against

NATIONAL BISCUIT COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE OUT OF TIME A SECOND PETITION FOR RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

THOMAS D. THACHER,
W. H. CRICHTON CLARKE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No.

KELLOGG COMPANY,
Petitioner,

AGAINST

NATIONAL BISCUIT COMPANY,
Respondent.

PETITIONER'S MOTION FOR LEAVE TO FILE OUT OF TIME ITS SECOND PETITION FOR RECONSIDERATION OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Now comes the petitioner herein and asks leave to file out of time the annexed second petition for reconsideration of its petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit.

The case is of great public importance because under the decree of the Circuit Court of Appeals, as "clarified" by a decision of that Court entered since the petition for a writ of certiorari was denied by this Court, the

respondent is in effect entitled to a perpetual monopoly of manufacture and sale of shredded wheat biscuits in accordance with the disclosure of patents which have long since expired and to the exclusive use of the name shredded wheat biscuit by which this previously patented product is known. This motion is made at the earliest opportunity after the Circuit Court of Appeals on May 5, 1938 changed its directions to the District Court.

Respectfully submitted,

KELLOGG COMPANY, Petitioner,
by THOMAS D. THACHER,
W. H. CRICHTON CLARKE,
Counsel.

Dated, May 23, 1938.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No.

KELLOGG COMPANY,
Petitioner,

AGAINST

NATIONAL BISCUIT COMPANY,
Respondent.

SECOND PETITION FOR RECONSIDERATION OF PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent brought suit in the District Court of the United States for the District of Delaware against the petitioner to enjoin trademark infringement and unfair competition in the sale of petitioner's product generally known as shredded wheat biscuits. The District Court dismissed the complaint upon the merits, holding that there was no violation of trademark or unfair competition

(R. 1, pp. 193-228). The Circuit Court of Appeals for the Third Circuit (Buffington, Davis and Thompson) affirmed the judgment of the District Court (R. 3-A, pp. 2069, 2073), but upon reargument vacated its order of affirmance and directed that an injunction issue (R. 3-A, pp. 2083-2094). To review this judgment the petitioner filed a petition for certiorari in this Court which was denied October 25, 1937, and thereafter applied for reconsideration of its petition which was denied November 8, 1937.

Events have occurred since the denial of the writ which clearly indicate that in the interest of justice the petition for the writ should now be reconsidered because of the action taken by the court below in revising its decree since the denial of the writ.*

The decree as originally drawn (R. 3-A, p. 2094) directed the District Court

> "to enter a decree enjoining the defendant from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade-mark",

which the Court described in its opinion (R. 3-A, p. 2085) as

> "consisting of a dish containing two biscuits submerged in milk".

Upon the going down of the mandate an interlocutory judgment was entered and an injunction was issued in

---

* As stated at page 4, *infra*, the revision of its decree by the court below subsequent to the denial of the petition for certiorari by this Court, brings its decision into conflict with the decisions of the Circuit Courts of Appeals in three other circuits and with applicable decisions of this Court. In *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34, this Court held that a conflict of decision between two Circuit Courts of Appeals, arising after a denial of a petition of certiorari, is ground for granting a writ upon a petition for rehearing.

the words of the mandate. Thereafter question arose in the District Court as to the meaning of the words of injunction taken from the mandate. The petitioner contended that they should be construed conjunctively, and that thus construed they permitted the petitioner to continue the manufacure of shredded wheat biscuits in their characteristic form and fairly to sell the product provided they were not sold under the name "Shredded Wheat" in conjunction with the use of plaintiff's trademark consisting of a dish containing two biscuits submerged in milk (R. 3-A, p. 2249). The respondent contended that the language should be construed disjunctively, and that the petitioner must be enjoined from all use of the words "Shredded Wheat" in advertising or selling its product, from all sales of shredded wheat biscuits in their characteristic form, and from picturing a dish containing two biscuits submerged in milk (R. 3-A, p. 2250).

The respondent thereafter, on March 4, 1938, moved the Court of Appeals (R. 3-A, p. 2248) to recall its mandate for clarification, and on May 5, 1938 the court below filed an opinion (R. 3-A, p. 2282) stating in part (R. 3-A, pp. 2283-4):

> "The language at the end of the opinion and in the order [of April 12, 1937] and mandate is poorly phrased. We intended to enjoin the use of the words 'Shredded Wheat' as a trade name, the advertising and sale of biscuit in the pillow-shape form, and the use of the two-biscuit-in-a-dish trade mark, separately or together. * * *"

The order recalling and clarifying the mandate directed (R. 3-A, p. 2285):

> "(2) That the said Mandate be clarified so as to direct the United States District Court for the District of Delaware to enter a decree, in the usual form, enjoining the defendant, Kellogg Company (1) from the use of the name 'SHREDDED WHEAT' as its trade name, (2) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit, and (3) from doing either; * * *"

Thus, the court below has now "clarified" its mandate so as to direct an injunction prohibiting petitioner from making any sales whatever of shredded wheat biscuits in their characteristic form, even though there is no violation of respondent's trade mark, and even though such sales are made in cartons or other packages of such distinctive size, style and design, and so marked, that there can be no misrepresentation or confusion as to the source of the product. The effect of the decree is to prohibit all sales of petitioner's product, and to give the respondent a monopoly in manufacturing and selling an article, heretofore protected by patents which have long since expired.

This change in the decree of the court below brings its decision into irreconcilable conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 Fed. 960, where the respondent's rights were determined in a suit brought by its predecessor in title after expiration of the patents to enjoin acts of unfair competition in selling shredded wheat biscuits identical in substance, size and appearance with the respondents. In that case the Court concluded (p. 966):

> "The decree will therefore be modified as follows: First, by relieving the defendants of any injunction in the sale of such biscuits as shall reach the last purchaser in cartons; second, all biscuits reaching the last purchaser outside of their cartons must either bear a letter, cross, or other plain symbol, impressed in their substance, or have fastened upon them a wrapping, tag, or band, stating that they are made by the Ross Food Company; third, the defendant at the end of six months may apply to the District Court to be relieved of the second requirement, upon showing that after a bona fide trial of all possible expedients it cannot comply with that provision, except at an expense which would make impossible any continued competition in the business of selling biscuits outside the cartons with any assurance of reasonable profit."

The Circuit Court of Appeals for the Second Circuit upheld the indubitable right of the defendant to manufacture and sell shredded wheat biscuits of precisely the same form, size and appearance as those sold by the Shredded Wheat Company, respondent's predecessor in title, emphasized the necessity of completely preserving the right of the defendant to compete with respondent's predecessor in the sale of such biscuits, and in this connection held (p. 964):

> "Under the guise of protecting against unfair competition, we must be jealous not to create perpetual monopolies."

This is the unavoidable and direct result of the injunction directed by the court below in its latest decree.

Contrasted with the situation which existed in the *Humphrey Cornell* or so-called "Ross" case, *supra*, the practice of the petitioner as disclosed by the record has been to manufacture and sell biscuits of smaller size than those sold by the respondent when the petitioner entered the field of competition (R. 1, p. 221), and furthermore, to sell in separate distinctive cartons two biscuits for service to the ultimate purchaser in hotel and restaurant trade (R. 1, p. 204). No biscuits are sold by petitioner except in cartons which are distinctively marked (R. 1, pp. 203-204, and see cartons R. 1, pp. 205-219). The District Court concluded that the defendant's practices fully complied with all of the requirements of the *Humphrey Cornell* case, *supra*.

The correctness of the decision in that case was in effect conceded by respondent in the court below. (See original Petition for Certiorari, p. 2, footnote.)

With respect to the use of the name "shredded wheat", the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Centaur Co.* v. *Heinsfurter*, 84 Fed. 955. With respect to the determination that the plaintiff was entitled to any relief, the decision of the court below is in conflict with

the decision of the Circuit Court of Appeals for the Sixth Circuit in *Kellogg Toasted Corn Flake Co.* v. *Quaker Oats Co.*, 235 Fed. 657, 667, and with applicable decisions of this Court in *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526; *Canal Co.* v. *Clark*, 13 Wall. 311; *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co.*, 220 U. S. 446. In holding respondent entitled to the exclusive use of the name "shredded wheat" the decision of the court below is in conflict with the decision of the Court of Appeals of the District of Columbia in *Natural Food Co.* v. *Williams*, 30 App. D. C. 348, and with the applicable decisions of this Court in *Holzapfel's Co.* v. *Rahtjen's Co.*, 183 U. S. 1, 12, and *Beckwith* v. *Commissioner of Patents*, 252 U. S. 538.

A further reason for review in this Court is found in the decision of the Privy Council in England, in *Canadian Shredded Wheat Co. Ltd.* v. *Kellogg Company of Canada Ltd., and another*, 55 R. P. C. 125, All England Law Reports Annotated 1938, Vol. 1, Part 8, pp. 618-634, where in a suit between the respective Canadian subsidiaries of the two parties to this suit, the members of the Judicial Committee of the Privy Council expressed their preference for the first decision of the court below dismissing the complaint to its later decision reversing the District Court. The facts stated in the judgment of the Privy Council delivered by Lord Russell of Killowen appear to be the same in all material respects as the facts in the case at bar. The questions presented were the same as those at bar. The decision is in direct conflict with that of the court below. For the convenience of the Court we are filing herewith printed copies of the opinion of the Privy Council.

These extraordinary circumstances disclosed by the proceedings in the court below since the denial of the petition for a writ of certiorari to review the decree of April 12, 1937, we submit, appropriately require further consideration of the question whether or not all of the

proceedings in the court below should not be reviewed in this Court.

Accordingly, the petitioner is filing coincidentally with the filing of this motion a new petition for a writ of certiorari to review the last decree of the Circuit Court of Appeals, entered on May 5, 1938. This motion for reconsideration of the prior petition for a writ of certiorari to review the decree of the court below, entered April 12, 1937, is now made so that the questions then considered may be open for consideration in determining whether this Court should review all of the proceedings in the court below.

WHEREFORE we pray that this Court reconsider the petition for a writ of certiorari heretofore filed herein, and upon such reconsideration and upon consideration of the petition for a writ of certiorari filed coincidentally with this motion that the Circuit Court of Appeals for the Third Circuit be directed to certify the record of its proceedings in this case to this Court for review.

Respectfully submitted,

THOMAS D. THACHER,
W. H. CRICHTON CLARKE,
Counsel for Petitioner.

Dated, May 23, 1938.

WE HEREBY CERTIFY that the foregoing petition is presented in good faith and not for delay.

THOMAS D. THACHER
W. H. CRICHTON CLARKE

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

2 56

NOS. [redacted] & [redacted]

KELLOGG COMPANY,

Petitioner,

against

NATIONAL BISCUIT COMPANY,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE A SECOND PETITION FOR RECONSIDERATION OF PETITIONER'S FIRST PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO PETITIONER'S SECOND PETITION FOR CERTIORARI.

THOMAS G. HAIGHT,
DAVID A. REED,
DRURY W. COOPER,
CHARLES A. VILAS,
Counsel for Respondent.

The Evening Post Job Printing Office, Inc., 20 Lafayette St., New York, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

Nos. 396 and 1053.

KELLOGG COMPANY,
Petitioner,

AGAINST

NATIONAL BISCUIT COMPANY,
Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE A SECOND PETITION FOR RECONSIDERATION OF PETITIONER'S FIRST PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO PETITIONER'S SECOND PETITION FOR CERTIORARI.

Statement of the Case.

In order to avoid repetition we are answering in one memorandum the petitioner's two applications which are now before the Court.* Both of these applications must have been filed on the theory that if respondent

* The first application is a motion for leave to file seven months out of time a second petition for reconsideration of petition for writ of certiorari, and the second application is a second petition for writ of certiorari.

knocks often enough the door will be opened, because, as will be presently shown, nothing new is now presented to the Court except the affirmance of a Canadian decision by the British Privy Council. It is fortunate for the Court that such a theory is not prevalent among counsel who seek writs of certiorari.

These applications combined constitute the *fourth* application to this Court since the Circuit Court of Appeals handed down its decision on April 12th, 1937 in petitioner's effort to escape the effect of that decision. Counting in addition the applications that have been made to the Circuit Court of Appeals since that time for the same purpose, they are the *eighth*. The only reason advanced why either application should be entertained by this Court, which has not already been advanced at least three times to this Court, is that on May 5th, 1938 the Circuit Court of Appeals made an order* recalling and clarifying the mandate† previously issued by that Court. It is claimed that this order is substantially different from the original order of April 12th, 1937‡ which this Court has refused to review, but we shall demonstrate that there is no substantial difference whatever.

We have not thought that we should burden the Court with a further recital of the facts in this case. In our brief in opposition to the first application for writ of certiorari the facts were stated fully. Nor do we think that we should again point out why there is no conflict between the decision of the Circuit Court of Appeals in the case at bar and the cases which were then and are now asserted by the petitioner as being in conflict. This was done in our brief in opposition to the first application for writ of certiorari.

The affirmance by the British Privy Council of the decision of the Ontario Supreme Court in *Canadian*

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* R. III A, p. 2285.

† *ibid*, 2254.

‡ *ibid*, 2094.

Shredded Wheat Company, Ltd. vs. *Kellogg Company, Ltd.*, has added nothing new. The decision of the Ontario Court was relied upon in the application for the original writ of certiorari and in the two subsequent applications which have been made to this Court. Indeed, in both the first petition for reconsideration and in the petition to this Court to stay the injunctive features of the order of the Circuit Court of Appeals, the decision of the Privy Council was foreshadowed and the Court was asked to even withhold its consideration of the petition for writ of certiorari or at least to prevent any injunctive process going into effect until after the decision in that case should be rendered. As pointed out in previous answers which we have filed in this Court, the facts in the Canadian case, involving the right of the defendant in Canada to use the plaintiff's registered trade mark "Shredded Wheat", presented an entirely different record from that before this Court. The plaintiff in Canada had a registered trade mark, and the decision of the Privy Council goes no farther in effect than to hold that plaintiff's proof had failed to establish that *in Canada in 1928*, when the term "Shredded Wheat" was registered, it had become distinctive of plaintiff's goods. The defendant having made but one sale in Canada before suit was brought, there was no actual evidence of "passing off". The record in the case at bar is replete with such evidence and evidence also that both the trade name "Shredded Wheat" and the shape of plaintiff's biscuit had acquired a distinctive meaning inseparably connected with respondent and its predecessors. Furthermore, the Judges of the Privy Council concurred in the rule of law contended for by respondent that in the case of a patent long expired, it is possible to establish that the name has acquired a distinctive meaning which a court of equity will protect. Thus there is no disagreement between the Circuit Court of Appeals for the Third Circuit and the Privy Council as to the law. The latter held that the Canadian plaintiff had not met the

burden of proof resting upon it, whereas the Circuit Court of Appeals held that the respondent here had discharged that burden.

We call attention to the fact that the British High Court of Justice on December 21st, 1937 (not yet reported), held that the words "Shredded Wheat" were registrable under the British Trade Marks Act. In that case the Shredded Wheat Company, Ltd., a British corporation, registered the words "Shredded Wheat" as a trade mark. The Kellogg Company of Great Britain, Ltd., which is the operating company in Great Britain for the petitioner here, sought to have the registration cancelled upon the ground that the words were not registrable both because descriptive and because of the expiration of patents. After a long trial and a very full hearing in which there was a very complete record, the Court held that the proof established that the words had acquired a distinctive meaning and were registrable over both objections.

As pointed out in our brief in opposition to the first application for the writ of certiorari, the case at bar is peculiarly one that must stand *upon its own facts*. Stripped of the technical considerations with which petitioner has always tried to cloak it, the present record presents a clear case of an attempt on the part of a competitor to appropriate to itself, and trade upon, the good will which respondent has built up over the years for its product by the expenditure of vast sums of money in advertising and by the excellence of its product. Thus the case falls, as already pointed out in that brief, within the bounds of unfair competition as announced by this Court in *Schechter Poultry Corporation* vs. *United States*, 295 U. S. 495, *i. e.* the "misappropriation of what equitably belongs to a competitor".

As in petitioner's previous briefs and applications to this Court, the cry of monopoly is again raised. A sufficient answer to this is that at least two of respondent's largest and most powerful competitors have always sold

and are still selling whole wheat biscuits manufactured under the expired Perky patents without appropriating respondent's trade name or the form and shape which have characterized its biscuit for over forty years.* It has been amply demonstrated that petitioner could easily manufacture its product in different forms and under a different name. It has been equally well demonstrated that petitioner does not wish to do what other competitors of respondent have done. It desires not to stand on its own feet but to trade upon respondent's good will.

ARGUMENT.

1. The order of May 5th, 1938 did not change in substance the order of April 12th, 1937, but merely clarified it.

At the outset it should be noted that petitioner does not claim that the Circuit Court of Appeals was without power to make the order of May 5th, 1938. The very fact that the jurisdiction of the Court to make the order is not now questioned carries with it the concession that it does not change in substance the order of April 12th, 1937. As pointed out in the cases cited in the opinion of the Circuit Court of Appeals† upon which the order of May 5th, 1938 was based, the Court was without power when this order was made to change in substance the order of April 12th, 1937 because the term at which it was made had long since expired.

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* See Respondent's brief in opposition, page 3.

† R. p. 2284, *Bronson* v. *Schulten*, 104 U. S. 410; *Marion County Court, W. Va.* v. *Ridge, et al.*, 13 Fed. (2d) 969; *Arcdil Mfg. Co.* v. *American Eq. Assur. Co.*, 87 Fed. (2d) 206; *Foster* v. *N. L. R. B.*, 90 Fed. (2d) 946. These authorities could, of course, be multiplied.

It is entirely clear that the order of May 5th, 1938 made no change *in substance* in the order of April 12th, 1937. All that it did was to eliminate the words at the end of the first order "in violation of its trade mark".* This will be manifest by comparing the two orders as they are quoted on pages 2 and 3 of the motion for leave to file the second petition. The clarification thus made was necessitated by the position which *petitioner* took before the District Court on the application to settle the form of decree to be entered on the mandate. Then, *for the first time,* petitioner took the position that the order of April 12th, 1937 enjoined it from using the name "Shredded Wheat" as a trade name and selling and advertising its biscuit in the form and shape of plaintiff's, *only* when *both* were done in connection with a trade mark known as the "two-biscuit-in-a-dish". In other words, that it should be enjoined from doing the things conjunctively only, and that it might do any two of the three provided it did not do all three. The District Court made a decree in the exact language of the mandate, which in turn used the same language as the order of April 12th, 1937. When petitioner persisted in *acting* upon its interpretation of the order of April 12th, 1937, respondent was compelled to ask that the mandate be recalled for clarification.† It made a motion to that effect during the term in which the mandate issued. The order of May 5th, 1938 clarifies the order of April 12, 1937 so that it is now made clear that the latter means exactly what the *petitioner represented* to the Circuit Court of Appeals on

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* For the reasons stated in the last opinion of the Circuit Court of Appeals (R. p. 2285), that Court declined to *rephrase* those words so that a violation of the two-biscuit-in-a-dish trade mark would be enjoined, although it stated that it was the intention in the original order on April 12th, 1937 to enjoin that violation as well as the others.

† It could have made a motion to punish for contempt but that would have entailed considerable delay and more extended litigation; the ultimate result would have been the same.

its first petition for rehearing and in its various previous applications to this Court that it meant, namely, that it prevented petitioner from using the words "Shredded Wheat" as its trade name and from selling its biscuit in the shape and form of respondent's, or either of them. We have attached hereto as an appendix extracts from petitioner's briefs and applications to this Court which demonstrate that the statement which we have made is entirely correct. This is not questioned. In the Circuit Court of Appeals on the application to recall the mandate for clarification, counsel for petitioner admitted that it had placed such a construction upon the order of April 12th, 1937 in its applications to that Court and to this Court. This appears from the last opinion of the Circuit Court of Appeals* where the Court said:

> "We thought that, when our opinion was read as a whole, we had made it perfectly clear that what we intended to enjoin was the use of the name 'Shredded Wheat' as a trade name and the advertising and selling of biscuits in the pillow-shape form, irrespective of whether the two-biscuit-in-a-dish trade mark were employed in connection with either the use of the name or the sale or advertising of the biscuit in the pillow-shape form. This was the construction which the appellee placed on the opinion and order of April 12, 1937, in its petition for rehearing to this court and appellant says that it placed the same construction upon them in its various petitions to the Supreme Court. *It so admitted before this court at the hearing to recall the mandate.* Appellee in those petitions doubtless placed upon the mandate what it believed to be its proper construction and its changed view adopted after the mandate of this court had issued was apparently due to the exigencies of its position rather than to any real belief that the opinion of this court left any doubt as to what was meant" (italics ours).

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* Record, p. 2282.

The parts of the extracts quoted on page 10 of the appendix which we have italicized go even further than we have above stated and show that petitioner considered at the time of filing its motion for rehearing in this Court that the meaning of the order of April 12th, 1937 was precisely what the Court said on May 5th, 1938 that it had intended, namely, "to enjoin the use of the words 'Shredded Wheat' as a trade name, the advertising and sale of biscuits in the pillow-shape form, and *the use of the two-biscuit-in-a-dish trade mark*, separately or together".*

In view of these considerations, it is difficult to see how petitioner can now be heard to make a diametrically different representation to this Court as to the meaning of the order of April 12th, 1937, in order to make it appear that this order was changed in substance so as to create a basis for another petition for reconsideration of the denial of the first petition for writ of certiorari, and a second petition for writ of certiorari.

II. The second petition for a writ of certiorari is a mere subterfuge to circumvent Section 350, Title 28, U. S. C.

If, as we have above endeavored to demonstrate, the order of May 5th, 1938 does not change in substance the order of April 12th, 1937, then it must follow that the Court is without jurisdiction to entertain the second petition for writ of certiorari. The time to file an application for a writ of certiorari to review the order of April 12, 1937, under Section 350, Title 28, U. S. C. expired ninety days after July 13th, 1937, which was the date on which the Circuit Court of Appeals denied petitioner's application for a rehearing.

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* Record, p. 2284.

As previously stated, the jurisdiction of the Court to make the order of May 5th, 1938 is not questioned. The petitioner presents nothing new in its second application for certiorari. It repeats its old contentions and old arguments. We submit that it is a mere subterfuge to circumvent the bar of the statute.

Conclusion.

It is respectfully submitted that the motion and petition should be denied.

THOMAS G. HAIGHT,
DAVID A. REED,
DRURY W. COOPER,
CHARLES A. VILAS,
Counsel for Respondent.

APPENDIX.

Quotations showing Petitioner's understanding of the meaning of the decision of April 12th, 1937:

"* * * the last decision in the Third Circuit which enjoins defendant from selling the biscuit in issue and thus, in effect, from making it * * *" (Petition for certiorari, page 12).

"The last decision of the Circuit Court of Appeals of the Third Circuit held that plaintiff may lawfully appropriate exclusively the form of (and thus the right to manufacture) the biscuit in issue * * * (*Ibid*, page 13).

"1. In holding that since the expiration of plaintiff's patents on Shredded Wheat, defendant was not entitled to advertise or sell shredded wheat biscuits in a form and shape similar to plaintiff's, * * *" (Petitioner's specification of errors *Ibid*, page 21).

"3. In holding that, since the expiration of plaintiff's patents on shredded wheat, defendant is not entitled to display in its advertisements pictures of shredded wheat biscuits in form and shape similar to plaintiff's * * *" (*Ibid*, page 22).

"Defendant can make the patent expired product but it is enjoined from advertising or offering it for sale * * *" (*Ibid*, page 24).

"* * * the court below has now enjoined defendant perpetually from advertising or selling any sized biscuit large or small, whether banded, tagged, packaged or not" (*Ibid*, page 24).

"* * * plaintiff is given a perpetual monopoly of the *form or shape and verbal and pictorial description* of a patent-expired product" (*Ibid*, page 26).

"The decree below holds in substance and effect, that plaintiff has perpetual and exclusive trademark property rights in the words "shredded wheat" and in the shape, appearance or design of the patent-expired biscuit * * *" (Petitioner's reply brief on petition for certiorari, page 1).

"The first 'injunction' which ever completely prohibited the sale of either marked, unmarked or cartoned biscuit was the second decree ordered below" (*Ibid*, page 4).

"There should be no misapprehension as to the character or scope of the perpetual monopoly claimed and granted by the second decision below" (Petition for rehearing, page 1).

"Petitioner could lawfully then, as it can now, sell in foreign countries a formerly patented product which it is perpetually enjoined from selling in any way whatever in its own country" (*Ibid*, page 4).

"Respondent * * * is now by this decision granted, long after expiration of its patents, a perpetual monopoly *not only in the manufacture and sale of the familiar shredded wheat biscuit*, but *a perpetual exclusive right to stop everyone else from calling the product by such name or representing the same pictorially* upon its cartons and in its advertising" (*Ibid*, page 5).

"By its second decision sought to be reviewed by the petitioner herein, the plaintiff-respondent is granted a perpetual monopoly in the manufacture and sale of the patent-expired *shredded wheat biscuit and in the use of such name and the pictorial representation of this product*" (Petition to withhold order denying a writ of certiorari, page 2).

"It held, as law, that even in the absence of fraud, deceit or misrepresentation by petitioner, a perpetual monopoly of product, design and name has arisen * * *" (Petition to stay injunction, page 9).

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DEC 8 1938
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

Nos. 2 and 56

KELLOGG COMPANY,

Petitioner,

AGAINST

NATIONAL BISCUIT COMPANY,

Respondent.

RESPONDENT'S MOTION FOR REHEARING AND MOTION FOR STAY OF MANDATE.

DAVID A. REED,
Solicitor for Respondent.

CHARLES A. VILAS,
THOMAS G. HAIGHT,
DRURY W. COOPER,
Of Counsel.

JEFFREY PRESS, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

Nos. 2 and 56

KELLOGG COMPANY,

Petitioner,

against

NATIONAL BISCUIT COMPANY,

Respondent.

RESPONDENT'S MOTION FOR REHEARING AND MOTION FOR STAY OF MANDATE

The respondent National Biscuit Company respectfully moves this Court for a rehearing of the above entitled cause in which an opinion was rendered November 14th, 1938, reversing the judgment of the Circuit Court of Appeals for the Third Circuit and directing the dismissal of the bill of complaint; and for a stay of the mandate of this Court pending the disposition of this motion for rehearing.

I.

It is respectfully submitted that the decision in this case extends and broadens the doctrine enunciated by this Court in *Singer* v. *June*, 163 U. S. 169, to an extent which conflicts with other decisions of this Court. The opinion of the Court states:

> "But the name and form are integral parts of the good will of the article. To share fully in the good will, it must use the name and the pillow-

shape. And in the good will Kellogg Company is as free to share as the plaintiff. Compare William R. Warner & Co. v. Eli Lilly & Co., 265 U. S. 526, 528, 530."

* * * * *

"Kellogg Company is undoubtedly sharing in the good will of the article known as 'Shredded Wheat'; and thus is sharing in a market which was created by the skill and judgment of plaintiff's predecessor and has been widely extended by vast expenditures in advertising persistently made. But that is not unfair. Sharing in the good will of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested."

This doctrine must necessarily result in profound economic consequences. The effect of it is to make the owner of an expired patent an outcast in the eyes of the law. For no matter how long and uninterrupted his use of the name applied to the product while it was patented, no matter how great the expenditure of money in acquiring good will nor how successful, that good will lies ready for appropriation by any comer at any time. Even though as much as a century of uninterrupted use of the name has created unprecedented good will, the owner of it is without the protection of the law because for a small fraction of time he enjoyed a monopoly in the production of the article.

While in *Singer* v. *June* (163 U. S. 169) this Court held that a patent owner, upon the expiration of the patent, *impliedly* dedicated to the public the right to use the name by which the patented article had been called during the life of the patent, "if essentially necessary" to describe the product, yet it clearly recognized that the good will which the patent owner had built up belonged to him. Thus,

in the opinion (written by Mr. Justice WHITE) at 163 U. S., page 187, the Court said:

> "To say that a person who has manufactured machines under a patented monopoly can acquire no good will, by the excellence of his work, or the development of his business, during the patent, would be to seriously ignore rights of private property, and would be against public policy, since it would deprive the one enjoying the patent of all incentive to make a machine of good quality, because at its termination all the reputation or good will resulting from meritorious work would be subject to appropriation by every one."

The decisions of this Court since that time have uniformly recognized the right of each trader to be protected in his good will, even though he had at some prior time sold under the protection of a patent. See *Elgin National Watch Co.* v. *Illinois Watch Case Company*, 179 U. S. 674; 675; *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554, 558, 556; *Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618, 623.

The uniform decisions of this Court have been that the owner of a patent, who through his skill in manufacture, expenditure in advertising and faithful service to the public, has built up a good will, does not upon the expiration of a patent yield all of this to the public as well as the invention of the patent. Moreover, in the instant case, during the seventeen years following the expiration of the basic Perky patents in 1912, the sales of the respondent's predecessor were increased almost three-fold. This tremendous good will, the indisputable resultant of the skill, judgment, advertising and faithful public service of respondent's predecessor *after the patent's expiration*, should not in good conscience be dedicated to the public merely

because there was a preceding seventeen years period during which sales were made under patent protection.

We appreciate that the Court refers to the good will of the *article* and not the good will of respondent. But the evidence indubitably shows that the two are inseparably connected. The article would have had no good will except for its healthful and excellent quality resulting from the care exercised by respondent and its predecessor in producing the article. Moreover, a great part of the good will of the article is the result of extensive advertising on the part of respondent and its predecessor, while petitioner and all others who might wish to compete sat by and allowed the good will to be created. It is believed that in this day, when the courts are continually called upon to prevent unfair competition, both bold and subtle, and when the law as recently stated by this Court has been expanded to cover not only misrepresentation but the "misappropriation of what equitably belongs to a competitor" (*Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, at p. 532), the beforestated doctrine announced by this Court in the case at bar should be reconsidered, especially in the light of the previous cited decisions of this Court.

In its opinion (p. 5) the Court said:

> "Kellogg Company's right was not one dependent upon diligent exercise. Like every other member of the public, it was, and remained, free to make shredded wheat when it chose to do so; *and to call the product by its generic name.*"

In previous cases this Court has recognized that acquiescence through lapse of time in the use of a trade mark or trade name may estop even a prior user from adopting or extending the use of a mark. See, for example, *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403; *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, and *Jacobs* v. *Iodent Chemical Co.*, 41 Fed. (2d) 637 (C. C. A. 3rd).

We submit that there is no difference in principle between depriving the owner of a trade mark, because of non-user, of his otherwise *exclusive* right to use it, and in preventing another, who at one time had a *non-exclusive* right to use a trade mark, from subsequently using it, merely because for a long period of time he and everyone else has neglected to use it. Especially is this true when the use will result in confusion and enable him to appropriate some of the good will of a competitor who has continually used the mark. It must be remembered that the dedication which this Court held in *Singer* v. *June* was made, at the expiration of the patent, of the name by which the patented article had been known, was not based upon any provision of the patent statutes, but upon the Court's idea of what was necessary to enable the public to enjoy fully the invention of the patent. An equity was thus raised in favor of the public, but this equity certainly can be destroyed by a paramount counter-equity. A court of equity always balances equities. A trade mark is lost by non-user in favor of one who has used it, because of the latter's superior equity. In respect to this it makes no difference whether respondent's claim be considered as based upon petitioner's delay or respondent's prior user since 1912.

The Court in its opinion refers to *William R. Warner & Co.* v. *Eli Lilly & Co.*, 265 U. S. 526, as a precedent for the proposition that the petitioner is free to share in the respondent's good will, but the *Warner* case, as we pointed out in our brief, was a clear case of unfair competition in which injunction was granted. Therein this Court said, at page 532:

> "But respondent being entitled to relief, is entitled to effective relief; *and any doubt in respect of the extent thereof must be resolved in its favor as the innocent producer* and against the petitioner, which has shown by its conduct that it is not to be trusted."

In the case at bar any doubt as to effective relief has been resolved *against* the innocent producer. This Court's opinion has given petitioner a right that enables him (claiming to be for years the *largest producer* of cereal foods) to sit idly by while the good will for an article has been built up and its connection, through name and form, has become inseparably connected with respondent as a producer, and then to step in and reap where it has not sown.

The Court states that the name "Shredded Wheat" "is the generic name of the article" and "since the term is generic, the original maker of the product acquired no exclusive right to use it." (Opinion, p. 3.) If the Court used the word "generic" in the sense of descriptive, we point out that in our brief (p. 40) we endeavor to demonstrate that the words "Shredded Wheat" are not descriptive in the sense that they may not constitute a valid trade mark. To ascertain whether they are descriptive we submit that one must go back to 1893 when they were first used by Perky. Is it possible to believe that at *that time* the name would have meant to anyone, filaments of whole wheat berries which had been boiled and passed through rollers so as to assume the form of long filaments or strings? If, on the other hand, the Court meant that the words were truly generic, it is only because they have been made so by respondent's and its predecessor's use of them for over 45 years, nearly two-thirds of which has occurred since the expiration of the patent. The Court holds in effect that the more extensive the use of a trade name the less chance there is that the proprietor of the name may be able to protect it against appropriation by others.

Perky was quite able without using the word "shredded" in his first patents to describe the machines of his invention and the product of the patent in total compliance with the patent statute requiring a description so full, clear and concise that the public on the patent's expiration might

enjoy the invention's use. Respondent's competitors, and for a time the Kellogg Company itself, found no necessity to appropriate the phrase. Kellogg's subsequent conduct was not in the slightest conceivable measure necessitous. Part of the time it falsely held its product out as the original. Part of the time it used respondent's two biscuit trade mark. Part of the time it copied the respondent's form. Part of the time it used respondent's now forty-five year old phrase, and sometimes used various combinations of all these. All of the time, and now for twenty-six years after the Perky patents expired, the respondent has used the phrase "Shredded Wheat" upon its product, and all of the time in the public's mind it has signified the respondent's Niagara Falls product. How and by what justice and under what equitable necessity did the Perky patents become free licenses to the Kellogg Company to do more than take what the patents gave? The patent owner does not, like Faust, sell his soul. He gets a limited seventeen year reward for the invention he gives. He is asked to give no more under the Patent Act. A court of equity should not award away more than this, save when compelling necessity requires it, in order that the public may enjoy the invention.

Paraphrasing the language of this Court in *Singer* v. *June*, 163 U. S. 169, 187, quoted above, we submit:

> "To say that respondent and its predecessors who manufactured food products under a patent monopoly for 17 years can acquire no good will, by the excellence of their work, or the development of their business, during the patent, is to seriously ignore rights of private property, and is against public policy."

II.

The doctrine of *Singer* v. *June* relied upon by the Court's opinion in this case rests upon *necessity*. The Court in *Singer* v. *June* said at page 185:

> "It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also *necessarily* pass to the public the generic designation of the thing which has arisen during the monopoly * * *" (Italics ours.)

But it was demonstrated beyond dispute in this case that this *necessity* does not exist here. To apply the paragraph just quoted to the present case is to carry the decision of *Singer* v. *June* beyond its basis. The Court points out in that case that the reason for permitting the defendant to use the word "Singer" was that the name was *"essentially necessary to vest the public with a full enjoyment of the monopoly."*

We have pointed out in our brief (p. 9) that other competitors, including petitioner for much of the time, have found it possible to enjoy the disclosures of the Perky patents without appropriating respondent's name and form. These facts are not disputed by the petitioner but apparently were overlooked by the Court. The Court has apparently wholly ignored the practices of other competitors and the lessons to be drawn therefrom. Similarly the Court has overlooked the evidence of widespread confusion among consumers (see Appendix C of respondent's brief).

This Court in subsequent cases has recognized that the doctrine of *Singer* v. *June* is one of necessity, only to be applied where inescapable need demands it to permit the public to enjoy the expired patents. Thus in *Holzapfel's*

Co. v. *Rahtjen's Co.*, 183 U. S. 1, 9-10, the Court pointed out that the only possible way to describe the patent expired product was "Rahtjen's Composition."

The question to be determined in a case of this character where the plaintiff is asserting a right to be protected in the good will which it has built up at great cost and over many years of faithful public service, and where the defendant is asserting a right to sell freely an unpatented product and describe it, is one which may involve some balancing of equity. Except for the statement of this Court in the instant case referred to above, it has been the endeavor of American courts to save to every man that good will which his skill and judgment produce. It has likewise been the endeavor of our courts to permit a trader to describe his goods. If these two endeavors come in conflict, the principal question to be determined is whether it is "essentially necessary" to deprive the plaintiff of any good will in order to permit the defendant to describe his product. This approach was taken by Mr. Justice HOLMES, then presiding in the Supreme Court of Massachusetts, in *American Waltham Watch Co.* v. *U. S. Watch Co.*, 173 Mass. 85, in which the Court said (p. 86):

> "In cases of this sort, as in so many others, what ultimately is to be worked out is a point or line between conflicting claims, each of which has meritorious grounds and would be extended further were it not for the other. *Boston Ferrule Co.* v. *Hills*, 159 Mass. 147, 149, 150. It is desirable that the plaintiff should not lose custom by reason of the public mistaking another manufacturer for it. It is desirable that the defendant should be free to manufacture watches at Waltham, and to tell the world that it does so. The two desiderata cannot both be had to their full extent, and we have to fix the boundaries as best we can. On the one hand, the

defendant must be allowed to accomplish its desideratum in some way, whatever the loss to the plaintiff. On the other, we think, the cases show that the defendant fairly may be required to avoid deceiving the public to the plaintiff's harm, so far as is practicable in a commercial sense. It is true that a man cannot appropriate a geographical name, but neither can he a color, or any part of the English language, or even a proper name to the exclusion of others whose names are like his. Yet a color in connection with a sufficiently complex combination of other things may be recognized as saying so circumstantially that the defendant's goods are the plaintiff's as to pass the injunction line. *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154, 156. So, although the plaintiff has no copyright on the dictionary or any part of it, he can exclude a defendant from a part of the free field of the English language, even from the mere use of generic words unqualified and unexplained, when they would mislead the plaintiff's customers to another shop. *Reddaway* v. *Banham* (1896) A. C. 199. So the name of a person may become so associated with his goods that one of the same name coming into the business later will not be allowed to use even his own name without distinguishing his wares. *Brinsmead* v. *Brinsmead*, 13 Times L. R. 3; *Reddaway* v. *Banham* (1896) A. C. 199, 210. See *Singer Manuf. Co.* v. *June Manuf. Co.*, 163 U. S. 169, 204; *Allegretti Chocolate Cream Co.* v. *Keller*, 85 Fed. Rep. 643. And so, we doubt not, may a geographical name acquire a similar association with a similar effect. *Montgomery* v. *Thompson* (1891) A. C. 217."

If the desire to protect the good will of the respondent be weighed against the desire to permit the petitioner to avail itself of the expired patents in this case, there can

be only one answer; the undisputed history of the Quaker Oats Company and the Loose Wiles Biscuit Company shows that they were and are able to avail themselves of the expired patents without taking unjustly the good will of the respondent by using either the words "Shredded Wheat" or the form of biscuit which has been associated with respondent and its predecessors. To the weight of this must be added the fact that petitioner has, for much of the period, used other words to designate its product.

III.

In its opinion herein this Court said:

> "There is no basis here for applying the doctrine of secondary meaning. The evidence shows only that due to the long period in which the plaintiff or its predecessor was the only manufacturer of the product, many people have come to associate the product, and as a consequence the name by which the product is generally known, with the plaintiff's factory at Niagara Falls."

It is submitted that the showing of the evidence that "many people have come to associate * * * the name by which the product is generally known, with plaintiff's factory at Niagara Falls" is precisely what has heretofore been known as "secondary meaning." It shows that in the public mind "Shredded Wheat" meant "a single thing coming from a single source and well known to the community." (*Coca-Cola Co.* v. *Koke Co.*, 254 U. S. 143, 146, opinion written by Mr. Justice Holmes.) The evidence here shows what it did in *Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 F. 960, which was summarized by Judge Learned Hand as follows (p. 963):

> "The plaintiff has at least shown that the public has become accustomed to regard its familiar wheat

> biscuit as emanating; if not from it by name, at least from a single, though anonymous, maker, and the second is as good for these purposes as the first."

The evidence in the *Humphrey-Cornell* case was taken in the year 1915. Prior to that time 9,962,529 cases of "Shredded Wheat" were sold. In the following 12 years 21,479,720 cases of "Shredded Wheat" were sold.* The secondary meaning which was clear in 1915, is even clearer today (see Appendix A, Respondent's Brief).

However, in its opinion herein, the Court required respondent not only to show as previously required by this Court in *Coca Cola* v. *Koke Co.*, 254 U. S. 143, 146, that the public knew the product as "a single thing coming from a single source, and well known to the community" but held:

> "but to establish a trade name in the term 'shredded wheat' the plaintiff must show more than a subordinate meaning which applies to it. It must show that the *primary* significance of the term in the minds of the consuming public is not the product but the producer."

This is in sharp contrast to the decision of this Court in *Coca-Cola Co.* v. *Koke Co.*, 254 U. S. 143, 146, in which the Court (by Mr. Justice Holmes) said:

> "It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words Coca-Cola probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. Although the fact did not appear in *United States* v. *Coca-Cola Co.*, 241 U. S. 265, 289, we see no reason to doubt that, as

*R., Vol. IV, p. 51.

> we have said, it has acquired a secondary meaning in which perhaps the product is more emphasized than the producer but to which the producer is entitled."

Our attention has just been called to the decision of this Court rendered December 5th, 1938, in the case of *Nu-Enamel Corporation* v. *Armstrong Paint and Varnish Co.*, in which this Court held that the word "Nu-Enamel" was descriptive of the product of the plaintiff but had acquired a secondary meaning. In that case, as in this case, the mark in question had been registered under the 1920 Trade Mark Act. Secondary significance, we believe, has been established in this case as conclusively as in the *Nu-Enamel* case. It seems impossible to us to reconcile the decision in the *Nu-Enamel* case and that in the case at bar on this point unless the Court in the latter has had regard to form rather than substance.

The decision of this Court in the instant case that secondary meaning is not shown where the plaintiff proves that the public identifies his product under its trade name, as a single thing coming from a single source is a marked departure from previous decisions of this Court and other federal courts and will necessarily affect adversely the heretofore established good will of many traders. The burden of proving that the producer and not the product is the primary significance of the term in the minds of the consuming public is a heavy one. Hungry folk think of wholesome food, not of manufacturing concerns.*

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*"Thirsty folk want beer, not explanations." Stone Ale Case, (Montgomery v. Thompson, 1891, A. C. 217, 8 RPC 361).

IV.

The opinion of the Court in this case overlooks the extension of the scope of the doctrine of unfair competition in recent years by this and other Courts. This is an action in equity based on equitable principles. As previously stated, this Court has recently recognized that the doctrine of unfair competition applies not merely to misrepresentation but to "misappropriation of what equitably belongs to a competitor" (*Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 at p. 532). The opinion of the Court in this case recognizes that the petitioner has appropriated and shared in the good will of the respondent but says that it has a perfect right to do so. We submit that this is contrary to the expressions of this Court in the *Schechter* case just referred to and in other cases cited in our brief. The idea has been well expressed by the Supreme Court of New York as recently as 1937 in *Philadelphia Storage Battery Co.* v. *Mindlin*, 163 Misc. 52, at page 56 as follows:

> "The fear is sometimes expressed that the extension of protection may foster monopoly, not merely of language but of trade. The fear is groundless. He who coins a trade symbol adds rather than detracts from the language. Even when a term in a dictionary is used in an arbitrary manner, the language is not impoverished. The term may still be used in its accepted sense; what equity prevents is the appropriation of the new layers of meaning that have been added by the plaintiff. The rights of the first user can be sustained to the extent that they do not unduly handicap others in the honest conduct of their business. New competition and enterprise must not be throttled, but the late comer should be compelled to rely upon his own ingenuity, rather than misrepresentation and misappropriation for the creation of his market. This much at least

> is demanded by the most elementary notions of honesty.' (Handler, Unfair Competition, 21 Iowa L. Rev. 175, 186.) Blatant imitation should not be recognized by the judicial condonation of practices which violate the fundamental precepts of fair business dealing."

A trade mark is not a monopoly in the sense in which that word has been used by the petitioner in this case. It is not a property right except in a somewhat limited sense. In its essence a trade mark is a responsibility. It vouches for the integrity of the goods to which it is attached. If the producer of the goods fails in maintaining the quality and integrity of trade marked goods, the mark itself loses its value. The Shredded Wheat Company and the respondent as its successor have for more than forty-five years maintained the integrity of the product to which the trade name "Shredded Wheat" has always been attached. Ever since the year 1912 the process of the Perky patents and the use of the machinery to make the product have been open to the public. No competitor except the petitioner has sought to share in the plaintiff's good will as the Court now says may be done. We believe that the Court overlooked that this is an equity case, appealing to the conscience of the chancellor. No possible equity can justify the petitioner in the conduct disclosed by the record, and the most elementary equitable considerations warrant some measure of protection for the respondent. To hold otherwise, as this Court does in this decision, is to discourage the very purpose for which the patent laws exist, namely, the encouragement of invention and enterprise by granting to an inventor the sole right to make and vend for a limited period the product of his brain upon condition that at the end of that limited period he dedicate it, and it alone to the public.

If a patentee is now to be deprived of the benefit of the good will which he has succeeded in attaching to his product, either during the life of the patent, or after its expiration, then he would be far better off never to take any patents (which must, as the *only statutory consideration,* inform the public how best to practice the invention, R. S., Sec. 4888), but to keep his invention secret, and rely upon his common law rights for protection from unfair competition by unscrupulous dealers who stand by until great good will has been acquired and then come and sit without day as unbidden guests. The Court's decision now adds the penalty of loss of good will to the statutory consideration for the grant of a patent.

V.

We believe the Court has misapprehended the action by the Circuit Court of Appeals with respect to the dish trade mark. This Court in its opinion (p. 8) says:

> "Fourth: By its 'clarifying' decree, the Circuit Court of Appeals enjoined Kellogg Company from using the picture of the two shredded wheat biscuits in the bowl only in connection with an injunction against manufacturing the pillow-shaped biscuits and the use of the term shredded wheat, on the grounds of unfair competition."

Reference to the opinion of the Circuit Court of Appeals discloses that that Court, while it had intended to enjoin the use of the dish trade mark, felt that there was some doubt as to its expression of that intention in its first opinion. The term having expired, it felt that it was without jurisdiction to change or add to its original mandate and, therefore, expressly declined to issue any injunction against the use of the dish trade mark. We believe, therefore, that the sentence from this Court's opinion quoted above is incorrect.

For these reasons we respectfully urge that this motion for rehearing be granted and that the opinion and judgment of the Court be modified as indicated herein and that the issuance of the mandate of the Court be stayed pending the disposition of this motion and of the rehearing.

Washington, D. C.
December 8th, 1938.

DAVID A. REED,
Solicitor for Respondent.

CHARLES A. VILAS,
THOMAS G. HAIGHT,
DRURY W. COOPER,
Of Counsel.

Certificate.

I, CHARLES A. VILAS, of counsel for the respondent herein, hereby certify that in my opinion the foregoing petition for rehearing herein and for a stay of the mandate pending determination thereof is sound in law and that the same is presented in good faith and not for the purpose of delay.

CHARLES A. VILAS.

pp. 1, 4, 6

SUPREME COURT OF THE UNITED STATES.

Nos. 2 and 56.—October Term, 1938.

Kellogg Company, Petitioner,
vs.
National Biscuit Company.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 14, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

This suit was brought in the federal court for Delaware[1] by National Biscuit Company against Kellogg Company to enjoin alleged unfair competition by the manufacture and sale of the breakfast food commonly known as shredded wheat. The competition was alleged to be unfair mainly because Kellogg Company uses, like the plaintiff, the name shredded wheat and, like the plaintiff, produces its biscuit in pillow-shaped form.

Shredded wheat is a product composed of whole wheat which has been boiled, partially dried, then drawn or pressed out into thin shreds and baked. The shredded wheat biscuit generally known is pillow-shaped in form. It was introduced in 1893 by Henry D. Perky, of Colorado; and he was connected until his death in 1908 with companies formed to make and market the article. Commercial success was not attained until the Natural Food Company built, in 1901, a large factory at Niagara Falls, New York. In 1908, its corporate name was changed to "The Shredded Wheat Company"; and in 1930 its business and goodwill were acquired by National Biscuit Company.

Kellogg Company has been in the business of manufacturing breakfast food cereals since its organization in 1905. For a period commencing in 1912 and ending in 1919 it made a product whose form was somewhat like the product in question, but whose manu-

Delaware

[1] The federal jurisdiction rests on diversity of citizenship—National Biscuit Company being a New Jersey corporation and Kellogg Company a Michigan corporation. Most of the issues in the case involve questions of common law and hence are within the scope of Erie R. R. *v.* Tompkins, 304 U. S. 64 (1938). But no claim has been made that the local law is any different from the general law on the subject, and both parties have relied almost entirely on federal precedents.

facture was different, the wheat being reduced to a dough before being pressed into shreds. For a short period in 1922 it manufactured the article in question. In 1927, it resumed manufacturing the product. In 1928, the plaintiff sued for alleged unfair competition two dealers in Kellogg shredded wheat biscuits. That suit was discontinued by stipulation in 1930. On June 11, 1932, the present suit was brought. Much evidence was introduced; but the determinative facts are relatively few; and as to most of these there is no conflict.

In 1935, the District Court dismissed the bill. It found that the name "Shredded Wheat" is a term describing alike the product of the plaintiff and of the defendant; and that no passing off or deception had been shown. It held that upon the expiration of the Perky patent No. 548,086 issued October 15, 1895, the name of the patented article passed into the public domain. In 1936, the Circuit Court of Appeals affirmed that decree. Upon rehearing, it vacated, in 1937, its own decree and reversed that of the District Court, with direction "to enter a decree enjoining the defendant from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade-mark; and with further directions to order an accounting for damages and profits." In its opinion the court described the trade-mark as "consisting of a dish, containing two biscuits submerged in milk". 91 F. (2d) 150, 152. We denied Kellogg Company's petition for a writ of certiorari, 302 U. S. 733; and denied rehearing, 302 U. S. 777.

On January 5, 1938, the District Court entered its mandate in the exact language of the order of the Circuit Court of Appeals, and issued a permanent injunction. Shortly thereafter National Biscuit Company petitioned the Circuit Court of Appeals to recall its mandate "for purposes of clarification." It alleged that Kellogg Company was insisting, contrary to the court's intention, that the effect of the mandate and writ of injunction was to forbid it from selling its product only when the trade name "Shredded Wheat" is applied to a biscuit in the form and shape of the plaintiff's biscuit and is accompanied by a representation of a dish with biscuits in it; and that it was not enjoined from making its biscuit in the form and shape of the plaintiff's biscuit, nor from calling it "Shredded Wheat," unless at the same time it uses upon its cartons plaintiff's trade-mark consisting of a dish

with two biscuits in it. On May 5, 1938, the Circuit Court of Appeals granted the petition for clarification and directed the District Court to enter a decree enjoining Kellogg Company (96 F. (2d) 873):

"(1) from the use of the name 'SHREDDED WHEAT' as its trade name, (2) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit, and (3) from doing either."

Kellogg Company then filed a petition for a writ of certiorari to review the decree as so clarified, and also sought reconsideration of our denial of its petition for certiorari to review the decree as entered in its original form. In support of these petitions it called to our attention the decision of the British Privy Council in *Canadian Shredded Wheat Co., Ltd.* v. *Kellogg Company of Canada, Ltd.*, 55 R. P. C. 125, rendered after our denial of the petition for certiorari earlier in the term. We granted both petitions for certiorari.[2] (304 U. S. —.)

The plaintiff concedes that it does not possess the exclusive right to make shredded wheat. But it claims the exclusive right to the trade name "Shredded Wheat" and the exclusive right to make shredded wheat biscuits pillow-shaped. It charges that the defendant, by using the name and shape, and otherwise, is passing off, or enabling others to pass off, Kellogg goods for those of the plaintiff. Kellogg Company denies that the plaintiff is entitled to the exclusive use of the name or of the pillow-shape; denies any passing off; asserts that it has used every reasonable effort to distinguish its product from that of the plaintiff; and contends that in honestly competing for a part of the market for shredded wheat it is exercising the common right freely to manufacture and sell an article of commerce unprotected by patent.

First. The plaintiff has no exclusive right to the use of the term "Shredded Wheat" as a trade name. For that is the generic term of the article, which describes it with a fair degree of accuracy; and is the term by which the biscuit in pillow-shaped form is generally known by the public. Since the term is generic, the orig-

[2] Rights here claimed by plaintiff have been involved in much other litigation. See Natural Food Co. v. Williams, 30 App. D. C. 348; Shredded Wheat Co. v. Humphrey Cornell Co., 250 Fed. 960 (C. C. A. 2d); Kellogg Co. v. National Biscuit Co., 71 F. (2d) 662 (C. C. A. 2d); Canadian Shredded Wheat Co., Ltd. v. Kellogg Co. of Canada, Ltd., 55 R. P. C. 125; In the Matter of Trade Mark No. 500,761, Registered in the Name of the Shredded Wheat Co., Ltd., in Class 42 (1938) Supreme Court of Judicature, Court of Appeal; also Natural Food Co. v. Buckley, No. 28,530, U. S. Dist. Ct., N. Dist. Ill., East. Div. (1908).

inal maker of the product acquired no exclusive right to use it. As Kellogg Company had the right to make the article, it had, also, the right to use the term by which the public knows it. Compare *Saxlehner* v. *Wagner*, 216 U. S. 385; *Holzapfel's Composition Co.* v. *American Composition Co.*, 183 U. S. 1. Ever since 1894 the article has been known to the public as shredded wheat. For many years, there was no attempt to use the term "Shredded Wheat" as a trade-mark. When in 1905 plaintiff's predecessor, National Food Company, applied for registration of the words "Shredded Whole Wheat" as a trade-mark under the so-called "ten year clause" of the Act of February 20, 1905, c. 592, sec. 5, 33 Stat. 724, William E. Williams gave notice of opposition. Upon the hearing it appeared that Williams had, as early as 1894, built a machine for making shredded wheat, and that he made and sold its product as "Shredded Whole Wheat". The Commissioner of Patents refused registration. The Court of Appeals of the District of Columbia affirmed his decision, holding that "these words accurately and aptly describe an article of food which . . . has been produced for more than ten years. . . ." *Natural Food Co.* v. *Williams*, 30 App. D. C. 348.[3]

Moreover, the name "'Shredded Wheat", as well as the product, the process and the machinery employed in making it, has been dedicated to the public. The basic patent for the product and for the process of making it, and many other patents for special machinery to be used in making the article, issued to Perky. In those patents the term "shredded" is repeatedly used as descriptive of the product. The basic patent expired October 15, 1912; the others soon after. Since during the life of the patents "Shredded Wheat" was the general designation of the patented product, there passed to the public upon the expiration of the patent, not only the right to make the article as it was made during the patent period, but also the right to apply thereto the name by which it had become known. As was said in *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, 185:

"It equally follows from the cessation of the monopoly and the falling of the device into the domain of things public, that along

[3] The trade-marks are registered under the Act of 1920. 41 Stat. 533, 15 U. S. C. §§ 121-28 (1934). But it is well settled that registration under it has no effect on the domestic common-law rights of the person whose trade-mark is registered. Charles Broadway Rouss, Inc. v. Winchester Co., 300 Fed. 706, 713, 714 (C. C. A. 2d); Kellogg Co. v. National Biscuit Co., 71 F. (2d) 662, 666 (C. C. A. 2d).

with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly. . . .

"To say otherwise would be to hold that, although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly."

It is contended that the plaintiff has the exclusive right to the name "Shredded Wheat", because those words acquired the "secondary meaning" of shredded wheat made at Niagara Falls by the plaintiff's predecessor. There is no basis here for applying the doctrine of secondary meaning. The evidence shows only that due to the long period in which the plaintiff or its predecessor was the only manufacturer of the product, many people have come to associate the product, and as a consequence the name by which the product is generally known, with the plaintiff's factory at Niagara Falls. But to establish a trade name in the term "shredded wheat" the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer. This it has not done. The showing which it has made does not entitle it to the exclusive use of the term shredded wheat but merely entitles it to require that the defendant use reasonable care to inform the public of the source of its product.

The plaintiff seems to contend that even if Kellogg Company acquired upon the expiration of the patents the right to use the name shredded wheat, the right was lost by delay. The argument is that Kellogg Company, although the largest producer of breakfast cereals in the country, did not seriously attempt to make shredded wheat, or to challenge plaintiff's right to that name until 1927, and that meanwhile plaintiff's predecessor had expended more than $17,000,000 in making the name a household word and identifying the product with its manufacture. Those facts are without legal significance. Kellogg Company's right was not one dependent upon diligent exercise. Like every other member of the public, it was, and remained, free to make shredded wheat when it chose to do so; and to call the product by its generic name. The only obligation resting upon Kellogg Company was to identify its own product lest it be mistaken for that of the plaintiff.

Second. The plaintiff has not the exclusive right to sell shredded wheat in the form of a pillow-shaped biscuit—the form in which the article became known to the public. That is the form in which shredded wheat was made under the basic patent. The patented machines used were designed to produce only the pillow-shaped biscuits. And a design patent was taken out to cover the pillow-shaped form.[4] Hence, upon expiration of the patents the form, as well as the name, was dedicated to the public. As was said in *Singer Mfg. Co.* v. *June Mfg. Co.*, *supra*, p. 185:

"It is self evident that on the expiration of a patent the monopoly granted by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows as a matter of course that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. We may, therefore, dismiss without further comment the complaint, as to the form in which the defendant made his machines."

Where an article may be manufactured by all, a particular manufacturer can no more assert exclusive rights in a form in which the public has become accustomed to see the article and which, in the minds of the public, is primarily associated with the article rather than a particular producer, than it can in the case of a name with similar connections in the public mind. Kellogg Company was free to use the pillow-shaped form, subject only to the obligation to identify its product lest it be mistaken for that of the plaintiff.

Third. The question remains whether Kellogg Company in exercising its right to use the name "Shredded Wheat" and the pillow-shaped biscuit, is doing so fairly. Fairness requires that it be done in a manner which reasonably distinguishes its product from that of plaintiff.

Each company sells its biscuits only in cartons. The standard Kellogg carton contains fifteen biscuits; the plaintiff's twelve. The Kellogg cartons are distinctive. They do not resemble those used by the plaintiff either in size, form, or color. And the difference in the labels is striking. The Kellogg cartons bear in bold script the names "Kellogg's Whole Wheat Biscuit" or "Kellogg's Shredded

[4] The design patent would have expired by limitations in 1909. In 1908 it was declared invalid by a district judge on the ground that the design had been in public use for more than two years prior to the application for the patent and theretofore had already been dedicated to the public. Natural Foods Co. v. Bulkley, No. 28,530, U. S. Dist Ct., N. Dist. Ill., East. Div. (1908).

Whole Wheat Biscuit" so sized and spaced as to strike the eye as being a Kellogg product. It is true that on some of its cartons it had a picture of two shredded wheat biscuits in a bowl of milk which was quite similar to one of the plaintiff's registered trade-marks. But the name Kellogg was so prominent on all of the defendant's cartons as to minimize the possibility of confusion.

Some hotels, restaurants, and lunchrooms serve biscuits not in cartons, and guests so served may conceivably suppose that a Kellogg biscuit served is one of the plaintiff's make. But no person familiar with plaintiff's product would be misled. The Kellogg biscuit is about two-thirds the size of plaintiff's; and differs from it in appearance. Moreover, the field in which deception could be practiced is negligibly small. Only 2½ per cent of the Kellogg biscuits are sold to hotels restaurants and lunchrooms. Of those so sold 98 per cent are sold in individual cartons containing two biscuits. These cartons are distinctive and bear prominently the Kellogg name. To put upon the individual biscuit some mark which would identify it as the Kellogg product is not commercially possible. Relatively few biscuits will be removed from the individual cartons before they reach the consumer. The obligation resting upon Kellogg Company is not to insure that every purchaser will know it to be the maker but to use every reasonable means to prevent confusion.

It is urged that all possibility of deception or confusion would be removed if Kellogg Company should refrain from using the name "Shredded Wheat" and adopt some form other than the pillow-shape. But the name and form are integral parts of the goodwill of the article. To share fully in the goodwill, it must use the name and the pillow-shape. And in the goodwill Kellogg Company is as free to share as the plaintiff. Compare *William R. Warner & Co.* v. *Eli Lilly & Co.*, 265 U. S. 526, 528, 530. Moreover, the pillow-shape must be used for another reason. The evidence is persuasive that this form is functional—that the cost of the biscuit would be increased and its high quality lessened if some other form were substituted for the pillow-shape.

Kellogg Company is undoubtedly sharing in the goodwill of the article known as "Shredded Wheat"; and thus is sharing in a market which was created by the skill and judgment of plaintiff's predecessor and has been widely extended by vast expenditures in advertising persistently made. But that is not unfair. Sharing in the goodwill of an article unprotected by patent or trade-mark

is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested. There is no evidence of passing off or deception on the part of the Kellogg Company;[5] and it has taken every reasonable precaution to prevent confusion or the practice of deception in the sale of its product.

Fourth. By its "clarifying" decree, the Circuit Court of Appeals enjoined Kellogg Company from using the picture of the two shredded wheat biscuits in the bowl only in connection with an injunction against manufacturing the pillow-shaped biscuits and the use of the term shredded wheat, on the grounds of unfair competition.[6] The use of this picture was not enjoined on the independent ground of trade-mark infringement. Since the National Biscuit Company did not petition for certiorari, the question whether use of the picture is a violation of that trade-mark although Kellogg Company is free to use the name and the pillow-shaped biscuit is not here for review.

Decrees reversed with direction to dismiss the bill.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER are of opinion that the decree of the Circuit Court of Appeals is correct and should be affirmed. To them it seems sufficiently clear that the Kellogg Company is fraudulently seeking to appropriate to itself the benefits of a goodwill built up at great cost by the respondent and its predecessors.

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[5] Attention is called to the fact that the label on these Kellogg cartons bears, in small letters, the words: "The original has this [W. K. Kellogg's] signature." Objection to their use was not charged in the bill; no such issue was raised at the trial; and the use was not enjoined. Counsel for the Company admitted in the argument before us that its use, common as applied to other Kellogg products, should not have been made on cartons of shredded wheat; and stated that the use had been discontinued long before entry of the "clarifying" decree.

[6] In its opinion clarifying the mandate, the Circuit Court of Appeals, after considering the provisions concerning the name and the form of the biscuit, said (96 F. (2d) 875):

"The only remaining question is whether, in view of the fact that the order of April 12, 1937, did not specifically provide for an injunction against the violation of the two-biscuit-in-a-dish trade-mark (although it was intended to do so) we have any jurisdiction to amend the mandate so as to include specifically such a provision. As there may be some doubt on this question, we will not amend the mandate so as to provide a specific injunction against the use of the two-biscuit-in-a-dish trade-mark. Its use on a carton or in advertising matter, when the defendant is not permitted to use the word 'Shredded Wheat' as a trade-name or to advertise or sell biscuits in the pillow-shaped form, would manifestly be so improper and so likely to mislead that we will assume that the appellee will not use it."